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 *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA ET AL. IN SUPPORT OF RESPONDENTS

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—Additional Amici Listed on the Inside Cover—

NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC.

AMERICAN BANKERS ASSOCIATION

AMERICAN FINANCIAL SERVICES ASSOCIATION

CONSUMER BANKERS ASSOCIATION

INDEPENDENT COMMUNITY BANKERS OF AMERICA

INDEPENDENT BANKERS ASSOCIATION OF TEXAS

TEXAS ASSOCIATION OF BUSINESS

TEXAS BANKERS ASSOCIATION

LONGVIEW CHAMBER OF COMMERCE

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States of America, National Federation of Independent Business Small Business Legal Center, Inc., American Bankers Association, American Financial Services Association, Consumer Bankers Association, Independent Community Bankers of America, Independent Bankers Association of Texas, Texas Association of Business, Texas Bankers Association, and Longview Chamber of Commerce.

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

The Chamber's members include numerous financial institutions, financial services companies, and

[1] Under this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Counsel notified the parties of their intended filing on June 16, 2023.

many other businesses subject to the regulatory and enforcement authority of the Consumer Financial Protection Bureau. The Chamber's members have a strong interest in ensuring that the Bureau's funding mechanism comports with the Constitution.

The National Federation of Independent Business Small Business Legal Center, Inc. is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center is an affiliate of the National Federation of Independent Business, Inc., which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The American Bankers Association is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.6 trillion in deposits and extend $11.8 trillion in loans. The ABA advocates for banks before Congress, regulatory agencies and the courts to drive pro-growth policies that help customers, clients, and communities thrive.

Founded in 1916, the American Financial Services Association is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the CBA is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans. Part of its mission includes representing its members interests in various government settings.

The Independent Community Bankers of America creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding $5.8 trillion in assets, $4.8 trillion in deposits, and $3.8 trillion in loans to consumers, small businesses, and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation, and fueling their customers' dreams in communities throughout America.

Independent Bankers Association of Texas is the largest state community banking organization in the nation, with membership comprised of more than 2,000 banks and branches in 700 Texas communities. Providing safe and responsible financial services to all Texans, IBAT member-bank assets range in size from $27 million to $39 billion with combined assets statewide of nearly $256 billion. IBAT member banks are committed to supporting and investing in their local communities. IBAT advocates for and represents the interests of its members in various settings.

Texas Association of Business is the largest general business association in the state as well as the Texas State Chamber of Commerce. TAB represents member companies, large and small, to create a policy, legal, and regulatory environment that allows them to thrive in business.

Texas Bankers Association is America's oldest and largest state banking organization. TBA advocates for 400 member banks in Austin and Washington and invests in Texas communities through financial literacy, scholarship, and charitable activities. TBA has a member median asset size of approximately $357 million, and its banks employ over 150,000 Texans. TBA is dedicated to representing Texas community banks as well as institutions of all sizes and charter types before the Texas Legislature, U.S. Congress, state and federal regulatory agencies, and, when necessary, the courts.

Longview Chamber of Commerce is a voluntary representative organization of business and professionals who have joined together for the betterment of business, development of tourism, development of downtown Longview potential, and the overall quality of life in Longview.

SUMMARY OF ARGUMENT

The Bureau's funding scheme is historically unique—and unconstitutional.

The Bureau is endowed with "vast authority." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2210 (2020). Its jurisdiction encompasses not only consumer financial-services companies, but also individuals and businesses that engage in any of ten specified consumer financial activities that are common throughout the economy. Far beyond the authority that discrete financial regulators enjoy, the Bureau's authority spans the entire market. *See* 12 U.S.C. §5481(6). In addition, Congress transferred to the Bureau rulemaking authority with respect to eighteen federal laws, §5581(b); and also endowed the Bureau with new authority to declare unlawful any "unfair, deceptive or abusive acts or practices." §5531(b). Finally, the Bureau has wide-ranging enforcement power—to conduct investigations, institute and adjudicate administrative proceedings, file enforcement actions in court, and seek myriad forms of relief, including civil penalties of up to $1 million per day.

All this government power is "double-insulated" from the constitutionally-mandated check of Congress's purse, lacking accountability to Congress or the people themselves. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 640 (5th Cir. 2022). While most executive agencies are subject to some level of budgetary oversight through Congress's annual appropriations process, the Bureau is "expressly exempt from budgetary review." *Id.* Instead, all the Bureau must do to secure funds is requisition from the Federal Reserve an amount "determined by the Director to be reasonably necessary to carry out" its functions. *Id.* at 638. This funding mechanism removes Congress from the process by siphoning funds directly from the Federal Reserve (an agency that is also funded outside the appropriations process). 12 U.S.C. §5497(a)(1); *see also* §243 (Federal Reserve draws funds from banks within the Federal Reserve System, but must remit funds above a statutory limit to the U.S. Treasury).

Although not every agency must receive funds through the typical process, the Bureau's historically unique level of budgetary independence "is *the epitome* of the unification of the purse and the sword in the executive." *Cmty. Fin.*, 51 F.4th at 640. No other agency—let alone one with the vast authority of the Bureau—has funding so insulated from congressional oversight and the entities and people it regulates. No other agency's spending is so disconnected from laws passed by Congress. At bottom, the Bureau's funding structure violates the Appropriations Clause's command that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, §9, cl. 7.

To be sure, some other agencies that regulate the financial-services industry draw their funds from the entities they regulate and other sources outside the typical appropriations process. *See* Pet. Br. 29-36 (addressing the funding mechanisms for the Federal Reserve, OCC, and FDIC, just to name a few). Yet, the "Bureau's perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies on offer." *Cmty. Fin.,* 51 F.4th at 641. And, as the Fifth Circuit observed, none of the agencies that Petitioners cite as comparators "wield enforcement or regulatory authority remotely comparable to the authority the Bureau may exercise throughout the economy." *Id.* (cleaned up). The Bureau's lack of accountability to Congress or to the people thus makes it unique even among its peers and clearly differentiates its funding mechanism from anything that could be understood as "in consequence of Appropriations made by law." *Cf. Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." (quoting *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting))).

Given its power and its insulation from congressional oversight, it is no surprise that the Bureau often oversteps its bounds. Recent examples of the Bureau's actions highlight the need for the Appropriations Clause's check on a particularly powerful agency. Indeed, that kind of oversight of executive power is precisely why the Founders gave Congress the power of the purse in the first place.

Remedying the constitutional problem here is thus important, and *amici* believe it can be done in an appropriate way. The judgment below vacates a single Bureau regulation that has never gone into effect. And there are relatively few other cases that raise the matter—typically cases where the harm of the unified appropriations and executive power is most evident. This Court can thus afford meaningful relief without significant disruption. Most simply, the Court could sever the offending funding provision and provide Congress with an opportunity to fix an otherwise unchallenged statutory scheme. Other financial regulators need not and should not be affected by such a decision because they do not enjoy the same level of unprecedented budgetary independence as the Bureau.

This Court also has discretionary tools at its disposal to temper the impact of its decision. For instance, were the Court concerned with upsetting the Bureau's ongoing activities—which have thus far been largely unaffected by the Fifth Circuit's decision—the Court could stay its mandate for a brief period to allow Congress to act. In fact, the House Financial Services Committee has already reported legislation favorably that would fund the agency through annual appropriations. H.R. 1382, 118th Cong. §3 (2023); *see also* S. 5280, 117th Cong. §3 (2022) (recent Senate consideration of the same).

Although such a stay of this Court's mandate would be unusual, it would address an unusual separation-of-powers problem. While this Court has "the negative power to disregard an unconstitutional enactment," *Massachusetts v. Mellon*, 262 U.S. 447, 488

(1923), it "cannot re-write Congress's work," *Seila Law*, 140 S.Ct. at 2211. Such "editorial freedom belongs to the Legislature, not the Judiciary." *Id.* (quoting *Free Enter. Fund*, 561 U.S. at 510; cleaned up). And in the unique circumstances here, where the Court would be recognizing that an existing agency's funding mechanism is unconstitutional, this Court would show due respect for a co-equal branch by giving Congress time to correct its error. At the same time, providing a defined period of time is necessary to avoid subjecting the people's rights to the whims of a single branch. The people formed a Union with important checks on its political branches, and those checks cannot be sidelined for long.

To that end, the Court should consider clarifying how the Bureau can continue carrying on its mission in regulating consumer financial activities. For example, the Court could clarify that meaningful relief for those who have raised the funding mechanism's infirmity in litigation requires the Bureau to reconsider certain actions once constitutionally funded. At the same time, the Court could remove any shroud of uncertainty for the Bureau and for regulated industry by noting that a combination of procedural and equitable doctrines, as well as the statute of limitations, insulate much of the Bureau's previous activities from future challenge. While it would have been better to have avoided this constitutional problem in the first place, an appropriate constitutional fix now is better than allowing it to persist.

In sum, this Court should feel no hesitation about providing the limited, but meaningful, relief that our Constitution calls for here.

ARGUMENT

The Bureau's unprecedented funding mechanism violates the Constitution's structural protections embodied in its separation of powers. As the Fifth Circuit correctly held, such a powerful agency cannot be doubly insulated from the congressional appropriations process. Indeed, the Bureau's aggressive enforcement and regulatory tactics highlight the need for the constitutional accountability that the Appropriations Clause provides. Although the Bureau would lead this Court to believe otherwise, its funding mechanism is unprecedented among financial regulators, which do not have nearly the same reach or powers. So this Court's decision can be narrowly limited to this unique agency. In fact, the Court has several tools at its disposal to craft an appropriate and meaningful remedy without disrupting the nation's financial regulatory apparatus.

I. The Bureau's funding mechanism violates the Constitution.

The Bureau's unprecedented funding mechanism violates the Constitution's structural protections embodied in the separation of powers generally and the Appropriations Clause specifically.

A. The Fifth Circuit's decision is correct.

The Framers made sure to separate the "purse" from the "sword" by vesting the power of the purse exclusively in the legislative branch. Federalist Nos. 78 (Alexander Hamilton), 58 (James Madison). They did so in part because "the legislative department alone has access to the pockets of the people." Federalist No. 48 (James Madison). The Appropriations Clause carries out the Framers' "straightforward and explicit command" that executive agencies remain accountable to the people through Congress's control over the purse strings. *OPM v. Richmond*, 496 U.S. 414, 424 (1990). Importantly, the Appropriations Clause ensures that "[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." *Id.* at 425.

Courts across the country have recognized the clause's role as "a bulwark of the Constitution's separation of powers." *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.); *see also United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) ("The 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."). The clause's importance undoubtedly "reflect[s] 'hard choices … consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.'" *NLRB v. Noel Canning*, 573 U.S. 513, 601-02 (2014) (Scalia, J., concurring) (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)). To give it anything less than full effect would ignore the Framers' careful construction of our Constitution and this all-important check on executive overreach.

On the merits, the Fifth Circuit's decision is correct. The Bureau's funding statute makes clear that its regular funding is not "subject to review" by congressional appropriations committees. 12 U.S.C. §5497(a)(2)(C). Instead, the statute states that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." §5497(c)(2). Although another section outlines a separate process for the "[a]uthorization of appropriations" if the Bureau requests more than 12% of the Federal Reserve's operating costs for its budget, the Bureau has never sought or received any such funds. §5497(e). So Congress made clear that the Bureau's ordinary operating budget cannot be treated as an appropriation. And the Fifth Circuit rightly considered the force of the statute that allows the Bureau to receive funds first from the Federal Reserve. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) ("Our duty is to give effect to the text that 535 *actual* legislators (plus one President) enacted into law."). Without evidence to the contrary, the Fifth Circuit was correct to give effect to Congress's definitional statement on how it categorizes these funds: not "appropriated monies."

That the Bureau has spent billions and billions of dollars without even a rubberstamp of its budget by Congress demonstrates the significance of this issue. Far from denying this constitutional bug, the Bureau's supporters have championed it as a feature. *See, e.g.*,

S. Rep. No. 111-176, at 163 (2010) (congressional supporters claimed that "the assurance of adequate funding, independent of the Congressional appropriations process," was "absolutely essential" for the Bureau); CFPB Financial Report: Fiscal Year 2022, at 38 (2022), perma.cc/GA5F-49E7 (championing the Bureau's autonomy as "an independent, non-appropriated bureau"). These concessions that the Bureau obtains its operating budget doubly insulated from the constitutionally-mandated appropriations process should doom its case on the merits.

That leaves the Bureau to quibble only on the appropriate remedy. *See* Pet. Br. 38-41. Yet the Fifth Circuit's rule is artfully simple: no money, no power. And the Fifth Circuit appropriately limited the remedy to vacatur of the challenged rule in this case. *See Cmty. Fin.,* 51 F.4th at 643 (finding "a linear nexus between the infirm provision (the Bureau's funding mechanism) and the challenged action (promulgation of the rule)"). Without any construction to save the challenged rule or alternative argument to provide constitutional funding without a legislative fix, the Fifth Circuit approved the narrow remedy commonly issued in a challenge to an unlawfully promulgated agency action: vacatur. *See Collins v. Yellen*, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring in part) (opining that the appropriate remedy is "a rewinding of agency action"); 5 U.S.C. §706(2)(A) (stating that, under the APA, a "reviewing court shall … hold unlawful and set aside agency action … found to be … not in accordance with law"). Upon determining that the Bureau promulgated the rule in violation of the Appropriations Clause—and without any legislative action to cure the constitutional defect—the Fifth Circuit was correct to vacate that rule.

B. The Bureau's short history confirms the importance of the constitutional safeguards enforced below.

Without adequate congressional oversight, the Bureau has predictably exceeded its boundaries. In its twelve short years of existence, the Bureau has a track record of overreach to the detriment of industry and consumers alike. Just a few examples underscore the need for additional oversight:

Last month, the Eleventh Circuit affirmed a sanctions order against the Bureau for its "willful disregard" of a district court's discovery orders in an enforcement action. *CFPB v. Brown*, 2023 WL 3939432, at *5 (11th Cir. June 12, 2023). As an example, the CFPB tried at length to avoid providing a Rule 30(b)(6) representative, and then when it finally provided one, "equipped its witness with so-called 'memory aids' from which the witness read verbatim for extended periods of time." *Id.* at *6. According to the Court, in response to one question, "the witness read from his memory aid for more than 40 minutes and then, after a break, continued reading for 18 minutes before the parties stipulated that he would have read another 93 pages." *Id.* The Eleventh Circuit agreed with the district court that "severe sanctions were warranted" for the Bureau's conduct and affirmed the dismissal of five defendants from the case. *Id.* at *8.

This aggressive conduct is not an isolated incident. Multiple circuit courts have intervened when the

CFPB has issued civil investigative demands so broad that they would have "effectively writ[ten] out of the statute all of the notice requirements that Congress put in." *CFPB v. Accrediting Council for Indep. Colleges & Schs.*, 854 F.3d 683, 692 (D.C. Cir. 2017); *see also CFPB v. Source for Pub. Data*, 903 F.3d 456, 459-60 (5th Cir. 2018) ("Simply put, the CFPB does not have unfettered authority to cast about for potential wrongdoing.").

In March 2022, a district court had to get involved when the Bureau emailed more than 18,000 of Fifth Third Bank's customers seeking information to support a pending enforcement action, without notice to the court or the bank. *See* Resp., *CFPB v. Fifth Third Bank, Nat'l Ass'n*, No. 21-cv-262, Dkt. 108 at 11 (S.D. Ohio Apr. 6, 2022). The Bureau did so even though the parties, in discussion with the court, had agreed to more narrow discovery and despite the many precedents where courts have facilitated any communication between a plaintiff and a defendant's customers. *Id.* at 8-11. Indeed, the Bureau did so even though a third-party consulting firm had reviewed the bank's operations and concluded the problem the CFPB had been investigating was isolated to just 800 out of 10 million accounts. Am. Answer, *CFPB v. Fifth Third Bank, Nat'l Ass'n*, No. 21-cv-262, Dkt. 80 at 3 (S.D. Ohio July 9, 2021). Although the CFPB voluntarily discontinued its mass email after Fifth Third sought relief from the court, the harm to customer goodwill caused by such aggressive enforcement activities cannot be undone.

Notably, the Fifth Circuit's well-reasoned opinion in this matter has not slowed the CFPB's enforcement agenda. It has refused to agree to stays of existing enforcement actions where the party has raised the funding issue as a basis for relief. *See, e.g.*, *CFPB v. TransUnion*, 2023 WL 3605995, at *2 (N.D. Ill. Apr. 13, 2023) (denying opposed motion for stay of enforcement action pending this Court's decision); *CFPB v. MoneyGram Int'l, Inc.*, 2022 WL 17547438, at *2 (S.D.N.Y. Dec. 9, 2022) (granting stay over the Bureau's objection and noting that "[t]he fact that the CFPB and the Solicitor General cite the instant case within the Petition only underscores the propriety of a stay here"). And it has continued to launch new enforcement actions and issue enforcement orders. Moreover, the Bureau has announced its intention to pursue adjudications, including adjudications of private rights, in its own administrative processes rather than in courts. *See* 12 C.F.R. §1081, Rules of Practice for Adjudication Proceedings. Despite a groundswell of industry comments opposing the Bureau's proposed rulemaking, it nevertheless declined to make any amendments before finalizing the rule.

Lest the Court think these overaggressive tactics are a recent trend, the Bureau has a long history of being reined in by courts. In 2014, an administrative law judge imposed penalties of $6.4 million for PHH Corporation's alleged violation of the Real Estate Settlement Procedures Act. Upon review of the order, then-Director Cordray "unilaterally added $103 million to the $6 million in penalties"—increasing the fine by twentyfold. *PHH Corp. v. CFPB*, 881 F.3d 75, 185 n.13 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), *abrogated by Seila Law*, 140 S. Ct. 2183. To do so, then-Judge Kavanaugh explained that "[t]he Director discarded the Government's longstanding interpretation of the relevant statute, adopted a new interpretation of that statute, applied that new interpretation retroactively, and then imposed massive sanctions on PHH for violation of the statute—even though PHH's relevant acts occurred before the Director changed his interpretation of the statute." *Id.* The D.C. Circuit rejected those decisions, *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *reinstated by* 881 F.3d 75, 83 (D.C. Cir. 2017) (en banc), even before this Court ultimately held that the Bureau's structure violated the separation of powers, *Seila Law*, 140 S.Ct. at 2197. Thus, the Bureau was forced to reverse course and dismiss the notice of charges against PHH because "PHH did not violate RESPA" after all. *In re PHH Corp.*, No. 2014-CFPB-0002 (CFPB June 7, 2018).

Some of the *amici* have also raised concerns about aggressive actions by the Bureau in other areas, including agency rulemaking, interpreting existing law, and interpreting its own authority. Notably, several of the *amici* have a pending lawsuit, arguing that the Bureau exceeded its statutory authority in reinterpreting its authority to pursue unfair, deceptive, or abusive acts or practices to subject industry to disparate-impact liability. *See* Compl., *Chamber of Commerce v. CFPB*, No. 22-cv-381, Dkt. 1 at 2 (E.D. Tex. Sept. 28, 2022). The Chamber also objected when the Bureau sidestepped the traditional hiring process to hire political loyalists through a novel "Policy Fellowship." *See* Letter from Daryl Joseffer to Director Chopra at 2 (June 28, 2022), perma.cc/GA8Z-9NTE ("Members of the House Committee on Financial Services detailed why this program is misguided—opening the door to all manner of favoritism and ideologically driven personnel selection and mismanagement, as well as conflicts of interest."). Other *amici* have another pending lawsuit, arguing that the Bureau's March 2023 finalization of the small business data collection specified under section 1071 of Dodd-Frank was, as a consequence of the Fifth Circuit's decision here, unlawfully promulgated. Reply, *Tex. Bankers Ass'n v. CFPB*, No. 7:23-cv-144, Dkt. 17 (S.D. Tex. June 23, 2023).

Each of these examples is unsurprising when one considers the aggregation of appropriations and executive power in the agency's hands. In fact, members of Congress have realized exactly this problem in their comments following the Fifth Circuit's ruling. *E.g.*, *McHenry Applauds 5th Circuit Decision Ruling CFPB Funding Mechanism Unconstitutional* (Oct. 19, 2022), perma.cc/AEQ6-96CW; *see also Luetkemeyer on Fifth Circuit Ruling CFPB Funding Structure is Unconstitutional* (Oct. 20, 2022), perma.cc/6MH2-ZHY7 ("Bringing the CFPB under the appropriations process would make it more accountable to the American people through their elected representatives. The Financial Services Committee must consider [pending legislation] immediately to give the Bureau certainty regarding its funding."). By enforcing the Appropriations Clause's requirements, the Court will add an essential check on the Bureau that is sorely lacking.

II. A decision affirming the judgment below will provide targeted, but meaningful, relief for those subject to the CFPB.

Setting aside the Bureau's hyperbole about "catastrophic" results, Pet. Br. 48, affirming the Fifth Circuit will not force the nation's financial regulatory apparatus to crumble. Indeed, *amici* represent many of the members who depend on this apparatus and have no wish to affect it in that way. Rather, *amici* seek targeted but meaningful relief from the Bureau's unprecedented, lack of accountability for its funding to either Congress or the people, which, combined with its vast regulatory power, makes it an agency like no other. Because the Bureau's unique features, this Court can provide targeted but meaningful relief, without disrupting the nation's other financial regulatory bodies. This outcome will not cause dramatic upheaval and will ultimately leave the CFPB better than this Court found it.

Contrary to *Amici* States' suggestion in support of the Bureau, Respondents' interest—and that of industry as a whole—in ensuring the Bureau is constitutionally funded is not "remote, fluctuating, and uncertain." *Amici* States' Br. 25. Regulated industry has an ongoing interest in constitutional checks on its regulator. With their private rights and businesses on the line, they have an interest in not being subjected to an agency that effectively combines the spending power of Congress with the executive power. Such an accumulation of power can lead to constitutional mischief that has real consequences for the regulated. And such an improper commingling of the sword and the purse into a single agency with a lack of accountability to either Congress or the people sets the Bureau apart and demonstrates industry's need for narrow, but meaningful relief.

A. The Bureau is an agency like no other.

The Bureau would have the Court believe that its level of budgetary independence is on the same level as the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, National Credit Union Administration, Farm Credit Administration, and Federal Housing Finance Agency. Pet. Br. 12. Although the Bureau claims to regulate the financial industry, that is where the similarities with those agencies end. The Bureau is more like market regulators like the Consumer Product Safety Commission, Federal Trade Commission, Securities and Exchange Commission, and Commodity Futures Trading Commission, none of whom share the Bureau's unique funding structure. But even the more traditional banking regulators are easily distinguished from the Bureau because of its unique lack of accountability for its funding and the vast authority it wields.

1. The Bureau's funding mechanism is unique.

None of the Bureau's preferred comparators receive funds from another agency that is itself immune from the appropriations process. That alone distinguishes the Bureau from every other financial regulator.

The other regulators also draw funds from the industry they regulate, which provides a layer of accountability to the people that is absent from the Bureau. For instance, the Office of the Comptroller of the Currency is mainly funded by fees assessed to nationally chartered banks with carefully crafted criteria to guide how it assesses them. 12 U.S.C. §16. The OCC is also a bureau of the Department of the Treasury, which is funded directly through the congressional appropriations process. *See* Pub. L. 117–328 (appropriating $14.2 billion to the Treasury Department for fiscal year 2023). And the OCC must make a statutorily-required annual report to Congress with a detailed budgetary breakdown and justification. 12 U.S.C. §14.

Similarly, the FDIC and NCUA are self-funded through operating fees that they levy against the financial institutions they insure and regulate. §§1814(d), 1820(e) (FDIC); §1755(a) (NCUA). Notably, the NCUA must deposit all operating fees it collects into the U.S. Treasury for use subject to particular spending conditions. §1755(d). And the NCUA's financial transactions are subject to audit by the Government Accountability Office. §1752a(f). The NCUA must present an annual report to Congress and the President summarizing its operations, including its operating budget, "for the Congress to review the financial program approved by the Board." §1752a(d). For its part, the FDIC must issue a much more detailed annual report to Congress and the President, detailing "its operations, activities, budget, receipts, and expenditures for the preceding 12-month period." §1827(a)(1).

Likewise, the FCA collects most of its funding from assessments levied against regulated banks and the Federal Agricultural Mortgage Corporation (Farmer Mac). §2250(a)(1)-(2). The FCA also faces detailed reporting requirements and the Inspector General Act, which allows audits of the FCA. 31 U.S.C. §§401-24.

Finally, the FHFA secures its funding through assessments of regulated entities, subject to a cap of its reasonable costs and expenses, with an illustrative list. 12 U.S.C. §4516(a). The FHFA is subject to supervision by the Office of Management and Budget through detailed financial-operating-plan reporting requirements. §4516(g). The FHFA is audited annually by the Comptroller General, which in turn produces a detailed annual report to Congress. §4516(h)(1)-(2).

In each instance, the other financial regulators receive funding directly from regulated entities, as authorized by statute. None of these agencies enjoy a perpetual funding mechanism, with funds drawn from another agency, let alone one with another layer of budgetary independence. These agencies also provide much more detailed budgetary reporting information to Congress than the Bureau. By comparison, the OCC's most recent annual report devoted over twenty pages to detailed financial analysis and explanation of the organization's financial management, whereas the CFPB's most recent report to Congress included only two cursory pages. *Compare* 2022 Annual Report at 41-63, OCC, (2022), perma.cc/T5H3-DBLP, *with* Semi-Annual Report of the CFPB at 73-75, CFPB (June 8, 2023), perma.cc/3DK3-B38X. This is a far cry from the required justification for an agency's budget and expenditures that additional congressional oversight would imbue to the Bureau.

The Bureau also points to longstanding government programs like Social Security, Medicare, and Medicaid, which receive standing appropriations from Congress. *See* Pet. Br. 21; Cert. Pet. 41a n.16; *see also Amici* Members of Congress Br. 4, 15. But those programs are readily distinguishable from the funding the Bureau receives that is "double-insulated" from congressional appropriations or the people. Congress exerts tremendous controls over those *programs*, unlike over the Bureau. *See, e.g.*, 2023 OASDI Trustees Report (Mar. 31, 2023), perma.cc/GD2Y-TXTU. And even *Amici* Members of Congress acknowledge that the Social Security Administration is "largely funded through the annual appropriations process." Members of Congress *Amici* Br. 25. Besides, the Bureau is a regulatory agency; it does not operate any government funding programs like the Social Security Administration. A ruling on the CFPB's unique funding mechanism would not affect the funding of federal programs like Social Security, Medicare, and Medicaid that Congress closely controls.

2. The Bureau's vast authority makes it unique.

The Bureau's preferred comparators are also far more limited in their reach, regulating only narrow corners of a particular industry. That distinction provides yet another reason why the Bureau needs greater oversight. For comparison, the OCC works directly with nationally chartered banks to ensure they are sound and competitive. 12 U.S.C. §1(a). The FDIC and NCUA share the responsibility of providing stability to different types of depository institutions. §1811(a); §1752a. Likewise, the FCA and FHFA oversee credit for markets farms and home mortgages, respectively. §2252(a); §4513(a)(1)(B). The Bureau's regulations touch all those aspects of financial markets and extend to the financial-service operations of auto dealers, law firms, and university student-loan offices, just to name a few. §5491(a). This broad scope is essential to the Bureau's mission—one that touches nearly every aspect of consumers' lives and the businesses that serve them.

Further, none of these other agencies have near the same array of powers as the Bureau. No other agency has the authority to "ac[t] 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*, 140 S. Ct. at 2202 n.8. The Constitution demands that an agency that "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy" receive greater funding and budgetary oversight than is currently provided to the Bureau. *Id.* at 2191.

Contrary to its own preferred categorization, the Bureau is more like the market regulators that inspired its design. As Senator Elizabeth Warren, the "intellectual founder" of the agency, argued in her paper calling for the Bureau's creation: "Just as the Consumer Product Safety Commission (CPSC) protects buyers of goods and supports a competitive market, a new regulatory agency—a Financial Product Safety Commission (FPSC)—would protect consumers who use financial products." Warren, *Product Safety Regulation as a Model for Financial Services Regulation*, 42 J. Consumer Aff. 452, 453 (2008). In fact, the CPSC carries out its broad congressional mandate "to protect the public" and "assist consumers" as a market regulator. 15 U.S.C. §§2051(b)(1)-(2), 2053. Unlike the Bureau, each year the CPSC makes a performance budget request to Congress as part of the appropriations process. *See* 2023 Performance Budget Request to Congress, CPSC (Mar. 28, 2022), perma.cc/ZK3F-Y2MF.

Likewise, the FTC operates as a market regulator to protect competition and protect consumers. 15 U.S.C. §45. The Bureau even shares some authority with the FTC, including the regulation of unfair or deceptive acts or practices. §45(a). Yet, unlike the Bureau, the FTC annually goes through the congressional appropriations process to obtain its operating budget. *See* Fiscal Year 2024 Congressional Budget Justification, FTC (Mar. 13, 2023), perma.cc/R5VE-CQ3R. Even the SEC must go through the federal appropriations process for its annual operating budget, even though it collects registration fees that exceed its appropriations. *See* FY 2024 Congressional Budget Justification, SEC (Mar. 13, 2023), perma.cc/7PCF-3KGE. Thus, unlike its closer comparators in scope and authority as a market regulator, the Bureau is noticeably absent from the appropriations process and the accountability it provides.

To be sure, Congress designed the Bureau to exempt it from typical political pressures. *CFPB v. All Am. Check Cashing, Inc.*, 33 F. 4th 218, 222-23 (5th Cir. 2022) (Jones, J., concurring). But Congress cannot constitutionally exempt the Bureau from accountability to the people. *Seila Law* was the first step in introducing the Bureau to constitutionally-mandated accountability. The Bureau's unmatched powers and reach, alongside its level of budgetary independence, warrant funding accountability tailored to this unprecedented agency's unique structure.

III. The Court can mitigate disruptions in the marketplace by crafting a narrow remedy.

Amici understand the important role the Bureau has in setting and enforcing reasonable regulations in consumer financial markets. When it regulates with accountability and consistent with statutory and procedural mandates, the Bureau promotes transparency and efficiency in the marketplace to the benefit of industry and consumers alike. But as this Court warned more than a decade ago, "[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enter. Fund*, 561 U.S. at 499. This Court thus can and should craft an appropriate remedy that avoids disruptions in consumer financial markets while also vindicating the Constitution. *See, e.g.*, *id.*, at 508 ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.”).

An appropriate remedy here would be much like the one in *Seila Law*. There, this Court severed another unconstitutional feature of this same Bureau. Here, too, this Court could sever the unconstitutional funding mechanism, leaving the rest of the Bureau’s enabling act in place. Of course, this would include severing the funding provision that authorizes the Director to requisition funds from the Federal Reserve—not merely the provisions precluding oversight of the Bureau’s unspent funds, as *Amici* States suggest. 12 U.S.C. §5497; *see also Amici* States Br. 26 (ignoring the only source ever used to fund the Bureau’s funds). Only severing the funding mechanism from the Federal Reserve can remedy the double insulation that makes the Bureau’s funding unique and offensive to the Appropriations Clause. Congress would then have the opportunity to fund the Bureau in a constitutionally appropriate manner.

To give Congress time to make that change, this Court should stay its decision for a reasonable but defined period to allow Congress to authorize temporary funding or permanently fix the constitutional defect. *See* S. Ct. R. 45(3). Although a stay is not the ordinary course when this Court rules a statutory provision unconstitutional, it may be appropriate in the unique circumstances here. The agency is already operating and has been doing so for quite some time; a decision holding its funding mechanism unconstitutional would doubtless raise a number of legal issues for the government in terms of implementation. Out of respect for the coordinate branches of government that created this agency, a stay to let Congress and the President fix the funding mechanism with minimum disruption may be justified here. But of course, such a stay should not be indefinite. There are bedrock constitutional principles at stake and, as noted above, the Bureau has both extraordinary power and an unfortunate history of exceeding its authority.

No matter what this Court decides to do with a stay, it should make clear that the remedy it provides is a limited one. The Bureau has already conceded that the judgment below "did not change the rules governing regulated entities." Cert. Pet. 10 n.3. Rather, all it did was vacate the Payday Lending Rule that had not yet gone into effect. *Id.*

Indeed, the Fifth Circuit's vacatur remedy was limited and correct under the circumstances. This Court has always provided a directly responsive remedy for a prevailing party in separation-of-powers cases. The successful party in these cases is entitled to an order setting aside as void *ab initio* the particular action taken by the unlawfully constituted agency. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (invalidating challenged proceeding and remanding for new adjudication before a different, properly appointed ALJ); *Noel Canning*, 573 U.S. at 521 (setting aside a challenged agency order issued by an unconstitutionally appointed adjudicative board); *Stern v. Marshall*, 564 U.S. 462, 469 (2011) (invalidating bankruptcy court order issued in violation of Article III);

Nguyen v. United States, 539 U.S. 69, 83 (2003) (where an appellate panel included a non-Article III judge who lacked jurisdiction, returning the challenged "cases to the Ninth Circuit for fresh consideration … by a properly constituted panel"); *Ryder v. United States*, 515 U.S. 177, 188 (1995) (invalidating the decision of an unconstitutionally constituted panel and remanding for a new "hearing before a properly appointed panel"). The specific vacatur of the rule challenged in this case honors that tailored approach.

That tailored approach also extends to parties in other pending cases who have raised the constitutional defect in the CFPB's funding mechanism as a basis for relief. *See, e.g.*, *Bohon v. FERC*, 143 S. Ct. 1779 (2023) (GVR'd in light of *Axon Enterprise, Inc. v. FTC*, 598 U.S. __ (2023)); *Polaris Innovations Ltd. v. Kingston Tech. Co. Inc.*, 141 S. Ct. 2844 (2021) (GVR'd in light of *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021)); *NLRB v. Gestamp S.C. LLC*, 573 U.S. 957 (2014) (GVR'd in light of *Noel Canning*, 573 U.S. 513). If it were otherwise, and relief in separation-of-powers cases were good for only one party, it would create the very "disincentive to raise" separation-of-powers challenges that this Court has rejected. *Ryder*, 515 U.S. at 183; *see Lucia*, 138 S. Ct. at 2055 n.5 (stating that the remedy in a separation-of-powers case should be created to further the "structural purposes" of the separation of powers). Thus, *Amici* who have raised the funding mechanism in their own lawsuits believe that they are entitled to vacatur of the challenged actions on that basis. Similarly, enforcement actions should be paused in the interim, until Congress addresses the funding issues. *See Seila Law*, 140

S.Ct. at 2220 (Thomas, J., concurring in part and dissenting in part). And constitutionally-funded Bureau officials should, at a minimum, pause and review the propriety of any pending enforcement actions where this issue has been raised. *See* Cert. Pet. 29 (listing several enforcement actions where parties raised this very constitutional issue).

Even so, the relief afforded here would be limited. The Administrative Procedure Act gives regulated entities only six-years from the date of injury to challenge agency actions. 28 U.S.C. §2401(a). And, in most cases, the time to appeal from a past agency adjudication, 12 U.S.C. §5563 (30 days), or court decision, Fed. R. App. P. 4 (60 days), has long since lapsed. *Amici* are not suggesting that a ruling to enforce the Constitution would resurrect past enforcement actions for which parties have already exhausted their requests for relief. But rather, relief would be limited to a few pending actions where the parties have raised the argument at issue here.

Providing the limited remedy discussed here would not disrupt the financial sector. Doctrines of Article III standing, equity, and party presentation, among others, as well as statutes of limitations, would prevent broader use of this Court's ruling to disrupt the Bureau. The federal courts' experience with other major separation-of-powers decisions, like *Seila Law*, *Lucia*, and *Free Enterprise Fund* prove the point.

CONCLUSION

To be sure, some heartburn is inevitable when Congress creates a new agency and structures it in an unconstitutional way. But that unfortunate circumstance is not a reason for this Court to also ignore the Constitution. The Bureau's statutory duties are vital to the financial-services industry and the American consumers they serve. This Court should not shy away from ensuring that the Bureau is constitutionally sound.

This Court has all the tools it needs to avoid any disruptive consequences from a correct decision here. It can (and should) stress the dissimilarity between the Bureau and other financial regulators. It can (and should) clarify the nature of the remedy it is providing. And it can (and should) afford Congress a defined period to provide constitutionally sound funding to the Bureau. With these steps, the Court will fulfill its duty to the Constitution and ultimately to the people.

The Court should affirm the decision below and stay its decision for a reasonable time to give Congress the opportunity to act.

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