No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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

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

The Mortgage Bankers Association, the National Association of Home Builders, and the National Association of REALTORS® ("*amici*") respectfully submit this brief as *amici curiae* in support of neither party.*

Amici take no position on the constitutionality of the statute in question. They limit their argument to the appropriate remedy in the event that the Court determines that the statute is unconstitutional. *Amici* file this brief because they are concerned that the Court's decision in this case could unnecessarily disrupt the nation's housing and real estate markets.

INTEREST OF *AMICI CURIAE*

The Mortgage Bankers Association (MBA) is a national association representing over 2,200 members of the real estate finance industry. Its membership spans real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to strengthen the nation's residential and commercial real estate markets, to support sustainable homeownership, and to extend access to affordable housing to all Americans. MBA

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* Pursuant to Rule 37.6, no counsel for a party has authored this brief, in whole or in part, and no person, other than *amici* or their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. In accordance with Rule 37.3(a), counsel for all parties have consented to the filing of *amicus curiae* briefs, and copies of the letters of general consent have been filed with the Clerk.

therefore has a strong interest in maintaining the stability of the mortgage and real estate markets.

The National Association of Home Builders of the United States (NAHB) is a trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, which construct 80% of all homes built in the United States. More than 93% of new home and approximately 83% of existing home purchases are made with home-secured credit.[1] NAHB therefore has a strong interest in maintaining the stability of the mortgage and real estate markets.

The National Association of REALTORS® (NAR) is a national trade association, representing 1.4 million members, including NAR's institutes, societies, and councils involved in all aspects of the residential and commercial real estate industries. Membership is composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local associations/boards and 54 state and territory associations of REALTORS®. Members advocate for private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a

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[1] David Logan, *Share of New Home Sales with Conventional Financing Rises in Third Quarter*, Eye On Housing (Oct. 25, 2019), http://eyeonhousing.org/2019/10/share-of-new-home-sales-with-conventional-financing-rises-in-third-quarter/ (last visited Dec. 3, 2019).

strict Code of Ethics, setting them apart from other real estate professionals for their commitment to ethical real estate business practices. For these reasons, NAR has a strong interest in maintaining the stability of the mortgage and real estate markets.

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

SUMMARY OF THE ARGUMENT

When Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, it made the legislation's purpose crystal clear with the first words in the statute: "An Act [t]o promote financial stability in the United States . . . ." Pub. L. No. 111-203, 124 Stat. 1376 (2010). Title X of the Act, the Consumer Financial Protection Act of 2010 (CFPA), established the Consumer Financial Protection Bureau (CFPB), and placed at its head a Director who would serve a statutorily-prescribed five-year term and could be removed prior to the expiration of this term only for cause. *See* 12 U.S.C. § 5491.

The CFPB has implemented and enforced federal consumer finance laws for nearly a decade, issuing over 80 final or interim final rules, at least 38 of which affect consumer mortgages.[2] The real estate industry has engaged with the CFPB on rulemaking and policy issues, including by providing continuous feedback to the CFPB on how to best fulfill its statutory mandates to ensure access to financial opportunity and protect

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[2] *See* Final Rules, CFPB, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/ (last visited Dec. 3, 2019).

the interests of American consumers. The industry also has invested billions of dollars to comply with the CFPB's new rules, regulations, and related guidance. Today, nearly all residential real estate finance transactions in the United States are undertaken in compliance with, and in reliance on, the rights, obligations, and protections set forth in the regulations and other guidance issued by the CFPB.

The petitioner in this case, Seila Law LLC, asks the Court to find that the CFPA is unconstitutional because of the for-cause removal provision. Further, the petitioner asks the Court to forego the traditional severability analysis applied when courts hold a statute unconstitutional, or in the alternative to strike down the CFPA in its entirety. Either of these approaches would result in immediate and severe disruption to the real estate financing industry, causing significant harm to consumers and the economy at large.

When determining how to remedy an unconstitutional statute, courts seek to give effect to congressional intent and to avoid unnecessary disruption. As applied, this typically means that instead of eliminating an entire statute, the offending provision is severed, leaving the remainder of the statute intact. Here, striking down the entirety of the CFPA, or declaring it unconstitutional without addressing severance, would eliminate or call into question the legitimacy of the detailed, technical regulations that govern past and future real estate finance transactions, not to mention the authority of a federal agency responsible for enforcing a host of consumer protection laws. Such an outcome would immediately cause significant disruption to the American economy, overturning regulatory guideposts, upsetting settled expectations, and creating substantial uncertainty in our housing

markets, all in contravention of Congress's clearly expressed intent to promote financial stability. The Court should avoid causing such harm. Accordingly, in the event that the Court finds the for-cause removal provision unconstitutional, it should sever that provision from the statute.

ARGUMENT

I. If the Court Finds the Restrictions on the President's Ability to Remove the Director of the CFPB Unconstitutional, It Should Sever the Restrictions.

The petitioner urges the Court not to consider whether the unconstitutional removal provision can be severed from the statute under traditional principles, but instead to simply dismiss the CFPB's enforcement action. In the alternative, the petitioner argues that if the Court does undertake a severability analysis, it should strike down the CFPA in its entirety, thereby abolishing the CFPB.

While the petitioner suggests that avoiding the severability question would be a modest approach, in fact, bypassing severability would have much the same practical effect as abolishing the CFPB. As the petitioner acknowledges, "because an agency with a structural constitutional defect lacks the authority to take executive action, *any exercise of executive power by the agency is void*." Brief for Petitioner ("Pet. Br.") at 46 (Dec. 9, 2019) (emphasis added). Therefore, either eliminating the CFPB or declaring it unconstitutional without addressing severance would immediately disable it from continuing to regulate the mortgage market. Further, either ruling would effectively prevent the industry and consumers from relying on the complex set of rules promulgated by the

CFPB over the past decade to govern mortgages and all manner of related transactions; all of the CFPB's past regulations would immediately be rendered, as the petitioner says, void. Such a result would be contrary to this Court's precedents and inconsistent with clear congressional intent, and would cause immediate and severe disruption in the U.S. economy, as described in more detail in Section II below.

The Court has made clear that the remedy upon finding a statute unconstitutional should be limited to severing the offending portion and leaving the remainder in place, as long as doing so is consistent with congressional intent and leaves a workable statute in place. *See, e.g.*, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–31 (2006); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–87 (1987).

Recently, the Court confronted a situation very similar to the present case when it ruled that restrictions on the President's ability to remove members of the Public Company Accounting Oversight Board were unconstitutional. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010). The Court remedied the constitutional defect by severing the removal restrictions, leaving the remainder of the statute undisturbed:

> Generally speaking, *when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact*. Because the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course . . . The Sarbanes–Oxley Act remains fully opera-

> tive as a law with these tenure restrictions excised. *We therefore must sustain its remaining provisions unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid*.

Id. at 508–09 (emphasis added; internal citations, alterations, and quotation marks omitted).

As an initial matter, there seems to be no dispute that, just as in *Free Enterprise Fund*, the CFPA would "remain[] fully operative as a law with these tenure restrictions excised." 561 U.S. at 509 (internal citations and quotation marks omitted). That leaves only the question of congressional intent, where the relevant question is "[w]ould the legislature have preferred what is left of its statute to no statute at all?" *Ayotte*, 546 U.S. at 330.

Congress expressed its intent clearly by including a severability clause in the statute explicitly providing that "[i]f any provision . . . is held to be unconstitutional, the remainder of this Act . . . shall not be affected thereby." 12 U.S.C. § 5302.[3] The petitioner

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[3] The severability clause appears in Section 3 of the Dodd-Frank Act and applies to the entire Act. *See* Pub. L. No. 111-203, § 3, 124 Stat. 1376, 1390 (2010) (codified at 12 U.S.C. § 5302). Title X of the Dodd-Frank Act is the Consumer Financial Protection Act of 2010, which created the CFPB and contains the restrictions on the removability of its Director. *See* Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010) (codified at 12 U.S.C. § 5301). Accordingly, the severability clause expresses Congress's intent with respect to the precise question presented in this case. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 199 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (finding the removal restrictions in the CFPA unconstitutional, but applying the severability clause in Section 3 of the Dodd-Frank Act (codified at 12 U.S.C. § 5302) to conclude that the proper remedy was to

argues that the Court should disregard the severability clause because it appears hundreds of pages of statutory text away from the removal provision and, "at most . . . Congress viewed the various *titles* as severable from each other . . . ." Pet. Br. at 45 (emphasis in original). But the plain language that Congress chose for the severability clause speaks not of the statute's "titles" being severable from each other, but instead clearly refers to "any provision" of the statute. 12 U.S.C. § 5302.

Congress also unequivocally stated that one of the primary purposes of the Act was to "promote financial stability." *See* Pub. L. No. 111-203, 124 Stat. 1376 (2010). There is no basis to conclude that Congress would have preferred the instability of having "no statute at all" to one with the removal requirement modified to accord with constitutional requirements. The petitioner relies on legislative history to infer that Congress would have preferred a multi-member commission rather than a director removable by the President. Pet. Br. at 44. This is highly speculative and inconsistent with the plain text of the statute. In any case, if the petitioner is correct, Congress can change the structure of the CFPB—and it will be able to do so without causing the drastic harm to consumers and the economy that will immediately result if the Court determines that the removal provision is unconstitutional but does not sever it.

The petitioner attempts to distinguish *Free Enterprise Fund*, *Ayotte*, and other similar cases applying the severability analysis on the basis that the requested relief in those cases was "affirmatively and prospec-

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sever the removal restrictions and leave the remainder of the statute in place).

tively, to invalidate an entire legislative act." *Id.* at 37. But this is a distinction without a difference, as the impact of a ruling that the CFPB's structure is unconstitutional would be to instantly throw into doubt the validity of all of the CFPB's actions, past and future—a result that, *amici* contend, Congress is unlikely to have intended. At best, the lower courts, inundated with cases challenging the CFPB's actions, would have to undertake the severability analysis, leading to substantial uncertainty and very likely inconsistent results until the issue inevitably returned to this Court.

The petitioner also argues that avoiding the severability analysis now will "allow Congress to determine how to remedy the constitutional defect in the CFPB's structure in the first instance." *Id.* at 47; *see also id.* at 41 ("Congress will be on notice that it should amend the Dodd-Frank Act to remedy that defect[.]"). But it would take significant time for Congress to pass legislation revising the CFPB's structure, and in the meantime, the collective experience of *amici's* members—which participate in a very substantial percentage of the nation's residential real estate transactions—strongly indicates that the negative effects on consumers and the economy described herein will be immediate and severe for the reasons set forth in Section II below.

Finally, in addition to the clear precedents favoring severance, courts remedying constitutional defects should seek to avoid disruption where possible. As the First Circuit Court of Appeals held in a case where it found unconstitutional the method of appointing members of a federal entity, "[i]n choosing among potential [remedial] options, we ought to reduce the disruption that our decision may cause." *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 861 (1st Cir.

2019). Similarly, the D.C. Circuit Court of Appeals redressed a constitutional infirmity in the method of appointing members of the federal Copyright Royalty Board by "provid[ing] a remedy that cures the constitutional defect with as little disruption as possible" and "minimizes any collateral damage." *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1336–37, 1340 (D.C. Cir. 2012).

As explained in the next section, a ruling abolishing the CFPB or undoing its past actions—or even just calling the legitimacy of its past actions into doubt—could destabilize critical segments of the national economy, in clear contravention of Congress's purpose in enacting the statute at issue. Instead, if the Court finds the CFPA for-cause removal provision to be unconstitutional, the Court should follow *Free Enterprise Fund* by simply severing the for-cause removal provision and leaving the remainder of the CFPA in place.

II. Striking Down the CFPA in its Entirety Would Be Massively Disruptive to the Mortgage Industry.

If the Court invalidates the entire CFPA, or otherwise issues a ruling calling into question the ongoing legitimacy of the CFPB's past actions,[4] the results could be catastrophic for the real estate finance industry. Among other things, the CFPB's rules likely would be invalidated, which would create disruptive uncertainty around millions of past home mortgage transactions predicated on these rules. Further, the mortgage markets would very likely all but grind to a halt as lenders would be unable to have any confidence

[4] *Amici* note that they have disagreed with some of the CFPB's past actions and are expressing neither support for, nor objections to, the merits or legality of any particular past actions.

that their transactions comply with law. In addition to lenders' inability to meet their obligations to operate in accordance with law, they would be unable to meet the requirements of their other federal and state regulators, which require both banks and non-bank lenders to comply with law.[5] Lenders would be unable to provide assurances to secondary market investors, whose willingness to purchase loans is a critical component of the national mortgage market.[6] And as the real estate financing industry floundered under such conditions, consumers would be largely unable to buy or sell their homes, causing untold hardship to families across the country.[7] Finally,

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[5] *See, e.g.*, 12 U.S.C. § 1(a) ("[T]he 'Office of the Comptroller of the Currency' . . . is charged with assuring the . . . compliance with laws and regulations . . . by, the institutions and other persons subject to its jurisdiction.") and N.Y. Banking Law § 590(5)(c) ("Mortgage bankers . . . shall make mortgage loans in conformity with the provisions of . . . all applicable federal laws and the rules and regulations promulgated thereunder[.]").

[6] *See, e.g.*, Fannie Mae Selling Guide, Chapter A3-2-01, Compliance With Laws (10/02/2019) (Dec. 4, 2019), https://www.fanniemae.com/content/guide/selling/a3/2/01.html ("The seller/servicer (any subservicer or third-party originator it uses) and any licensee of Fannie Mae technology must [ ] comply with, all federal, state, and local laws (e.g., statutes, regulations, ordinances, directives, codes, administrative rules and orders that have the effect of law, and judicial rulings and opinions) that apply to [ ] any of its origination, selling, or servicing practices, including laws and regulations on consumer credit, equal credit opportunity and truth-in-lending, and borrower privacy[.]").

[7] According to NAR's 2019 Profile of Home Buyers and Sellers, 86% of recent home buyers financed their purchases, and of those, 88% of the purchase amount was typically financed. First-time buyers, which made up 33% of all home buyers, typically financed 94% of their purchase. *Highlights From the Profile of Home Buyers and Sellers*, Nat'l Ass'n of REALTORS® (Nov. 21, 2019), https://www.nar.realtor/research-and-statistics/research-reports/

invalidating the CFPB's rules would essentially render worthless the years of effort and billions of dollars that the industry has invested into compliance with those rules.

Since its inception nearly a decade ago, the CFPB has issued numerous rules governing the mortgage market.[8] Nearly all of the CFPB's rules implement laws that predate the CFPA, and many address amendments to those older laws that were contained in Title XIV of the Dodd-Frank Act (*i.e.*, amendments that would not be invalidated by a ruling that the CFPB is unconstitutionally structured). Virtually all of the residential mortgages issued in the United States since then have been consummated and administered pursuant to those rules. If those rules are suddenly invalidated (or CFPB-adopted amendments to those rules are invalidated), it may be unclear what rules should have applied, and consequently whether the origination and servicing of those transactions has been in compliance with the law.

This likely would have three significant effects. First, lenders and other market participants would not be able to fulfill their legal and contractual obligations to ensure and certify that transactions comply with the law. Second, the legal uncertainty could lead to

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highlights-from-the-profile-of-home-buyers-and-sellers (last visited Dec. 6, 2019) (hereinafter 2019 Profile of Home Buyers and Sellers).

[8] According to the Final Rules filter tool on the CFPB website, the CFPB has issued at least 38 rulemakings affecting consumer mortgages. *See* Final Rules, CFPB, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/?title=&topics=mortgage-closing&topics=mortgage-origination&topics=mortgages&topics=mortgage-servicing&from_date=&to_date= (last visited Dec. 3, 2019).

numerous lawsuits by consumers or governmental agencies against mortgage lenders and servicers, as well as numerous lawsuits between industry participants. The mere prospect of the potential liability from these risks would create crippling uncertainty. Third, such lawsuits and widespread uncertainty could result in broad safety, soundness, stability, liquidity, and operational challenges because many industry participants of every variety—including banks, non-bank lenders, and investors in mortgage loans and securities—could be financially weakened by potential liability or exposure to market losses.

A significant example of the changes the CFPB made to the regulatory scheme governing mortgage loans is the TILA-RESPA Integrated Disclosure Rule, or "TRID," which was promulgated by the CFPB in 2013 and went into effect in October 2015. *See* 78 Fed. Reg. 79,730 (Dec. 31, 2013) (codified at 12 C.F.R. pts. 1024, 1026); 80 Fed. Reg. 43,911 (July 24, 2015) (codified at 12 C.F.R. pts. 1024, 1026). Before TRID, every residential mortgage required two separate sets of disclosure statements, one pursuant to the Truth in Lending Act (TILA) and the other pursuant to the Real Estate Settlement Procedures Act (RESPA). Provisions of the CFPA amended each of TILA and RESPA to require the CFPB to adopt a new disclosure scheme to integrate the disclosures, and to adopt a proposed regulation no later than July 21, 2012. Pub. L. No. 111-203, § 1032(f), 124 Stat. 1376, 2007 (2010) (codified at 12 U.S.C. § 5532). TRID synthesized those TILA and RESPA disclosures, in some instances by crafting exemptions to the disclosure requirements set forth in TILA and/or RESPA.[9] If the CFPB's

[9] For example, TRID changed the way the "total of payments" is calculated for a mortgage disclosure. *See* 78 Fed. Reg. 79,730,

rulemaking actions are found to be invalid as a result of this case, one consequence would be that TRID is invalid. That would allow borrowers or others to claim that all post-October 2015 mortgage transactions were in violation of the law. Consequently, many such consumers could assert the right to cancel their mortgages and be reimbursed for all fees associated with the transaction, as the new disclosures would not have complied with the prior statutory requirements that would still be in effect if the CFPA were to be invalidated.

Another example of the important changes made by the CFPB is the ability-to-repay requirement that Congress enacted as Section 1411 of the Dodd-Frank Act, Pub. L. No. 111-203, § 1411, 124 Stat. 1376, 2142 (2010) (codified at 15 U.S.C. § 1639c), amending TILA to add a new Section 129C(a) that requires residential mortgage lenders to ensure that the borrower has a reasonable ability to repay the loan. *See* 78 Fed. Reg. 35,429 (June 12, 2013) (codified at 50 C.F.R. pt. 18). Lenders are required to fully document that the borrower meets reasonable underwriting standards. A borrower who obtains a loan that fails to meet this standard can bring an action under TILA against the lender or the secondary market purchaser who bought the loan. This TILA amendment would not be eliminated if the CFPA were to be invalidated, but the CFPB's regulations implementing the safe harbor provision exempting certain "qualified mortgages" likely would be. *See* Pub. L. No. 111-203, § 1412, 124

80,038 (Dec. 31, 2013) (codified at 12 C.F.R. pts. 1024, 1026), preamble to the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) (describing the CFPB's modification to the calculation of total of payments).

Stat. 1376, 2145 (2010) (codified at 15 U.S.C. § 1639c). In particular, the CFPB adopted a special exemption for loans that qualify for purchase by Fannie Mae or Freddie Mac, and millions of loans have been made relying on this regulatory provision to ensure compliance with their statutory requirements.[10] *See* 78 Fed. Reg. 6407 (Jan. 30, 2013) (codified at 12 C.F.R. pt. 1026). Thus, if the regulation is invalidated, the legal risk profile of millions of loans would change, leading to potential challenges and possible financial stability issues for numerous mortgage lenders and purchasers.[11]

The consequences of the invalidation of the CFPB's mortgage rules for existing mortgage transactions have the potential to be highly disruptive. The noncompliance of a mortgage loan could subject a lender to regulatory actions, civil lawsuits, or, in some situations, the rescission of the loan contract by the consumer.[12] For example, liability under TILA in

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[10] One recent industry study estimated that approximately $260 billion of 2018 residential mortgage originations—approximately 16% of all residential mortgage lending—were made under this special exemption. Pete Carroll, *Expiration of the CFPB's Qualified Mortgage "GSE Patch" – Part 1*, CoreLogic Insights Blog (July 11, 2019), https://www.corelogic.com/blog/2019/07/expiration-of-the-cfpbs-qualified-mortgage-gse-patch-part-1.aspx (last visited Dec. 3, 2019).

[11] Because the risk arises from a segment of the mortgage market eligible for sale to Fannie Mae and Freddie Mac, the risk would be especially concentrated in those entities, each of which has been operating under federal conservatorship since 2008. *See History of Fannie Mae and Freddie Mac Conservatorships*, Fed. Hous. Fin. Agency, https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx (last visited Dec. 3, 2019).

[12] Both RESPA and TILA contain safe harbor provisions protecting lenders whose mortgage loans complied with certain agencies' rules at the time of consummation, and the CFPA

some cases can reach loan purchasers as well as loan originators. *See* 15 U.S.C. § 1641 (2011). The complex web of agreements making up the mortgage industry, involving mortgage originators, loan purchasers, secondary market investors, servicing companies, and others, would crumble as industry participants lost the critical ability to confidently certify a loan's compliance with the law. Creditors that relied on regulatory exemptions created by the CFPB in its rulemakings would face federally-created defenses to foreclosure that could, in effect, render billions of dollars of loans uncollectable. *See* 15 U.S.C. § 1640(k). And with millions of mortgages potentially out of compliance, the secondary mortgage market would slow to a halt because participants would not be willing to risk buying or selling mortgages with unquantifiable legal risk.

Further, a decision declaring the CFPB unconstitutional but not addressing severability likely would lead to a slew of potentially inconsistent lower court rulings on severability, which could create an untenable situation where the CFPB's rules remain viable in some of the appellate circuits but not others. This

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amended those provisions to include references to rules promulgated by the CFPB. *See* 12 U.S.C. § 2617(b) (2011) (RESPA safe harbor provision); 15 U.S.C. § 1640(f) (TILA safe harbor provision); Pub. L. No. 111-203, § 1098(11), 124 Stat. 1376, 2104 (2010) (codified at 12 U.S.C. § 2616) (amending RESPA safe harbor provision to replace references to the Secretary of Housing and Urban Development with references to the CFPB); Pub. L. No. 111-203, § 1100A(2), 124 Stat. 1376, 2107 (2010) (amending TILA safe harbor provision to replace references to the Federal Reserve Board with references to the CFPB). The mortgage industry is concerned that the elimination of the CFPA could similarly extinguish these safe harbor protections for following CFPB rules.

would be particularly problematic for the secondary mortgage market, which depends on uniform national marketability. Further, the resulting uncertainty would lead to higher costs, which would be passed on to consumers.

In addition to jeopardizing existing mortgage loans, new loans would become difficult to originate. The immediate problem would be one of uncertainty, as the mortgage industry struggled to determine the current state of the law and how to consummate a legal mortgage transaction. Moreover, presuming the government eventually would establish a new set of rules, industry participants would have to spend substantial time and money modifying all manner of internal processes and technology systems to conform to the new requirements.[13] Other lenders would either close their doors entirely or choose to stop offering consumer mortgage products. In the meantime, origination of new mortgage loans likely would slow to a standstill, out of liability concerns and also because of the uncertainty that such loans would be marketable in the secondary loan market.[14]

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[13] By way of example, it took the mortgage industry nearly two years to prepare to implement TRID. *See* 80 Fed. Reg. 43,911 (July 24, 2015) (codified at 12 C.F.R. pts. 1024, 1026) (the CFPB originally prescribed an implementation period of 19 months, then postponed the effective date another two months "to help ensure the smooth implementation of the TILA-RESPA Final Rule").

[14] The federal government's consumer financial protection activities could also be disrupted. While other federal agencies could retake the rulemaking and oversight responsibilities previously transferred to the CFPB, those agencies could find themselves without enough staff, funding, time, or expertise to effectively respond and take up even a portion of the regulatory responsibilities previously shouldered by the CFPB. Also, some

The cessation of available credit would directly affect the home building and home resale industries, which NAR estimates to account for nearly 17% of U.S. gross domestic product.[15] Without sufficient available credit, even for a short period, home builders of all sizes would stop building new homes, and would be under pressure from their lenders to sell any inventory they do have, further depressing home values. Currently, total housing inventory remains exceptionally low, and any disruption to available credit would therefore only exacerbate this issue.[16] Remodeling and renovations, as well as the sale of ancillary products and services that accompany a home resale, would also be affected, negatively impacting the economy. The housing market would shift away from consumers who purchase homes with credit, who are frequently families and first-time home buyers.

Even a temporary period of uncertainty would be economically significant, as many thousands of residential mortgage transactions are made across the

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of the CFPB's functions were transferred from the Office of Thrift Supervision, which no longer exists. *See* Pub. L. No. 111-203, § 313, 124 Stat. 1376, 1523 (2010) (codified at 12 U.S.C. § 5413) (abolishing the Office of Thrift Supervision).

[15] *See* Nadia Evangelou, *How Do Home Sales Affect the Economy in Your State?*, Nat'l Ass'n of REALTORS®: Economist's Outlook (July 7, 2019), https://www.nar.realtor/blogs/economists-outlook/how-do-home-sales-affect-the-economy-in-your-state (last visited Dec. 6, 2019).

[16] Total housing inventory at the end of October 2019 was 1.77 million units, down approximately 4.3% from one year ago. *Existing-Home Sales Climb 1.9% in October*, Nat'l Ass'n of REALTORS® (Nov. 21, 2019), https://www.nar.realtor/newsroom/existing-home-sales-climb-1-9-in-october (last visited Dec. 4, 2019).

country each day,[17] and consumers depend on the expected availability of mortgage credit to buy, sell, and modify their homes. Thousands of Americans working in the mortgage, home building, and real estate industries could lose their jobs, as well as thousands more in businesses that provide goods and services to these industries.[18] And even after consumer mortgage credit became available once again, it is likely that the number of companies offering consumer mortgage products would have decreased significantly, leading to decreased competition and increased costs in the marketplace.

Americans continue to express a preference for homeownership, and recognize that purchasing a home is a good financial investment and a critical tool for building wealth. Overall homeownership levels remain at historic lows, especially among minorities.[19]

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[17] In August 2019, the Federal Financial Institutions Examination Council reported Home Mortgage Disclosure Act data indicating that there were 6.3 million closed-end mortgage originations in 2018 alone. *See* Press Release, Nat'l Credit Union Admin., FFIEC Announces Availability of 2018 Data on Mortgage Lending (Aug. 2019), https://www.ncua.gov/newsroom/press-release/2019/ffiec-announces-availability-2018-data-mortgage-lending (last visited Dec. 3, 2019).

[18] For example, 89% of recent buyers purchased their home through a real estate agent or broker, and five percent purchased directly from a builder or builder's agent. 2019 Profile of Home Buyers and Sellers.

[19] The U.S. Census Bureau reported that the overall homeownership rate for the third quarter of 2019 was 64.8%, with Asian, Native Hawaiian, and Pacific Islander Alone householders at 58.5%, Hispanic householders (of any race) at 47.8%, and Black Alone householders at 42.7%, compared to non-Hispanic White Alone householders at 73.4%. Press Release, U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership,

Homeownership growth will be significantly stymied if available mortgage credit becomes too costly or nonexistent and housing inventory levels remain suppressed due to the significant market disruptions that would occur if the CFPB is abolished or its authority essentially eliminated.

Finally, eliminating the CFPB, and the rules and guidance it has issued, would undo years of effort and billions of dollars invested by the residential real estate industry into compliance programs and systems. It is no exaggeration to say that the CFPB's rules and guidance have permeated nearly every aspect of residential mortgage loan origination and servicing. Mortgage lenders, servicers, and related businesses have completely overhauled their operations to conform to the CFPB's requirements. This involved massive investments in new technologies and computer systems, along with associated efforts to devise new policies and train employees to implement them. Although *amici* are not aware of any carefully developed estimates of the total cost of these efforts, we feel comfortable stating that the industry has spent in the billions of dollars creating a new infrastructure to originate and service loans under the rules issued by the CFPB. Eliminating those rules now would not only greatly diminish the value of those investments, but would also create enormous costs to rebuild the compliance structure for a new regulatory regime—costs that inevitably would be borne by consumers.

In sum, the disruption to the real estate finance industry, the home building industry, the numerous related markets, and the overall economy caused by

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Third Quarter 2019 (Oct. 29, 2019), https://www.census.gov/housing/hvs/files/currenthvspress.pdf (last visited Dec. 4, 2019).

the elimination of the Consumer Financial Protection Bureau and its foundational statute would be swift and devastating. It would undo all the costly efforts to come into compliance with an extensive new regulatory regime following the financial crisis, and could generate another decade of litigation around residential mortgage loans. Such upheaval would run counter to Congress's stated purpose in the Dodd-Frank Act of promoting financial stability, and therefore should be avoided.

CONCLUSION

For the foregoing reasons, in the event that the Court finds the removal restrictions in the Consumer Financial Protection Act of 2010 to be unconstitutional, the Court should apply the severability clause and excise those restrictions, rather than striking down the statute in its entirety.

Respectfully submitted,

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