No. 22-448

In the Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,
Petitioners,

v.

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

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

BRIEF OF AMICI CURIAE ACA INTERNATIONAL IN SUPPORT OF RESPONDENTS AND STAY

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE[1]

ACA International (ACA) is a nonprofit corporation based in Minneapolis, Minnesota. Founded in 1939, as the American Collectors Association, ACA is the largest trade group for the debt collection industry. ACA has members in every state and more than 30 countries. ACA represents more than 1,700 member organizations and their more than 133,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA International, *Advocacy Booklet* (Nov. 21, 2022), bit.ly/3UKuh5m.

ACA's members include sole proprietorships, partnerships, small businesses, and large corporations. Some members operate within a single state while a few are large multinational corporations that operate in every state. Nearly 90% of ACA's members are small businesses with limited resources. *Id.* Many of their customers are small businesses as well.

ACA's members are vital to protecting both consumers and creditors. Members work with consumers to resolve consumer debt, which saves every American household, on average, more than $700 each year. Kaulkin Ginsberg, *2020 State of the Industry Report*, ACA International (2020), bit.ly/3uxMcBC. ACA's members also help keep America's credit-based economy functioning with access to low-cost credit. For example, in 2018 the accounts receivable management (ARM) industry returned more than $90 billion to

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

creditors for goods and services they had provided to their customers. *Id.* These collections benefit consumers by lowering the costs of goods and services, particularly at a time when rising prices are hurting consumers throughout the country.

ACA provides its members with essential information, education, and guidance on compliance with laws and regulations. ACA also articulates the value of the credit-and-collection industry to businesses, consumers, policymakers, and courts. As part of this mission, ACA regularly files amicus briefs in cases of interest to its membership, like this one.

ACA and its members have a strong interest in how the Court decides and, if necessary, remedies the constitutional issue presented in this case for many reasons, including that participants in the accounts receivables management (ARM) industry are both supervised, and regulated under the various consumer protection laws under the Consumer Financial Protection Bureau's (CFPB or Bureau) jurisdiction. The CFPB is the first federal agency with rule-writing authority for The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, the law governing the collections industry, and it recently issued rules amending Regulation F, that made massive changes to the operations and compliance programs for businesses in the debt collection industry. 12 C.F.R. § 1006 (2021). Additionally, in recent months the CFPB has publicly targeted the practice of collecting several types of debt, including student loan and medical debt, as well as the practice of credit reporting. Just last month, the CFPB provided notice to stakeholders that it plans to begin the pre-rule making process for a rule under the Fair Credit Reporting Act, which could have a major

impact on industry operations. If the Bureau's funding scheme provided for at 12 U.S.C. § 5497 violates the Appropriations Clause, the Bureau's future is necessarily in doubt.

ACA submits this brief in support of Respondents because ACA's members agree that the Bureau's current funding scheme cannot be squared with the Appropriations Clause. However, this brief centers on which branch of government should decide how to fix the Bureau and what this Court should do in order to minimize disruption while Congress considers its options. ACA therefore asks this Court to affirm, but to also stay its mandate for six months to allow Congress sufficient time to consider its options.

SUMMARY OF THE ARGUMENT

The design of the CFPB "deviate[s] from the structure of nearly every other independent administrative agency in our history." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). In *Seila Law*, this Court held that Congress' insulation of the CFPB from oversight by the executive branch through a single director removable only for cause violated the constitutional separation of powers. Of course, Congress did not only limit the President's oversight of the CFPB—it purported to limit its own power of oversight by insulating the CFPB from the Congressional appropriations process. Whether this limit on Congressional oversight similarly violates the constitutional separation of powers is the core issue in this case.

I. This constitutional question is, if anything, more important than the question addressed in *Seila Law*. The CFPB is invested with sweeping authority affecting virtually every American as consumers of

loans and other financial products. In its exercise of this broad authority, the Bureau is virtually immune from Congressional oversight because it is funded by the Federal Reserve System—at the sole discretion of the Bureau's Director—not Congressional appropriation.

II. In *Seila Law*, the Court addressed the constitutional infirmity, but saved the Bureau by severing that portion of the Bureau's enabling legislation insulating the Director from Presidential oversight. Assuming the Bureau's insulation from Congressional oversight inherent in the appropriations process poses a similar constitutional problem, the Court cannot do similarly here. The Bureau's funding scheme is inseparable from the Bureau's exercise of its administrative authority. If that funding scheme is unconstitutional, it will necessarily take an act of Congress to provide for the Bureau's continued function.

III. Because of the necessity for action by the political branches, the Court should exercise its equitable power to stay its mandate in order to give those branches the opportunity to minimize any disruption arising out of the Court's holding.

ARGUMENT

I. The CFPB's insulated funding structure is unconstitutional.

The separation of the purse from the sword is a bedrock principle of the United States system of governance. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Appropriations Clause manifests "the necessary partition among the several departments." The Federalist No. 51 (James Madison). And thus, the separation of powers infirmity that the Fifth Circuit identified below in this mater strikes at the heart of the American constitutional promise.

As the Court observed just three years ago, the CFPB's insulated funding scheme "aggravates" the separation of powers as it evades the Framers' "solution to governmental power and its perils," principally to "divide it." *Seila Law*, 140 S. Ct. at 2204. But even more so now, the consequences of severing the Bureau Director's for-cause removal have exacerbated the constitutional infirmity by intensifying the nondelegation violation. The current legal landscape cedes core appropriations power equivalent to up to 12 percent of Federal Reserve funds each year to the President.

Thus, pursuant to the reasoning guiding the Court's determination in *Seila Law*, the impact of the Court's decision in *Seila Law*, and as masterfully laid out in Respondents' briefing, the CFPB's double insulated, self-actualizing, perpetual funding mechanism violates the separation of power and therefore is unconstitutional.

The remainder of ACA's brief addresses the question of the appropriate remedy the Court may choose to fasten. ACA represents 1,700 businesses in the accounts receivables industry. ACA members have robust compliance programs and work with their state and federal regulators who supervise and regulate them. Any changes to the "new normal" since the

CFPB's inception a little more than a decade ago will impact how ACA members operate and the compliance programs and systems that they have in place in response to Bureau's rules and enforcement actions. While ACA members do not agree with many actions taken by the Bureau, they also benefit when there is regulatory certainty and clear requirements. ACA has an interest in ensuring that any remedy the Court imposes minimizes the disruption to markets and financial service providers, while still securing Respondents meaningful relief.

II. The Court Should Affirm the Lower Court's Decision but Stay Its Mandate to Allow Congress to Reconstitute the Bureau.

A. Severance is Not Appropriate.

Where a statutory provision is unconstitutional the Court will ordinarily leave the remainder of the law intact: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped *if what is left is fully operative as a law*." *Champlin Ref. Co. v. Corp. Comm'n of State of Okla.*, 286 U.S. 210, 234 (1932) (emphasis added). Hence, only where a statute can still function after an unconstitutional portion is set aside is severance appropriate. "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is *incapable of functioning independently*." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (emphasis added). The requirement that a statute remaining after severance be "fully operative as a law" makes sense: if a statutory provision is unconstitutional and what remains is a law that is

unworkable, courts must invalidate the entire statute, because they are not empowered to author legislation.

Here, the CFPB has no prospect for continued operation as a going concern—let alone a financial supervisory agency with the panoply of supervisory, enforcement, rulemaking, and adjudicatory powers delegated to it by Congress—without 12 U.S.C. § 5497. *Cf. CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 242 (5th Cir. 2022) (Jones, J., concurring) ("Just as a government actor cannot exercise power that the actor does not lawfully possess, so, too, a government actor cannot exercise even its lawful authority using money the actor cannot lawfully spend.").

The CFPB asks the Court to avoid this outcome by "surgically" rewriting § 5497 into a constitutionally sound funding scheme. The Court cannot accept the agency's invitation. "The Court's only instrument" to remedy a constitutional defect in a statute "is a blunt one." *Seila Law*, 140 S. Ct. at 2211. That is, courts have "the negative power to disregard an unconstitutional enactment." *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), and citing *Marbury v. Madison*, 5 U.S. 137, 178 (1803)). This negative power allows courts to "strike out words" but not "insert words that are not now in the statute." *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (citations omitted). As the Court said in *Seila Law*, the Court "cannot re-write Congress's work by *creating* offices, terms, and the like." 140 S. Ct. at 2211 (emphasis added). The same goes for creating a new funding scheme. At bottom, this "editorial freedom . . . belongs to the Legislature, not the Judiciary." *Id.* (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 510 (2010)).

The Bureau's funding scheme is without equal and is emblematic of the separation of powers concerns raised by this Appropriations Clause challenge. Congress has purported to endow the Bureau with perpetual funding from a source completely exempt from congressional appropriations committee review. *See* 12 U.S.C. § 5497(a). The Bureau holds these funds in an account outside the Treasury, controlled solely by the director of the CFPB. § 5497(b)(1), (c)(1). And the Bureau may rollover unused funds year-over-year "until expended." § 5497(c)(1). Hence, once the Director draws down Treasury funds under § 5497(a)(1) these "are permanently available to him without any further act of Congress." *Cmty. Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616, 639 (5th Cir. 2022), cert. granted, 143 S. Ct. 978 (2023).

Because of the nature of the Bureau's funding under 12 U.S.C. § 5497, the Court cannot fix the problem and save the Bureau by disregarding this provision. Instead, in order to keep the CFPB; the Court would have to write a new appropriations statute. Of course, the Court cannot do this—that power lies exclusively with Congress. Indeed, just over a century ago, the Court declined to do similarly. In *Hill v. Wallace*, 259 U.S. 44 (1922), the Court held a tax on grain futures created in the 1921 Future Trading Act exceeded Congress's taxing power. This tax funded the Secretary of Agriculture's rulemaking power over grain futures contracts also created in the statute. Despite the fact the act included a severance clause, the Court declined to "amend the act" by "inserting limitations it d[id] not contain." *Id.* at 70–71. As the Court reasoned, it is not the role of the Court to "introduce words of limitation into a … statute"; to do so "would be to make a new law, not enforce an old one." *Id.* at 71

(quoting *In re Trade-Mark Cases*, 100 U.S. 82, 100 (1879)); *see also United States v. Reese*, 92 U.S. 214, 221 (1875). Ultimately, because the unconstitutional tax was "so interwoven" with other parts of the Future Trading Act and implementing regulations, the Court invalidated all those parts that could not be separated, including the Secretary of Agriculture's rule-making power over grain futures contracts that was the core of the act. *Hill*, 259 U.S. at 70.

The Court should decline to assume Congress' power to rewrite the CFPB's authorizing legislation, and as it did in *Hill*, leave a solution to the political branches.

B. The Court should stay its mandate a reasonable period to allow Congress the opportunity to minimize disruption.

While the constitutional infirmity in the Bureau's funding structure mandates that the Court invalidate 12 U.S.C. § 5497, the Court enjoys equitable discretion to fashion a remedy that minimizes the disruption from its ruling. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *Milliken v. Bradley*, 433 U.S. 267, 286 (1977). Among the remedial measure available to the Court is the Court's ability to stay its mandate for a brief period. *See* S. Ct. R. 45.3. A stay would allow the Bureau to continue to exist, protecting market and institutional stability, while simultaneously allowing the political branches time to respond to—and potentially remedy, if desired—the defective financing scheme.

This is not a novel approach; the Court has previously used stays to minimize the immediate impact of its rulings that otherwise would have sweeping con-

sequences. *See N. Pipeline Constr. Co v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (ordering a four-month stay to "afford Congress an opportunity to reconstitute the bankruptcy courts . . . without impairing the interim administration of the bankruptcy laws"); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (instituting a 30-day stay to "allow[] the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act").

Eliminating the Bureau overnight would be as perilous as its continued existence as an unchecked governmental actor. Through its rulemaking, supervisory, and enforcement authority, the Bureau regulates roughly 70,000 businesses across the country, and its actions impact each and every individual who utilize financial products. Furthermore, it is the primary regulatory enforcer of 19 federal, consumer-protection laws, governing everything from residential mortgages, to banking practices, to student loans. A sudden vacuum in this space would harm all industry participants, including ACA's members, and all individuals who rely on market stability and certainty.

Therefore, the least disruptive remedy is for the Court to stay its judgment in this case for six months and leave the reshaping of the Bureau's funding structure to the political process. A re-aligned Bureau might be empowered to ratify or reconsider prior agency actions before the mandate issues, *Cmty. Fin. Servs. Ass'n of Am.*, 51 F. 4th at 624–644 (considering the CFPB's promulgation of the Payday Lending Rule); revisit any open and pending enforcement actions; and determine whether to re-adjudicate certain prior adjudications, if any, *see Canning v. NLRB*, 823 F.3d 76, 80 (D.C. Cir. 2016); *Intercollegiate Broad.*

Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 118–19 (D.C. Cir. 2015). Indeed, Congress is already considering several proposals that would regularize the Bureau's funding and governance. *See, e.g.*, TABS Act of 2023, H.R. 1382, 118th Cong. (2023) (making CFPB funding subject to Congressional appropriation); Consumer Financial Protection Commission Act, H.R. 1410, 118th Cong. (2023) (restricting the CFPB to answer to a bipartisan commission). These and other proposals could be considered by Congress provided this Court implements a reasonable delay before issuing its mandate.

And even if overhauling the Bureau's financing structure proves too difficult for the political branches, a reasonable stay would give the Bureau time to transition its affairs with minimal disruption to the markets, consumers, and regulated entities. It would also place the decision to allow the disruption that would necessarily follow the Bureau's shuttering where it belongs: with the political branches of government.

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

CONCLUSION

The Court should affirm the Fifth Circuit's decision vacating the Bureau's Payday Lending Rule because the CFPB's funding as provided at 12 U.S.C. § 5497 violates the Appropriations Clause. Because such a holding will render the Bureau non-operational, the Court should refuse to rewrite the Bureau's funding statute and instead allow the political branches time to react to its decision and to adopt an appropriations measure to fund the Bureau, if desired. To this end the Court should stay its mandate for six months.

Respectfully submitted,

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