No. 19-7

In The
Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU.

On Writ Of Certiorari To The U.S. Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CREDIT UNION NATIONAL ASSOCIATION, INC. IN SUPPORT OF PETITIONER AND A STAY

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QUESTIONS PRESENTED

1. Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

2. Whether, if the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, 12 U.S.C. § 5491(c)(3) can be severed from the remainder of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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INTEREST OF AMICUS CURIAE[1]

The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,500 federal and state credit unions, which collectively serve 115 million members nationwide. CUNA's mission in part is to advocate for responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services to credit union members.

This case concerns the constitutionality of a financial regulator of unprecedented character. The Consumer Financial Protection Bureau (CFPB or Bureau), established by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Title X), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. §§ 5481 to 5603 (2018)), is unique in many ways. It has the broadest regulatory reach of any financial regulator; it is the first agency to have authority over both bank and non-bank "covered" financial services firms; and its enforcement and

[1] All parties have filed blanket consent for the filing of amicus briefs. No party's counsel authored this brief in whole or in part, and no person or entity other than amicus curiae, its counsel, or its members made a monetary contribution intended to fund the brief's preparation or submission.

rulemaking authority extends to companies of any size, as well as their managers.

Through this broad grant of authority, the Bureau subjects non-depository lenders to the same oversight as government-chartered and -insured institutions. That is, it sweeps into its regulatory ambit previously unregulated and underregulated entities. This scheme benefits consumers by charging a single agent with enforcing U.S. consumer-protection laws, while at the same time leveling the regulatory playing field for market participants. Although there are measures the Bureau should take to improve its regulatory and supervisory process, the need for consumer protection in the United States remains.

That said, CUNA agrees with Petitioner and the CFPB that Congress's chosen design cannot withstand constitutional scrutiny because the statutory restriction on the President's ability to remove the Bureau's Director violates the separation of powers.

This brief focuses on the remedy to cure that structural defect. CUNA's experience serving regulated entities provides it with a unique voice principal to the remedial issue before the Court. A remedy that severs the "for-cause" removal provision would yield an agency design that the 111th Congress would have rejected. On the other hand, a remedy that disempowers the Bureau negates the benefits of a single federal regulator for bank and non-bank firms. To preserve the consumer-protection benefits that the CFPB provides, while remedying the unconstitutional power vested in the agency's Director, CUNA advocates that the Court vacate the lower court's decision and shift the responsibility for fixing the Bureau's structure to the political branches.

SUMMARY OF THE ARGUMENT

Congress created a juggernaut in 2010 when it built the Consumer Financial Protection Bureau. Whether exercising its rulemaking, supervisory, or enforcement authority, the CFPB regulates an estimated 70,000 U.S. businesses, which affects 100 percent of individuals who consume financial products. Overall, Bureau authority covers a $13.95 trillion consumer-finance market[2]—an estimated 68 percent of the American gross domestic product.

Congress well knows the rationale for an independent financial regulator. And it is evident from Title X's appointment of a single director, removable only for cause, along with Title X's structure and history, that Congress intended the Bureau to be free from the vagaries of presidential politics.

I. The Bureau has broad power to enforce financial and consumer-protection laws in the United States. But the unchecked nature of that power is what threatens individual liberty. CUNA endorses

[2] *See* 2019:Q3 Quarterly Report on Household Debt and Credit, Fed. Reserve Bank of N.Y. Research & Statistics Grp., Ctr. for Microeconomic Data (Nov. 2019), https://nyfed.org/342VfdV.

Petitioner's and the CFPB's analysis that the Bureau's structure violates the separation of powers. What's more, the structural error goes beyond the for-cause removal provision in Title X. Because of the constitutional violation, the Court must fashion a remedy, which is the primary focus of CUNA's brief.

II. The leadership that wields the Bureau's authority is a mishmash of structures born through iterative legislative proposals: The CFPB is not a bipartisan board like the Federal Trade Commission or National Credit Union Administration; it is not a single-director agency guided by the Treasury Secretary like the Office of the Comptroller of the Currency; nor is it a single-director agency guided by an oversight board of Cabinet members, like the Federal Housing Finance Agency.

Indeed, despite the CFPB's current structure, the CFPB bore hallmarks of these financial regulators at various points in the legislative process. But, no iteration of the legislation envisioned an individual director who was to serve at the President's pleasure. In truth, Congress did not want the CFPB to be an executive agency. And for that reason, the Court cannot sever the removal provision in Title X, when what will remain is an administrative Frankenstein the 111th Congress would have rejected.

III. Because a "minimalist" severance remedy is unavailable, the Court should strike all of Title X and vacate the lower court's decision. As an additional remedial measure, the Court should stay its mandate for a short period. A stay would allow the political branches time to respond to the Court's decision and reconstitute the Bureau, while minimizing the disruption to consumers and the market.

ARGUMENT

I. Congress Established a Unique—but Unconstitutional—Independent Agency When It Devised the Bureau.

Beginning in 2007, the United States faced the most severe financial crisis since the Great Depression. Millions of Americans saw their home values drop, their savings shrink, their jobs eliminated, and their small businesses lose financing.

Congress responded by creating an independent agency with vast power: the CFPB. On the 2011 transfer date, Title X vested the Bureau with the authority to implement and enforce consumer-credit laws that existed decades before its creation[3]—such as the Truth in Lending Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act, among others—

[3] On Title X's designated transfer date, much of the federal consumer-financial-law jurisdiction and functions of seven agencies—the Board of Governors of the Federal Reserve System (Federal Reserve), the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Federal Trade Commission (FTC), and the Department of Housing and Urban Development (HUD)—were transferred to the Bureau. *See* 12 U.S.C. § 5581(b).

along with the power to identify and prohibit unfair, deceptive, or abusive finance practices. *See* 12 U.S.C. § 5531. But that's not all:

- The Bureau has the on-site supervision and examination authority of prudential banking regulators. *See* §§ 5514(b), 5515(b).

- As a civil law enforcement body, the Bureau investigates with administrative subpoenas and enters into consent agreements that apply the panoply of equitable and legal relief. §§ 5562(b), 5564(a)–(b).

- The Bureau files federal court lawsuits independent of the Department of Justice, § 5564(a), (d), and only a handful of statutes of limitations and exceptions to Bureau authority circumscribe its activities.

- The Bureau is free from congressional appropriations. § 5497(a)(2)(C).

- The Bureau holds administrative adjudications. § 5563(a).

- And the Bureau is authorized to issue orders to assess millions in civil money penalties or to take away a person's livelihood. *See generally* §§ 5565, 5566.

The Bureau clearly wields vast power to regulate financial and consumer-protection laws. But the most troubling aspect is the unchecked nature of that power. As developed in Part II, *infra*, the Bureau is led by a single director with an unusual degree of independence. Central to that independence is a provision in

Title X mandating that the President may only remove the Director for cause.

The Constitution is designed to secure individual liberty, and "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). The separation-of-powers violation Petitioner seeks to remedy here strikes at the heart of this constitutional promise. Petitioner, the CFPB, and the dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), masterfully dissect the reasons why the Bureau's single-director structure cannot stand. CUNA agrees with that analysis and adopts it here.

The remainder of CUNA's argument here tackles the remedial issues. CUNA represents thousands of regulated credit unions across the country, which rely on regulators to oversee financial markets, stabilize the national economy, and promote operational stability at the facility level. CUNA has an interest in ensuring any remedy the Court imposes minimizes disruption to markets and financial transactions, while still awarding Petitioner meaningful relief.

II. The For-Cause Removal Provision Cannot Be Judicially Severed from Title X.

The legislative history on Title X (pre- and post-enactment) shows why Congress structured the Bureau the way it did. Whether the Court may sever the removal provision turns on whether Congress would have enacted "those provisions which are within its power, independently of those which are not." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (alterations omitted) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)); *see also Hill v. Wallace*, 259 U.S. 44, 70–72 (1922) (holding the Future Trading Act nonseverable because valid and invalid provisions were so intertwined that the Court would have to rewrite the law to allow it to stand). The Court cannot sever when the remaining statute is "plainly contrary to the intent of Congress." *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Title X's history is crucial to divining congressional intent and supports a conclusion that the for-cause removal provision in Title X cannot be severed.

A. Congress drew from other U.S. financial regulators in structuring the Bureau.

In 2009, the Obama Administration tasked a unit at the Department of Treasury Office of Financial Institutions to draft a legislative proposal to create a consumer bureau that would end the fragmentation of the then-current regulatory system. The new bureau would combine the authority of several agencies into a single agency focused on consumer protection. S. Rep. No. 111-176, at 11 (2010). In drafting early versions of Title X, the task force drew from the structures of other U.S. financial regulators. These regulators have structural safeguards in varying form along a spectrum of independence, within categories such as concentration of power, appointment, removal, succession, oversight, funding, and independence of opinion. *Cf.* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 800, 809 (2013).

Concentration of power. For example, NCUA has a three-member, bipartisan board, 12 U.S.C. § 1752a(b)(1), and the FTC has five commissioners, 15 U.S.C. § 41. These agencies have less concentrated power than the OCC and the Federal Housing Finance Agency (FHFA), which each have a single director. *See* 12 U.S.C. §§ 1 (OCC), 4512(b)(1) (FHFA).

Appointment, Removal, and Succession. Most federal financial regulatory chiefs are principal officers appointed by the President with the advice and consent of the Senate. *See*, *e.g.*, §§ 2 (OCC), 1752a(b)(1) (NCUA); 15 U.S.C. § 41 (FTC). And for removal, while some directors and commissioners can be removed for any reason, at least one may only be "removed by the President, upon reasons to be communicated by him to the Senate." *Compare* 12 U.S.C. § 2 (OCC), *with* 15 U.S.C. § 41 (FTC). Likewise, the process for elevating a successor varies: some are picked by the President, 12 U.S.C. § 4512(f) (FHFA), whereas others are elevated from appointees preselected by Cabinet members, § 4 (OCC).

Oversight, Funding, and Independence. Commissions and boards generally do not have oversight other than from Congress. *See* §§ 1752a(b)(1) (NCUA), 241 (Federal Reserve); 15 U.S.C. § 41 (FTC). Further, single directors usually serve under the general direction of at least one Cabinet member. 12 U.S.C. §§ 4513a(a) (FHFA), 1 (OCC). Regarding funding, a number of agencies obtain their funding from assessments or profits from their operations. §§ 1755 (NCUA), 16 (OCC), 243 (Federal Reserve). And all of these agencies report independently to Congress without first clearing their testimony with the administration. § 250.

Significantly, lawmakers drew from these historical attributes when they first structured the CFPB.

B. Early proposals favored independent, bipartisan, multi-member leadership.

Many of the attributes discussed above are featured prominently in the discussion drafts from 2009, and in the enacted law in 2010. The original draft of Title X that the Department of Treasury task force circulated established a five-member, bipartisan commission. *See* Financial Services Oversight Council Act of 2009, 111th Cong. § 1012(a) (July 22, 2009) (unenacted discussion draft), *available at* https://bit.ly/2RHPMH4.[4]

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[4] Section 1012(a) states,

> Composition of the Board.—The Agency shall have a Board that is composed of 5 members as follows:
>
> (1) 4 members of the Board who shall be appointed by the President, by and with the advice and consent of the Senate—
>
> > (A) from among individuals who are citizens of the United States; and

The Senate version of the bill, S. 3217, likewise started with a five-person, bipartisan commission. *See* Restoring American Financial Stability Act of 2009, 111th Cong. § 1012(a) (Nov. 10, 2009) (unenacted discussion draft) ("The management of the CFPA shall be vested in a board of directors that is composed of 5 members. . . ."), *available at* https://bit.ly/2YIUENM. The proposals contemplated a commissioner's removal only for cause, funding by assessments on the industry it regulated, and no advisor or Cabinet oversight.

But when Representative Frank introduced H.R. 4173 on December 3, 2009, Title X contemplated a single director only removable for cause and advised by a 12-member bipartisan advisory board that included leadership from the FDIC, NCUA, FTC, and the HUD Secretary, among others. *See* H.R. 4173, 111th Cong. § 4103 (2009). This oversight-board model mirrored the leadership structure of the FHFA,[5] the agency that oversees Fannie Mae and Freddie Mac. *See* 12 U.S.C. §§ 4511, 4512.

> (B) who have a [*sic*] strong competencies and experiences related to consumer financial products or services; and
>
> (2) the Director of the National Bank Supervisor.

[5] The FHFA director is beholden to the Federal Housing Finance Oversight Board (Oversight Board), which advises the director "with respect to overall strategies and policies in carrying out the duties of the Director." 12 U.S.C. § 4513a(a). The Oversight Board is comprised of the Treasury Secretary and the HUD Secretary, as well as the Chairman of the Securities and Exchange Commission. § 4513a(c).

Different still, the leadership structure that passed in the House, and eventually into law, *see* Pub. L. No. 111-203, 124 Stat. 1376, established a single director that the President could remove only for cause with no oversight. Proponents of H.R. 4173 later explained the structural change was because they preferred the OCC model, which has a single director and independent funding separate from congressional budget appropriations. *See* 157 Cong. Rec. 11,699 (2011) (statement of Rep. Frank). They also cited the benefits of a lithe and quick single-director agency. *See id.*

C. The enacted leadership structure for the Bureau is a mishmash.

While the bill sponsors may have preferred the OCC's leadership model in theory, it is not what they got. Rather, the process of shifting the leadership structure from a five-person bipartisan commission, to an oversight board that nominates its own executive director, to a single director with no Cabinet oversight, resulted in a unique structure[6] not reflected in any other U.S. financial regulator.

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[6] *See* 12 U.S.C. § 5491(b)(1) (single director); *id.* (Director appointed by the President with the advice and consent of the Senate); § 5491(c)(3) (the CFPB Director may be dismissed only for "inefficiency, neglect of duty, or malfeasance in office"); § 5491(b)(5) (the Bureau Director appoints her own Deputy Director who shall "serve as acting Director in the absence or unavailability of the Director"); § 5492(c)(2) (the Director receives no advice or direction from a principal officer); § 5497(a) (funding from Federal Reserve earnings); § 5492(c)(4) (the Bureau's

Certainly there are similarities between the CFPB and the OCC. Like the CFPB Director, the President appoints the Comptroller for a five-year term, with the advice and consent of the Senate. 12 U.S.C. § 2. Further, the OCC derives its funding from assessments on the banks it regulates, § 16, and the CFPB is funded from the Federal Reserve's combined earnings, § 5497(a). Finally, both bureaus are independent in that they report to Congress without first clearing their testimony with the President's appointees. *Compare* § 250 (OCC), *with* § 5492(c)(4) (CFPB). But that's where the similarities end.

For instance, the CFPB and the OCC have different parameters for removal. Although the President may "remove[ ]" the Comptroller "upon reasons to be communicated by him to the Senate," § 2, the CFPB Director may be dismissed only for "inefficiency, neglect of duty, or malfeasance in office," § 5491(c)(3).

Another difference is succession. The Treasury Secretary appoints the Comptroller's deputies. § 2. Upon a vacancy in the office or during the absence or disability of the Comptroller, each Deputy Comptroller will continue in his or her assigned duties under an order of succession following the First Deputy Comptroller. § 4. In contrast, Title X's succession provisions operate like an oligarchy. The Bureau's Director appoints her own deputy Director. § 5491(b)(5)(B). And Title X provides that the Director's pick shall "serve as

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legislative recommendations or testimony shall reflect the Bureau's own views).

acting Director in the absence or unavailability of the Director." *Id.*[7]

And executive oversight is another difference. The Comptroller performs his or her duties under the "general direction of the Secretary of the Treasury." § 1. The CFPB Director, however, receives no advice or direction from a principal officer. *See* § 5492(c)(2).

These differences between a time-tested, single-director structure and Title X, as enacted, indicate that the CFPB's structural design did not result from careful consideration, legal research, and negotiated compromise.[8] Nor was it a copy-and-paste from the National Bank Act. Rather, Congress layered amendment upon amendment, which, when viewed in total, resulted in a highly independent structure.

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[7] *See generally English v. Trump*, No. 1:17-cv-02534(TJK) (D.D.C. filed Nov. 26, 2017) (lawsuit by CFPB Deputy Director alleging the Trump Administration violated 12 U.S.C. § 5491(b)(5)(B) when the President appointed Mick Mulvaney to be Acting Director of the Bureau).

[8] Indeed, by the final version, which had jettisoned the bipartisan commission or advisory board, the advice Congress received on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and the structure of the OCC, was outdated and inapposite. *See* Br. of Amicus Curiae of U.S. House of Reps. in Supp. of J. Below, *Seila Law, LLC v. CFPB* (U.S. Oct. 4, 2019) (No. 19-7). While the advice may have been correct when a commission structure appeared in the discussion drafts, it did not apply to a single director with no oversight and self-selected successors.

D. Congress would not have passed Title X with a Director removable at will by the President.

Perhaps the best evidence that Congress did not intend for the Director to serve at the will of the President is the absence of such a measure. But even so, Congress's successive edits to create a CFPB increasingly removed from executive control demonstrate that legislators would not have approved a Bureau Director removable at will.

Post-enactment legislative actions confirm this conclusion. One year after President Obama signed Title X into law, House Republicans advanced a bill to turn the Bureau's single director into a five-person commission. Consumer Financial Protection Safety and Soundness Improvement Act of 2011, H.R. 1315, 112th Cong. § 104(b) (2011). Although the effort failed due to add-on proposals in H.R. 1315,[9] the House debate on July 21, 2011, provides insight into Congress's understanding when it passed Title X a year earlier. Republican proponents of H.R. 1315 asserted that until the last hour before the House passed the Dodd-Frank Act, drafters had consistently structured the Bureau as a bipartisan, multi-member board. 157 Cong. Rec. 11,699 (2011) (statement of Rep. Capito); *id*. (statement of Rep. Bachus). The version of the bill that passed the House, however, had a single director with

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[9] H.R. 1315 would have subjected the Bureau to more oversight from the Financial Stability Oversight Council and prevented the full transfer of power to the CFPB until the Senate confirmed a Director. *See* H.R. 1315, 112th Cong. § 103.

no oversight board. The record is thin as to why both parties accepted this proposal, except Representative Bachus suggested the acquiescence to a single director could be attributed to "three nights of amendments and sessions that went all day"—in other words, exhaustion. *Id*.

At bottom, the history makes clear that Congress pushed for structural safeguards to keep the Bureau independent of presidential control. And this congressional intent is consistent at every stage of the legislative process. Judicially severing the removal provision would rewrite Title X to be contrary to congressional intent, leaving the agency to function in a manner inconsistent with Congress's vision.

E. Congress would have preferred a bipartisan, multi-member commission over a CFPB director who serves at the will of the President.

Legislators had good reason to prefer a commission structure, as a commission provides greater stability in leadership. For instance, as House members in 2011 indicated, a commission with staggered terms provides greater stability by ensuring there is always some form of leadership at the CFPB. 157 Cong. Rec. 11,698 (statement of Rep. Capito).

Indeed, these words proved true from 2011 to 2013, a protracted period in which the Senate would not approve a director appointee. In a workaround, the President's chosen Director ascended to his role during a pro forma Senate session, citing the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. The Court effectively nullified this move in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), but, even so, the first director ran the Bureau without Senate approval for 18 months. In August 2013, after the 113th Senate confirmed his appointment, the Director published a notice "affirm[ing] and ratify[ing] any and all actions" he took during his recess-appointment tenure. Notice of Ratification, 78 Fed. Reg. 53,334-02 (Aug. 30, 2013). Courts have agreed that the Director's subsequent valid appointment, together with his ratification, cured any deficiencies.[10] Nevertheless, the single-director structure worked for a significant time to avoid the important Senate-confirmation check upon executive power.

Congressional leaders also pointed out that a single director can unilaterally reverse the decisions of his or her predecessors. 157 Cong. Rec. 11,698 (Rep. Capito). Again, the CFPB's director model has proved this assessment true. Beginning in the spring of 2013, the CFPB, under its first director, started researching its Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule, *see* 12 C.F.R. pt. 1041. The

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[10] *See, e.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016) (holding that improper recess appointment did not invalidate Bureau's enforcement action because the CFPA authorized the Bureau's action and the Director subsequently ratified that action after he was properly appointed), *cert. denied*, 137 S. Ct. 2291 (2017); *State Nat'l Bank of Big Springs v. Lew*, 197 F. Supp. 3d 177 (D.D.C. 2016) (holding regulations promulgated during the Director's improper recess appointment were not invalid because Title X gave the Bureau authority to promulgate regulations).

Bureau issued the notice of proposed rulemaking on July 22, 2016. 81 Fed. Reg. 47,864–48,218. The rule sought to change the U.S. small-dollar consumer loan landscape by imposing rigid underwriting requirements for small-value loans and creating a new credit reporting (i.e., "registered information") system. *See generally* 12 C.F.R. pt. 1041.

But just after the CFPB published the final rule in November 2017, the CFPB Director who initiated the four-year effort resigned. Approximately 14 months later, the new Bureau Director, appointed by the President, issued proposed rules to rescind the mandatory underwriting provisions of the rule and to delay the August 19, 2019 compliance date for those provisions to November 19, 2020, while it reconsidered the underwriting provisions. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date; Correcting Amendments, 84 Fed. Reg. 27,907 (June 17, 2019). Thus, ostensibly because of the autonomous director structure, a four-year rulemaking effort reversed course.

As shown, a single director exposes the CFPB and consumers to variances in ideology from one administration to another. Industry members, including CUNA's members, find this instability disruptive and expensive. For example, in 2018, the new Bureau Acting Director unilaterally decided the CFPB did not have the authority to conduct routine supervisory examinations for compliance with the Military Lending Act. *See* Glenn Thrush, *Mulvaney Looks to Weaken Oversight of Military Lending*, NYTimes.com (Aug. 10, 2018), https://nyti.ms/36vNcbe. Similarly, financial institutions have made major investments or abandoned markets based on CFPB rulemaking or guidance, only to have their business decisions undermined by the Director's political whims.[11]

Most importantly, consumers suffer from the whipsaw of inconsistent markets. "Consumers stand to lose the most if we have a situation in which the directorship of the CFPB swings back and forth between the extremes of the political spectrum." 157 Cong. Rec. 11,698 (statement of Rep. Capito).

Indeed, when considering whether to amend the CFPB's structure in 2011, one House Member conceded that, "whether the commission ought to be five members on a commission or one director is . . . the only part of [H.R. 1315] that really" is up for debate. *Id.* at 11,702 (statement of Rep. Miller). But at no point did lawmakers urge that the Director be removable at the President's will. Severing the phrase, "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3), will not give Americans a consumer

[11] One example is TransUnion's November 14, 2017 acquisition of a provider of alternative credit data, analytics, and risk scoring information for short-term and other small-dollar loans. TransUnion's acquisition came days after the Bureau announced its final "Payday Rule" mandating use of credit reporting in small-dollar loan underwriting. *Compare* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R. pt. 1041, *with* News Announcement, *TransUnion Expands Credit Access to More Americans with Acquisition of FactorTrust*, TransUnion.com (Nov. 14, 2017), https://bit.ly/2YzvvVF.

bureau contemplated by Congress. Nor will it fix the leadership structure's other anomalies.

One solution is to roll back the clock to a version of Title X that is both constitutional and contemplated by Congress. The Court, however, is not the legislative scribe for the 111th Congress. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 510 (2010) ("[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary."); *PHH Corp.*, 881 F.3d at 200 (Kavanaugh, J., dissenting) (observing "no Supreme Court case has adopted such an approach"). Because the Court cannot rewrite Title X to incorporate a commission-based structure deemed constitutional in other cases, *see Humphrey's Ex'r*, 295 U.S. at 629, a more considered and nuanced remedy is necessary.

III. The Court Should Vacate the Lower Court's Decision but Stay Its Mandate to Allow the Political Branches to Reconstitute the Bureau.

Because the "minimalist" remedy invoked in similar cases[12]—severing the for-cause removal provision from the statute—is unavailable to correct the structural error (*see* subpart II.D, *supra*), the Court should invalidate the entirety of Title X. That result may seem inconvenient. But convenience has never been enough

[12] *Free Enter. Fund*, 561 U.S. at 509; *Bowsher*, 478 U.S. at 735–36; *Collins v. Mnuchin*, 938 F.3d 553, 595 (5th Cir. 2019) (en banc) (majority opinion on remedy), *cert. petition docketed* (U.S. Oct. 25, 2019) (No. 19-422); *PHH Corp.*, 881 F.3d at 200 (Kavanaugh, J., dissenting).

to save an unconstitutional law. *INS v. Chadha*, 462 U.S. 919, 944 (1983). Nor should convenience cause this Court to restructure the Bureau into something the 111th Congress would have refused to adopt. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 864 (1986) (Brennan, J., dissenting) (noting while resolution of claim "may be accomplished more conveniently . . . the Framers foreswore this sort of convenience" when it impinges on "freedom" secured by the Constitution).

To be sure, the Court has not shied away from remedying violations of constitutional separation of powers even when the path forward may be hard or messy. The Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* struck the bankruptcy court's entire jurisdictional design because Congress encroached upon Article III by vesting judicial power in "a non-Art. III adjunct." 458 U.S. 50, 87 (1982) (plurality). Although the Court stayed its judgment, it showed no hesitation to invalidate Congress's chosen structure for bankruptcy courts nationwide, with the implicit instruction to try again. *Id.* at 88 (giving "Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws"); *id.* at 92 (Rehnquist, J., concurring in judgment). And the Court has issued other disruptive decisions when fidelity to the Constitution demanded it. Indeed, the Court invalidated hundreds of statutes because of a separation-of-powers violation, *Chadha*, 462 U.S. at 958–59; it refused to acquiesce to an unconstitutional seizure of the Nation's steel mills during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952); and it invalidated hundreds of adjudications for failure to follow the quorum requirement in the National Labor Relations Act, *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010). In the end, "[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided," *Chadha*, 462 U.S. at 959, even when remedying a constitutional violation.

The correct remedy in this case is for the Court to invalidate all of Title X. *See PHH Corp.*, 881 F.3d at 164 (Henderson, J., dissenting) ("Because section 5491(c)(3) is at the heart of Title X [and thus cannot be severed], I would strike Title X in its entirety."); *see also N. Pipeline*, 458 U.S. at 88. For Petitioner, the appropriate remedy is for the Court to vacate the lower court's decision granting the Bureau's petition enforcing compliance with the civil investigative demand (CID), and remand with instructions to deny the petition. If Title X is invalid, the Bureau has no authority to prosecute the CID action against Petitioner. *See CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018) (ordering the Bureau terminated from case because it "lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers" (quoting *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993))), *appeal docketed*, No. 18-2743 (2d Cir. Sept. 17, 2018). Further, the statute authorizing the action would be without legal effect. *See* 12 U.S.C. §§ 5562(c)(1) (authorizing issuance of CID), 5562(e)(1) (authorizing the Bureau to petition federal district court for enforcement).[13]

While the constitutional defect here mandates broad invalidation of a congressional act, the Court remains empowered to minimize the disruption from its ruling. Federal courts have broad equitable discretion to determine the appropriate remedy for constitutional violations. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *Milliken v. Bradley*, 433 U.S. 267, 286 (1977). In deciding "what is necessary, what is fair, and what is workable," *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (quoting *New*

[13] The Court has on occasion limited its constitutional holdings to prospective application, most notably in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (per curiam) and *Northern Pipeline*, 458 U.S. at 88. Nonetheless, in each case the Court still awarded meaningful relief to the petitioners. *N. Pipeline*, 458 U.S. at 88 (awarding petitioner relief it requested including affirming lower court's dismissal order); *Buckley*, 424 U.S. at 142–43 (awarding prospective "declaratory and injunctive relief" because that is what plaintiff asked for). The Court has since cabined the circumstances in which prospective-only relief is warranted: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). This is particularly true for prior adjudications presided over by unconstitutional actors. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *Ryder v. United States*, 515 U.S. 177, 182–83 (1995). Here, the Director has statutory authority to preside over adjudications under 12 U.S.C. § 5563(a)(1)–(2), and has in fact exercised that authority. *See PHH Corp.*, 881 F.3d at 82 (majority opinion).

York v. Cathedral Acad., 434 U.S. 125, 129 (1977)), the Court weighs "the balance of equities" and "the public interest," *Winter*, 555 U.S. at 32. Among the remedial measures available is for the Court to stay its mandate for a brief period. *See* S. Ct. R. 45.3. A stay would allow the Bureau to continue to exist in name under the cloud of the Court's constitutionality holding, while also allowing the political branches time to respond to (and potentially remedy) the structural problem.

The Court has previously used such stays to minimize the disruption of rulings that otherwise would have sweeping effects. *See N. Pipeline*, 458 U.S. at 88 (ordering four-month stay[14] to "afford Congress an opportunity to reconstitute the bankruptcy courts . . . without impairing the interim administration of the bankruptcy laws"); *Buckley*, 424 U.S. at 143 (ordering 30-day stay to "allow[] the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act"); *Bowsher*, 478 U.S. at 736 (ordering 60-day stay "to permit Congress to implement . . . fallback provisions"). As explained above, the U.S. economy, financial markets, and financial institutions, including CUNA's members, rely on regulatory stability to operate and transact business every day. Whether the Bureau is exercising its rulemaking, supervisory, or enforcement authority, the Bureau regulates an estimated 70,000 U.S. businesses—and 100 percent of individuals who consume financial products. Not to mention, the Bureau is the primary

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

enforcement regulator for 19 federal consumer-protection laws, touching on everything from residential mortgages to student loans to banking practices. Stated differently, "[t]he Director of the CFPB wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting). CUNA does not pretend the Bureau's entrenchment in everyday financial life saves its unconstitutional structure, nor does CUNA believe it should influence the Court's severance analysis. But eliminating the CFPB from the regulatory scheme overnight would be as dangerous and uncertain as a political and polarized CFPB.

For this reason, the least disruptive remedy is for the Court to stay its judgment in the case for six months and leave restructuring and reauthorizing the Bureau to the political process. *See N. Pipeline*, 458 U.S. at 88; *see also Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 863 (1st Cir.) (staying mandate for 90 days "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause"), *cert. granted sub nom. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019). A constitutionally reconstituted Bureau would have the authority to ratify prior final agency actions (or not) before the mandate issues, *see Collins*, 938 F.3d at 595; reconsider the 19 pending enforcement actions;[15] *see*

[15] *See* Bureau BIO 16 n.2, *All Am. Check Cashing, Inc. v. CFPB*, (U.S. Nov. 6, 2019) (No. 19-432) (stating "[t]he Bureau currently has 19 pending enforcement actions").

Doolin Sec. Sav. Bank, F.S.B. v. OTS, 139 F.3d 203, 212–13 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996);[16] and start re-adjudicating qualifying 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).

Even if reconstituting the Bureau proves too much 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. Even more, 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, 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").

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

CONCLUSION

The Court should hold all of Title X of the Dodd-Frank Act unconstitutional and vacate the lower court's enforcement of the Bureau's CID petition. The Court should also stay its mandate to allow the political branches time to react to its decision and to enact a commission structure to lead the Bureau.

Respectfully submitted,

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