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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the Consumer Financial Protection Bureau (CFPB) and Rohit Chopra, in his official capacity as Director of the CFPB.

Respondents (plaintiffs-appellants below) are Community Financial Services Association of America, Limited and Consumer Service Alliance of Texas.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 51 F.4th 616. The order of the district court (Pet. App. 47a-76a) is reported at 558 F. Supp. 3d 350. A subsequent order of the district court is not published in the Federal Supplement but is available at 2021 WL 7541405.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2022. The petition for a writ of certiorari was filed on November 14, 2022, and granted on February 27, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App., *infra*, 1a-10a.

STATEMENT

Congress has provided by law that the Consumer Financial Protection Bureau (CFPB or Bureau) shall receive up to a capped amount of funding each year from the earnings of the Federal Reserve System to fulfill its statutory responsibility to administer and enforce consumer financial protection laws. The court of appeals held that this statutory funding mechanism violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and vacated a CFPB regulation because it was promulgated at a time when the CFPB was receiving funding from that mechanism. No other court has ever held that Congress violated the Appropriations Clause by passing a statute authorizing spending. Nor has a court previously approved a similarly sweeping theory of retrospective relief, which threatens profound disruption by calling into question virtually every action the CFPB has taken in the 12 years since its creation.

A. Legal Background

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act), Pub. L. No. 111-203, 124 Stat. 1376 (12 U.S.C. 5301 *et seq.*). The Act provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010) (Senate Report). It established the CFPB as an "independent bureau" "in the Federal Reserve System," 12 U.S.C. 5491(a), and transferred to the CFPB certain consumer financial protec-

tion authorities of several existing agencies, including the Federal Reserve Board, Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), and National Credit Union Administration (NCUA), see 12 U.S.C. 5581. The Act directs the CFPB "to implement and, where applicable, enforce Federal consumer financial law" to ensure, among other things, that consumer financial markets are "fair, transparent, and competitive." 12 U.S.C. 5511(a). And the Act empowers the CFPB to carry out that mandate by, among other things, promulgating rules prohibiting "unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service." 12 U.S.C. 5531(b); see 12 U.S.C. 5512(b)(1).

Congress specified that the CFPB would receive up to a capped amount of annual funding "from the combined earnings of the Federal Reserve System." 12 U.S.C. 5497(a)(1).[1] Each year, the Federal Reserve Board transfers to the Bureau "the amount determined by the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year." *Ibid.* Congress specified that the amount transferred to the CFPB "shall not exceed" 12% "of the total operating expenses of the Federal Reserve System" as reported in the Board's 2009 annual report. 12 U.S.C. 5497(a)(2)(A)(iii); see Bd. of Governors of the Fed. Re-

[1] The Federal Reserve System earns money through the operations of Federal Reserve Banks, which buy and sell bonds and securities, receive fees for services provided to banks, credit unions, and other depository institutions, and generate interest on loans to depository institutions. See generally 12 U.S.C. 342-361.

serve Sys., *96th Annual Report 2009*, at 491 (May 2010). That statutory cap, which amounted to $597.6 million, is adjusted only for inflation. 12 U.S.C. 5497(a)(2)(B). In fiscal year 2022, the inflation-adjusted cap was approximately $734 million, and the CFPB received approximately $641.5 million. See CFPB, *Financial report of the Consumer Financial Protection Bureau: Fiscal year 2022*, at 45 (Nov. 15, 2022).[2]

The money transferred to the CFPB is deposited into a "Bureau Fund" at a Federal Reserve bank. 12 U.S.C. 5497(b)(1) and (2). Congress provided that the money in the Bureau Fund "shall be immediately available" and "shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities." 12 U.S.C. 5497(c)(1).

Congress specified that the funds transferred by the Federal Reserve Board to the CFPB "shall not be subject to review by" the House and Senate Appropriations Committees. 12 U.S.C. 5497(a)(2)(C). But Congress established several other mechanisms for overseeing the CFPB's use of funds. For example, the CFPB Director must regularly submit reports to and appear before other congressional committees, including to "justif[y]" the CFPB's "budget request of the previous year." 12 U.S.C. 5496(c)(2); see 12 U.S.C. 5496. And the Comptroller General—a legislative officer—must conduct annual audits of the CFPB and submit to Congress reports including statements of assets, liabilities, income, and expenses. 12 U.S.C. 5497(a)(5).

2. In 2017, the CFPB issued a final rule entitled Payday, Vehicle Title, and Certain High-Cost Install-

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[2] The CFPB also collects civil penalties, but it may use those sums only to compensate victims of violations of consumer financial laws or for consumer education programs. 12 U.S.C. 5497(d).

ment Loans (the Payday Lending Rule). 82 Fed. Reg. 54,472 (Nov. 17, 2017). That rule was signed by then-Director Richard Cordray and had two major components, both of which invoked the Bureau's authority to prohibit "unfair" or "abusive" practices. *Id.* at 54,472; see 12 U.S.C. 5531(b).

First, the rule's underwriting provisions prohibited covered lenders from making certain types of loans, including payday and vehicle title loans, "without reasonably determining that the borrowers will have the ability to repay the loans according to their terms." 82 Fed. Reg. at 54,588; see *id.* at 54,874. The underwriting provisions have been rescinded and are not at issue here.

Second, the rule's payment provisions prohibited covered lenders from attempting to withdraw payments from a consumer's account after two consecutive attempts had failed due to a lack of funds, unless the consumer provided a new authorization. 82 Fed. Reg. at 54,472; see 12 C.F.R. 1041.7, 1041.8. The rule explained that when two consecutive attempts have failed, "further attempts" are "very unlikely to succeed, yet they clearly result in further harms to consumers," such as overdraft fees imposed by consumers' banks. 82 Fed. Reg. at 54,472; see *id.* at 54,720-54,726. "Despite these potential risks to consumers," the Bureau found that "many lenders vary the timing, frequency, and amount of payment attempts," "make multiple attempts to collect payment on the same day," and "repeat the attempt to collect payment multiple times on subsequent days," triggering hundreds of dollars in fees with little prospect of actually collecting the debt. *Id.* at 54,723-54,724.

B. Procedural History

1. Respondents are two associations of companies regulated by the Payday Lending Rule. In April 2018,

they filed this suit challenging the rule on various statutory and constitutional grounds. Pet. App. 6a. Around the time of respondents' suit, the CFPB, then led by Acting Director Mick Mulvaney, decided to engage in rulemaking to reconsider the Payday Lending Rule. *Ibid.* The Bureau later issued a notice proposing to rescind the rule's underwriting provisions, but not its payment provisions. 84 Fed. Reg. 4252 (Feb. 14, 2019). In light of that rulemaking, the district court stayed proceedings in this case. Pet. App. 6a; see *id.* at 74a-75a.

During the rulemaking process, President Trump nominated, and the Senate confirmed, Kathleen Kraninger to be CFPB Director. Pet. App. 7a. In July 2020, after this Court declared invalid the Director's for-cause removal protection in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), Director Kraninger ratified the payment provisions of the Payday Lending Rule to eliminate any question about whether they had been affected by the removal protection. 85 Fed. Reg. 41,905 (July 13, 2020). The CFPB also promulgated a new final rule rescinding the underwriting provisions but leaving the payment provisions intact. 85 Fed. Reg. 44,382 (July 22, 2020).

2. Respondents filed an amended complaint challenging the payment provisions on various grounds. D. Ct. Doc. 76 (Aug. 28, 2020). Respondents devoted most of their complaint to other statutory and constitutional arguments, but they briefly asserted that the CFPB's funding mechanism violates the Appropriations Clause and the separation of powers. *Id.* at 30.

The district court granted summary judgment to the CFPB. Pet. App. 47a-76a. As relevant here, the court explained that "[t]he Appropriations Clause 'means simply that no money can be paid out of the Treasury

unless it has been appropriated by an act of Congress.'" *Id.* at 72a (quoting *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990)). The court concluded that "[w]here, as here, a statute authorizes an agency to receive funds up to a certain cap, there is no Appropriations Clause issue." *Ibid.*

3. The Fifth Circuit affirmed in part, reversed in part, and vacated the Payday Lending Rule's payment provisions. Pet. App. 1a-46a.

a. The court of appeals began by rejecting respondents' principal challenges. Pet. App. 9a-27a. Among other things, the court held that the payment provisions fall within the CFPB's statutory authority to deem certain practices "unfair," and that those provisions were not arbitrary or capricious. *Id.* at 9a-18a. The court thus concluded that "the Bureau acted within its statutory authority" in issuing the rule. *Id.* at 14a. In addition, the court rejected respondents' contention that the payment provisions should be invalidated because a statutory provision purported to insulate the Director from at-will removal when the rule was promulgated. *Id.* at 18a-23a. The court reasoned that respondents had not established that the "removal provision inflicted a constitutional harm" because they failed to show that the Director's removal protection affected the CFPB's issuance of the payment provisions. *Id.* at 22a.[3]

b. Respondents had devoted just two pages of their opening brief to their Appropriations Clause argument. Pet. C.A. Br. 28-30. The court of appeals nonetheless embraced that novel argument, holding that "the

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[3] This Court denied respondents' cross-petition for a writ of certiorari seeking review of the statutory and removal issues. See *Community Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB*, 143 S. Ct. 981 (2023) (No. 22-663).

Bureau's funding structure violates the Appropriations Clause of the Constitution and the separation of powers principles enshrined in it." Pet. App. 27a. The court acknowledged this Court's statement that "the Appropriations Clause expressly 'was intended as a restriction upon the disbursing authority of the Executive department,'" not a restriction on Congress. *Id.* at 33a (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)). But according to the Fifth Circuit, "an *appropriation* is required" to authorize spending; "[a] law" providing an agency with a funding source and spending authority "does not suffice." *Id.* at 38a.

The court of appeals did not specify what more is required for such a law to provide an "appropriation." Instead, the court listed certain features of the Bureau's statutory funding mechanism in Section 5497(a)-(c) that, in its view, collectively rendered that mechanism unconstitutional. Pet. App. 33a-37a. The court noted that the CFPB does not "rely on annual appropriations" but rather receives up to a capped amount of funding each year through transfers from the Federal Reserve Board. *Id.* at 33a; see *id.* at 33a-34a. And because the court deemed the Federal Reserve Board itself to be funded "'outside the appropriations process through bank assessments,'" the court perceived "a double insulation from Congress's purse strings." *Id.* at 34a-35a (citation omitted).

The court of appeals further emphasized that the funds that the CFPB receives are "permanently available" until expended. Pet. App. 35a. It cited a provision stating that "funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." *Id.* at 36a (quoting 12 U.S.C. 5497(c)(2)) (brackets omitted). It maintained

that "Congress expressly renounced its check" on the CFPB "by legislating that 'funds derived from the Federal Reserve System . . . shall not be subject to review by'" the House and Senate Appropriations Committees. *Ibid.* (quoting 12 U.S.C. 5497(a)(2)(C)). And the court added that "[t]he constitutional problem" it perceived in the CFPB's funding mechanism "is more acute because of the Bureau's capacious portfolio of authority." *Id.* at 37a.

The court of appeals recognized that "every court to consider [the CFPB's] funding structure," including the D.C. Circuit and at least six district courts, "has deemed it constitutionally sound." Pet. App. 39a. But the court "respectfully disagree[d]" with those decisions. *Ibid.* The court also acknowledged that Congress has established several other agencies that, like the CFPB, are funded through sources other than time-limited spending statutes. *Id.* at 40a. In the court's view, however, the various features it had identified meant that the CFPB's "funding structure goes a significant step further than that enjoyed by the other agencies." *Ibid.*

c. Turning to "the question of remedy," the court of appeals did not ask whether the constitutional violation it perceived could be cured by severing any of the portions of Section 5497 that the court deemed objectionable. Pet. App. 42a. Nor did the court consider the remedial questions raised by its novel holding that Congress had violated the Appropriations Clause by enacting a funding statute. Instead, the court borrowed the remedial framework discussed in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), even though it acknowledged that *Collins* "is not precisely on point" because it involved an invalid removal protection rather than an Appropriations Clause violation. Pet. App. 42a.

The court of appeals interpreted *Collins* to require examination of whether "there is a linear nexus" between "the agency's unconstitutional funding scheme" and its "promulgation of the rule." Pet. App. 44a. The court found such a nexus because "the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency's unconstitutional funding scheme." *Ibid.* Accordingly, the court "vacate[d] the Payday Lending Rule." *Id.* at 45a.

SUMMARY OF ARGUMENT

Congress enacted a statute explicitly authorizing the CFPB to use a specified amount of funds from a specified source for specified purposes. The Appropriations Clause requires nothing more. The court of appeals' novel and ill-defined limits on Congress's appropriations authority contradict the Constitution's text and congressional practice dating to the Founding. And the court compounded its error by adopting an unjustified and profoundly disruptive retrospective remedy.

A. Text, history, and precedent establish the constitutionality of the CFPB's funding mechanism.

1. The Appropriations Clause's text does not limit Congress's authority to determine the specificity, duration, and source of appropriations. The Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. Const. Art. I, § 9, Cl. 7. As Justice Story explained, the Clause reflects the Founders' judgment "that congress should possess the power to decide, how and when any money should be applied for [public] purposes." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213 (1st ed. 1833).

The Founders knew how to limit Congress's appropriations authority when they wished to do so. In the

section preceding the Appropriations Clause, the Constitution specifies that "no Appropriation of Money" to raise and support an army "shall be for a longer Term than two Years." U.S. Const. Art. I, § 8, Cl. 12. That special restriction confirms that the Constitution otherwise leaves it to Congress to determine the specificity, duration, and source of appropriations.

2. Longstanding practice reinforces the natural reading of the Constitution's text. Since the Founding, Congress has often made lump-sum appropriations committed to the discretion of the Executive Branch; provided federal entities and activities with standing appropriations that remain in place unless and until Congress repeals them; and funded agencies through fees, assessments, investments, or other similar sources. And as particularly relevant here, Congress has frequently chosen such funding mechanisms for financial regulatory agencies, including the OCC, FDIC, and Federal Reserve Board (among others).

3. Precedent accords with the constitutional text and history. This Court has rejected the only claim it has encountered asserting that a statute violated the Appropriations Clause, emphasizing that the Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937). Indeed, other than the Fifth Circuit below, no court has ever held that an Act of Congress violated the Appropriations Clause.

4. The CFPB's appropriation is consistent with constitutional text, history, and precedent. Congress provided that the CFPB shall receive a capped amount of funding each year from the earnings of the Federal Reserve System, and further specified when and how the

Bureau may spend those funds. 12 U.S.C. 5497(a)(1) and (2). By prescribing the amount, duration, source, and purpose of the CFPB's funding, Section 5497 more than satisfies the classic elements of an appropriation and falls comfortably within Congress's historical practice.

B. The contrary arguments offered by the Fifth Circuit and respondents lack merit. The court and respondents fail to grapple with the Appropriations Clause's text, with Congress's historical practice, or with this Court's precedent. Instead, they simply assert that the CFPB's funding mechanism is "unprecedented." Br. in Opp. 16; see Pet. App. 40a-41a. But the CFPB's funding mechanism accords with Congress's longstanding practice of authorizing agencies to spend money indefinitely from sources other than annual appropriations statutes. Indeed, Section 5497 is not materially distinct from the statutes funding other financial regulators such as the OCC, FDIC, and Federal Reserve Board—statutes whose constitutionality respondents appear to concede.

C. Even if there were some constitutional flaw in Section 5497, the court of appeals erred in vacating the Payday Lending Rule's payment provisions for two independent reasons.

First, this Court's ordinary practice when it identifies "a constitutional flaw in a statute" is to "sever[] any problematic portions while leaving the remainder intact." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2209 (2020) (opinion of Roberts, C.J.) (citation omitted). Here, a severability analysis is mandated by the Dodd-Frank Act's express severability clause. 12 U.S.C. 5302. The court of appeals thus should have asked whether the Appropriations Clause violation it perceived in

Section 5497 could have been cured by excising some or all of the specific subsections on which it focused, which would have allowed the remainder of Section 5497's funding mechanism to function independently. But the court declined to undertake that analysis, instead simply presuming that the funding mechanism created in Section 5497(a)-(c) is entirely invalid. That was error.

Second, vacatur of the CFPB's past actions would not be an appropriate remedy in any event. Vacatur would be inconsistent with historical practice and with Congress's judgment about the proper remedies for Appropriations Clause violations when Executive Branch officials expend public money in excess of, or in the absence of, an appropriation. And vacatur would also contradict traditional remedial principles by inflicting significant disruption on the Nation's economy and the consumers, financial institutions, regulators, and others who have reasonably relied on the CFPB's past actions. Rather than adopting a remedial approach with such sweeping and inequitable results, the court of appeals should at most have granted forward-looking relief preventing the CFPB from using funds derived from Section 5497 to enforce the payment provisions against respondents or their members.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING INVALID THE CFPB'S FUNDING MECHANISM AND VACATING THE PAYDAY LENDING RULE

By its terms, the Appropriations Clause prohibits expenditures of public money without an appropriation made by law, but does not limit Congress's authority to determine the specificity, duration, and source of appropriations. Here, Congress satisfied the Appropriations Clause by enacting a statute explicitly authorizing the

CFPB to spend up to a specified amount of funds from a specified source for specified purposes—just as Congress has done for many other agencies. As the Second Circuit recently recognized, the Fifth Circuit's contrary conclusion finds "no support" in "the Constitution's text," "in the history of the Appropriations Clause," or "in Supreme Court precedent." *CFPB* v. *Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 182-183 (2d Cir. 2023). And the Fifth Circuit's sweeping and disruptive remedial approach further compounded that error.

A. Text, History, And Precedent Establish The Constitutionality Of The CFPB's Statutory Funding Mechanism

In construing the Constitution, this Court looks to "the constitutional text," "historical practice," and "th[e] Court's precedents." *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1542 (2022); see, *e.g.*, *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2197 (2020). Here, those indicia all point in the same direction: The CFPB's statutory funding mechanism is constitutional.

1. The Appropriations Clause's text does not limit Congress's authority to determine the specificity, duration, and source of the appropriations it makes by law

a. The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. That text is a "straightforward and explicit command." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990). "It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Ibid.* (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)).

The Appropriations Clause thus "protects Congress's 'exclusive power over the federal purse.'" *United States Dep't of the Navy* v. *Federal Labor Relations Auth.*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (Kavanaugh, J.) (citation omitted); see *The Federalist No. 58*, at 394 (James Madison) (Jacob E. Cooke ed., 1961). The Clause makes clear that only Congress may make appropriations of public funds. See *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851). And the Clause correspondingly restricts "the disbursing authority of the Executive department" by barring expenditures absent statutory authorization. *Cincinnati Soap*, 301 U.S. at 321; see *Department of the Navy*, 665 F.3d at 1347 ("[The Appropriations Clause] is particularly important as a restraint on Executive Branch officers."). Even if Congress has approved a particular activity, and even if sufficient money is available in the Treasury, "the payment of money from the Treasury must be authorized by a statute." *Richmond*, 496 U.S. at 424; see, *e.g.*, *Knote* v. *United States*, 95 U.S. 149, 154 (1877); *Reeside*, 52 U.S. (11 How.) at 291.

The Appropriations Clause was "wholly uncontroversial at the Constitutional Convention." Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 56 (2017). The principle of legislative control over appropriations had already been "cemented" in England, *id.* at 60, as well as the Colonies, see Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 47 (1998). And "the fiscal provisions of the state constitutions" during the Founding period made "money matters" a "legislative prerogative." Gerhard Casper, *Appropriations of Power*, 13 U. Ark. Little Rock L.J. 1, 8 (1990).

By including an Appropriations Clause in the U.S. Constitution, the Founders confirmed that federal officials in the new Republic could not spend public funds unless and until Congress enacted a statute authorizing such spending.

b. The Appropriations Clause makes clear that the authority to make "Appropriations" "by Law" belongs to Congress, but it does not *limit* Congress's authority when making such appropriations. As Justice Story explained, the Clause reflects the Founders' judgment "that congress should possess the power to decide, how and when any money should be applied for [public] purposes." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213 (1st ed. 1833). And the Clause "is a limitation, not upon the powers of congress, but upon the acts of the executive, and other public officers, in regard to the public monies in the treasury." 2 Story § 922, at 388. Applying that principle, this Court recently observed that the Clause does not "address[] whether Congress itself can create or incur an obligation directly by statute," but instead prevents "federal employees and officers [from] mak[ing] or authoriz[ing] payments without appropriations." *Maine Cmty. Health Options* v. *United States*, 140 S. Ct. 1308, 1321 (2020).

The term "appropriation" itself reinforces Congress's broad authority to determine the specificity, source, and duration of laws authorizing spending. In the Founding era, "appropriation" meant "[t]he act of sequestering, or assigning to a particular use or person." 1 *An American Dictionary of the English Language* (1828) (capitalization omitted); see 1 *A Dictionary of the English Language* (1755) ("The application of something to a particular purpose."). Justice Story, for

instance, described an "appropriation" as "*an application of money*" for "objects" that "concern the general welfare," 2 Story § 975, at 444, emphasizing that "[i]t would be impracticable to enumerate all the[] various objects of appropriation in detail," *id.* § 988, at 457 n.1.

The same understanding prevails today. In modern budgetary parlance, an "appropriation" is a statutory provision that "specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure." 2 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law*, 2-22 (4th ed. 2016 rev.) (*GAO Redbook*) (citation omitted). As at the Founding, therefore, a congressional "appropriation" is simply a law making a particular source of funding available for particular uses.

c. The Founders knew how to limit Congress's authority to make appropriations when they wished to do so. In the section preceding the Appropriations Clause, the Constitution specifies that "no Appropriation of Money" to raise and support an army "shall be for a longer Term than two Years." U.S. Const. Art. I, § 8, Cl. 12. Under that separate clause, Alexander Hamilton explained, Congress is not "at liberty to vest in the executive department permanent funds for the support of an army"; instead, it is "obliged," "once at least in every two years, to deliberate upon the propriety of keeping a military force on foot." *The Federalist No. 26*, at 168 (emphases omitted). James Madison contrasted that special restriction on army appropriations with "the British Constitution," which "fixe[d] no limit whatever to the discretion of the Legislature" regarding the duration of appropriations for the army—or for any other purpose. *The Federalist No. 41*, at 273.

Consistent with British practice, "the text of the Constitution allows for indefinite appropriations in all contexts other than the army." Chafetz 58. The Founders' decision to impose a special, explicit restriction on army appropriations reflects the recognition that the Appropriations Clause would otherwise allow Congress to "authorize standing appropriations that would keep funds flowing until a later Congress repealed the initial appropriation law." Akhil Reed Amar, *America's Constitution: A Biography* 116 (2005). As a check on a "standing army," the Founders chose to depart from "ordinary appropriation rules" for "army—and only army—appropriations." *Ibid.*; see *The Federalist No. 24*, at 153 (Alexander Hamilton) (describing the clause restricting army appropriations as a "qualification" of general "legislative discretion" over appropriations). The special exception for army appropriations thus proves the baseline rule under the Appropriations Clause: Congress has broad authority to determine the specificity, duration, and source of the appropriations it makes by law.

2. Longstanding practice confirms the natural reading of the constitutional text

"'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); see *The Federalist No. 37*, at 236 (James Madison). The Court therefore "look[s] to the actual practice of Government" to inform its understanding of the separation of powers. *NLRB* v. *Noel Canning*, 573 U.S. 513, 557 (2014). Here, practice dating to the Founding (and even before) confirms that the Appropriations Clause does not limit Congress's

power to determine the specificity, duration, and source of appropriations.

a. *Specificity.* Since the Founding, appropriations statutes have often given the Executive Branch broad discretion to spend funds up to a specified amount. "From 1789-1791, the First Congress made lump-sum appropriations for the entire Government—'sums not exceeding' specified amounts for broad purposes." *Clinton* v. *City of New York*, 524 U.S. 417, 466 (1998) (Scalia, J., concurring in part and dissenting in part) (brackets and citation omitted). In one provision, for instance, Congress appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." Act of Sept. 29, 1789 (1789 Act), ch. 23, § 1, 1 Stat. 95; see, *e.g.*, Act of Mar. 26, 1790 (1790 Act), ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190. In another, Congress appropriated to the President "a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government." 1790 Act § 3, 1 Stat. 105.

Similar "[e]xamples of appropriations committed to the discretion of the President abound in our history." *Clinton*, 524 U.S. at 467 (Scalia, J., concurring in part and dissenting in part). And "[a]ppropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies." *Cincinnati Soap*, 301 U.S. at 322. Indeed, "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993).

"The constitutionality of such appropriations has never seriously been questioned." *Clinton*, 524 U.S. at 467 (Scalia, J., concurring in part and dissenting in part). Even those who favored more granular congressional control over spending as a policy matter never doubted Congress's constitutional authority "to appropriate in gross while trusting in executive discretion." Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 136 (1972) (discussing views of President Jefferson and his Secretary of the Treasury, Albert Gallatin); see Casper 16-18 (similar).

b. *Duration.* Congress has often provided federal entities and activities with funding for multiple years—sometimes indefinitely (that is, unless and until Congress acts again). Standing appropriations (sometimes called "permanent" appropriations) remain "always available for specified purposes and do[] not require repeated action by Congress to authorize [their] use." 2 *GAO Redbook* 2-10; see, *e.g.*, 20 U.S.C. 54 (appropriating certain funds "for the perpetual maintenance and support of the Smithsonian Institution"). But Congress can of course repeal or modify standing appropriations at any time. See, *e.g.*, Permanent Appropriation Repeal Act, 1934, ch. 756, §§ 1-13, 48 Stat. 1224-1230 (repealing a variety of standing appropriations); Public Health Service Act, ch. 373, § 611, 58 Stat. 714 (repealing a standing appropriation to the Public Health Service); Manufactured Housing Improvement Act of 2000, Pub. L. 106-569, Tit. VI, § 609, 114 Stat. 3010-3011 (restricting an agency's prior discretion to spend collected fees on an ongoing basis). Standing appropriations date back to the Founding era. See, *e.g.*, Act of Aug. 4, 1790, ch. 34, § 1, 1 Stat. 138-139 (appropriating "yearly sum"

of $600,000 from "monies * * * which shall hereafter arise from the duties on goods, wares and merchandise imported into the United States" towards "the support of the government of the United States").

In some cases, Congress has made standing appropriations that are uncapped in amount and provide such "sum[s] sufficient to carry out" a program. 42 U.S.C. 301. That is true, for instance, of appropriations for Social Security payments, 42 U.S.C. 301, 401(b); payments of final judgments against the government, 31 U.S.C. 1304(a) (2018 & Supp. I 2019); and payments for scholarships for veterans' dependents, 20 U.S.C. 1070h. See also 31 U.S.C. 1305 (making miscellaneous standing appropriations of "[n]ecessary amounts" for certain purposes).

This practice of spending that "does not require annual appropriations" is routine and widespread. Chafetz 62. Between 1967 and 1998, such spending grew from about 30% of the federal budget to about 54% of the federal budget. Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 Harv. J. on Legis. 297, 314 (1998). And in fiscal year 2022, such spending accounted for approximately 63.8% of the federal budget—a total of $3.76 trillion. See Congressional Budget Office, *The Accuracy of CBO's Budget Projections for Fiscal Year 2022*, at 3 (Jan. 2023).

c. *Source.* Longstanding practice also confirms that Congress may provide for the funding of federal entities through fees, assessments, investments, or other similar sources. Even before the Founding, the British Parliament funded certain public entities through such sources. For instance, Parliament established a commission to oversee the maintenance and sale of forfeited estates, authorized a standing payment of the

commissioners' yearly salaries from the "[m]onies, which shall arise by Sale of the said Estates and Interests," 1717, 4 Geo. 1, c. 8 (Eng.), and stated that "[a]ll the Monies arising by this Act [are] *appropriated* to the Use of the Publick," 1715, 1 Geo. 1 Stat. 2, c. 50 (Eng.) (emphasis added). Similarly, Parliament established a body of trustees to oversee a fish market in Westminster and authorized it to collect fees from participating fishermen, to be used to "pay and discharge all Expenses and Charges" of the market, including the trustees' and other officers' salaries. 1749, 22 Geo. 2, c. 49 (Eng.).

In the United States, Congress's practice of funding federal entities through fees or assessments began in the Founding era. In 1791, Congress established the First Bank of the United States, to be funded through sales of stock to investors. See Act of Feb. 25, 1791, ch. 10, § 1, 1 Stat. 191-192. In 1792, Congress established a national Post Office, to be funded through its collection of postage assessments. See Act of Feb. 20, 1792, ch. 7, §§ 2, 3, 1 Stat. 233-234. The same year, Congress established a National Mint, to be funded in part through its collection of fees. See Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 249. And in 1836, Congress established the Patent Office, to be funded through its collection of fees paid by patent applicants. See Act of July 4, 1836, ch. 357, § 9, 5 Stat. 121.

As particularly relevant here, Congress has frequently chosen such funding sources for financial regulatory agencies. In 1875, Congress provided for the funding of the OCC through assessments levied on banks. See Act of Feb. 19, 1875, ch. 89, 18 Stat. 329; 12 U.S.C. 16, 481, 482. The OCC's funding statute authorizes it to collect such assessments as the agency

"determines [are] necessary or appropriate to carry out the responsibilities of the [OCC]." 12 U.S.C. 16; see 12 U.S.C. 481, 482.

Similarly, in 1913, Congress established the Federal Reserve Board to supervise the Federal Reserve System and provided for the Board's funding through assessments on Federal Reserve Banks. See Federal Reserve Act, ch. 6, §§ 10, 11, 38 Stat. 260-263; 12 U.S.C. 243, 244. Federal Reserve Banks earn revenues through open-market operations, such as purchases and sales of bonds and securities. Federal Reserve Act § 14, 38 Stat. 264-265; 12 U.S.C. 355. In turn, the Federal Reserve Board may levy assessments on the Federal Reserve Banks in an amount "sufficient to pay [the Board's] estimated expenses and the salaries of its members and employees." Federal Reserve Act § 10, 38 Stat. 260-261; 12 U.S.C. 243; see 12 U.S.C. 244.

Since 1913, Congress has adopted similar funding approaches for many other financial regulatory agencies, including the FDIC, Banking Act of 1933, ch. 89, sec. 8, § 12B(*l*) and (y), 48 Stat. 172-176, 179-180; 12 U.S.C. 1815(d), 1820(e); the NCUA, Federal Credit Union Act, ch. 750, §§ 5, 6, 48 Stat. 1217-1218; Act of Mar. 10, 1970, Pub. L. No. 91-206, 84 Stat. 49; 12 U.S.C. 1755(a) and (b); the Farm Credit Administration, Farm Credit Act of 1933, ch. 98, § 5(a)(1) and (2), 48 Stat. 258; 12 U.S.C. 2250; and the Federal Housing Finance Agency, 12 U.S.C. 4516.

That longstanding approach is not limited to the financial regulatory sector. Other agencies from U.S. Citizenship and Immigration Services, 8 U.S.C. 1356(m) and (n), to Customs and Border Protection, 19 U.S.C. 58c (2018 & Supp. III 2021); 8 U.S.C. 1356 (2018 & Supp. II 2020), to the Animal and Plant Health Inspection

Service, 21 U.S.C. 136a(a), are likewise funded in part through the collection of fees or assessments.

3. Precedent accords with constitutional text and history

Precedent further confirms that the Appropriations Clause leaves it to Congress to determine the specificity, duration, and source of appropriations. This Court has decided only one case involving a claim that a statute violated the Appropriations Clause, and it rejected that claim. In *Cincinnati Soap*, the law at issue imposed a tax on the processing of coconut oil and provided that the proceeds "shall be held as a separate fund and paid to the Treasury of the Philippine Islands," which at the time remained a federal territory. 301 U.S. at 310 (citation omitted). Plaintiffs challenging the law contended "that there ha[d] been no constitutional appropriation, or that any attempted appropriation [wa]s bad, because the particular uses to which the appropriated money is to be put have not been specified." *Id.* at 321. The Court deemed the plaintiffs' statutory challenge to the appropriation "premature" because "none of the proceeds of the tax in question ha[d] been transmitted to the Philippine Treasury" when the Court decided the case. *Ibid.* But the Court concluded that the plaintiffs' constitutional challenge under the Appropriations Clause was "without merit" because the Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Ibid.*

Lower courts have also recognized that "Congress has plenary power" to decide how to exercise its constitutional authority over appropriations. *Harrington* v. *Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977); see *Department of the Navy*, 665 F.3d at 1347. Courts have thus

rejected attempts "to distinguish those acts of Congress which created valid appropriations from those which did not." *United Biscuit Co. of Am.* v. *Wirtz*, 359 F.2d 206, 213 n.14 (D.C. Cir. 1965), cert. denied, 384 U.S. 971 (1966). And two courts of appeals and multiple district courts have upheld the constitutionality of the CFPB's funding mechanism in particular. *E.g.*, *Law Offices of Crystal Moroney,* 63 F.4th at 181-184; *PHH Corp.* v. *CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc), abrogated on other grounds by *Seila Law, LLC* v. *CFPB*, 140 S. Ct. 2183 (2020). Indeed, other than the Fifth Circuit below, no court has ever held that an Act of Congress violated the Appropriations Clause.

4. Congress permissibly funded the CFPB through a standing lump-sum appropriation

The CFPB's statutory funding mechanism is consistent with the Appropriations Clause's text, with longstanding practice, and with this Court's precedent. Congress provided that the CFPB shall be funded "from the combined earnings of the Federal Reserve System." 12 U.S.C. 5497(a)(1). Congress capped the amount that the Bureau may receive each year at a fixed sum ($597.6 million), adjusted only for inflation. 12 U.S.C. 5497(a)(2)(A) and (B). Congress specified when the CFPB may use those funds, making them "immediately available" and "available until expended." 12 U.S.C. 5497(c)(1). And Congress specified how the CFPB may use the funds—to "pay the expenses of the Bureau in carrying out its duties and responsibilities." *Ibid.* By prescribing the source, amount, duration, and purpose of the CFPB's funding, Section 5497 more than satisfies the classic elements of an appropriation.

Section 5497 also falls comfortably within Congress's longstanding practice. The CFPB's discretion

to determine how to spend its capped amount of funding is no different from the discretion Congress has long granted to agencies through routine lump-sum appropriations. Compare 12 U.S.C. 5497(a)(1)-(2) and (c)(1) (appropriating capped amount "to pay the expenses of the Bureau in carrying out its duties and responsibilities"), with Department of Justice Appropriations Act, 2022, Pub. L. No. 117-103, Div. B, Tit. II, 136 Stat. 116 (appropriating $1.58 billion "[f]or necessary expenses of the United States Marshals Service"); 1789 Act § 1, 1 Stat. 95 (appropriating "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war"). Indeed, such discretion is "the very point of a lump-sum appropriation." *Lincoln*, 508 U.S. at 192.

The duration and source of the CFPB's funding are likewise nothing new. As noted, since the Founding, Congress has often provided agencies with standing authority to spend funds derived from sources such as fees, assessments, and investments. See pp. 22-24, *supra*. In fact, the CFPB's funding source ("the combined earnings of the Federal Reserve System," 12 U.S.C. 5497(a)(1)) is the same as the Federal Reserve Board's own funding source. See 12 U.S.C. 243.

In sum, Congress enacted a standing, capped, lump-sum appropriation for the CFPB—a commonplace way of appropriating funds. And the Office of Management and Budget (OMB) treats the CFPB's appropriation in that standard manner for purposes of the federal budget. See OMB, *Appendix: Budget of the U.S. Government: Fiscal Year 2023*, at 1219 (*OMB 2023 Budget*), https://www.whitehouse.gov/wp-content/uploads/2022/03/appendix_fy2023.pdf. Nothing about that ordinary appropriation poses any constitutional problem.

B. The Contrary Arguments Offered By The Court Of Appeals And Respondents Lack Merit

The court of appeals held that the CFPB's funding mechanism "cannot be reconciled with the Appropriations Clause." Pet. App. 42a. But the court failed to grapple seriously with the Clause's text, Congress's longstanding practice, or this Court's precedent. Respondents have likewise made little effort to ground their defense of the court's novel holding in text, history, or precedent. Instead, respondents have primarily echoed the court's assertion that the CFPB's funding mechanism is "unprecedented." Br. in Opp. 16; see Pet. App. 40a-41a. But the CFPB's funding mechanism fits comfortably within Congress's longstanding practice of authorizing agencies to spend money indefinitely from sources other than annual appropriations bills.

1. The court of appeals' decision has no support in text, history, or precedent

a. The court of appeals' only effort to justify its holding based on the Appropriations Clause's text was its observation that "[a] law alone does not suffice" to satisfy the Clause because "an *appropriation* is required." Pet. App. 38a. Yet the court did not attempt to define "appropriation." And as explained above, the CFPB's funding statute plainly provides an "appropriation" as that term was understood at the Founding and today. See pp. 16-17, *supra*.

Taking a different tack, respondents do not suggest that the text of the Appropriations Clause itself limits Congress's authority to choose the specificity, duration, and source of the "Appropriations" it makes "by Law." U.S. Const. Art. I, § 9, Cl. 7. Instead, they assert (Br. in Opp. 16) that the "concern" behind the special restriction on army appropriations requires reading an

analogous yet unstated restriction into the Appropriations Clause. Cf. *CFPB* v. *All Am. Check Cashing, Inc.*, 33 F.4th 218, 225, 232 n.50 (5th Cir. 2022) (per curiam) (Jones, J., concurring) (similar). But that assertion contradicts one of "the plainest principles of interpretation": "[W]hen the [C]onstitution establishe[s] certain qualifications"—as it does with the two-year limit on army appropriations—"it mean[s] to exclude all others." 2 Story § 624, at 100. The express restriction on army appropriations thus evinces "the *absence* of any restrictions in the Appropriations Clause other than that Congress must authorize government funding in a prior statute." *Law Offices of Crystal Moroney*, 63 F.4th at 182 (emphasis added). The suggestion that the Appropriations Clause contains some implied limit on the duration of appropriations also ignores that the Founding-era Congress gave the Post Office, National Mint, and Bank of the United States indefinite authority to spend money from particular funding sources, see p. 22, *supra*, and that much of the government is currently funded through standing appropriations, see p. 21, *supra*.

b. Respondents also cannot escape history and precedent. They have offered no evidence that the Founders intended the Appropriations Clause as a limit on Congress's power to pass laws providing funding to agencies. Nor have they cited any precedent suggesting as much. And although the court of appeals asserted that the Clause was intended to "affirmatively obligate[] Congress" to make appropriations that "'maintain the boundaries between the branches and preserve individual liberty,'" Pet. App. 31a (citation omitted), its only citation for that assertion was the concurrence in

All American Check Cashing, which itself cites nothing, see 33 F.4th at 231 (Jones, J., concurring).

Respondents emphasize some Founders' concerns about maintaining "the separation of purse and sword." Br. in Opp. 12 (quoting Pet. App. 29a); see Chafetz 57. But Congress's choice to fund the CFPB using a traditional mechanism—a standing, capped appropriation—in no way threatens that separation. In any event, as the source on which respondents rely makes clear, in this context the Founders used the "sword" not as a metaphor for the Executive Branch generally, but instead as a specific reference to the army. See Chafetz 56-57; see also, *e.g.*, Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 427 (2018). And to remove any potential concerns about the unification of the purse and sword, the Founders limited army appropriations to a maximum length of two years. U.S. Const. Art. I, § 8, Cl. 12; see Amar 115-116. The constitutional text and history evince no similar concerns about the manner in which Congress funds *other* executive branch entities.

2. The CFPB's funding statute accords with Congress's traditional manner of funding financial regulators

Lacking support in text, history, and precedent, respondents stake their case on the assertion that the CFPB's funding mechanism is "unprecedented." Br. in Opp. 16; see Pet. App. 40a-41a. But they acknowledge (Br. in Opp. 22) that agencies dating back to the Founding, including the Post Office and National Mint, were funded from sources other than annual appropriations. And they recognize (*id.* at 22-23) that the same is true of other financial regulators, including the Federal Reserve Board, OCC, and FDIC. See Pet. App. 40a. Like the CFPB's appropriation, those agencies' funding

statutes contain "no temporal limitation." Br. in Opp. 15. But respondents appear to concede (*id.* at 22-23) the constitutionality of those longstanding funding laws. And they have offered no principled distinction between those laws and the CFPB's funding statute.

a. Respondents assert (Br. in Opp. 16) that Congress gave the CFPB "nearly unfettered discretion" over its funding. See Pet. App. 33a. But even if such a grant of discretion could raise constitutional concerns, Congress did no such thing here. It imposed an annual cap of $597.6 million, adjusted for inflation. 12 U.S.C. 5497(a)(2)(A) and (B). The only discretion the CFPB has is to request *less* than that congressionally determined amount. By contrast, Congress imposed no absolute cap on the funding of agencies like the OCC and Federal Reserve Board. The OCC is authorized to collect assessments "as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office." 12 U.S.C. 16; see *ibid.* (noting factors the Comptroller may "take into account"). And the Federal Reserve Board is authorized to collect "assessment[s] sufficient to pay its estimated expenses and the salaries of its members and employees." 12 U.S.C. 243.

Nor is the statutory cap on the CFPB's funding "illusory" or "astronomical." Br. in Opp. i, 1, 14, 15. Congress set the cap to ensure that "the CFPB budget is modest" in comparison with the budgets of "other financial regulatory bodies." Senate Report 163. In fiscal year 2022, the inflation-adjusted amount that the CFPB could receive through this mechanism was approximately $734 million, and the CFPB requested and received $641.5 million. See p. 4, *supra*. The operating expenditures of the OCC, Federal Reserve Board, and FDIC significantly

exceed the CFPB's cap.[4] And the CFPB's cap is also well below the budgets of various other agencies that receive funding in part through the collection of fees, including the Animal and Plant Health Inspection Service, 21 U.S.C. 136a(a), the Patent and Trademark Office, 35 U.S.C. 41, Customs and Border Protection, 19 U.S.C. 58c (2018 & Supp. III 2021), and the National Mint, 31 U.S.C. 5136.[5]

Respondents' hypotheticals (Br. in Opp. 17) about appropriations of "up to a trillion dollars annually forever for the FBI or FTC" thus miss the point. Most fundamentally, it is the political process, not the Appropriations Clause, that provides the check against such hypothetical appropriations. Nor could Congress guarantee funding "forever"; like every other law, a standing appropriation is always subject to revision or repeal by a future Congress—and indeed, Congress has revised or repealed standing appropriations numerous times. See p. 20, *supra*. But even if the Appropriations Clause did impose some unspecified and previously unrecognized limits on the amount or duration of appropriations, respondents cannot explain why the CFPB's modest appropriation

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[4] See, *e.g.*, OCC, *2022 Annual Report* 43 (OCC's FY2022 expenditures totaled approximately $1.1 billion); Bd. of Governors of the Fed. Reserve Sys., *108th Annual Report of the Board of Governors of the Federal Reserve System* 154 (2021) (Federal Reserve Board's FY2022 estimated operating expenditures totaled approximately $970 million); FDIC, *2022 Annual Report* 117 (FDIC's FY2022 operating expenditures totaled approximately $1.9 billion).

[5] See *OMB 2023 Budget* 84 (Animal and Plant Health Inspection Service's 2022 budget authority totaled $1.66 billion); *id.* at 215 (Patent and Trademark Office's 2022 budget authority totaled $3.7 billion); *id.* at 505 (Customs and Border Protection's 2022 budget authority totaled $16.2 billion); *id.* at 1015 (Mint's 2022 budget authority totaled $3.41 billion).

would transgress those limits when the appropriations for other agencies and activities—which are often much larger or more open-ended—do not.

Respondents also note that the Bureau's funds "remain available until expended." 12 U.S.C. 5497(c)(1); see Br. in Opp. 14; Pet. App. 35a-36a. But that type of provision is commonplace and traces back to the Founding era. See, *e.g.*, Act of Mar. 2, 1799, ch. 24, §§ 9-10, 1 Stat. 716 (establishing a permanent fund for financing naval pensions administered by multiple agencies). In budgetary terms, the provision is "standard language used to make a no-year appropriation," meaning that the funding "is available for obligation without fiscal year limitation." 1 *GAO Redbook* 5-7 (3d ed. Jan. 2004). The unspent funds of the OCC and Farm Credit Administration, for example, likewise remain available across fiscal years for investment and for use on those agencies' ongoing activities. See 12 U.S.C. 16, 192, 481, 2250; OCC, *2022 Annual Report* 43-44. Again, therefore, this feature of the CFPB's funding does not distinguish it from common funding mechanisms whose constitutionality respondents appear to concede.[6]

b. Ultimately, respondents' insistence (Br. in Opp. 16) that the CFPB's funding is "unprecedented" reduces to a single distinction: Agencies like the Postal Service, National Mint, Federal Reserve Board, OCC, and FDIC are funded through fees or assessments

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[6] The court of appeals additionally emphasized that the CFPB's funds are held at a Federal Reserve Bank, rather than "in a Treasury account." Pet. App. 35a. But the court ignored that the Treasury General Account is *itself* held "primarily" at Federal Reserve Banks. See U.S. Dep't of the Treas., Bureau of the Fiscal Serv., *Treasury General Account (TGA)*, https://tfx.treasury.gov/taxonomy/term/10867.

collected by those agencies themselves, whereas the CFPB receives its funding through transfers from the Federal Reserve Board. *Id.* at 22-23. But the Appropriations Clause does not dictate that an agency's funding must "be drawn from a particular 'source.'" *Law Offices of Crystal Moroney*, 63 F.4th at 182 (citation omitted). Respondents' purported distinction, therefore, has no constitutional relevance.

The Federal Reserve Board's funding source illustrates the point. As explained above, Federal Reserve Banks generate revenue through, *inter alia*, purchases and sales of bonds and securities on the open market, 12 U.S.C. 355, and that revenue becomes part of the combined earnings of the Federal Reserve System, see 12 U.S.C. 289(a)(2) and (3)(A). In turn, the Federal Reserve Board receives its funding from those earnings by levying assessments on the Federal Reserve Banks. 12 U.S.C. 243. Respondents do not dispute (Br. in Opp. 23) that Congress made a valid "[a]ppropriation[]" "by Law" when it authorized the Federal Reserve Board to spend a portion of the Federal Reserve System's earnings on the Board's operations. It follows, then, that Congress likewise made a valid appropriation when it authorized the CFPB—"an independent bureau" established "in the Federal Reserve System," 12 U.S.C. 5491(a)—to spend a portion of the same earnings on its operations.

The court of appeals sought to distinguish the Federal Reserve Board on the ground that the Board receives money directly from Federal Reserve Banks, whereas the CFPB receives money through transfers by the Board. Pet. App. 34a; see 12 U.S.C. 243. Attempting to draw an analogy to *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561

U.S. 477 (2010), the court described the CFPB's arrangement as "a double insulation from Congress's purse strings." Pet. App. 35a; see Br. in Opp. 24. But that double-insulation theory is incorrect because the Federal Reserve Board—the supposed intermediary between Congress and the CFPB—exercises no power over how much money the CFPB receives. Rather, it simply transfers the requested amount up to the cap defined by Congress. 12 U.S.C. 5497(a). That ministerial role in no way insulates the CFPB from congressional control. Congress is free to modify the Bureau's funding at any time by simply passing a statute, just as it would be if Section 5497(a) instead granted the Bureau the same capped amount from the government's general funds.

Respondents assert (Br. in Opp. 22-23) that agencies that rely on their own fees and assessments are constrained "because they must consider the risk of losing funding if regulated entities exit their regulatory sphere." That argument is doubly wrong. First, it rests on a mistaken premise: As just explained, the Federal Reserve Board is funded through assessments levied on Federal Reserve Banks, not private parties. 12 U.S.C. 243. As statutorily mandated components of the Federal Reserve System, those banks could not simply "exit the[] regulatory sphere" if they thought the assessments were too high. Br. in Opp. 22; see 12 U.S.C. 222, 263, 341. And in practice, neither could the financial institutions insured by the FDIC (unless they were willing to take the drastic step of forgoing FDIC deposit insurance). See 12 U.S.C. 1818(a)(1).

Second, and more fundamentally, even if private entities could exit the regulatory sphere based on their disagreement with agency assessments, respondents fail to

explain why the resulting "accountability" (Br. in Opp. 23) would have any relevance under the Appropriations Clause. Under respondents' own theory (*id.* at 11-13), and that of the court of appeals (Pet. App. 35a), the Clause is concerned with preserving *Congress*'s control over spending—not with agencies' accountability to the *private* entities they regulate. Nothing in the Clause's text or history suggests that the constitutionality of an agency's funding mechanism turns on whether it is sufficiently "constrained by market forces." Br. in Opp. 22.

c. In a final attempt to distinguish the CFPB from other agencies funded outside of annual spending bills, the court of appeals emphasized "the Bureau's capacious portfolio of authority." Pet. App. 37a; see Br. in Opp. 23-24. But the scope of the CFPB's regulatory authority is unrelated to any purported Appropriations Clause issue. The Founders made the same appropriations principles applicable to all government entities except the Army, and nothing in the constitutional text or history supports distinctions based on the size or nature of an agency's portfolio.

Any attempt to inject those considerations into the Appropriations Clause is also inconsistent with this Court's decision in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021). There, the Court emphasized that "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies." *Id.* at 1785. Because no "clear standard" exists to "distinguish agencies" based on the amount of power they wield, the Court disapproved of such comparisons when assessing separation-of-powers questions. *Id.* at 1784. Respondents and the court of appeals, however, rely on precisely that sort of comparison. See Br. in Opp. 23-24; Pet. App. 37a, 40a.

Their comparison is also mistaken on its own terms. Respondents assert that other agencies with similar funding mechanisms do not possess authority "remotely comparable" to the CFPB's. Br. in Opp. 23 (citation omitted); see Pet. App. 40a. But the Federal Reserve Board's decisions have "global consequence." *Seila Law*, 140 S. Ct. at 2239 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part). And the Federal Reserve Board, OCC, and FDIC exercise significant policymaking and enforcement authority over key segments of the financial industry. See, *e.g.*, 12 U.S.C. 248, 1818, 1828. Accordingly, respondents are simply incorrect in suggesting that the CFPB's authority to "creat[e] substantive rules," "prosecut[e] violations," and impose "penalties" is somehow unique among agencies funded outside of annual spending bills. Br. in Opp. 23 (citation omitted).

In fact, the CFPB inherited most of its authorities from agencies with similar funding mechanisms. See 12 U.S.C. 5581(b)(1), (2), (4), and (6) (describing functions transferred from the Federal Reserve Board, OCC, FDIC, and NCUA). Respondents do not dispute that those mechanisms were valid means of funding the relevant activities before the CFPB's creation. Congress cannot have violated the Appropriations Clause by using the same basic mechanism to fund the same basic activities within the CFPB.

3. The court of appeals' remaining arguments were flawed

The court of appeals gave three additional reasons for finding a constitutional violation. Respondents did not defend those grounds in their brief in opposition, and they are as flawed as the others already discussed.

First, the court of appeals relied on the statutory provision specifying that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." 12 U.S.C. 5497(c)(2); see Pet. App. 38a. The court treated that provision as a self-defeating declaration that Section 5497 violates the Appropriations Clause. See Pet. App. 38a ("We take Congress at its word."). But it is nothing of the kind. Section 5497(c)(2) does not purport to describe the status of the CFPB's funds under the Constitution; instead, it merely exempts those funds from *statutes* that impose limitations on "the use of all appropriated amounts." 2 *GAO Redbook* 2-22; cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (statutory labels are dispositive of matters "within Congress's control," but not matters governed by "the Constitution"). Congress has included similar provisions in the funding statutes for the Federal Reserve Board, 12 U.S.C. 244, the OCC, 12 U.S.C. 16, 481, and the Farm Credit Administration, 12 U.S.C. 2250(b)(2), among other agencies.

Second, the court of appeals relied on the provision stating that "funds derived from the Federal Reserve System . . . shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." Pet. App. 36a (quoting 12 U.S.C. 5497(a)(2)(C)). In the court's view, that provision "relinquishe[s] [Congress's] jurisdiction to review agency funding." *Ibid.* In fact, it simply allocates authority among different congressional bodies: The statute establishes numerous other means for congressional review of the CFPB's finances, including requiring reports to and hearings before other congressional committees. 12 U.S.C. 5496(a), (b), and (c)(2); see 12 U.S.C.

5497(a)(5) (Comptroller General audit and report). The Appropriations Clause is not concerned with such matters of internal congressional housekeeping. Indeed, the House and Senate did not even establish Appropriations Committees until the 1860s. See S. Doc. No. 14, 110th Cong., 2d Sess. 5 (2008).

Finally, the court of appeals emphasized general "separation of powers" concerns, Pet. App. 37a, 42a, but those concerns are misplaced. The Appropriations Clause is "a bulwark of the Constitution's separation of powers" because it "restrain[s]" "Executive Branch officers" from infringing on Congress's "'absolute'" "control over federal expenditures." *Department of the Navy*, 665 F.3d at 1347-1348 (citation omitted). But where, as here, Congress has enacted a law that provides funding for the Executive Branch expenditures at issue, "the straightforward and explicit command of the Appropriations Clause" is satisfied. *Richmond*, 496 U.S. at 424. And courts have no license to depart from the text and history of the constitutional provisions adopted by the Founders in pursuit of their own views about the proper structure and funding of administrative agencies.

C. At The Very Least, Any Appropriations Clause Violation Would Not Warrant Vacatur Of The Payday Lending Rule

For the foregoing reasons, this Court should hold that Congress's authorization of funding for the CFPB complies with the Appropriations Clause. But even if the Court were to find an Appropriations Clause violation, it should reverse the court of appeals' determination that the proper remedy is to vacate the Payday Lending Rule.

When this Court finds "a constitutional flaw in a statute," it ordinarily seeks to "limit the solution to the problem" by "severing any problematic portions while leaving the remainder intact." *Seila Law*, 140 S. Ct. at 2209 (opinion of Roberts, C.J.) (citation omitted). And once the Court identifies the particular statutory provision(s) that must be treated as invalid, it then applies traditional remedial principles to determine the appropriate relief for the parties before it. See, *e.g.*, *Collins*, 141 S. Ct. at 1789 & n.26. The court of appeals failed to follow either of those steps: It did not conduct a severability analysis at all, instead simply presuming that the funding mechanism established in Section 5497(a)-(c) is entirely invalid. And the court then ignored traditional remedial principles in favor of an inapposite framework developed to address a different type of constitutional violation.

Under a proper remedial analysis, the court of appeals should not have vacated the Payday Lending Rule. Instead, it should have excised and severed any problematic provisions of Section 5497. And even if the court determined that the funding mechanism established in Section 5497(a)-(c) is invalid in its entirely, it should have afforded at most forward-looking relief limiting the CFPB's authority to use funds derived from that source to take future enforcement actions under the Payday Lending Rule against respondents or their members. See *Free Enter. Fund*, 561 U.S. at 513.

1. The court of appeals erred by failing to conduct a severability analysis

It has been "firmly established since *Marbury* v. *Madison*" that courts should adopt "surgical" remedies when they find constitutional flaws in Congress's work, rather than undertaking "wholesale destruction" of the

challenged statute. *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350-2351 (2020) (opinion of Kavanaugh, J.). Accordingly, "[i]n a case that presents a conflict between the Constitution and a statute," this Court "give[s] 'full effect' to the Constitution and to whatever portions of the statute are 'not repugnant' to the Constitution, effectively severing the unconstitutional portion of the statute." *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021) (quoting *Bank of Hamilton* v. *Lessee of Dudley*, 27 U.S. (2 Pet.) 492, 526 (1829) (Marshall, C.J.)). And the obligation to conduct such a severability analysis is especially clear here because this case is governed by the Dodd Frank Act's "express severability clause," which directs that "if 'any provision of this Act' is 'held to be unconstitutional' * * * 'the remainder of this Act' should 'not be affected.'" *Seila Law*, 140 S. Ct. at 2209 (opinion of Roberts, C.J.) (quoting 12 U.S.C. 5302).

That severability clause required the court of appeals to determine which specific provision or provisions of the Dodd Frank Act render the CFPB's funding mechanism unconstitutional. But the court declined to answer that question or to identify "the line between a constitutionally and unconstitutionally funded agency." Pet. App. 36a. Instead, the court simply declared that the purportedly "unprecedented arrangement" created by the combination of all of the relevant statutory provisions is unconstitutional, *ibid.*, and proceeded on the understanding that the entire "funding scheme" created by Section 5497(a)-(c) is invalid, *id.* at 44a. That was error.

The court of appeals' opinion suggests that the Appropriations Clause violation it perceived could be eliminated by severing one or more specific provisions of the

Act rather than invalidating the funding mechanism as a whole. Three of the provisions on which the court focused warrant particular mention. First, in seeking to distinguish the CFPB from the Federal Reserve Board, the court relied heavily on the fact that the CFPB's funding "remain[s] available until expended," 12 U.S.C. 5497(c)(1), whereas the Federal Reserve System's surplus funding is capped. See Pet. App. 35a. Second, the court emphasized that Section 5497(b)(1) provides for the CFPB's funds to be held in an account controlled by the CFPB, rather than in a Treasury account, which the court characterized as "tak[ing] the Bureau completely off the separation-of-powers books." *Ibid.* And third, the court focused on the provision stating that the CFPB's funding "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate," 12 U.S.C. 5497(a)(2)(C), reasoning that this restriction is an impermissible "exemption from congressional review." Pet. App. 36a.

The court of appeals presumably would not have devoted so much attention to those provisions, see Pet. App. 34a-37a, if they made no difference under the Appropriations Clause. But if one or more of those provisions creates constitutional difficulties when combined with the rest of Section 5497, the appropriate course would not be to "raz[e] [the] whole statute[]." *American Ass'n of Political Consultants*, 140 S. Ct. at 2351 (opinion of Kavanaugh, J.). Instead, it would be to sever and declare unenforceable the offending provision(s), while leaving the remainder of Section 5497 intact. See 12 U.S.C. 5302. Those remaining portions of Section 5497 would continue to "function[] independently," *Seila Law*, 140 S. Ct. at 2209 (opinion of Roberts, C.J.) (citation omitted), by providing the CFPB with funding

to fulfill its statutory responsibilities. See 12 U.S.C. 5497(a) and (c)(1).

A decision declaring some or all of those provisions unconstitutional while acknowledging that the rest of Section 5497 complies with the Appropriations Clause would provide no basis for upsetting the Payday Lending Rule. Respondents have not suggested that the cost of the CFPB's rulemaking efforts exceeded the funding that the CFPB was entitled to draw from the Federal Reserve System during the years in question, such that the CFPB would have been unable to complete the rulemaking but for its ability under Section 5497(c)(1) to access unexpended funds from prior years. Nor have respondents offered any reason to believe that the CFPB's rulemaking would have proceeded differently if its funds were held in Treasury accounts or if it were subject to oversight by the "Committees on Appropriations of the House of Representatives and the Senate," 12 U.S.C. 5497(a)(2)(C), as opposed to other congressional committees. And without such a showing—or some other demonstration that the Payday Lending Rule is attributable to a specific provision of the Act that itself violates the Appropriations Clause—respondents do not even arguably have any "entitlement to retrospective relief." *Collins*, 141 S. Ct. at 1788.

2. Respondents would not be entitled to retrospective relief even if Section 5497(a)'s grant of funding were invalid

Even if the court of appeals were correct in treating the entire funding mechanism created in Section 5497(a)-(c) as invalid, the court erred in attempting to transpose the remedial framework discussed in *Collins* into the Appropriations Clause context and then invoking that framework to grant retrospective relief. The

court acknowledged that "*Collins* is not precisely on point." Pet. App. 42a. But the court "follow[ed] its framework" anyway, *ibid.*, reasoning that if agency action can be invalidated where a court finds that the President would have prevented that action but for an unconstitutional restriction on removal, see *Collins*, 141 S. Ct. at 1789, then a court should also vacate agency action if a challenger shows that it was paid for with money "drawn through the agency's unconstitutional funding scheme," Pet. App. 44a. That reasoning rests on a flawed assumption that agency action carried out using funds that were not validly appropriated should be automatically vacated. Such an assumption is inconsistent with more than 150 years of historical practice and conflicts with traditional remedial principles.

a. As discussed above, see p. 25, *supra*, no court has ever before held that an Act of Congress violated the Appropriations Clause. Going back to 1870, however, Congress has enacted laws addressing a different type of Appropriations Clause violation: Executive officials' expenditure of public money in excess of, or in the absence of, an appropriation. See Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (providing that "it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year"); Anti-Deficiency Act, 31 U.S.C. 1341 *et seq*. Yet respondents have not identified a single decision holding that a litigant can have prior agency actions declared void merely by persuading a court that they were carried out with unappropriated funds.

Instead, Congress has long provided that such violations are appropriately addressed through forward-looking remedies—such as removal from office of the

official responsible for the unauthorized expenditure—that avoid the disruption of retroactive invalidation. See, *e.g.*, Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-1258 (fines and removal from office); 31 U.S.C. 1349(a) (administrative sanctions up to removal); 31 U.S.C. 1350 (criminal penalties for willful violations).

That history refutes the court of appeals' unexplained assumption that agency action must be vacated whenever a court determines that it resulted from the expenditure of funds that were not validly appropriated. And when "'Congress has provided what it considers adequate remedial mechanisms for constitutional violations,'" a court should "hesitate before casting aside those limitations" and creating its own remedies. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 74 (1996) (citation omitted); *id.* at 75 (declining to go beyond remedies established by statute even where "Congress d[id] not have authority under the Constitution" to impose those remedies).

b. Other traditional remedial principles likewise counsel against treating retrospective invalidation of agency rulemaking and other actions as the default remedy for violations of the Appropriations Clause. In general, the Constitution does not itself require any particular remedy for a violation of its provisions. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-327 (2015). It instead operates against the backdrop of statutes, common-law doctrines, and equitable principles that define and limit the availability of relief. See *id.* at 326-328. The Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, expressly incorporates those traditional limits by preserving a court's power to "deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702.

Because the question has never arisen, no court has considered how to apply traditional remedial principles when Congress funds an agency's activities through a statute later found to violate the Appropriations Clause. But traditional principles provide no support for the court of appeals' assumption that any agency action carried out using funds that were not validly appropriated is void. Unlike a constitutional defect in the *substantive* statute authorizing agency action, an unconstitutional funding provision does not mean that the action itself is invalid. To the contrary, as even the court below recognized, "Congress plainly (and properly) authorized the Bureau to promulgate the Payday Lending Rule," Pet. App. 43a, and the Rule faithfully implements the applicable statutory standards, see *id.* at 9a-18a. Furthermore, unlike the invalidation of substantively unauthorized agency actions, retrospective invalidation would not actually cure the relevant constitutional violation—it would not, for example, undo the CFPB's expenditures associated with the Rule or restore any funds to the federal fisc.

Traditional remedial principles also require courts to craft remedies that do "not unnecessarily infringe on competing interests," *United States* v. *Morrison*, 449 U.S. 361, 364 (1981), and that take adequate account of "the public interest" and "the balance of equities," *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, that would mean affording respondents at most prospective relief preventing the CFPB from enforcing the Payday Lending Rule against them or their members until Congress provides the Bureau with funding from another source. As in *Free Enterprise Fund*, that prospective remedy would provide meaningful relief to respondents by ensuring that, going

forward, the Payday Lending Rule "to which [respondents' members are] subject will be enforced only by" an agency funded through constitutionally permissible appropriations. 561 U.S. at 513. While such a prospective remedy could itself upend the CFPB's activities, it would at least avoid the profoundly disruptive effect of unwinding already completed and concededly authorized agency actions like the Payday Lending Rule.

This Court has recognized the necessity of limiting retrospective relief in numerous contexts. Under the doctrine of qualified immunity, for example, courts often deny damages for constitutional violations in part to minimize the "social costs" of lawsuits against public officials. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). Under the exclusionary rule, courts may decline to exclude evidence obtained in violation of the Fourth Amendment where the "costs" of exclusion "outweigh" the "benefits." *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006) (citation omitted). And in some circumstances, the Court has denied retrospective remedies that would "affect the validity" of "administrative actions" taken by unconstitutionally appointed officials under the *de facto* doctrine. *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976) (per curiam) (according "de facto validity" to the "past acts" of the Federal Election Commission) (emphasis omitted); see *id.* at 8-9, 124-137. Declining to grant retrospective relief in such circumstances reflects deeply rooted common-law "considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected," as well as "the good order and peace of society." *Norton* v. *Shelby Cnty.*, 118 U.S. 425, 441 (1886); see *Waite* v. *Santa Cruz*, 184 U.S. 302, 323 (1902) (noting that the *de facto* doctrine ensures that members of the public who transact business

with an officer need not "investigate his title, but may safely act upon the assumption that he is a rightful officer").

Those same considerations weigh strongly in favor of limiting the remedy for any Appropriations Clause violation in Section 5497 to forward-looking relief. Even if the Court were to hold that the funding mechanism created in Section 5497(a)-(c) is entirely unconstitutional, vacatur of the CFPB's past actions would be inappropriate in light of the significant disruption that such vacatur would produce. In the 12 years since it was created, the CFPB has taken myriad actions to fulfill its statutory responsibilities using funds appropriated by Section 5497. It has issued more than 200 final rules, governing implementation of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*; the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.*; the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*; the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.*; and the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, among others. Those rules govern important aspects of countless transactions involving both regulated entities and individual consumers every day, affecting the way homes are mortgaged, cars are purchased, credit cards are administered, loans are made, debts are collected, and banks are run.

To take just one example, CFPB regulations make adjustments and exceptions to some of the mortgage-related disclosure requirements under the Truth in Lending Act. See 15 U.S.C. 1638; 12 C.F.R. 1026.19, 1026.37, 1026.38. If those regulations were vacated, mortgage lenders would have to immediately modify the disclosures they give millions of consumers each year, and borrowers could seek to rescind certain

mortgage transactions that had relied on regulatory disclosure exceptions, see 15 U.S.C. 1635. Recognizing the destabilizing consequences of vacating past CFPB actions, the Mortgage Bankers Association, National Association of Home Builders, and National Association of Realtors filed a brief in *Seila Law* warning that if the Court issued a decision "calling into question the ongoing legitimacy of the CFPB's past actions," "the results could be catastrophic for the real estate finance industry." Mortg. Bankers Ass'n et al. Amici Br. at 10, *Seila Law*, *supra* (No. 19-7). Those entities predicted that such a decision "would create disruptive uncertainty around millions of past home mortgage transactions," and that "the mortgage markets would very likely all but grind to a halt." *Ibid.* Any judicial remedy here should seek to avoid those sorts of calamitous consequences.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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1. U.S. Const. Art. I, § 9, Cl. 7 provides:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2. 12 U.S.C. 5497 provides:

Funding; penalties and fines

(a) Transfer of funds from Board Of Governors

(1) In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to—

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount

The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) Reviewability

Notwithstanding any other provision in this title,[1] the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

(3) Transition period

Beginning on July 21, 2010, and until the designated transfer date, the Board of Governors shall transfer to the Bureau the amount estimated by the Secretary needed to carry out the authorities

[1] See References in Text note below.

granted to the Bureau under Federal consumer financial law, from July 21, 2010 until the designated transfer date.

(4) Budget and financial management

(A) Financial operating plans and forecasts

The Director shall provide to the Director of the Office of Management and Budget copies of the financial operating plans and forecasts of the Director, as prepared by the Director in the ordinary course of the operations of the Bureau, and copies of the quarterly reports of the financial condition and results of operations of the Bureau, as prepared by the Director in the ordinary course of the operations of the Bureau.

(B) Financial statements

The Bureau shall prepare annually a statement of—

(i) assets and liabilities and surplus or deficit;

(ii) income and expenses; and

(iii) sources and application of funds.

(C) Financial management systems

The Bureau shall implement and maintain financial management systems that comply substantially with Federal financial management systems requirements and applicable Federal accounting standards.

(D) Assertion of internal controls

The Director shall provide to the Comptroller General of the United States an assertion as to the effectiveness of the internal controls that apply to financial reporting by the Bureau, using the standards established in section 3512(c) of title 31.

(E) Rule of construction

This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

(F) Financial statements

The financial statements of the Bureau shall not be consolidated with the financial statements of either the Board of Governors or the Federal Reserve System.

(5) Audit of the Bureau

(A) In general

The Comptroller General shall annually audit the financial transactions of the Bureau in accordance with the United States generally accepted government auditing standards, as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where accounts of the Bureau are normally kept. The representatives of the Government Accountability Office shall have access to the

personnel and to all books, accounts, documents, papers, records (including electronic records), reports, files, and all other papers, automated data, things, or property belonging to or under the control of or used or employed by the Bureau pertaining to its financial transactions and necessary to facilitate the audit, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, documents, records, reports, files, papers, and property of the Bureau shall remain in possession and custody of the Bureau. The Comptroller General may obtain and duplicate any such books, accounts, documents, records, working papers, automated data and files, or other information relevant to such audit without cost to the Comptroller General, and the right of access of the Comptroller General to such information shall be enforceable pursuant to section 716(c) of title 31.

(B) Report

The Comptroller General shall submit to the Congress a report of each annual audit conducted under this subsection. The report to the Congress shall set forth the scope of the audit and shall include the statement of assets and liabilities and surplus or deficit, the statement of income and expenses, the statement of sources and application of funds, and such comments and information as may be deemed necessary to inform Congress of the financial operations and condition of the Bureau, together with such recommendations with respect thereto as the Comptroller General may

deem advisable. A copy of each report shall be furnished to the President and to the Bureau at the time submitted to the Congress.

(C) Assistance and costs

For the purpose of conducting an audit under this subsection, the Comptroller General may, in the discretion of the Comptroller General, employ by contract, without regard to section 6101 of title 41, professional services of firms and organizations of certified public accountants for temporary periods or for special purposes. Upon the request of the Comptroller General, the Director of the Bureau shall transfer to the Government Accountability Office from funds available, the amount requested by the Comptroller General to cover the full costs of any audit and report conducted by the Comptroller General. The Comptroller General shall credit funds transferred to the account established for salaries and expenses of the Government Accountability Office, and such amount shall be available upon receipt and without fiscal year limitation to cover the full costs of the audit and report.

(b) Consumer Financial Protection Fund

(1) Separate fund in Federal Reserve established

There is established in the Federal Reserve a separate fund, to be known as the "Bureau of Consumer Financial Protection Fund" (referred to in this section as the "Bureau Fund"). The Bureau Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose.

(2) Fund receipts

All amounts transferred to the Bureau under subsection (a) shall be deposited into the Bureau Fund.

(3) Investment authority

(A) Amounts in Bureau Fund may be invested

The Bureau may request the Board of Governors to direct the investment of the portion of the Bureau Fund that is not, in the judgment of the Bureau, required to meet the current needs of the Bureau.

(B) Eligible investments

Investments authorized by this paragraph shall be made in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Bureau Fund, as determined by the Bureau.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Bureau Fund shall be credited to the Bureau Fund.

(c) Use of funds

(1) In general

Funds obtained by, transferred to, or credited to the Bureau Fund shall be immediately available to the Bureau and under the control of the Director, and shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities. The compensation of the Director

and other employees of the Bureau and all other expenses thereof may be paid from, obtained by, transferred to, or credited to the Bureau Fund under this section.

(2) Funds that are not Government funds

Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.

(3) Amounts not subject to apportionment

Notwithstanding any other provision of law, amounts in the Bureau Fund and in the Civil Penalty Fund established under subsection (d) shall not be subject to apportionment for purposes of chapter 15 of title 31 or under any other authority.

(d) Penalties and fines

(1) Establishment of victims relief fund

There is established in the Federal Reserve a separate fund, to be known as the "Consumer Financial Civil Penalty Fund" (referred to in this section as the "Civil Penalty Fund"). The Civil Penalty Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose. If the Bureau obtains a civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau shall deposit into the Civil Penalty Fund, the amount of the penalty collected.

(2) Payment to victims

Amounts in the Civil Penalty Fund shall be available to the Bureau, without fiscal year limitation, for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws. To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs.

(e) Authorization of appropriations; annual report

(1) Determination regarding need for appropriated funds

(A) In general

The Director is authorized to determine that sums available to the Bureau under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year.

(B) Report required

When making a determination under subparagraph (A), the Director shall prepare a report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the level of the amount set forth in subsection (a)(2). The Director shall submit the report to the President and to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives.

(2) Authorization of appropriations

If the Director makes the determination and submits the report pursuant to paragraph (1), there are hereby authorized to be appropriated to the Bureau, for the purposes of carrying out the authorities granted in Federal consumer financial law, $200,000,000 for each of fiscal years 2010, 2011, 2012, 2013, and 2014.

(3) Apportionment

Notwithstanding any other provision of law, the amounts in paragraph (2) shall be subject to apportionment under section 1517 of title 31 and restrictions that generally apply to the use of appropriated funds in title 31 and other laws.

(4) Annual report

The Director shall prepare and submit a report, on an annual basis, to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives regarding the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the sources and application of funds of the Bureau, including any funds appropriated in accordance with this subsection.