A CONGRESSIONAL INAPPROPRIATION?: TROUBLESHOOTING *CFPB V. CFSA* AHEAD OF THE SUPREME COURT'S REVIEW

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INTRODUCTION

Consumer Financial Protection Bureau v. Community Financial Services Ass'n of America[1] has emerged as one of the most consequential cases before the U.S. Supreme Court this term.[2] The U.S. Court of Appeals for the Fifth Circuit's judgment below—in *Community Financial Services Ass'n of America v. Consumer Financial Protection Bureau*[3] ("*CFSA v. CFPB*")—held the Consumer Financial Protection Bureau's ("the CFPB" or "the Bureau") funding structure to be unconstitutional under the Appropriations Clause of the U.S. Constitution.[4] With this holding, the Fifth Circuit created a circuit split with the U.S. Court of Appeals for the District of Columbia Circuit[5] and became the first federal court of appeals to invalidate a federal funding statute under the Appropriations Clause.[6] After the Fifth Circuit declared 12 U.S.C. § 5497 (the Bureau's funding provision) constitutionally invalid, it applied—for unclear reasons—the remedial framework that the Supreme Court first introduced in *Seila Law LLC v. Consumer Financial Protection Bureau*[7] and then clarified in *Collins v. Yellen*.[8] By applying that framework rather than conducting a severability analysis as 12 U.S.C. § 5302 requires, the Fifth Circuit vacated both § 5497 in its entirety and the Payday Lending Rule[9] promulgated thereunder and challenged by the trade association plaintiffs.[10]

Shortly after the Fifth Circuit decided the case, the U.S. Court of Appeals for the Second Circuit decided *CFPB v. Law Offices of Crystal Moroney,*

1. 143 S. Ct. 978 (U.S. Feb. 27, 2023) (No. 22-448).

2. *See generally* Consumer Finance Monitor, *CFSA v. CFPB Moves to the U.S. Supreme Court: A Closer Look at the Constitutional Challenge to the Consumer Financial Protection Bureau's Funding*, BALLARD SPAHR (May 4, 2023), https://www.ballardspahr.com/Insights/Blogs/2023/05/Podcast-CFSA-v-CFPB-Moves-to-US-Supreme-Court-Guest-GianCarlo-Canaparo [https://perma.cc/L9NR-J4W7].

3. 51 F.4th 616 (5th Cir. 2022) ("*CFSA v. CFPB*"), *cert. granted sub nom.* CFPB v. Cmty. Fin. Servs. Ass'n of Am., 143 S. Ct. 978 (U.S. Feb. 27, 2023) (No. 22-448).

4. *See id.* at 635.

5. *See* PHH Corp. v. CFPB, 881 F.3d 75, 95–96 (D.C. Cir. 2018).

6. Courts other than the Fifth Circuit that have considered the Bureau's funding structure have found it constitutionally sound. *See, e.g.*, Bureau of Consumer Fin. Prot. v. Citizens Bank, N.A., 504 F. Supp. 3d 39, 57 (D.R.I. 2020); Bureau of Consumer Fin. Prot. v. Fair Collections & Outsourcing, Inc., No. 19-cv-2817, 2020 WL 7043847, at *7–9 (D. Md. Nov. 30, 2020).

7. 140 S. Ct. 2183, 2208 (2020).

8. 141 S. Ct. 1761, 1788–89 (2021); *see also CFSA v. CFPB*, 51 F.4th at 642–43; *Seila L.*, 140 S. Ct. at 2208 (2020).

9. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017).

10. *CFSA v. CFPB*, 51 F.4th at 643.

P.C.,[11] directly disagreeing with the Fifth Circuit's interpretation of the Appropriations Clause.[12]

This legal showdown fundamentally threatens not only the United States' consumer financial protection regime,[13] but also the essential operations of other independent financial agencies.[14] Most notable in this group is the Federal Reserve Board, which enjoys self-funding that is insulated from congressional oversight—akin in several respects to the Bureau's funding structure under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[15] ("Dodd-Frank").[16]

This Essay assesses the Fifth Circuit's rulings as to (1) Section 5497's constitutional invalidity and (2) the proper remedy in view of such a holding. It assesses the parties' arguments on appeal to the Supreme Court and proposes how the Court should and likely will decide. While this Essay accepts the Second Circuit's reasoning as superior to the Fifth Circuit's, it acknowledges that the Fifth Circuit sets forth a technically plausible, if novel, reading of the Appropriations Clause. As such, it predicts that the Supreme Court will likely uphold the Fifth Circuit's holding as to § 5497's unconstitutionality. The Supreme Court, however, should reverse the Fifth Circuit's remedial ruling. The Court should either remand for a severability analysis of § 5497 or stay the Fifth Circuit's vacatur of the Payday Lending Rule and permit the political branches to hash out a constitutionally firm funding scheme for the CFPB. In any event, vacatur of the Payday Lending Rule was an inappropriate remedy.

I. BACKGROUND

A. Dodd-Frank and the Creation of the CFPB

Congress enacted Dodd-Frank in 2010. The Act was intended to provide "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008."[17] Through the Consumer Financial Protection Act[18] ("the CFPA"), Dodd-Frank established the CFPB and granted it vast regulatory enforcement powers, including rulemaking, supervisory, and enforcement authority in the massive consumer financial

11. 63 F.4th 174 (2d Cir. 2023).
12. *See id.* at 181–83.
13. *See* Petition for Writ of Certiorari at 10–12, CFPB v. Cmty. Fin. Servs. Ass'n of Am., No. 22-448 (U.S. Nov. 14, 2022).
14. Brief for the Petitioners at 11, CFPB v. Cmty. Fin. Servs. Ass'n of Am., No. 22-448 (U.S. May 8, 2023) ("Congress has frequently chosen [similar] funding mechanisms for financial regulatory agencies, including the OCC, FDIC, and Federal Reserve Board (among others).").
15. Pub. L. No. 111-203, 124 Stat. 1376 (2010).
16. *See* Brief for the Petitioners, *supra* note 14, at 33.
17. S. REP. NO. 176, at 2 (2010).
18. Pub. L. No. 111-203, 124 Stat. 1955 (codified as amended in scattered sections of the U.S.C.).

protection legal space.[19] The Bureau is authorized to enforce and regulate under the various consumer financial protection statutes enacted prior to its creation, the enforcement of which had previously been entrusted to an amalgam of federal and state agencies.[20] Most controversial is the Bureau's power to promulgate rules defining and regulating "unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service."[21]

Congress set forth a comprehensive funding scheme for the Bureau in 12 U.S.C. § 5497,[22] while 12 U.S.C. § 5491 established the CFPB as an independent bureau in the Federal Reserve System.[23] The Bureau does not rely on annual appropriations for funding, but rather maintains a "Consumer Financial Protection Fund" at the Federal Reserve Bank.[24] It draws funds from the Federal Reserve in an amount that the Director determines to be "reasonably necessary" each year.[25] This amount is subject to a statutory cap pinned to a percentage of the Federal Reserve System's total annual operating expenses.[26] The monies on deposit in the Fund are permanently available to the Director, and the Bureau may "roll over" the funds it draws into future years.[27] Section 5497 states that the Bureau's withdrawal of funds will not be subject to oversight by the Committees on Appropriations of the House of Representatives and the Senate.[28] There is no stated bar on other congressional committees or federal entities reviewing the Bureau's funding.[29] The Director communicates the Bureau's funding activities to Congress, and the Office of the Comptroller reviews the Bureau's spending activities.[30]

Section 5497 received criticism, alongside other components of the CFPA, when Dodd-Frank was first enacted.[31] However, other provisions—chiefly Dodd-Frank's removal power protections—took priority in suits challenging the Bureau's structure.[32] Section 5497 was, until very recently, viewed as a secondary defect; parties challenging the Bureau's structure, and actions

19. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020) ("[T]he [CFPB] Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy.").

20. Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 36 (2012).

21. 12 U.S.C. § 5531(b); *see also id.* § 5512(b)(1).

22. *See id.* § 5497.

23. *See id.* § 5491(a).

24. *See id.* § 5497(b).

25. *Id.* § 5497(a)(1).

26. *See id.* § 5497(a)(2).

27. *Id.* § 5497(c)(1); *see CFSA v. CFPB*, 51 F.4th 616, 639 (5th Cir. 2022) ("[T]he Bureau may 'roll over' the self-determined funds it draws *ad infinitum*.").

28. 12 U.S.C. § 5497(a)(2)(C).

29. Brief for the Petitioners, *supra* note 14, at 4 ("Congress established several other mechanisms for overseeing the CFPB's use of funds.").

30. *See id.*

31. *See, e.g.*, Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99 (2013).

32. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

taken under that structure, have relied on alternative claims that conservative courts and academic circles have blessed.[33]

The Bureau's funding structure is not a total outlier. The CFPA declares the Bureau to be "independent," and numerous agencies of that type use nontraditional funding schemes.[34] Chief among these peer agencies is the Federal Reserve.[35] The Federal Reserve System draws money through the operations of its various banks.[36] Those banks "buy and sell bonds and securities, receive fees for services provided to banks, credit unions, and other depository institutions, and generate interest on loans to depository institutions."[37] A handful of other independent agencies enjoy nontraditional funding schemes as well, including the Office of the Comptroller of the Currency (OCC) and the Federal Housing Finance Agency (FHFA).[38]

B. The Appropriations Clause

The Appropriations Clause of the U.S. Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[39] Its "straightforward and explicit command . . . 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'"[40] The Appropriations Clause has rarely been seriously raised in litigation.[41]

Professor Kate Stith's 1989 article, *Congress' Power of the Purse*, has figured prominently in Appropriations Clause litigation, including *CFSA v. CFPB*.[42] Stith frames the Appropriations Clause as vesting Congress with core responsibilities accompanying its power over the purse.[43] She presents an account of the historical conception of legislative appropriations, concluding that the Framers would have conceived of a "valid" appropriation

33. *See generally CFSA v. CFPB*, 51 F.4th 616 (5th Cir. 2022) (considering, and rejecting, numerous statutory and constitutional claims directed at the Bureau).

34. Brief for the Petitioners, *supra* note 14, at 36.

35. *See id.* at 23.

36. 12 U.S.C. § 243.

37. 12 U.S.C. § 350.

38. For an attempt to distinguish the Bureau's structure from that of peer independent financial agencies, see Pearson, *supra* note 31, at 109–10.

39. U.S. CONST. art. I, § 9, cl. 7.

40. Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937))).

41. Brief for the Petitioners, *supra* note 14, at 19–20 ("The constitutionality of [lump-sum] appropriations has never seriously been questioned." (quoting Clinton v. City of New York, 524 U.S. 417, 467 (1998) (Scalia, J., concurring in part and dissenting in part))).

42. *See generally* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1989); *CFSA v. CFPB*, 51 F.4th 616, 637 (5th Cir. 2022).

43. Stith, *supra* note 42, at 1348 ("While section 8 of article I enumerates the powers of the legislative branch, the appropriations clause in section 9 . . . . affirmatively obligates Congress to exercise a power already in its possession.").

as one including congressionally imposed limitations on the time, amount, and object of funds authorized for government use.[44]

C. Seila Law *and* Collins*: Remedial Frameworks for Unconstitutional Structural Defects*

In *Seila Law*, the Supreme Court found the removal protections afforded to the Bureau's Director under § 5491 unconstitutional as violating the separation of powers doctrine.[45] The Court underscored several aspects of the Bureau's structure that made the removal protections particularly concerning,[46] including that the Bureau is headed by a single Director with a five-year term and receives "funds outside the appropriations process."[47] The Court also made much of the Bureau's vast powers and responsibilities.[48] The Court asserted, for example, that the Bureau's "financial freedom" increased the risk that it would slip from the control of the executive branch and, therefore, of the voting public.[49] The Bureau's single-Director structure, in tandem with § 5497 and the removal protections, permitted a single individual to "dictate and enforce policy for a vital segment of the economy affecting millions of Americans."[50]

For these reasons, the Court invalidated the removal protections as an unconstitutional encroachment on the President's Article II removal powers.[51] It rejected, however, the petitioner's requested remedy: that the Court toss out the civil investigative demand (CID), the issuance and enforcement of which gave rise to the case.[52] Noting Dodd-Frank's inclusion of an express severability clause,[53] the Court remanded the case for a severability analysis.[54] Severing the unconstitutional removal provision while allowing Dodd-Frank's unproblematic provisions to survive meant that

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44. *See id.* at 1353–54 ("As Alexander Hamilton explained, 'no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed.'" (quoting "Explanation," Nov. 11, 1795, in 8 A. HAMILTON, WORKS 122, 128 (H.C. Lodge ed. 1885))).

45. *See* 140 S. Ct. 2183, 2197 (2020).

46. *See id.* at 2204 ("The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.").

47. *See id.* at 2204 ("The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control.").

48. *See id.* at 2200–01 (distinguishing *Morrison v. Olson*, 487 U.S. 654 (1988), on the grounds that "the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions").

49. *Id.* at 2204.

50. *Id.*

51. *Id.* at 2203.

52. *Id.* at 2211.

53. 12 U.S.C. § 5302.

54. *See Seila L.*, 140 S. Ct. at 2208.

the Bureau's actions were legally legitimate despite the Bureau's structural defect.[55]

Shortly after *Seila Law*, the Supreme Court decided *Collins v. Yellen*, a case involving a challenge to removal protections afforded to the FHFA, another independent agency established through the Housing and Economic Recovery Act of 2008[56] (HERA).[57] In *Collins*, Fannie Mae and Freddie Mac shareholders sued the FHFA and its Director, challenging on statutory and constitutional grounds an amendment to a purchase agreement that the FHFA had entered into with Fannie Mae and Freddie Mac.[58] The Court agreed with the shareholders that the FHFA Director's removal protections violated the separation of powers.[59] However, rather than invalidate the amendment—which was made under the FHFA's unconstitutional structure—the Court remanded for determination of the proper remedy.[60] In doing so, the Court clarified *Seila Law* and provided a remedial framework applicable in cases where (1) an agency structure has been found constitutionally defective, and (2) litigants seek vacatur of an agency action under that structure.[61]

The Court acknowledged that "the unconstitutional restriction on the President's power to remove a Director of the FHFA could [inflict compensable harm]," entitling the shareholders to the injunctive relief that they sought.[62] The Court proposed an example of such compensable harm:

> Suppose . . . that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way.[63]

The Court remanded the question of whether the removal provision caused such harm by frustrating real or potential pushback against the FHFA's action.[64] The effect of its analysis, however, is clear.[65] A showing of

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55. *Id.* at 2207–08.

56. Pub. L. No. 110-289, 122 Stat. 2654 (2008).

57. *See* Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021) (declaring the Recovery Act's removal protections unconstitutional under separation of powers doctrine); *id.* at 1788–89 (declining to invalidate an FHFA action taken while the structural constitutional defect existed).

58. *See id.* at 1770.

59. *See id.* at 1783.

60. *See id.* at 1770.

61. *See id.* at 1788–89 (stating that while "it is [] possible for an unconstitutional [structural] provision to inflict compensable harm," plaintiffs must demonstrate that the removal protections effected a challenged amendment by frustrating an exercise of the President's removal power that would have kept the amendment from inflicting harm).

62. *See id.* at 1789.

63. *Id.*

64. *Id.*

65. *See CFSA v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) (distilling from *Collins* "three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the

compensable harm is necessary to justify vacatur of an agency action taken under an unconstitutional agency structure.[66] The unconstitutional structural defect must have caused the injury wrought by the agency action.[67] To make that showing, a litigant must demonstrate that the defective provision stood to frustrate—and *did* frustrate—a government decision.[68] In *Collins*, the frustrated government decision at issue was the President's ability to exercise his removal powers without cause, which, the shareholders argued, would have prevented their injury.[69]

II. BACKGROUND AND HOLDING OF *CFSA V. CFPB*

A. The Fifth Circuit's Judgment

In 2018, two trade associations, Community Financial Services Association of America and Consumer Service Alliance of Texas (collectively, the "Associations"), acting on behalf of payday lenders and credit-access businesses, brought an action against the CFPB.[70] The Associations challenged the Bureau's 2017 Rule, titled "Payday, Vehicle Title, and Certain High Cost Loans," imposing duties on the payday lenders and credit-access businesses.[71] The Associations launched a bevy of claims asking the court to vacate the Payday Lending Rule. These arguments sought to vacate the rule on its own merits, through, for example, an arbitrary and capricious challenge under the Administrative Procedure Act,[72] as well as through structural arguments rooted in the separation of powers doctrine.[73] Nestled among these was an argument novel to the Fifth Circuit, aimed at the unique CFPB's funding structure laid out in § 5497 of the CFPA.[74]

The Associations' argument under the Appropriations Clause failed on a motion for summary judgment before Judge Lee Yeakel of the U.S. District Court for the Western District of Texas.[75] Judge Yeakel dismissed the

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infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor").

66. *Collins*, 141 S. Ct. at 1788–89.

67. *See id.* at 1789.

68. *See id.* at 1788–89.

69. *See id.*

70. *CFSA v. CFPB*, 51 F.4th at 625.

71. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017). The payment provision in effect at the time of the Fifth Circuit's decision in *CFSA v. CFPB* declared "'unfair' and 'abusive' payday lenders' practice of attempting additional withdrawals from consumers' accounts after two consecutive attempts failed due to insufficient funds unless the lender acquired 'new and specific authorization.'" 51 F.4th at 626–27.

72. 5 U.S.C. §§ 551–559; *see CFSA v. CFPB*, 51 F.4th at 630–31 (concluding that "summary judgment in favor of the Bureau" on the Associations' arbitrary and capricious challenges "was warranted").

73. *See generally* Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, 558 F. Supp. 3d 350 (W.D. Tex. 2021), *aff'd in part*, *rev'd in part*, 51 F.4th 616 (5th Cir. 2022), *cert. granted sub nom.* CFPB v. Cmty. Fin. Servs. Ass'n of Am., 143 S. Ct. 978 (U.S. Feb. 27, 2023) (No. 22-448).

74. Petition for Writ of Certiorari, *supra* note 13, at 7.

75. *See Cmty. Fin. Servs. Ass'n. of Am.*, 558 F. Supp. 3d at 364.

contention almost out of hand, giving greater attention to the Associations' other arguments before rejecting those as well.[76] A three-judge panel of the Fifth Circuit affirmed on all but the novel Appropriations Clause issue.[77] The panel ruled that (1) the Bureau's funding scheme was unconstitutional, and (2) the proper remedy was vacatur of the Payday Lending Rule and wholesale invalidation of § 5497.[78]

1. Appropriations Clause Analysis

Writing for the panel, Judge Cory T. Wilson took issue with several components of the Bureau's funding scheme set forth in § 5497.[79] The court rooted its reasoning in "foundational precepts" in the Framers' writings and taken up by some contemporary legal scholarship.[80] The panel distinguished the CFPB as an agency wielding exceptional power and enjoying a funding scheme "unique across the myriad independent executive agencies across the federal government."[81]

Departing from the Supreme Court's and several lower courts' treatment of the Appropriations Clause as "simply" a hurdle for Congress,[82] the Fifth Circuit made much of the separation of powers interest—the separation of sword and purse—that influenced the Framers.[83] The panel explained that the Appropriations Clause does more than affirm the importance of "a valid reservation of congressional control over funds in the Treasury."[84] It obligates Congress to use its purse power "to maintain the boundaries between the branches and preserve individual liberty from the encroachments of executive power."[85]

Echoing *Seila Law*, the majority pointed out that the Federal Reserve from which the Bureau draws its funds "is itself outside the appropriations process through bank assessments," concluding that this enabled "a[n unprecedented]

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76. *See id.*

77. *CFSA v. CFPB*, 51 F.4th at 623 (finding that "one arrow has found its target: Congress's decision to abdicate its appropriations power under the Constitution").

78. *Id.* at 642–43.

79. *Id.* at 638–42.

80. *Id.* at 623 (alluding to overtures made in THE FEDERALIST NO. 48 (James Madison) and the Records of the Federal Convention); *see* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139–40 (Max Farrand ed. 1937).

81. *CFSA v. CFPB*, 51 F.4th at 624.

82. *Id.* at 640 (quoting Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990)).

83. *See, e.g.*, *id.* at 635–36 (noting that the Framers "viewed Congress's exclusive 'power over the purse' as an indispensable check on 'the overgrown prerogatives of the other branches of the government'" and as "the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president" (first quoting THE FEDERALIST NO. 58 (James Madison); then quoting JOSH CHAFETZ, CONGRESS'S CONSTITUTION, LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 57 (2017))).

84. *Id.* at 637 ("[A]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." (quoting Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990))).

85. *Id.* (citing Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., 33 F.4th 218, 231 (5th Cir. 2022) (Jones, J., concurring)); *see also* Stith, *supra* note 42, at 1349.

double insulation from Congress's purse strings."[86] The monies on deposit in the Bureau's Fund are made permanently available to the Director, and the Bureau may "roll over" whatever funds it has drawn from year to year.[87] As a final nail in the coffin, Congress mandated that "funds derived from the Federal Reserve System . . . shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."[88] This "double insulation from Congress's purse strings" spelled § 5497's demise.[89]

For the Fifth Circuit, the modern exigencies of equipping an agency with a funding structure congruent with its manifold responsibilities could not override the Framers' insistence on "inconvenien[ce], 'clums[iness],' [and] 'inefficien[cy]'"—virtues essential to the American model of governance.[90] To the extent that Congress could exercise flexibility in its direction of appropriations, an agency as "staggering[ly]" empowered as the CFPB merited heightened scrutiny by courts.[91] *Seila Law*'s elimination of the Director's removal protections had made the Bureau more—not less—problematic; as the court noted, "[a]n expansive executive agency insulated . . . from Congress's purse strings, expressly exempt from budgetary review, and *headed by a single Director removable at the President's pleasure* is *the epitome* of the unification of the purse and the sword . . . ."[92]

2. The Remedial Holding: Wholesale Vacatur of § 5497 and the Payday Lending Rule

The Fifth Circuit declined to undertake a severability analysis despite Dodd-Frank's express severability clause and the Supreme Court's insistence in *Seila Law* that, in light of that clause, a severability analysis of Dodd-Frank's defective provisions was required.[93] The Fifth Circuit instead

86. *CFSA v. CFPB*, 51 F.4th at 638–39. *But see* Consumer Fin. Prot. Bureau v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174, 182 (2d Cir. 2023) (rejecting the Fifth Circuit's "double insulation" theory as insufficient to establish an Appropriations Clause violation).

87. *CFSA v. CFPB*, 51 F.4th at 639.

88. *Id.*; *see also* 12 U.S.C. § 5497(a)(2)(C).

89. *Id.* at 639.

90. *Id.* at 637 (quoting NLRB v. Noel Canning, 573 U.S. 513, 601–02 (2014) (Scalia, J., concurring)).

91. *Id.* at 638.

92. *Id.* at 640 (first emphasis added).

93. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209 (2020) ("When Congress has expressly provided a severability clause . . . [w]e will presume 'that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision . . . unless there is strong evidence that Congress intended otherwise.'" (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987))). After holding § 5497 unconstitutional, the Fifth Circuit did not even mention undertaking a severability analysis. *See generally CFSA v. CFPB*, 51 F.4th 616. The Associations, in their brief, attempt to justify wholesale invalidation of § 5497 on the grounds that severing the problematic portions of the statute would be impracticable, given the apparent egregiousness of the provision. *See* Brief in Opposition at 26, CFPB v. Cmty. Fin. Servs. Ass'n of Am., No. 22-448 (Jan. 13, 2023).

vacated § 5497 in its entirety as an "egregious" and apparently irredeemable constitutional violation.[94]

The panel then considered whether § 5497's invalidity would spell the end of the Payday Lending Rule that the Bureau had promulgated.[95] It attempted to adapt the remedial framework set forth in *Seila Law* and *Collins* to this new context.[96] Under *Collins*, the Associations needed to show not only that the Bureau's funding structure violated the separation of powers, but that its structural constitutional violation inflicted harm through the Payday Lending Rule.[97] Because the agency obtained the funding employed to promulgate the Payday Lending Rule through the unconstitutional funding scheme, the majority found "a linear nexus" between the infirm § 5497 and the Payday Lending Rule.[98] Whereas in *Seila Law* the unconstitutional removal restriction at issue did not bear upon the Bureau's challenged rulemaking, here the funding structure "literally *effected*" the challenged rulemaking.[99]

B. The Second Circuit's Judgment in Crystal Moroney

Following the Supreme Court's grant of certiorari in *Consumer Financial Protection Bureau v. Community Financial Services Ass'n of America*, the Second Circuit issued its decision in *Crystal Moroney*.[100] The court entered into direct disagreement with the Fifth Circuit and upheld the Bureau's funding structure.[101] The Second Circuit framed the Appropriations Clause as "intended as a restriction upon the disbursing authority of the Executive department."[102] It concluded that the Clause simply mandates that the payment of a capped amount of money from the Treasury be commanded by statute.[103] Because § 5497 was authorized by Congress and bound by specific statutory provisions, the funding structure was valid.[104]

The defendant claimed that the CFPA unconstitutionally empowered the Bureau, and thus the executive branch, to unilaterally determine how much money is "reasonably necessary" to carry out its mission, without "any meaningful guidance" from Congress.[105] The Second Circuit could find no precedent supporting a "meaningful guidance" standard and reaffirmed the

94. *See CFSA v. CFPB*, 51 F.4th at 623, 639 n.14. The Associations struggle to justify the Fifth Circuit's refusal to even consider undertaking a severability analysis of § 5497. *See* Brief in Opposition, *supra* note 93, at 26.

95. *See CFSA v. CFPB*, 51 F.4th at 635–42.

96. *Id.* at 642–43.

97. *See supra* Part I.C.

98. *CFSA v. CFPB*, 51 F.4th at 643.

99. *Id.* (emphasis added).

100. *See generally* Consumer Fin. Prot. Bureau v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174 (2d Cir. 2023).

101. *See id.* at 181–83.

102. *Id.* at 181.

103. *See id.*

104. *Id.*

105. *See id.* ("Moroney cites no support for a 'meaningful guidance' test under the Appropriations Clause."); *see also* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) ("The contention . . . that any attempted appropriation is bad, because the particular uses to which the appropriated money are to be put have not been specified, is without merit.").

Appropriations Clause's mandate as a simple one.[106] In its view, the combination of a statutory cap on the Bureau's Fund withdrawals and Congress's explicit sanction of § 5497's non-traditional aspects satisfied the Appropriations Clause.[107]

The Second Circuit lambasted the Fifth Circuit's assertion that Congress's "double insulation" of the Bureau from supervision justified a finding of unconstitutionality.[108] Reading the applicable precedent literally, the majority held that the Clause merely requires the authorization, by statute, of funds to be drawn from the Treasury.[109] Beyond that "straightforward and explicit command," there was no further work to be done.[110]

Nor did the majority find that the *text* of the Clause implied a more rigorous standard. In the court's view, nothing in the Constitution suggests that congressional appropriations may be invalid absent a "time limit[ation]," or that they need be drawn from a particular source—i.e. the Treasury.[111] Article I, Section 8 of the Constitution does impose such a time limit on appropriations, but solely with respect to appropriations made for the purpose of raising and supporting armies.[112] By negative inference, a time limit requirement barring the Bureau's "roll-over" power is absent from the Appropriations Clause.[113]

Moreover, the Second Circuit criticized the Fifth Circuit's application of the Appropriations Clause's mandates, as the Framers understood them.[114] Original understandings of congressional appropriations recognized limits as to time and purpose, and required that appropriations be made out of a "fund."[115] The CFPA established clear, broad objectives for the Bureau to pursue.[116] Congress authorized the Bureau to treat the Federal Reserve System as its source of funds, and it established a clear limit on fund withdrawals in declaring that, while the Bureau could withdraw funds reasonably necessary to its ends, it could not draw an amount above a specified percentage of the Federal Reserve System's revenues.[117] Although

106. *See Crystal Moroney*, 63 F.4th at 181.
107. *See id.*
108. *See id.* at 182.
109. *See id.*
110. *Id.* (quoting Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990)).
111. *Id.*
112. *See id.*; U.S. CONST. art. I, § 8, cl. 12.
113. *See Crystal Moroney*, 63 F.4th at 182 ("By 'negative implication,' the absence of any restrictions in the Appropriations Clause other than that Congress must authorize government funding in a prior statute 'precludes the sort of implicit . . . limit[s]' that the Fifth Circuit chose to impose in CFSA." (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018))).
114. *Id.* at 183.
115. *See id.* ("[N]o money can be expended, but for an *object*, to an extent, and *out of a fund*, which the laws have prescribed." (quoting 7 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 532 (John C. Hamilton ed. 1851))).
116. *See* 12 U.S.C. § 5511(a)–(b).
117. *See Crystal Moroney*, 63 F.4th at 178.

certainly unique and arguably "anomalous,"[118] § 5497 thus satisfied the requirements in place at the time of the Founding.[119]

C. Fallout of CFSA v. CFPB

Courts and commentators instantly recognized the magnitude of the Fifth Circuit's decision in *CFSA v. CFPB*.[120] The majority's ruling as to the Appropriations Clause violation threatens to upend over a decade of consumer finance regulation by an authority plainly delegated the power to pursue it. Because all agency actions use appropriated funds, affirmance by the Supreme Court will extinguish the CFPB's ability to ensure fairness in consumer debt markets, consumer credit, mortgage markets, and more. The opinion also exposes the Federal Reserve, an independent financial agency vested with oversight responsibility for a great deal of U.S. monetary policy, to claims of constitutional infirmity.[121] The Federal Reserve, of course, is just one among several independent financial agencies that are self-funded and thus partially insulated from the shifting tides of electoral politics.[122] The Fifth Circuit's opinion would render powerless an agency that regulates a massive, trouble-ridden industry—and that protects lay consumers from a gamut of unfair, deceptive, and abusive practices—but its effects could prove even more dire should it receive the Supreme Court's endorsement.

The *CFSA v. CFPB* remedial ruling exacerbates these concerns. Should the Supreme Court accept the extension of the *Seila Law* and *Collins* remedial frameworks in the Appropriations Clause context, then suits asserting such violations could, in the short term, render self-funding independent agencies powerless and nullify bodies of properly-enacted regulations that serve delegated ends.[123] In the longer term, the remedy may drastically limit Congress's means of empowering regulators to carry out its aims.[124]

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118. *See CFSA v. CFPB*, 51 F.4th 616, 638 (5th Cir. 2022).

119. *See Crystal Moroney*, 63 F.4th at 183.

120. *See, e.g.*, Alan S. Kaplinsky, Michael Gordon & John L. Culhane, Jr., *A New Dark Cloud Descends: Fifth Circuit Panel Rules that CFPB Funding Mechanism is Unconstitutional*, BALLARD SPAHR LLP (Oct. 20, 2022), https://www.consumerfinancemonitor.com/2022/10/20/a-new-dark-cloud-descends-fifth-circuit-panel-rules-that-cfpb-funding-mechanism-is-unconstitutional/ [https://perma.cc/ZB52-K8H4].

121. *See* Petition for Writ of Certiorari, *supra* note 13, at 10 ("[T]he court of appeals' decision . . . threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector.").

122. *See id.* at 15.

123. Brief for the Petitioners, *supra* note 14, at 13 ("[V]acatur would [] contradict traditional remedial principles by inflicting significant disruption on the Nation's economy and the consumers, financial institutions, regulators, and others who have reasonably relied on the CFPB's past actions . . . . [T]he court of appeals should at most have granted forward-looking relief [limited to respondents or their members].").

124. *See* Block-Lieb, *supra* note 20, at 35 ("Dodd-Frank instills in the CFPB independence both from industry actors and political forces looking to undermine the Bureau's mission of consumer protection.").

III. ASSESSING THE FIFTH CIRCUIT'S DECISION IN *CFSA V. CFBP*: REVERSAL IS NECESSARY

This section evaluates the Fifth Circuit's holdings as to § 5497's validity under the Appropriations Clause and as to the appropriate remedy in the event of an Appropriations Clause violation. It concludes that the Fifth Circuit's judgment should be reversed. Alternatively, if the Appropriations Clause holding is affirmed, then the Supreme Court should reverse the remedial holding and remand to the Fifth Circuit with instructions to conduct a severability analysis.

A. The Bureau's Funding Structure Does Not Violate the Appropriations Clause

Whether the Supreme Court adopts the Fifth Circuit's Appropriations Clause analysis, or that of the Second and D.C. Circuits, will turn largely on the extent to which the Court is willing to distinguish the Bureau from other financial agencies funded by nontraditional means. Unfortunately, the Supreme Court has taken exception to the CFPB's structure before.[125] In *Seila Law*, the Court leveled attacks at both the Bureau's extensive, concentrated powers and its funding scheme.[126] Yet, the Fifth Circuit's opinion is a leap from precedent rife with holes.[127]

1. Section 5497 Does Not Pose Separation of Powers Concerns as the Fifth Circuit Defines Them

Much of the Fifth Circuit opinion frames checks and balances among the several branches as flowing from the principle that the Constitution must "safeguard against the encroachment or aggrandizement of *one branch at the expense of the other*."[128] Separation of powers doctrine, realized through checks and balances is, on this definition, concerned with the diminution in power of one of the three branches of government as a consequence of action undertaken by another.[129]

Section 5497, however, is a congressional limit on its own power. It is unclear from the authorities cited by the Fifth Circuit whether Congress's exercise of its own power—which somewhat weakened its traditional oversight role—raises separation of powers concerns as the panel defined them. It is difficult to characterize a branch's curtailment of its *own* authority

125. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207 (2020) ("While '[n]o one doubts Congress's power to create a vast and varied federal bureaucracy,' the expansion of that bureaucracy into new territories the Framers could scarcely have imagined only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people." (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010))).

126. *See id.* at 2193–94.

127. *CFSA v. CFPB*, 51 F.4th 616, 641 (5th Cir. 2022) (noting the Bureau's contention that "every court to consider its funding structure has deemed it constitutionally sound").

128. *Id.* at 635 (emphasis added) (quoting Morrison v. Olson, 487 U.S. 654, 693 (1988)).

129. *See id.*

as "encroachment or aggrandizement of one branch at the expense of the other."[130] *Seila Law*, by contrast, involved a legislative branch encroachment on the executive branch's removal power.[131] *That* plainly constitutes a congressional "encroachment or aggrandizement" by Congress at the expense of the executive branch.[132]

2. The CFPB Is Subject to Congressional and Executive Oversight

One of the Fifth Circuit's bogeyman provisions—§ 5497(a)(2)(C)—states that "[n]otwithstanding any other provision in this title, the [Bureau] funds derived from the Federal Reserve System . . . shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."[133] The panel framed the provision as precluding congressional review of Bureau spending wholesale and thus ceding Congress' power of the purse over to the Bureau.[134] Yet, as the Bureau points out, several means of congressional and other oversight do exist.

First, § 5497(a)(5)(A) requires the Office of the Comptroller General to conduct annual audits of the Bureau's financial transactions "in accordance with the United States generally accepted government auditing standards."[135] The Government Accountability Office, a legislative agency directed by the Comptroller General, has full access to the Bureau's information.[136] Under § 5497(a)(5)(B), the Comptroller General is *required* to submit a report of each annual audit directly to Congress, with copies of the reports going to the President and the Bureau as well.[137] Information pertaining to the Bureau's sourcing, use, and amount of funds withdrawn is thus annually presented to Congress.[138]

Second, despite the language of § 5497(a)(2)(C), the Bureau is required to prepare and submit a report regarding its funding, including its assets and liabilities, and the extent to which the Bureau's anticipated funding needs are expected to exceed the funding cap contained in § 5497(a)(2)(A).[139] Section 5497(a)(2)(C)'s "notwithstanding" language is important—Congress clearly

130. *Id.*

131. *See Seila L.*, 140 S. Ct. at 2198 (reiterating the President's general removal power, subject to only two exceptions).

132. *See CFSA v. CFPB*, 51 F.4th at 635; *see also Seila L.*, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part) (noting that Humphrey's Executor v. United States, 295 U.S. 602 (1935) "paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design").

133. 12 U.S.C. § 5497(a)(2)(C); *see CFSA v. CFPB*, 51 F.4th at 639.

134. *See CFSA v. CFPB*, 51 F.4th at 639.

135. 12 U.S.C. § 5497(a)(5)(A).

136. *See id.*

137. *See* Petition for Writ of Certiorari, *supra* note 13, at 4–5.

138. 12 U.S.C. § 5497(a)(5)(B) ("The Comptroller General shall submit to the Congress a report of each annual audit conducted under this subsection. The report . . . shall set forth the scope of the audit and shall include . . . *the statement of sources and application of funds*, and such comments and information as may be deemed necessary to inform Congress of the financial operations and condition of the Bureau . . . ." (emphasis added)).

139. *See* Petition for Writ of Certiorari, *supra* note 13, at 4.

placed alternative means of congressional oversight in the funding statute's text.[140]

Third, while it was not, strictly speaking, a Congressional check on the Bureau's funding, the Supreme Court's decision in *Seila Law* provided an additional executive branch check on the Bureau. With the President now able to terminate the Bureau's Director at will, irresponsible funding activities by the Director are more likely to result in removal.

Finally, Congress and the President may together modify § 5497 via the ordinary legislative process if they so choose. It is true that this power does not fit perfectly into the domain of Congress' special power over the purse. It is important, however, to recognize that attacks against the Bureau through the courts arise from anti-CFPB lawmakers' and lobbyists' inability to alter the CFPA through the political process.[141] If such actors seek to alter the Bureau's funding structure, it would better accord with the Framers' will to have them participate in the "inconvenient, 'clumsy,' [and] 'inefficient'"[142] lawmaking process than to allow them to invalidate that funding structure, in its entirety, through litigation.

3. Section 5497 Satisfies the Standard for Valid Appropriations at the Time of the Founding

On appeal, the Bureau essentially assumes Kate Stith's account, misapplied by the Fifth Circuit, of appropriations as they were conceived at the Founding.[143] In *Congress' Power of the Purse*, Stith notes that, at the time of the Founding, appropriations were expected to place limits on time, amount, and object: "The specification of object and time limitations, as well as an amount limitation, for each appropriation assures that the public fisc will not be obligated without legislative authorization *and* that there will be a legislative authorization for all activity undertaken in the name of the United States."[144]

Stith quotes Alexander Hamilton in support of her finding: Hamilton "explained, 'no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed.'"[145] The Fifth Circuit cited to Stith's proposition that the Appropriations Clause both bestows congressional "purse" power and imposes obligations to meet historical

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140. *See id.*

141. "Starting with the CFPB's establishment in 2011, its congressional opponents regularly filed bills to hamstring the Bureau, including many that were aimed at altering the Bureau's structure. None of these congressional attacks, save one, has succeeded to date." Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2569–71 (2019) (surveying proposals to alter the Bureau's structure by legislation).

142. *CFSA v. CFPB*, 51 F.4th 616, 637 (5th Cir. 2022) (quoting N.L.R.B. v. Noel Canning, 573 U.S. 513, 601–02 (2014)).

143. *See* Brief for the Petitioners, *supra* note 14; *supra* Part I.B.

144. Stith, *supra* note 42, at 1354.

145. *Id.* (quoting "Explanation," Nov. 11, 1795, in 8 A. HAMILTON, WORKS 122, 128 (H.C. Lodge ed. 1885)).

standards.[146] Yet *CFSA v. CFPB* ignored Stith's insight into what those obligations consist of. The Bureau maintains that these three requirements were met with respect to § 5497: "By prescribing the amount, duration, source, and purpose of the CFPB's funding, Section 5497 *more than satisfies* the classic elements of an appropriation and falls comfortably within Congress's historical practice."[147]

4. Other Factors Weigh in Favor of Reversal

The Fifth Circuit's opinion weaponizes the Appropriations Clause in a way that is at odds with precedent and undermines other independent agencies' appropriations schemes. The elephant in the room—the Federal Reserve—cannot cleanly be distinguished from the Bureau in terms of its funding and other relevant circumstances. Like the Bureau, the Federal Reserve is imbued with enormous, far-reaching power over the United States's monetary and financial systems.[148] It is true that the Federal Reserve Board is headed by a multi-member commission rather than a single Director.[149] But, like the Bureau, the Federal Reserve was clearly intended by Congress to be insulated from political pressures, and Congress prescribed its funding scheme to that end.[150]

On appeal, the Bureau highlights the gravity of the Fifth Circuit's first ever invalidation of a federal agency's appropriations statute.[151] The Bureau asserts that the Associations fail in their attempt to posit a workable distinction between the Bureau's funding structure under § 5497 and other nontraditional (i.e. nonannual) appropriations schemes.[152]

So too does the Bureau adopt the Second Circuit's negative inference argument.[153] The Framers clearly knew how to place heightened restrictions on appropriations when they felt it necessary—for example, the insistence on a two-year time limit for military appropriations in Article I, Section 8 ("[N]o Appropriation of Money to th[e] Use [of raising and supporting Armies] shall be for a longer Term than two Years").[154] There is no such requirement in the text of the Appropriations Clause ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").[155]

One weakness in the Bureau's argument on appeal to the Supreme Court is that it posits a simple dichotomy of agencies receiving annual appropriations, on the one hand, and agencies receiving other-than-annual

146. *CFSA v. CFPB*, 51 F.4th at 637.
147. *See* Brief for the Petitioners, *supra* note 14, at 12 (emphasis added).
148. *See* 12 U.S.C. §§ 342–361.
149. *See id.* § 244.
150. Block-Lieb, *supra* note 20, at 35.
151. Brief for the Petitioners, *supra* note 14, at 30.
152. *Id.* at 12.
153. *See id.*; Consumer Fin. Prot. Bureau v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174, 182 (2d Cir. 2023).
154. U.S. CONST. art. I, § 8, cl. 12.
155. *Id.* art. I, § 9, cl. 7.

appropriations, on the other.[156] There are advantages to the Bureau's approach—it will communicate that a successful attack on § 5497 portends future attacks against other nontraditional funding statutes. But to the extent that the Associations can draw even weak distinctions between the Bureau and other independent financial agencies, the Supreme Court might be willing to uphold the Fifth Circuit's invalidation of the Bureau's funding provision as an outlier.[157] The Court also might be willing to overlook the Associations' failure to offer a principled distinction because the Bureau's exceptional power subjects it to special scrutiny. But the Associations struggle or fail to offer a strong reason for invalidating § 5497 while leaving the Federal Reserve and other important independent financial agencies' funding statutes intact.[158]

B. The Fifth Circuit Improperly Applied the Remedial Analysis Set Forth in Seila Law *and* Collins

Somehow, the Fifth Circuit's decision to hold § 5497 unconstitutional under the Appropriations Clause is only the second most concerning aspect of its ruling in *CFSA v. CFPB*. The court's choice to adapt the remedial frameworks set out in *Seila Law* and *Collins* to the Appropriations Clause context led it to vacate the 2017 Payday Lending Rule that the Associations challenged.[159]

1. The Fifth Circuit Erred in Failing to Undertake a Severability Analysis of § 5497

The panel opted to fit the round peg of the *Seila Law* framework into a square hole, rather than do as the Supreme Court explicitly directed in prior cases concerning the Bureau's structure: attempt to sever the problematic funding provision from the remainder of Dodd-Frank.[160] The Supreme Court in *Seila Law* and *Collins* was focused on differentiating (a) challenged agency actions that, but for an agency's unlawful removal protections, would not have occurred and, therefore, not have caused the claimants' injury, from (b) agency acts not *effected* by the unlawful removal protections.[161] Thus, in *Seila Law*, the Court found it unnecessary to strike down the Bureau's CID

156. *See* Petition for Writ of Certiorari, *supra* note 13, at 13–14.

157. This, despite the Supreme Court's observation in *Collins v. Yellen* that "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies" and that "the constitutionality of removal restrictions [does not] hinge[] on such an inquiry." 141 S. Ct. 1761, 1785 (2020).

158. *See* Brief in Opposition, *supra* note 93, at 23 ("*Seila Law* makes clear that the CFPB differs from the Federal Reserve *in kind*, not just degree. And regardless, even differences in degree are relevant in the *nondelegation* context.").

159. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 643 (5th Cir. 2022).

160. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209 (2020).

161. *CFSA v. CFPB*, 51 F.4th at 642 ("Though *Collins* is not precisely on point, we follow its framework because, though that case involved an unconstitutional removal provision, we read its analysis as instructive for separation-of-powers cases more generally.").

directed towards the petitioner law firm because the law firm could not show that the President had tried, and failed, to remove the Bureau's Director.[162] Instead, the Court pointed to Dodd-Frank's express severability clause as requiring the Court to conduct an inquiry into whether the invalid removal provision could be severed from the remainder of Dodd-Frank.[163] This would mean that the CID at issue and other Bureau actions would remain valid, the removal provision would be severed from the remainder of Dodd-Frank, and the regulatory regime and agency Congress clearly set out to establish in Dodd-Frank would survive.[164]

The Fifth Circuit declined to apply a traditional severability analysis to Dodd-Frank, despite the Supreme Court's contrary instruction. As the Court reiterated in *Seila Law*, the presence of a severability clause creates a presumption "that Congress did not intend the validity of the statute in question to depend on the validity of the [unconstitutional] provision [absent] strong evidence that Congress intended otherwise."[165]

The Associations struggle to justify the Fifth Circuit's refusal even to attempt a severability analysis; in their Brief, they conflate severability analysis, a typical judicial practice, with the issuance of an advisory opinion.[166] But severing portions of a defective statutory provision is very different from:

> [A]nalyz[ing] a set of hypothetical statutes varying some or all of the[] key features; next issu[ing] a series of advisory opinions about which permutations would be constitutional; and then determin[ing] whether there is a valid permutation that Congress would prefer as second-best *and* that the Court could create by 'severing' parts of Section 5497.[167]

Far from the quasi-legislative guessing game that the Associations claim the Bureau seeks to play, severability doctrine is a well-settled judicial tool, used to strike bad provisions from duly enacted laws while leaving untouched those provisions that can operate independently.[168]

Because the Fifth Circuit failed to conduct any severability analysis, none of § 5497 survived *CFSA v. CFPB*.[169] If it had, the Payday Lending Rule would remain in place. Instead, the Fifth Circuit, after invalidating the Bureau's funding provision wholesale, applied *Seila Law*'s and *Collins*'s standard to also void the Payday Lending Rule.[170] Section 5497's invalidity

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162. *See Collins*, 141 S. Ct. at 1788 (explaining *Seila Law*'s rationale for not displacing the CID).

163. *Seila L.*, 140 S. Ct. at 2207–08 (observing that if the removal provision is severed from Dodd-Frank, "then the CFPB may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal").

164. *See id.*

165. *Id.* at 2209 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987)).

166. Brief in Opposition, *supra* note 93, at 26.

167. *Id.*

168. *See Seila L.*, 140 S. Ct. at 2208–09 (citing Dorchy v. Kansas, 264 U.S. 286, 289–90 (1924)).

169. *See supra* Part II.A.2.

170. *See id.*

stripped the Bureau of power to take *any action whatsoever* using its funds. The Payday Lending Rule thus had to be struck down.

2. The Court Misapplied the Remedial Framework in *Seila Law* and *Collins*

Even assuming that the remedial framework from *Collins* can be adapted to the Appropriations Clause context—and was thus applicable in *CFSA v. CFPB*—the Fifth Circuit misapplied that test. *Collins* required a demonstration by the individual seeking to enjoin the FHFA's amendment that the unconstitutional structural provision frustrated some extrinsic action—in that case, removal of the FHFA's director by the President—that would have prevented the amendment's enactment.[171] No such showing can be made in *CFSA v. CFPB*, as Congress has not acted to override § 5497's strictures. In fact, the legislative history behind Dodd-Frank demonstrates that Congress meant what it said when it equipped the Bureau with a comprehensive, if "anomalous" funding scheme.[172] That applying *Collins* in the Appropriations Clause context seems endlessly complex is precisely why the Fifth Circuit should have simply undertaken the requisite severability analysis.[173] In the event that the Supreme Court upholds the Fifth Circuit's holding under the Appropriations Clause, it should reverse the Payday Lending Rule's vacatur and remand the case for a severability analysis.

CONCLUSION

The question of an appropriate funding scheme for the CFPB is a matter best left to the political branches. Yet, the Supreme Court may well uphold the Fifth Circuit's holding in *CFSA v. CFPB* as to § 5497's unconstitutionality. The Court should, however, reverse the Fifth Circuit's remedial ruling, as vacatur of the Payday Lending Rule was an inappropriate remedy. Accordingly, the Court should either remand for a severability analysis of § 5497 or stay the Fifth Circuit's vacatur of the Payday Lending Rule.

171. *See supra* Part I.C; *supra* notes 62–69.
172. Petition for Writ of Certiorari, *supra* note 13, at 10.
173. *See Seila L.*, 140 S. Ct. at 2209.