No. 22-448

IN THE

Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a challenge to the validity of a single regulation promulgated by the Consumer Financial Protection Bureau (CFPB or Bureau). As relevant here, the Rule prohibits a covered lender from continuing to make preauthorized attempts to withdraw loan repayments from a consumer's bank account after two consecutive attempts are denied for insufficient funds. 82 Fed. Reg. 54,472, 54,877-79 (Nov. 17, 2017). Respondents (the Lenders) claimed that the Rule is unlawful on several grounds, and the court of appeals vacated the Rule on one ground after rejecting the others.

Properly framed, the question that is presented by the Bureau's petition is:

1. Whether the Rule should be vacated because the CFPB's statutory authorization to choose its own amount of annual public funding subject only to an illusory cap, in perpetuity and for core executive powers, violates the Appropriations Clause.

Although the Court should deny the Bureau's petition, if it grants that petition, it should either grant the Lenders' cross-petition or add to the Board's petition two antecedent questions that also are presented by the judgment under review:

2. Whether the Rule should be vacated because it was promulgated by Director Cordray while shielded from removal by President Trump under a statutory provision this Court later held is unconstitutional.

3. Whether the Rule should be vacated because the prohibited conduct falls outside the statutory definition of unfair or abusive conduct.

RULE 29.6 STATEMENT

Community Financial Services Association of America, Limited has no parent corporation, and no publicly held corporation holds a ten percent or more ownership stake. Consumer Service Alliance of Texas has no parent corporation, and no publicly held corporation holds a ten percent or more ownership stake.

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INTRODUCTION

In the judgment below, the court of appeals vacated a single CFPB regulation that has never been in effect and should not go into effect. That judgment is correct because the Rule has multiple legal defects, including but not limited to the Appropriations Clause issue upon which the Fifth Circuit and the Bureau have focused. Moreover, that issue does not warrant this Court's review in this case or at this time—let alone in the expedited and limited manner that the Bureau proposes. The Court should deny the Bureau's certiorari petition.

The Fifth Circuit correctly held that the Rule is invalid because "Congress's decision to abdicate its appropriations power" to the CFPB "violates the Constitution[]" and deprived the Bureau of lawfully funded "means to promulgate the rule." Pet.App. 2a, 44a. The Appropriations Clause is "a bulwark of the Constitution's separation of powers" that gives Congress "exclusive power over the federal purse" as "a restraint on Executive Branch officers." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012) (Kavanaugh, J.). As part of a broad plan, however, to make the CFPB an independent agency free from the influence of politically accountable officials, the 2010 Congress granted the Bureau sui generis authority to *choose its own amount* of annual public funding, in *perpetuity* and for *core executive powers*, subject only to an illusory cap (currently around $750 million, with unspent funds available for roll-over and investment). *See* 12 U.S.C. § 5497; Pet.App. 33a-36a. In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020), this Court rejected another piece of the plan, holding that the 2010 Congress violated Article II's vesting of executive power in the President because it shielded the CFPB from attempts by the President to supervise the agency by removing its Director. Here, the 2010 Congress likewise violated Article I's vesting of fiscal power in Congress because it shielded the CFPB from attempts by future Congresses to supervise the agency by overseeing its funding. Pet.App. 37a.

While recognizing that the Appropriations Clause is "an important check on the Executive Branch," the Bureau erroneously contends that the Clause "does not … limit the manner in which Congress itself may exercise its authority." Pet. 11-12. Were that so, a single Congress could effectively nullify the Clause by passing a law authorizing the Executive Branch to spend as much public funds as desired in perpetuity for virtually any purpose, unless and until a future Congress could overcome a Presidential veto to retake its power over the purse. The Fifth Circuit properly rejected that flawed position. The Clause does not permit Congress to "cede" away its fiscal control over the CFPB under our "structural separation of powers," Pet.App. 34a-35a, 38a-39a, and there is "no limiting principle" that "would stop Congress from similarly divorcing other agencies from the hurly burly of the appropriations process," Pet.App. 41a-42a. The Bureau rejoins that Congress already allows some agencies to fund themselves "through sources other than allocations in annual appropriations bills." Pet. 14. But as the Fifth Circuit properly found, "[e]ven among self-funded agencies, the Bureau is unique"—"'an innovation with no foothold in history or tradition.'" Pet.App. 40a-41a (quoting *Seila Law*, 140 S. Ct. at 2202).

In all events, while the Appropriations Clause question may well warrant this Court's review at some point, it is neither cleanly presented in this case nor ripe for definitive resolution at this time. The Fifth Circuit incorrectly rejected two antecedent grounds for vacating the Rule: (1) the Rule's promulgation was tainted by the removal restriction later held invalid in *Seila Law*, because Director Cordray remained in office only because President Trump was improperly prevented from firing him; and (2) the Rule exceeds the CFPB's authority because the prohibited conduct falls outside the statutory definition of unfair or abusive conduct. Pet.App. 9a-14a, 18a-23a.

Granting certiorari thus would not necessarily enable this Court to reach and decide the Appropriations Clause question. Especially in light of constitutional-avoidance principles, this Court may well end up affirming the Rule's vacatur on alternative grounds. Given the significant prospect that this Court will be unable to resolve the constitutional question in this case, it should await a better vehicle. All the more so since that will allow this novel and important question to percolate. The Fifth Circuit is the only court of appeals that has actually considered it, and this Court would benefit from further development of the complex legal and historical arguments before resolving the debate.

Although the Bureau insists that immediate review of the Fifth Circuit's decision is needed due to purported operational concerns, Pet. 29-31, the *judgment* below simply vacated a single regulation that has never been in effect. If and when a future judgment significantly disrupts the agency's activities, the Bureau can seek review in that case—which may provide the Court with a better vehicle to actually resolve the Appropriations Clause question. In the meantime, the mere existence of the *opinion* below has had little apparent effect on the CFPB, which has continued to pursue enforcement actions throughout the country and even initiated new rulemakings. Indeed, the Administration can moot any problems by reaching a deal with Congress for interim appropriations until this Court resolves the validity of the CFPB's permanent funding scheme.

Accordingly, although decisions holding federal statutes unconstitutional often warrant certiorari, this case is not an appropriate vehicle to resolve the Appropriations Clause question. If, however, the Court decides otherwise and grants review, it at least should proceed in a more deliberative fashion than the Bureau has urged. The Court should expressly include the antecedent questions, either by granting the Lenders' cross-petition or adding them to the Board's petition. That will provide the parties with clarity about whether the Court intends to consider the alternative grounds, and it will provide the Court with the proper range of options to resolve the actual controversy between the parties over the Rule's validity. Furthermore, the Court should set the case for ordinary briefing and argument next Term. In these circumstances, the Bureau cannot justify its demand for a case of this complexity and importance to be briefed, argued, and decided in a few months at the end of a busy Term.

STATEMENT OF THE CASE

A. Legal Background

1. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the Act), the 2010 Congress created the CFPB to serve "as an independent financial regulator" responsible for "implementing and enforcing a large body of financial consumer protection laws." *Seila Law*, 140 S. Ct. at 2193 (cleaned up). In addition to placing 18 existing statutes under the CFPB's domain, Congress tasked the agency with enforcing a new proscription on "any unfair, deceptive, or abusive act or practice" by certain members of the consumer-finance sector. *Id.* (quoting 12 U.S.C. § 5536(a)(1)(B)). With the "sole responsibility to administer 19 separate consumer-protection statutes," the CFPB's reach extends to "everything from credit cards and car payments to mortgages and student loans." *Id.* at 2200.

Congress also armed the CFPB with "potent enforcement powers." *Id.* at 2193. The agency can "issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court." *Id.* It can "seek restitution, disgorgement, and injunctive relief, as well as civil penalties." *Id.* And it can bring that "coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties." *Id.* at 2200-01.

Despite vesting the CFPB with this significant authority, the 2010 Congress took unprecedented steps to insulate the agency from oversight by the politically accountable branches. It limited the

President's ability to remove the CFPB Director to cases of "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)(1), (c)(3). Such removal restrictions had rarely before been extended beyond multi-member expert agencies exercising only quasi-legislative and quasi-judicial powers. *Seila Law*, 140 S. Ct. at 2198-99, 2201-02. In *Seila Law*, this Court held that the CFPB's removal protection was unconstitutional. *Id.* at 2192.

The 2010 Congress likewise tried to shield the CFPB from oversight *by itself and future Congresses*. According to the CFPB's architects, it was "absolutely essential" that the new regulator receive funding through a mechanism "independent of the Congressional appropriations process." S. Rep. No. 111-176, at 163 (2010). They wanted the Bureau to avoid "the difficulties faced by the Office of Federal Housing Enterprise Oversight (OFHEO)," which faced "repeated Congressional pressure because it was forced to go through the annual appropriations process." *Id.* In their view, OFHEO's lack of "a steady stream of independent funding outside the appropriations process led to repeated interference" with its activities. 156 Cong. Rec. 13,195 (2010) (Sen. Dodd); *accord id.* (even the mere "threat of congressional interference could very well have served to circumscribe the actions OFHEO was willing to take"). The CFPB's creators "did not want to repeat that mistake." *Id.*

The 2010 Congress thus provided that the CFPB would not have to "rely on the annual appropriations process" and would "receive[] funding directly from the Federal Reserve." *Seila Law*, 140 S. Ct. at 2193-94. The CFPB can simply ask the Federal Reserve each year, in perpetuity, for an "amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau." 12 U.S.C. § 5497(a)(1). The Federal Reserve must grant the request so long as it does not exceed $597.6 million, adjusted for inflation. *See id.* § 5497(a)(2)(A)-(B); Pet. 3-4. In fiscal year 2022, the Bureau took $641.5 million of the $734 million available. CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2022*, at 44-45 (Nov. 15, 2022), https://bit.ly/3WCVoke (*2022 Report*).

Any unused funds "shall remain available" to the CFPB "until expended" in future years. 12 U.S.C. § 5497(c)(1). And the agency may use the Federal Reserve to "invest[]" the portion "that is not, in the judgment of the Bureau, required to meet [its] current needs." *Id.* § 5497(b)(3). As of September 30, 2022, the CFPB's investments were worth nearly $340 million. *2022 Report*, at 86.

2. In 2016, Director Cordray, President Obama's Senate-confirmed CFPB head, invoked the Act's new prohibition on "unfair" or "abusive" conduct to propose a regulation focusing generally on payday loans and other short-term, small-dollar consumer loans offered by non-bank lenders. 81 Fed. Reg. 47,864 (July 22, 2016). In 2017, following the change in administrations, but before *Seila Law* held that the CFPB's removal protection is unconstitutional, Cordray issued the final regulation. 82 Fed. Reg. 54,472 (Nov. 17, 2017).

The Rule imposed two primary prohibitions on covered lenders. The Rule's underwriting provisions banned making certain loans without reasonably determining that consumers have the ability to satisfy the repayment terms. 82 Fed. Reg. at 54,874-77. And the Rule's payment provisions banned continuing to make preauthorized attempts to withdraw loan repayments from a consumer's bank account after two consecutive attempts failed due to insufficient funds (absent renewed consumer authorization). 12 C.F.R. §§ 1041.7-1041.8. During this litigation, the CFPB reconsidered the Rule and rescinded the underwriting provisions. Pet.App. 5a. Due to that reconsideration and the litigation, the payment provisions have been stayed and never gone into effect. Pet. 10 n.3.

B. Procedural History

1. The Lenders, two associations of regulated entities, filed suit in April 2018 seeking vacatur of the Rule on statutory and constitutional grounds. Pet.App. 6a. The Lenders contended that the Rule exceeds the CFPB's statutory authority to forbid "unfair" or "abusive" conduct; was issued by Director Cordray while he was unconstitutionally insulated from removal by President Trump; and was promulgated using funds spent in violation of the Appropriations Clause. *Id.*

Around that time, the CFPB, then run by Acting Director Mulvaney following Cordray's resignation, announced that it intended to reconsider the Rule. *Id.* In July 2020, the CFPB, by that point headed by Senate-confirmed Director Kraninger, rescinded the Rule's underwriting provisions, 85 Fed. Reg. 44,382 (July 22, 2020), but purported to ratify the Rule's payment provisions in response to *Seila Law*, 85 Fed. Reg. 41,905 (July 13, 2020).

The district court granted summary judgment to the Bureau. Pet.App. 47a-76a. The court concluded that the Rule's payment provisions fall within the agency's statutory authority to proscribe "unfair" or "abusive" conduct. Pet.App. 59a-62a. The court acknowledged that the Rule was issued by Director Cordray while he was unconstitutionally shielded from removal, but concluded that the Rule was not void given the remedies holding in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). Pet.App. 52a-54a. And the court held that there was "no Appropriations Clause issue" because "a statute authorizes" the CFPB "to receive funds up to a certain cap." Pet.App. 66a.

2. The Fifth Circuit affirmed some of those holdings but ultimately reversed the judgment and vacated the Rule. Pet.App. 1a-46a.

First, the court held that the Rule's payment provisions fall within the CFPB's statutory authority to proscribe "unfair" conduct. Pet.App. 9a-14a. It rejected the Lenders' argument that any financial harms caused by successive withdrawal attempts are "reasonably avoidable by consumers," and that the Lenders' withdrawal attempts thus fall within a statutory limitation on the "[u]nfairness" definition in 12 U.S.C. § 5531(c)(1). Pet.App. 12a-14a.

Second, although the court agreed that the Rule had been "promulgated by a director who was unconstitutionally shielded from removal" under *Seila Law*, the court held that the Lenders could not "obtain a remedy" for that violation under *Collins*. Pet.App. 18a-19a; *see* Pet.App. 19a-23a. The court read *Collins* to require the Lenders to "demonstrate" not just that "President Trump would have removed

Cordray" absent the removal restriction, but also that "the Bureau would have acted differently as to the rule" under Cordray's hypothetical replacement. Pet.App. 23a. Finding that the Lenders could not make this showing, the court declined to consider the validity of Kraninger's purported ratification of the Rule's payment provisions. *Id.*

Finally, the court nevertheless vacated the Rule because it was "the product of the Bureau's unconstitutional funding scheme." Pet.App. 45a; *see* Pet.App. 27a-46a. Following a path previously proposed by Judge Edith Jones, the court held that "the Bureau's funding structure violates the Appropriations Clause." Pet.App. 27a; *see CFPB v. All American Check Cashing, Inc.*, 33 F.4th 218, 220-42 (5th Cir. 2022) (en banc) (Jones, J., concurring). The court reasoned that Congress had "abdicate[d] its appropriations power" by granting the CFPB a "self-actualizing, perpetual funding mechanism" to bankroll sweeping "executive power." Pet.App. 2a, 33a. "By abandoning its most complete and effectual check" on the Executive Branch and thereby unifying "the purse and the sword," "Congress ran afoul of the separation of powers embodied in the Appropriations Clause." Pet.App. 37a (cleaned up). And because the Bureau had no "means to promulgate the rule" "without its unconstitutional funding," the proper remedy under *Collins* was to vacate the Rule. Pet.App. 44a-45a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW CORRECTLY VACATED THE RULE ON APPROPRIATIONS CLAUSE GROUNDS

The Appropriations Clause vests the power of the purse in Congress, enabling the most politically accountable branch to both protect the federal fisc and check the exercise of executive power. The 2010 Congress, however, deliberately circumvented that safeguard by vesting the CFPB with discretionary authority to fund its operations by taking as much as hundreds of millions of dollars directly from the Federal Reserve each year forever. The Bureau's defenses of Congress's unprecedented abdication of its fiscal oversight all fail. And the Bureau's contention that the Rule should be upheld regardless fares no better.

A. The Appropriations Clause Ensures Congressional Oversight Of The Federal Fisc And Executive Power

The Appropriations Clause commands that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Clause governs all "public money," including "all the taxes raised from the people[] as well as revenues arising from other sources." *OPM v. Richmond*, 496 U.S. 414, 427 (1990). This provision serves two related separation-of-powers functions.

First, "vesting Congress with control over fiscal matters" best "ensur[es] transparency and accountability to the people." Pet.App. 29a. The Framers gave the "power over the purse" to the people's "immediate representatives" in Congress. THE FEDERALIST NO. 58, at 394 (J. Cooke ed. 1961) (J. Madison). By making Congress "the guardian" of "the common fund of all," 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858), the Framers protected "the right of the people" to be "consulted upon the disposal of the money" that the government has taken from them to pay "[a]ll [its] expences," 1 St. George Tucker, BLACKSTONE'S COMMENTARIES App., at 362 (1803). The Appropriations Clause thus restricts "the disbursing authority of the Executive department," *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), "to secure regularity, punctuality, and fidelity[] in the disbursements of the public money," *Richmond*, 496 U.S. at 427.

Second, "the separation of purse and sword" also provides Congress, and in turn the people, with "an indispensable check" on Executive action. Pet.App. 29a. The Framers recognized that giving the powers of both "the sword and the purse" to a single Branch "would furnish one body with all the means of tyranny." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 348-49 (J. Elliot 2d ed. 1891) (A. Hamilton). To neutralize that threat, they vested Congress with "the power over the purse," so that it would maintain "a controlling influence over the executive power" by "hold[ing] at its own command all the resources[] by which a chief magistrate could make himself formidable." 1 Story § 531. In short, Congress could "unnerve the power of the sword by striking down the arm which wields it." *Id.* As Madison emphasized, Congress's power to deny "the supplies requisite for the support of government" would be its "most compleat and effectual weapon" for defeating "the overgrown prerogatives of the other branches." THE FEDERALIST NO. 58, at 394. The Appropriations Clause thus is "a bulwark of the Constitution's separation of powers" that "is particularly important as a restraint on Executive Branch officers," *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.), because "[a]ny exercise of a power" validly held by the Executive remains "limited by a valid reservation of congressional control over funds" needed to carry it out, *Richmond*, 496 U.S. at 425.

B. The CFPB's Funding Statute Nullifies Congress's Appropriations Power In An Unprecedented Manner

1. The CFPB's unique funding scheme constitutes a deliberate effort to circumvent the role the Appropriations Clause assigns to Congress in preserving the separation of powers. The 2010 Congress abdicated its fiscal power over the CFPB's budget and abrogated the ability of its successors to wield that check against the agency's exercise of executive power. This structure nullifies the Clause by allowing a single Congress to unite purse and sword for an Executive agency that it wishes to permanently shield from political accountability, unless and until the President and both chambers of Congress agree to restore fiscal oversight.

a. To start, the 2010 Congress ceded to the CFPB "unilateral[]" authority to "self-determine[]" the amount of its own funding. Pet.App. 35a. Freed from the typical duty to seek funding from Congress, *see* Pet.App. 33a; *CFPB v. All American Check Cashing, Inc.*, 33 F.4th 218, 230-31 (5th Cir. 2022) (en banc) (Jones, J., concurring) (*All American*), the CFPB can directly requisition from the Federal Reserve "the amount determined by the Director to be reasonably necessary to carry out" the agency's functions each year. 12 U.S.C. § 5497(a)(1). That cuts out Congress, because the Federal Reserve's earnings are "outside the appropriations process," Pet.App. 35a; *see infra* at 22-23, and the Act reiterated that the CFPB's "funds derived from the Federal Reserve … shall not be subject to review by the Committees on Appropriations," 12 U.S.C. § 5497(a)(2)(C). Thus, instead of "plead[ing] with Congress for funds," "the CFPB Director need only send a perfunctory letter to the Federal Reserve." *All American*, 33 F.4th at 223 & n.7.

The only limit the 2010 Congress placed on the CFPB's ability to "self-direct[] how much money to draw," Pet.App. 41a n.16, is an illusory "cap" on the amount: almost $600 million (*i.e.*, 12% of the Federal Reserve's total operating expenses reported in 2009), which is now nearly $750 million after being adjusted for inflation. *See* 12 U.S.C. § 5497(a)(2)(A)-(B); Pet. 3-4. And even that astronomical figure is more toothless than appears. Unlike the Federal Reserve (and every other agency to our knowledge), the CFPB's unused funds all "remain available until expended" and may even be "invest[ed]" to the extent they are "not, in the judgment of the Bureau, required to meet [its] current needs." 12 U.S.C. § 5497(b)(3), (c)(1); *see* Pet.App. 34a-35a. The agency thus enjoys the unique freedom to "'roll over' the self-determined funds it draws *ad infinitum*," effectively creating a "permanently available" endowment "without any further act of Congress." Pet.App. 35a-36a. In little over a decade, the CFPB has amassed a surplus war chest of nearly $340 million, *see 2022 Report*, at 86, which dwarfs many agencies' annual budgets, *see* USAspending.gov, *Agency Profiles*, https://bit.ly/3Wu2s2u (last visited Jan. 11, 2023).

b. Moreover, the 2010 Congress's ceding of appropriations power to the CFPB has no temporal limitation. This "self-actualizing, perpetual funding mechanism" is "so egregious" because it operates in perpetuity. Pet.App. 33a, 36a n.14. That "reverses the baseline" for appropriations under Article I. *All American*, 33 F.4th at 238. Rather than both chambers of Congress and the President needing to *agree* to fund the CFPB each year, the agency can continue to choose the amount of its own funding "forever" (up to the illusory cap) "unless *prohibited* by Congress" and the President. *Id.*

Thus, if the people's representatives try to take back the power over the CFPB's purse, the President or either chamber can unilaterally "veto" that effort. *Id.* This inversion of the Appropriations Clause is analogous to the unconstitutional granting of legislative power to the President or one chamber alone. *See Clinton v. City of New York*, 524 U.S. 417, 447 (1998); *INS v. Chadha*, 462 U.S. 919, 959 (1983). Put differently, although "one legislature cannot abridge the powers of a succeeding legislature," *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.), "that is exactly what the masterminds behind the CFPB" were attempting. *All American*, 33 F.4th at 239. Congress acted "intentionally to bind its own hands in the future when political winds change." *Id.* at 239 & n.64.

Notably, the Framers were so concerned about this dynamic in the context of standing armies that the Constitution expressly prohibits army appropriations "for a longer Term than two Years." U.S. Const. art. I, § 8, cl. 12; *see* THE FEDERALIST NO. 26, at 167-68 (A. Hamilton). This restriction applies even if Congress itself chooses a specific sum for the army's limited use. It makes a mockery of this provision and the underlying concern for Congress to grant a law-enforcement agency nearly unfettered discretion to choose its own amount of funding in perpetuity.

c. Nor does the 2010 Congress's ceding of appropriations power contain any limitation on the functions funded. The CFPB can deploy its self-chosen funds to carry out any and all of "its duties and responsibilities." 12 U.S.C. § 5497(c)(1). These "significant executive power[s]" were a key reason why this Court rejected the agency's independence from presidential removal. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020); *see supra* at 5-6. Likewise, "[a]n expansive executive agency insulated … from Congress's purse strings" is "the unification of the purse and the sword in the executive—an abomination the Framers warned would destroy that division of powers on which political liberty is founded." Pet.App. 37a (cleaned up).

2. The unconstitutionality of the CFPB's funding scheme is confirmed by its unprecedented nature. "Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it." *Seila Law*, 140 S. Ct. at 2201 (cleaned up). No other agency from the Founding until 2010 appears to have been permanently ceded the power to choose the amount of its own public funding for core executive powers. *See infra* at 22-24. Simply put, a "law-enforcement agency with complete fiscal independence is unprecedented." *All American*, 33 F.4th at 235. As with the CFPB's removal protection, therefore, the lack of any "foothold in history or tradition" for the CFPB's funding structure is fatal. *Seila Law*, 140 S. Ct. at 2202.

Conversely, if this novel scheme were permissible, Congress could nullify the Appropriations Clause at will. "Other powerful agencies are already champing at the bit for such budgetary independence," *All American*, 33 F.4th at 237, and there is "no limiting principle" to prevent its extension to any or every civilian executive agency, Pet.App. 41a—*e.g.*, up to a trillion dollars annually forever for the FBI or FTC. The CFPB thus "provides a blueprint" for destroying our "system of checks and balances." *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 500 (2010). It invites the "tyranny" of letting a single Congress place the "purse [and] the sword … into the same hands," Pet.App. 29a n.8, unless a later Congress manages the "nearly insurmountable" task of wresting back the purse-strings, *All American*, 33 F.4th at 238. As a seminal separation-of-powers thinker warned long ago, "[i]f the legislative power was to settle the subsidies … for ever, it would run the risk of losing its liberty, because the executive power would be no longer dependent." 1 Charles Montesquieu, THE SPIRIT OF LAWS, bk. XI, ch. VI, at 172 (J.V. Prichard ed., T. Nugent trans. 1914).

C. The Bureau's Merits Defenses Of Its Funding Scheme All Fail

The Bureau claims that text, history, and precedent support its funding scheme. Not so.

1. The Bureau principally argues that the Appropriations Clause "requires nothing more" than that Congress pass "a statute explicitly authorizing" an agency's spending, because the Clause does not expressly "limit the manner in which Congress itself may exercise its authority." Pet. 10, 12. But that reading ignores the Clause's text and context.

The Clause does not merely require Executive spending to be "authorized by law." It instead requires such spending to be done "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Especially given the underlying separation-of-powers rationales, *see supra* at Part I.A, Congress does not possess unfettered discretion to authorize Executive spending, let alone the power to cede virtually unfettered discretion to an agency to determine the size of its own purse in perpetuity. That is not a "Law" making an "Appropriation[]," but rather the repudiation of one.

On the Bureau's view, the First Congress could have made liars out of the Federalists by passing a law allowing all future Presidents to spend as much public money as they want on any lawful executive action (besides army activity). Thereby "[e]xtended to its logical conclusion," the Bureau's position would "render the Appropriations Clause a nullity." *Richmond*, 496 U.S. at 428. "[T]he control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Id.*

This Court, though, has repeatedly reaffirmed that "the separation of powers does not depend … on whether the encroached-upon branch approves the encroachment." *Free Enter. Fund*, 561 U.S. at 497 (cleaned up). Just as "an individual President" cannot "choose to bind his successors by diminishing their powers," *id.*, "one Congress cannot yield up its own powers, much less those of other Congresses to follow," *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment) (cleaned up); *accord Clinton*, 524 U.S. at 447.

In particular, "Congress … may not transfer to another branch powers which are strictly and exclusively legislative," even pursuant to legislation. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.) (cleaned up). Although Members of this Court have disagreed about the nondelegation doctrine's scope when applied to an agency's *substantive* powers, *compare id.* at 2129-30; *with id.* at 2131-48 (Gorsuch, J., dissenting), the doctrine's application in the *funding* context is straightforward. Deciding the amount that an agency may draw from the government's accounts is the key legislative function that the Appropriations Clause vests "exclusive[ly]" in Congress. *Dep't of Navy*, 665 F.3d at 1346. Moreover, under *any* standard, it is "delegation running riot" to grant a law-enforcement agency perpetual authority to fill in a blank check from the federal fisc every year so long as it does not exceed more than half a billion dollars (plus inflation adjustment). *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

2. The Bureau also contends that this funding scheme has ample historical support. Pet. 12-15. But the proffered analogues are all inapposite.

a. The Bureau begins by analogizing its funding cap to Founding-era statutes that made "lump-sum appropriations" to Executive departments for "'sum[s] not exceeding' specified amounts." Pet. 13. Unlike the CFPB's statute, however, those laws did not operate *in perpetuity*. They were all "annual appropriations." Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 727 (2012) (discussing, for example, "[t]he nation's very first appropriations bill," Act of Sept. 29, 1789, ch. 23, 1 Stat. 95, 95). These early enactments therefore required the Executive to regularly return to Congress to continue operating, and they did not subvert a single chamber's ability to block further funding as a means of checking those operations. *See supra* at 15-16. Although the Constitution does not require that all appropriations be annual, *see* Pet. 12-13, annual lump-sum appropriations provide no support for a law ceding the power of the purse to an executive agency in perpetuity, *see Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("the degree of agency discretion that is acceptable" under the nondelegation doctrine "varies according to the scope of the power congressionally conferred").

Moreover, the sums specified in these early laws were based on detailed estimates submitted to Congress by Treasury Secretary Hamilton, "covering everything" down to "the prorated salaries of various doorkeepers." Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L. Rev. 1, 10 (1990); *see, e.g.*, Act of Mar. 26, 1790, ch. 4, § 4, 1 Stat. 104, 105 (referring to one report and its inclusion of "a provision for building a light-house on Cape Henry"). If the estimates ended up somewhat higher than actually needed, the First Congress reasonably gave President Washington's subordinates the discretion not to overspend and instead to return the surplus funds to the Treasury. *See, e.g.*, Act of Feb. 11, 1791, ch. 6, 1 Stat. 190. That is a far cry from the 2010 Congress's decision to give the CFPB *carte blanche* to spend whatever the Director deems "reasonably necessary" each year in perpetuity, 12 U.S.C. § 5497(a)(1)-(2), *and* to retain and invest any excess funds obtained below the nine-figure "cap," *id.* § 5497(b)(3), (c)(1). Indeed, on the Bureau's view, Congress could "cap" the agency at a trillion dollars, which underscores the meaninglessness of the "cap" as a limiting principle here.

b. The Bureau next emphasizes the existence of "standing" or "permanent" appropriations for certain "mandatory spending" programs. Pet. 13-14. But such programs do not present the problem of a single Congress abdicating to the Executive its power over an agency's purse and abrogating the ability of future Congresses to check the agency through fiscal oversight. For entitlement spending like Social Security, Congress *itself* "has determined" what "amounts" and which "beneficiaries" should be paid; and insofar as an agency has ongoing discretion in how the program is administered, future Congresses "retain[] control … via the *agency's* annual appropriations." Pet.App. 41a n.16. The "Bureau's structure" is not at all "comparable to mandatory spending programs." *Id.*

c. The Board lastly claims kinship with a small set of agencies that are funded outside the appropriations process through sources like "fees, assessments, or investments." Pet. 14. But these agencies are in an entirely unrelated family, given their historical pedigree and compatibility with the political accountability concerns animating the Appropriations Clause.

Some of these agencies (like the Post Office and the National Mint) are funded by *fees they charge for services they render*—a practice authorized by the earliest Congresses. Pet. 14-15. That a practice goes back to the Founding is "contemporaneous and weighty evidence" of its constitutionality. *Seila Law*, 140 S. Ct. at 2197. And it is not too surprising that the Framers were untroubled by the practice. Even though later Congresses might be thwarted in taking back the purse-strings from such agencies, the people themselves at least have some ability to do so directly. The fees are inherently constrained by market forces, and the public can even refuse to buy the agencies' services to influence their conduct.

Close cousins to those agencies are others (like the OCC and the FDIC) that are funded by *assessments they charge to entities they regulate*—a practice that took root in the early 1900s. Pet. 15. Again, that a practice is "long settled and established … is a consideration of great weight" in separation-of-powers cases. *Noel Canning*, 573 U.S. at 524 (cleaned up). And again, at least "some level of political accountability is preserved" for these financial regulators, *All American*, 33 F.4th at 236, because they must consider the risk of losing funding if regulated entities exit their regulatory sphere due to excessive regulation, *see* Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 111 (2013) (discussing how financial institutions can engage in "charter shopping" among state and federal regulators, and how that dynamic influences regulatory decisions). In fact, such accountability is one reason *why* the 2010 Congress "decid[ed] against a fee-based funding approach" for the CFPB. *Id.*; *see id.* at 109-12.

The Federal Reserve fits comfortably within this tradition, as it is funded by assessments, fees, and other transactions with member institutions, regulated entities, or members of the public. *See* Pet. 3 n.1, 15. Moreover, the Federal Reserve "is in an entirely different league" from the CFPB with respect to its limited "regulatory [and] enforcement authority," which is why its governors' independence from presidential removal remains intact after *Seila Law*. 140 S. Ct. at 2202 & n.8. Although the Bureau notes that this Court has declined "to weigh the relative importance" of an agency's executive powers in the removal context, Pet. 21-22 (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1785 (2021)), *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. *See supra* at 20.

The CFPB, in contrast, is not "remotely comparable" to the agencies funded by assessments or fees. *All American*, 33 F.4th at 237. To begin, it is "responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law*, 140 S. Ct. at 2202 n.8. In addition, it is funded by money already in the federal fisc for reasons *entirely unrelated to its own conduct*. Financial institutions and counter-parties obviously are not going to stop doing business with the Federal Reserve to indirectly starve the CFPB of resources. The CFPB is thus "doubly insulated" from Congress and the people themselves. *All American*, 33 F.4th at 236; *see* Pet.App. 35a. This "innovation with no foothold in history or tradition" cannot stand. Pet.App. 41a (quoting *Seila Law*, 140 S. Ct. at 2202).

3. Finally, the Bureau asserts that this Court's precedents in *Cincinnati Soap* and *Richmond* validate its funding scheme. Pet. 11, 15, 22-23. But the Bureau wrenches one sentence of dicta out of context while disregarding actual holdings.

Cincinnati Soap involved a challenge to a federal tax on the ground that Congress had provided for the "entire proceeds" to be transferred to a territorial government without "direct[ing]" or "specif[ying]" any "particular uses" for the funds. 301 U.S. at 312, 321. The case in no way implicated the question whether Congress may allow an executive agency to choose the amount of its own public funding in perpetuity. Moreover, while stating that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress," the Court held only that "the interjection of the question into the present cases is premature." *Id.* at 321. Because the proceeds had not yet been transferred, "[i]f Congress ha[d] not made [a valid] appropriation, it [could] still do so." *Id.* And though the Court did reject the claim that the lump-sum transfer was "an unlawful delegation of legislative power," it emphasized that "the important point [was] that Congress was here dealing with a dependency"—*i.e.*, paying the "local government" of a "territor[y]" (as opposed to funding an executive agency). *Id.* at 322-23; *accord Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020) (stating that *Cincinnati Soap* held that "territorial legislators may exercise the legislative power of the Territories without violating the nondelegation doctrine").

Richmond is even further afield. That case merely held that, despite a federal employee's "erroneous oral and written advice … to a benefits claimant," the Appropriations Clause prohibits "judicial use of the equitable doctrine of estoppel" to grant "a money remedy that Congress has not authorized." 496 U.S. at 415-16, 426. *Richmond* repeated the dicta in *Cincinnati Soap* to make the "straightforward" point that congressional authorization is *necessary* to satisfy the Clause, not to establish the novel proposition that *any* legislation is *sufficient*. *Id.* at 424. If anything, *Richmond*'s reasoning cuts against that proposition. *See supra* at 18.

D. The Bureau's Remedial Defenses Of The Rule Also Fail

The Bureau retreats to the position that, even if its funding statute is unconstitutional, the defect does not taint the Rule. But neither of the Bureau's two arguments has merit.

1. The Bureau objects that the Fifth Circuit "fail[ed] to conduct a severability analysis," which "would not have necessarily invalidated all of Section 5497." Pet. 23-24. This objection is doubly flawed.

To begin, the Bureau mischaracterizes the Fifth Circuit's judgment. The court did not "invalidate" any part of the statute. Rather, the relief requested and granted was *to vacate the Rule* because the statutory authorization of funding that allowed the Bureau to promulgate the Rule is unconstitutional. Pet.App. 46a. Regardless of what "severability analysis" implies about the Bureau's funding going forward under the Act, it cannot retroactively change that the Bureau promulgated the Rule in 2017 only by spending funds that were not constitutionally appropriated under the Act as written.

In addition, the Bureau mischaracterizes the Fifth Circuit's reasoning. It suggests the decision may have turned on ancillary provisions in Section 5497. *See* Pet. 24. But the court made clear that those provisions just "underscore" the flaw inherent in this "egregious" "funding scheme." Pet.App. 36a & n.14. The holding rests on three key features of the scheme: it is (1) "self-actualizing" and "double-insulated," Pet.App. 33a-36a; (2) "perpetual," Pet.App. 36a & n.14; and (3) funding a "capacious portfolio" of executive powers, Pet.App. 37a. *Accord* Pet.App. 40a-41a (reiterating these factors, "[t]aken together"); *supra* at Part I.B.

The Bureau does not and cannot suggest that the Fifth Circuit should have first analyzed a set of hypothetical statutes varying some or all of these key features; next issued a series of advisory opinions about which permutations would be constitutional; and then determined 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. Judges cannot "foresee which of many different possible ways the legislature might respond to" this novel constitutional violation, *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality op.), and they lack the "editorial freedom" to "blue-pencil" the statute regardless, *Free Enter. Fund*, 561 U.S. at 509-10. That is especially so here, because the Appropriations Clause bars a "judicial … remedy" that would permit the expenditure of federal funds that "Congress has not authorized." *Richmond*, 496 U.S. at 426. The Fifth Circuit instead properly applied "the negative power to disregard an unconstitutional enactment," *Seila Law*, 140 S. Ct. at 2211, holding that Section 5497 did not validly appropriate the funds used by the Bureau to promulgate the Rule, Pet.App. 44a.

2. That conclusion likewise refutes the Bureau's fallback objection to the Fifth Circuit's holding that "the remedy" for the Appropriations Clause violation "was to invalidate" the Rule. Pet. 24-25. As *Collins* reaffirmed, this Court applies the vacatur remedy to the "exercise of power that [a government] actor did not lawfully possess." 141 S. Ct. at 1788. And because the Appropriations Clause is "'a restriction upon the disbursing authority of the Executive department,'" it functions as "a restraint" on the power possessed by "Executive Branch officers." *Dep't of Navy*, 665 F.3d at 1347 (quoting *Cincinnati Soap*, 301 U.S. at 321). Since "the Bureau lacked any other means to promulgate the rule" "without its unconstitutional funding," Pet.App. 44a, it did not lawfully possess the power to do so.

Contrary to the Bureau's contentions, it does not matter if the agency was statutorily "authorized" to promulgate the Rule; whether it would have promulgated the Rule if "funded by 'valid' appropriations"; or that the Rule's vacatur will "not … undo the [agency's] expenditures" or "restore any funds to the federal fisc." Pet. 25-27. The analogous points could be made in cases challenging actions by *improperly appointed* officers, yet vacatur is the standard remedy in that context. *Collins*, 141 S. Ct. at 1788 (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018)); *see* Cross-Pet. 17-18. Vacatur likewise is the proper remedy for a regulation promulgated in violation of the Appropriations Clause. Pet.App. 45a; *All American*, 33 F.4th at 242.

II. IN ALL EVENTS, THE JUDGMENT BELOW DOES NOT WARRANT REVIEW

Although decisions holding a federal statute unconstitutional are strong candidates for certiorari, Pet. 28, this case is the latest exception that proves the rule. *Cf. Sessions v. Binderup*, 137 S. Ct. 2323 (2017); *United States v. Beer*, 569 U.S. 947 (2013). The Appropriations Clause question is important and may well warrant this Court's resolution eventually, but not in this case or at this time. The case is a poor vehicle because the judgment below only vacates a single CFPB regulation that has never gone into effect, and that vacatur can be affirmed on two independent, alternative grounds. Under constitutional-avoidance principles, the Court would need to consider those grounds first (as the Fifth Circuit did) and would not reach the Appropriations Clause question at all if it agreed with the Lenders on either one (as it likely would). Especially in these circumstances, the Court should allow further percolation on the novel constitutional question, which would improve review once the question is cleanly presented. And that prudent approach is all the more appropriate because the Bureau grossly exaggerates its need for immediate resolution.

A. This Case Is A Bad Vehicle Because There Are Two Antecedent Grounds For Vacating The Rule

"This Court … does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015). A prevailing party thus may "defend its judgment" here "on any ground properly raised below," especially when "that ground was … rejected" below. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). Although "cross-petitioning for certiorari" is generally unnecessary, *see id.*, the Lenders have filed a cross-petition in an abundance of caution, Cross-Pet. 11-12. It raises two alternative grounds for vacating the Rule that the Fifth Circuit erroneously rejected.

First, the Rule should be vacated as a remedy for the constitutional violation that this Court found in *Seila Law—i.e.*, the CFPB Director's statutory removal protection violates Article II. All agree that Director Cordray promulgated the Rule before *Seila Law* declared the removal restriction unenforceable. Pet. 5-6; Pet.App. 5a-7a, 18a. Yet the Fifth Circuit read *Collins* to foreclose vacatur unless the Lenders "demonstrate" (1) not just that "President Trump would have removed Cordray" absent the removal restriction, (2) *but also* that "the Bureau would have acted differently as to the rule" under Cordray's hypothetical replacement. Pet.App. 23a. No one can seriously question the Lenders' showing on the first point; and neither law nor logic supports imposition of the second requirement, which flouts the rule in *Collins* that vacatur is warranted when an official does not lawfully have the power to take the action challenged. *See* Cross-Pet. Part I; *supra* at 27-28.

Second, the Rule should be vacated because the banned conduct falls outside the statutory definition of "unfair" or "abusive" conduct. As relevant here, Congress imposed a precondition that expressly bars the CFPB from outlawing conduct unless the conduct causes substantial injury "not reasonably avoidable by consumers" or it "takes unreasonable advantage" of consumers' "inability … to protect [their] interests" or their "lack of understanding … of the material risks, costs, or conditions of the product or service." 12 U.S.C. § 5531(c)(1)(A), (d)(2)(A)-(B). Yet the Rule bans covered lenders from continuing to attempt *preauthorized* withdrawals for repayment from consumers' bank accounts after two attempts are denied for insufficient funds, merely to protect consumers from incurring additional fees or other harms. 12 C.F.R. §§ 1041.7-1041.8. Of course, consumers can reasonably avoid any such harm in myriad ways, including by declining loans that preauthorize successive withdrawal attempts; funding their accounts before the repayment date; or revoking access to their accounts if they lack the necessary funds. The Bureau deemed all that irrelevant based on a paternalistic misinterpretation of the statute that allows the agency to prevent informed consumers from voluntarily accepting reasonable financial risks. *See* Pet.App. 9a-14a. In rubberstamping that position, the Fifth Circuit allowed the Bureau to effectively write the precondition out of the Act. *See* Cross-Pet. Part II.

Importantly, under the constitutional-avoidance doctrine, this Court would need to consider and reject these alternative grounds for vacating the Rule *before* it could reach the Appropriations Clause question. "If a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999) (cleaned up). Thus, "[w]here a party raises both statutory and constitutional arguments in support of a judgment, ordinarily [this Court] first address[es] the statutory argument" because it may be able "to avoid unnecessary resolution of the constitutional issue." *Schweiker v. Hogan*, 457 U.S. 569, 585 (1982); *see id.* at 588 (applying this principle even though statutory claim ultimately failed and constitutional claim still needed to be resolved). Likewise, where a ruling on the availability of a "remedy" would make it "unnecessary" to decide a "far reaching" "constitutional question," "[i]t would be imprudent for this Court to resolve [the latter] issue" first. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam). These principles apply here, because the Lenders have raised an alternative statutory claim and an alternative claim about the remedy for a *Seila Law* violation (the latter of which is governed by sub-constitutional principles of "general law," *Dep't of Commerce*, 525 U.S. at 344, as the Bureau itself emphasizes, Pet. 25).

To be sure, in the above-cited cases, this Court still accepted plenary review despite the presence of antecedent non-constitutional issues, but they arose in materially different postures. In two of them, this

Court had mandatory appellate jurisdiction, and the statutory claim, if successful, also would have mooted the constitutional claim in *all* cases. *Dep't of Commerce*, 525 U.S. at 343-44; *Schweiker*, 457 U.S. 584-85. In the third, this Court merely vacated and remanded for the court of appeals to consider the remedies question that it had bypassed in rejecting the constitutional claim on the merits. *Hernandez*, 137 S. Ct. at 2007. Here, by contrast, the Fifth Circuit decided the non-constitutional issues first, and affirming its vacatur of the Rule based on one of those grounds will leave the Appropriations Clause question in need of resolution in some other case. Accordingly, it makes little sense for this Court to accept discretionary jurisdiction given the possibility—indeed, likelihood—that it will be unable to reach the constitutional question. The Court should await a cleaner vehicle.

B. Further Percolation Is Warranted For The Appropriations Clause Question

Denying certiorari also would be prudent because it would enable further percolation of the novel and important constitutional question. No other court of appeals has passed on it. Contrary to the Bureau's assertion (Pet. 28-29), the D.C. Circuit did not decide an Appropriations Clause claim in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). It held only that "[t]he CFPB's budgetary independence … does not intensify any effect on the President of the removal constraint." *Id.* at 96. Moreover, insofar as that court invoked a purported "tradition of independent financial regulators," *id.* at 95, this Court has since held that "the CFPB is in an entirely different league," *Seila Law*, 140 S. Ct. at 2202 n.8.

Further percolation would be especially useful so lower courts could address how the nondelegation doctrine relates to the Appropriations Clause claim. Even though the Fifth Circuit stressed the "self-actualizing," "self-determined," and "self-direct[ed]" nature of the CFPB's funding scheme, Pet.App. 33a, 35a, 41a n.16, it artificially refused to consider the nondelegation doctrine. And its rationale—that the Lenders had "forfeited" this "argument" in district court, Pet.App. 24a n.6—is flawed. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995) ("once a federal claim is properly presented, a party can make any argument in support of that claim," including even "a new argument" that was "expressly disavowed" below (cleaned up)). As a result, although nondelegation principles are directly responsive to many of the Bureau's arguments, *see supra* at 18-19, 20, 23, 24-25, the Bureau's petition fails to say anything about them. This aspect of the question presented would be much better developed after additional lower-court litigation.

Conversely, the Bureau considerably overstates the "legal and practical significance of the decision below." Pet. 29. The Bureau admits that the *judgment* below "did not change the rules governing regulated entities" because the Rule has been stayed and never gone into effect. Pet. 10 n.3. In fact, the Bureau does not even assert that the Rule's vacatur is itself cert-worthy. The Bureau instead cites a few cases where parties challenging other agency actions have cited the Fifth Circuit's *opinion*, and it fears that "[n]ew challenges" will soon follow. Pet. 29. Of course, granting certiorari in this case will not solve the Bureau's concern if the antecedent grounds for vacating the Rule end up precluding the Court from reaching the Appropriations Clause question—indeed, it might delay the Court's resolution if a second case must be taken and decided.

Moreover, the Bureau has hardly ground to a halt under the shadow of the Fifth Circuit's decision. It continues to plow full steam ahead, initiating and pursuing enforcement actions and even recently proposing new regulations. *See* CFPB, *Newsroom*, https://bit.ly/3YCnQ7q (last visited Jan. 11, 2023). It has urged courts outside the Fifth Circuit to reject the decision below. *See, e.g.*, *CFPB v. TransUnion*, No. 22-cv-1880, 2022 WL 17082529, at *4-5 (N.D. Ill. Nov. 18, 2022). It cites only a single pending case where the Fifth Circuit's decision would be *binding*, Pet. 29, and the Lenders are aware of only a handful more. If and when some judgment in some future case has "major practical effects," *id.*, the Bureau should seek this Court's review then—which may well present a better vehicle.

Finally, if the Administration is concerned about the CFPB's ongoing activities, it can seek interim appropriations until this Court resolves the funding statute's validity. In fact, legislation was introduced last month to fund the agency through annual appropriations. *See* U.S. Senate Comm. on Banking, Hous., & Urb. Affs., *Toomey, Hagerty Introduce Bill To Make CFPB Accountable to Congress* (Dec. 15, 2022), https://bit.ly/3j9Ixrb. And if the President and Congress are unwilling or unable to enact even a temporary legislative patch, that underscores the constitutional problem with the CFPB's permanent funding scheme.

III. AT MINIMUM, THE CASE SHOULD BE HEARD NEXT TERM WITH EXPANDED BRIEFING

Even if the Court decides to grant certiorari, it should not do so in the unreasonable manner the Bureau proposes. Although this petition will not be considered until the February 17, 2023 Conference, the Bureau has urged the Court to expedite merits briefing and decide the case this Term. *See* Letter from E. Prelogar to S. Harris (Nov. 21, 2022). It is neither necessary nor appropriate to try to resolve a case of this complexity and importance in just four months during the busy conclusion of a momentous Term. For the reasons discussed above, this case is nothing like ones where the decennial "census questionnaire needed to be finalized for printing by the end of June 2019," *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019), or "a nationwide injunction" was "impos[ing] a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico," *Biden v. Texas*, 142 S. Ct. 2528, 2536, 2543 (2022). Whatever shadow of uncertainty may be cast by a regional circuit court opinion and judgment vacating only a single stayed regulation, the parties, the Court, and the Nation would be better served by briefing, arguing, and deciding the case during the next Term.

A more deliberative schedule is also prudent because the Court's deliberations should extend more broadly than the Appropriations Clause question. The Court should make clear that the case will encompass the antecedent grounds for affirmance that the Lenders have raised. By granting the Lenders' cross-petition or expressly adding the questions to the Bureau's petition, the Court will provide clarity to the parties about the issues it intends to consider and ensure the proper range of options is available to resolve the actual controversy between the parties over the Rule's validity.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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