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 THE MORTGAGE BANKERS ASSOCIATION, THE NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE NATIONAL ASSOCIATION OF REALTORS® AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

The Mortgage Bankers Association (MBA) is a national association representing more than 2,200 members of the real-estate finance industry. Its membership spans real-estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life-insurance companies, and others in the mortgage-lending field. MBA has a strong interest in maintaining the stability of the mortgage and real-estate markets.

The National Association of Home Builders of the United States (NAHB) is a trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. NAHB was founded in 1942, and today it is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers who construct about 80% of all homes built in the United States. Because almost 90% of new-home purchases and more than 70% of existing-home purchases are made with home-secured credit,[2] NAHB also has a strong interest in

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

[2] David Logan, *Market Share of All-Cash New Home Sales Hits 32-Year High,* Eye on Housing (Feb. 17, 2023), https://tinyurl.com/3hhspkp8.

maintaining the stability of the mortgage and real-estate markets.

The National Association of REALTORS® (NAR) is a trade association representing more than 1.5 million members, including NAR's institutes, societies, and councils involved in all aspects of the residential and commercial real-estate industries. NAR's membership consists of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real-estate industry. Members belong to one or more of the approximately 1,200 local associations/boards and 54 state and territory associations of REALTORS®. Members advocate for private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a strict code of ethics, which sets them apart from other real-estate professionals for their commitment to ethical real-estate practices. For these reasons, NAR likewise has a strong interest in maintaining the stability of the mortgage and real-estate markets.

MBA, NAHB, and NAR frequently participate as amici curiae to safeguard the legal rights and business interests of their members and those similarly situated.

INTRODUCTION AND SUMMARY OF ARGUMENT

If this Court rules for Respondents and strikes down the Payday Lending Rule, 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. §§ 1041.7, 1041.8), it must be careful to issue a circumscribed

ruling that does not call into question other crucial regulations issued by the CFPB over the past years while receiving funding under 12 U.S.C. § 5497.[3] In *Seila Law LLC v. CFPB*, this Court recognized that undoing the CFPB's actions across the board "would trigger a major regulatory disruption" and do "appreciable damage to Congress's work in the consumer-finance arena." 140 S. Ct. 2183, 2210 (2020). That warning remains true today. Amici submit this brief to highlight the potentially catastrophic consequences that a decision drawing those rules into doubt could have on the mortgage and real-estate markets. Thus, this Court should take care not to call into question current CFPB regulations, including those governing the real-estate financing industry, which could lead to immediate and intense disruption to the housing market, harming both consumers and the broader economy.

Congress created the CFPB in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491). Title X of the Dodd-Frank Act, known as the Consumer Financial Protection Act (CFPA), established the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." *Id.* When Congress passed the Dodd-Frank Act, it made the legislation's purpose crystal-clear with the first words in the statute: "An

[3] Amici have disagreed with some of the CFPB's past actions, and in this brief they are neither expressing support for nor objecting to the merits or legality of any particular past action.

Act [t]o promote the financial stability of the United States … ." 124 Stat. at 1376.

Over the past decade, the CFPB has issued hundreds of final rules, dozens of which affect consumer mortgages. *See* CFPB, *Final Rules* (2023), https://tinyurl.com/26kpzanz. The real-estate finance industry has engaged with the CFPB on these rules and other policy issues, including by providing regular feedback to the CFPB on how the agency can best fulfill its statutory mandates to ensure that consumers have access to financial opportunities while also protecting them from abusive financial practices. Today, virtually all financial transactions for residential real estate in the United States depend upon compliance with the CFPB's rules, and consumers rely on the rights and protections provided by those rules. Importantly, the industry has invested billions of dollars into structuring its operations for compliance with the CFPB's regulations and other guidance.

If the Court issues a decision that extends beyond the Payday Lending Rule and asserts that these mortgage-related rules are potentially invalid because they were promulgated using funds appropriated through § 5497, it could set off a wave of challenges and the housing market could descend into chaos, to the detriment of all mortgage borrowers. Lenders, servicers, and consumers have operated by the CFPB's guideposts for more than ten years, and without those rules substantial uncertainty would arise as to how to undertake mortgage transactions in accordance with federal law.

Thus, if the Court holds that all or part of § 5497 violates the Appropriations Clause, the Court should sever any offending portions from § 5497. In addition, it may be appropriate for the Court to further Congress's intent to promote financial stability by granting de facto validity to past actions that the CFPB took under its current funding scheme. And the Court should consider other steps to limit the adverse consequences of such a ruling.

ARGUMENT

I. Ruling In A Manner That Calls Into Question All Of The CFPB's Rules Could Destabilize The Mortgage Market.

The only rule currently before this Court is the Payday Lending Rule. But if this Court strikes down that rule and does so in a broad manner that calls into question all of the CFPB's rules, it could be devastating for the real-estate finance industry in at least three main ways. First, if the CFPB's rules regarding mortgages were to be called into question, lenders and other market participants would struggle greatly to carry out their legal and contractual obligations to ensure and certify that their transactions comply with all applicable laws. Second, that legal uncertainty would generate a flood of legal challenges—brought by consumers, governmental agencies, or other industry participants—against real estate professionals, mortgage lenders, and mortgage servicers, with potentially crippling liability. And third, widespread uncertainty and an attendant wave of litigation could lead to severe instability, liquidity issues, and operational problems in the mortgage market. These

harmful consequences would be felt by lenders, mortgage servicers, and investors, and they would harm both current and future borrowers. Thus, this Court, if it rules for Respondents, should take steps to avoid causing chaos in the mortgage market.

A. Over the last ten years, to improve "financial stability" and "protect consumers from abusive financial services practices," 124 Stat. at 1376, the CFPB has reshaped the laws governing residential-mortgage loans in significant ways that are now baked into the daily functioning of the mortgage industry. The mortgage industry has collectively spent billions of dollars overhauling its infrastructure to create compliance programs and systems that ensure adherence to the CFPB's rules for loan origination and servicing.[4] Further, homebuilding and real-estate professionals and their consumers, in working with lenders, rely upon the mandatory disclosures and business-operation regulations for transparency and consistency across various purchase transactions. If those rules suddenly could not be relied upon due to a decision from this Court, the mortgage market could quickly descend into shambles—a devastating possibility for the vast majority of prospective homebuyers who need housing and credit to finance those purchases. *See* NAR, *2022 Profile of Home Buyers and Sellers*, 8 (Nov. 2022), https://tinyurl.com/3n63c3ny (almost 90% of

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[4] Amici are not aware of any precise calculations of the industry's costs, but they feel comfortable stating that the collective costs of adapting to the CFPB's rules number in the billions.

buyers in 2021 and almost 80% in 2022 financed their purchase).[5]

Notably, the CFPB's rules are critical to satisfying mortgage-disclosure requirements, which serve the crucial purpose of ensuring that consumers are apprised of inherently complex contractual information. Before Congress created the CFPB, every residential mortgage required two separate sets of disclosures: one under the Truth in Lending Act (TILA), and another under the Real Estate Settlement Procedures Act (RESPA). The CFPB simplified the disclosure process by promulgating the TILA-RESPA Integrated Disclosure Rule, known as "TRID," in 2013. 78 Fed. Reg. 79,730 (Dec. 31, 2013) (codified at 12 C.F.R. pts. 1024, 1026). Pursuant to the agency's authority under the CFPA, TRID put into place a new disclosure scheme that integrated the prior disparate requirements under TILA and RESPA, in some cases by creating exemptions to those disclosure requirements. *Id.* TRID protects consumers by ensuring that they "understand their loan options" and can "avoid costly surprises at the closing table."[6] CFPB, *Know Before You Owe: Mortgages*,

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[5] First-time buyers, who made up more than a quarter of all purchasers in 2022, financed 94% of their purchase on average. NAR, 2022 Profile of Home Buyers, *supra*, at 7-8.

[6] Among other things, TRID demands that the "total of payments disclosure" provided at closing includes "principal, interest, mortgage insurance (including any prepaid or escrowed mortgage insurance), and loan costs" instead of the "regulatory amounts of the finance charge and the amount financed," which consumers had struggled to understand. 78 Fed. Reg. at 80,038; *see* 12 C.F.R. § 1026.38(o)(1). TRID took effect in 2015. 80 Fed. Reg. 43,911 (July 24, 2015).

https://tinyurl.com/5n8zb22j (last visited May 11, 2023).

Moreover, the CFPB's rules have created nationally applicable standards for how mortgage servicers must operate and increased protections for borrowers. "Regulation X" covers everything from the notice servicers must provide when they assign or sell a mortgage to options for helping borrowers avoid foreclosure. *See* 12 C.F.R. Part 1024. For example, Regulation X requires servicers to follow certain steps when a borrower provides written notice of a servicer's purported error, such as failing to pay the borrower's insurance premiums or imposing a fee with no reasonable basis for doing so. 12 C.F.R. § 1024.35(a). After receiving notice, a servicer must—usually within seven business days—correct the error or "[c]onduct[] a reasonable investigation" and give the borrower a written statement explaining, among things, why the servicer reached that conclusion and how the borrower can request documents that the servicer relied on to investigate. *Id.* § 1024.35(e).

Regulation X also establishes procedures for reviewing loss-mitigation applications, which can help borrowers avoid foreclosure. For instance, when a servicer "receives a complete loss mitigation application more than 37 days before a foreclosure sale," the service must evaluate "all loss mitigation options available to the borrower"—such as payment plans or loan modifications—and then give the borrower written notice of which options the servicer will offer and how long the borrower has to accept or reject the terms. *Id.* § 1024.41(c). These nationwide standards could be modified quickly to allow servicers to respond in a

more uniform fashion to disruptions caused by the pandemic. During the pandemic, the CFPB's temporary changes included allowing servicers to offer "streamlined loan modifications without a complete loss mitigation application" and, in certain circumstances, requiring servicers to "renew reasonable diligence efforts to obtain complete loss mitigation applications from certain borrowers." CFPB, *Executive Summary of the 2021 Mortgage Servicing COVID-19 Rule* (June 28, 2021), https://tinyurl.com/m34stnt3.

The CFPB has also established a key safe harbor to TILA's requirement for residential-mortgage lenders to determine that, "at the time the loan is consummated, the consumer has a reasonable ability to repay the loan." 15 U.S.C. § 1639c(a). Under TILA, lenders must fully document that borrowers meet underwriting standards, and generally any lender that issues a mortgage not in compliance with the ability-to-repay requirements faces potential civil liability from the borrower. *See id.* § 1640(a). In some cases, a borrower could even "rescind the transaction." *Id.* § 1635(a).

The CFPB promulgated a safe-harbor rule under which certain "qualified mortgages"—such as those where the loan's annual percentage rate calculated under TILA is at or below a threshold published weekly by the CFPB—are deemed to comply with the ability-to-repay requirements. *See* 85 Fed. Reg. 86,308, 86,309 (Dec. 29, 2020) (codified at 12 C.F.R. § 1026.43(e)). Lenders have relied on that safe-harbor rule to originate millions of loans in compliance with statutory requirements. And without this safe harbor, the legal-risk profile of many loans would change,

creating challenges for lenders and purchasers in originating certain loans or selling them on the secondary market—challenges that could dry up the supply of financing for the housing market and hurt consumers.

In sum, over the last decade, lenders and real-estate professionals have structured their operations to depend on TRID, the CFPB's safe harbor for TILA's ability-to-repay requirements, and other CFPB rules related to consumer mortgages and home-purchase transactions. Congress understood that these rules would be critical to implementing the Dodd-Frank Act's changes to TILA and RESPA, because it required the CFPB to promulgate certain new rules within 18 months of the agency's creation. *See* 15 U.S.C. § 1601 note (2010).

Lenders also rely on the CFPB's rules in their efforts to comply with other federal regulators' standards and meet the demands of state regulators[7] and

[7] The Office of the Comptroller of the Currency, for example, which "supervises all national banks and federal savings associations," Office of the Comptroller of the Currency, *About Us*, https://tinyurl.com/5fd95yu7 (last visited May 12, 2023), has a statutory duty to ensure that "the institutions and other persons subject to its jurisdiction" "compl[y] with laws and regulations." 12 U.S.C. § 1(a). New York, meanwhile, requires mortgage bankers to "make mortgage loans in conformity with" not only New York's banking laws but also "all applicable federal laws and the rules and regulations promulgated thereunder." N.Y. Banking Law § 590(5)(c). Likewise, California requires mortgage servicers to "comply with all applicable requirements of California and federal law." Cal. Fin. Code § 50130(g). Texas does the same. *See* Tex. Fin. Code § 157.010(a) (the Savings and Mortgage

additional key players in the mortgage market. Likewise, investors in the secondary market[8] depend on assurances from mortgage originators that a given transaction complies with all relevant legal requirements. Fannie Mae, for example, buys mortgages only from lenders that "comply with all federal, state, and local laws" applicable to their origination of mortgages, including "statutes, regulations, ordinances, directives," and "administrative rules." Fannie Mae, *Selling Guide: A3-2-01, Compliance with Laws* (Apr. 5, 2023), https://tinyurl.com/45xsx3nu.

In short, the mortgage market, with its complex moving pieces and vast array of participants—including mortgage originators, secondary purchasers, investors in the secondary market, loan servicers, and others—depends on each participant's ability to certify that a loan complies with the law. But if all of the CFPB's rules are called into question, both prospectively and potentially retrospectively, uncertainty regarding legal obligations will reign. This would leave market participants unable to certify compliance and invite challenges relating to past certifications,

Lending Commissioner will authorize the registration of a mortgage banker "if the commissioner concludes that the mortgage banker will comply with state and federal law").

[8] When entities like "Fannie Mae and Freddie Mac buy mortgages from lenders and either hold these mortgages in their portfolios or package the loans into mortgage-backed securities," that gives lenders more money "to engage in further lending." FHFA, *Fannie Mae and Freddie Mac* (2023), https://tinyurl.com/yc5xb9s9. Thus, purchases on the secondary-mortgage market "help ensure that individuals and families that buy homes … have a continuous, stable supply of mortgage money." *Id.*

representations, and warranties. As a result, the mortgage market could grind to a halt.

B. Almost all of the residential mortgages originated over the past decade have been made and administered pursuant to the CFPB's rules. Absent those rules, it would be unclear what rules govern mortgage transactions. And a host of market participants could face potential liability for the origination and servicing of huge numbers of mortgages, representing trillions of dollars of obligations. In short, chaos would ensue.

As discussed above, federal law imposes civil liability against lenders in certain circumstances, such as when a lender fails to comply with TILA's ability-to-repay requirements or meet the CFPB's safe harbor. *Supra* 9. Should the CFPB's safe-harbor rule lose its legitimacy, borrowers could attempt to sue lenders for damages or, in some situations, seek to rescind their loan contracts. *Id.* Loan purchasers would be vulnerable too, because TILA extends civil liability to "assignee[s]" if a violation "is apparent on the face of the disclosure statement." 15 U.S.C. § 1641. Moreover, borrowers could also assert defenses to foreclosure under federal law for the same statutory violations, which could make it difficult or impossible for lenders to collect on billions of dollars in loans—even if those loans complied with the relevant rules when they were originated. *See id.* § 1640(k)(1) (providing that, as a defense to foreclosure, a consumer "may assert a violation by a creditor of paragraph (1) or (2) of section 1639b(c) of this title, or of section 1639c(a)").

Absent the certainty provided by the CFPB's rules, mortgage lenders, mortgage servicers, and other industry participants might be forced to sue each other to protect their own interests in sorting out whether particular transactions complied with the laws. Similarly, government regulators might need to pursue enforcement actions or investigations to determine the legal status of loans issued under bygone rules.[9]

C. The litigation and widespread uncertainty that would likely result from a decision that suddenly called all the CFPB's rules into question would prove devastating to the mortgage market. It would be difficult for lenders to issue new loans without having clarity on the state of the law and their origination and servicing obligations. Lenders would have concerns about their potential financial exposure for issuing new loans and the uncertainty of whether new loans would be purchased on the secondary market. Indeed, many lenders depend on selling loans to secondary purchasers to continue making new loans to consumers. *See supra* n.8.

Any freeze on new loans would devastate consumers' options for buying or selling homes, given that

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[9] TILA and RESPA have safe-harbor provisions that protect lenders whose mortgage loans complied with certain agencies' rules at the time of consummation, and the CFPA amended those provisions to encompass the CFPB's rules. *See* 15 U.S.C. § 1640(f) (TILA's safe harbor); 12 U.S.C. § 2617(b) (RESPA's safe harbor); §§ 1098(11), 1100A(2), 124 Stat. at 2104, 2107 (CFPA's amendments to both). But a ruling calling all the CFPB's rules into question could trigger arguments that the safe harbors for having complied with the CFPB's rules are also invalid.

most people need financing to purchase a house. *See* NAR, 2022 Profile of Home Buyers, *supra*, at 8. Almost 80% of all homebuyers use a loan to purchase a home, and among first-time homebuyers that number jumps as high as 97%. *Id.* at 5, 8. Not only would first-time homebuyers be devastated by an inability to obtain a mortgage, but minority communities also would be disproportionately negatively impacted. While homeownership levels are up overall, Black buyers are not keeping pace. The gap between white and Black homeownership is the widest it has been in a decade, and with half of Black buyers being first-time homeowners, the vast majority of whom use a loan to make their purchase, the gap would widen even further. *See id.* at 7. Moreover, the financial stakes for the economy are high: Fannie Mae estimated in December that 2023 would see $1.33 trillion in mortgage originations for purchases of single-family homes alone. Fannie Mae, *Housing and Mortgage Markets Declined Significantly in 2022* (Dec. 19, 2022), https://tinyurl.com/mreryhfk.

With the threat of credit availability drying up, the home-building and home-resale industries would also suffer, with serious consequences for the national economy. NAR estimates that these industries account for almost 17% of the country's gross domestic product. Nadia Evangelou, NAR, *How Do Home Sales Affect the Economy and the Job Market in Your State?* (June 2, 2022), https://tinyurl.com/whkkrdk6. Home builders would be unable to continue constructing new homes without sufficient credit available, and they would also face severe pressure to sell any current inventory, thus depressing home values. A lack of new construction would amplify existing supply

issues in the housing market, where inventory "is hovering near historic lows" in many parts of the country. Alana Semuels, Time, *Why There Are No Houses to Buy in Many U.S. Metro Areas* (Mar. 9, 2023), https://tinyurl.com/3rxjd4pm. And many consumers might be unable to obtain credit to remodel existing homes, which would also deprive the economy of ancillary products and services that often accompany the resale of a home. Ultimately, the housing market would shift toward the relatively few buyers who can afford to purchase a home with cash—all while the loss of financing depressed home values and thus the value of bank-owned residential mortgage-backed securities, potentially triggering solvency issues for some banks.

Even a temporary period of uncertainty surrounding the CFPB's mortgage-related rules would have a significant negative impact on the economy. Across the country, thousands of transactions for residential mortgages occur each day. *See* Fannie Mae, *Housing and Mortgage Markets*, *supra*. A large majority of American consumers depend on credit to purchase, sell, and renovate their homes. And thousands of Americans who work in the mortgage, home-building, and real-estate industries could lose their jobs if the mortgage market crashes. Moreover, some companies that currently offer consumer-mortgages could go out of business or simply shift to commercial loans exclusively, leading to decreased competition and increased costs in the marketplace.

Finally, as amici noted above, invalidating the CFPB's rules would deny the real-estate industry and financial institutions the benefit of the billions of

dollars they have invested into compliance programs and systems, including new technology and training for employees. That investment in technology has resulted in efficiencies and consistencies that greatly benefit the public and the economy. Those gains would be lost if the CFPB's rules lose their vitality, unnecessarily increasing the risks of market crises that the CFPA was enacted to prevent.

In short, invalidating or calling into question all of the CFPB's rules likely would cause tremendous and irreparable harm to the real-estate finance industry, the home-building industry, related industries, consumers, and the economy as a whole.

II. If Ruling For Respondents, The Court Should Take Steps To Limit The Scope And The Adverse Consequences Of Such A Ruling.

A. This Court should sever the offending provisions from the funding statute.

The Court has long held that it should "limit the solution to the problem" when addressing a statute with "constitutional flaw[s]." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010). That approach requires "severing" any unconstitutional portions of a statute "while leaving the remainder intact." *Id.* The Court followed that path when it last confronted the Dodd-Frank Act in *Seila Law*, severing the CFPB's director's for-cause removal restriction from the statute but not invalidating acts that the CFPB took while the restriction remained in place. 140 S. Ct. at 2209-11. Thus, if the Court

concludes that any part of the CFPB's funding statute violates the Appropriations Clause, it should conduct a severability analysis and excise the offending portions, making clear that its ruling does not call into question the validity of any existing CFPB regulations not challenged in this case.

As *Seila Law* recognized, the Dodd-Frank Act has an express severability clause. 140 S. Ct. at 2209. Section 5302 of Title 12—called "Severability"—provides that "[i]f any provision of this Act" or any provision's application in a given situation "is held to be unconstitutional, the remainder of this Act …shall not be affected thereby." So "[t]here is no need to wonder what Congress would have wanted" under the circumstances here, "because it has told us." *Seila Law*, 140 S. Ct. at 2209.

Here, although the Fifth Circuit did not specify which parts of the CFPB's funding statute crossed the constitutional line, the government has suggested several provisions that could be severed from the rest of § 5497. OB40-42. Among other things, the Court could sever the requirement that the CFPB's funds "shall remain available until expended," § 5497(c)(1), or the provision insulating the agency's budget from "review" by Congress's Appropriations Committees, § 5497(a)(2)(C). The remaining provisions of the Act "bearing on the CFPB's structure and duties" would "remain fully operative without the offending [funding] restriction[s]." *Seila Law*, 140 S. Ct. at 2209. That harms-limiting approach makes sense, because nothing in the Act's "text or history" shows that "Congress would have preferred" undoing the CFPB's entire

body of work to having a CFPB funded by more typical appropriations. *Id.*

A broader ruling calling into question all of the CFPB's existing regulations and past actions would be inappropriate. *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) ("vacatur of past actions is not routine"). To be sure, if all or part of § 5497 violates the Appropriations Clause, the CFPB might "be obliged to halt further [prospective] spending of funds … under Section 5497" until an emergency appropriations bill is enacted to fund the agency. Pet. 25. The funding issue before the Court, however, should not be construed to implicate the CFPB's substantive authority.[10]

A broader ruling here would be wholly improper given the potential adverse consequences it would engender, as outlined extensively above. In *Seila Law*, this Court acknowledged that "eliminat[ing] the CFPB … would trigger a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-finance arena." 140 S. Ct. at 2210. But invalidating the CFPB's unchallenged rules, or failing to make clear that the Court's opinion here does not put those rules in jeopardy, could

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[10] Respondents cross-petitioned on whether the Payday Lending Rule should be vacated because: (1) then-Director Richard Cordray promulgated it "while shielded from removal"; and/or (2) "the prohibited conduct falls outside the statutory definition of unfair or abusive conduct." Cross-Petition at i, *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 22-663 (U.S. Jan. 13, 2023). The Court denied the cross-petition, and those questions are not fairly encompassed within the government's petition, so they are not before the Court.

trigger the same disruption and damage that the Court recently sought to avoid. Accordingly, the Court should cabin the reach of any affirmance here by stating that its decision confirms the validity of other rules that the CFPB issued while § 5497 remained in effect in its original form.

B. This Court also should grant de facto validity to the CFPB's past actions not challenged here.

In recognition of the catastrophic economic consequences that would occur if the Court rules in a manner that calls the lawfulness of all the CFPB's rules into question, the Court also should limit the scope of its ruling by expressly according "de facto validity" to those unchallenged rules and by staying its judgment for a limited time to give Congress the opportunity "to adopt other valid [funding] mechanisms." *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976) (per curiam). The Court took that path in *Buckley* with respect to the past acts of an improperly constituted agency. *Id.* And it did so again in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* for decisions rendered by Article I bankruptcy judges who had been improperly given Article III judicial power. 458 U.S. 50, 88 (1982). The same result would be warranted here if this Court's rationale would otherwise call all the CFPB's rules into question.

Buckley addressed a host of constitutional challenges to the Federal Election Campaign Act of 1971, which, among other things, set contribution limits and created the Federal Election Commission to administer the law. 424 U.S. at 7. The Commission

exercised "direct and wide ranging" enforcement power, such as bringing civil suits for injunctive relief, and also had "extensive rulemaking and adjudicative powers." *Id.* at 110-11. Although some parts of the Campaign Act passed muster, the provision allowing Congress itself to choose four of the Commission's six voting members violated the Appointments Clause. *Id.* at 140-43. Given the destabilizing effects of applying that holding retroactively, however, *Buckley* "accorded de facto validity" to the Commission's "past acts." *Id.* at 142. And *Buckley* deemed a "limited stay" of the judgment appropriate to allow Congress to restructure the Commission while the Commission could still "function de facto in accordance with the substantive provisions of the [Campaign] Act." *Id.* at 143.

Later, *Northern Pipeline* struck down the part of the Bankruptcy Act of 1978 that conferred Article III judicial power—such as the ability to hear any civil proceedings "related" to bankruptcy cases—on bankruptcy judges who lacked Article III's institutional safeguards of life tenure and "a fixed and irreducible compensation." 458 U.S. at 54-60, 87 (plurality). But the decision "appl[ied] only prospectively." *Id.* at 88 (majority). The Court declined to apply its constitutional ruling retroactively because of the "unprecedented" legal question involved and the "substantial injustice and hardship" that such application would have caused to "litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Id.* And like *Buckley*, *Northern Pipeline* stayed its judgment for about three months to give Congress a chance "to reconstitute the bankruptcy courts or to

adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Id.*[11]

This case likewise calls for a determination of de facto validity and a temporary stay of the judgment if the Court's ruling here would otherwise call all the CFPB's rules into question. As the government explains, no court had ever found an Appropriations Clause violation until the Fifth Circuit did here. OB25. So, the legal question of how to remedy any such violation is "unprecedented" in the truest sense of the word. *Northern Pipeline*, 458 U.S. at 88. And rescinding or invalidating the CFPB's other rules and past actions because of any Appropriations Clause violation would cause tremendous "injustice and hardship" both to borrowers in regulated markets and to mortgage lenders and other industry participants that have structured their operations around the CFPB's rules. *See supra* 6.

Finally, as to the agency's authority, the circumstances here strongly support granting de facto

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[11] To be sure, members of this Court have sometimes disagreed about how far *Northern Pipeline*'s constitutional analysis should extend in other cases. *E.g.*, *Stern v. Marshall*, 564 U.S. 462, 509 (2011) (Breyer, J., dissenting) (contending that the majority "overemphasizes the precedential effect of the plurality opinion in *Northern Pipeline*"). But the remedial portion of *Northern Pipeline* that amici discuss here commanded a majority, because Justices Rehnquist and O'Connor "agree[d] with the discussion in Part V of the [four-justice] plurality opinion respecting retroactivity and the staying of the judgment of this Court." 458 U.S. at 92 (Rehnquist, J., concurring in the judgment).

validity to the CFPB's existing rules—even more so than in *Buckley* and *Northern Pipeline*. In those cases, the commissioners and bankruptcy judges, respectively, wielded power that the Constitution did not permit them to have. *Supra* 20. Still, the Court affirmatively sanctioned their past acts. Here, by contrast, the funding issue before the Court does not cast doubt on the CFPB's substantive authority, as the Fifth Circuit recognized: "Congress plainly (and properly) authorized the Bureau to promulgate the Payday Lending Rule." Pet. App. 43a. That provides all the more reason for the Court to state that any ruling of a constitutional violation in this case does not wipe out the CFPB's other regulations and does not call into question the validity of past acts that Respondents did not challenge.

Thus, if the Court concludes that the CFPB's funding mechanism violates the Appropriations Clause, granting de facto validity to the CFPB's past acts (other than the Payday Lending Rule at issue here) and temporarily staying the judgment to give Congress time to fix the agency's funding structure is warranted to avoid sowing chaos in an economy already under strain. The Court's precedents support that course. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 546 (1991) (White, J., concurring) ("certain decisions will be applied prospectively only," and the "propriety" of that approach "is settled"). And the public interest demands it.

CONCLUSION

For the foregoing reasons, if the Court concludes that the CFPB's funding mechanism violates the Appropriations Clause, the Court should take steps to limit the scope of the ruling and to mitigate the adverse consequences of a ruling that would call all the CFPB's rules into question.

Respectfully submitted,

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May 15, 2023