No. 22-448

IN THE

Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an executive agency may authorize its own funding each year without an appropriation from Congress.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus opposing the accumulation of power in any one governmental branch, which violates the Constitution's careful separation of powers. *See, e.g., Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023); *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

INTRODUCTION

The top-side briefs reveal the shotgun approach of the Consumer Financial Protection Bureau and its friends in defending the constitutionality of the CFPB's funding mechanism. Some briefs, including one by the Constitutional Accountability Center on behalf of several professors, depict the CFPB's funding mechanism as adhering to historical practice. Other briefs try to scare this Court by arguing that if the Court strikes down the CFPB's funding mechanism then bad actors will run amok throughout the country.

On the surface, these arguments appear unrelated. But they are interrelated. If the historical arguments fall, then the doomsday arguments must fall too. In 1776, the thirteen original colonies declared their independence from Great Britian because King George III had too much power and

* No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

Parliament had too little power. At the Constitutional Convention, the Framers remained keenly aware of the executive branch's threat to liberty when it has too much power. They included many structural checks to prevent the President from having too much power. "So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Congressmen in the early days of the Republic likewise ensured that Congress did not give the executive branch too much power. That is why the administrative state as we know it today did not exist in the late 1700s and early 1800s. Rather than punt to unelected bureaucrats, Congress passed laws that set policy for our nation.

This worked. The federal government functioned just fine without a massive administrative bureaucracy and without independent federal agencies lacking any accountability to the political branches. Many tasks the federal government now handles were governed by state and local officials. These politicians were closer to the people and thus better understood their wants and needs.

The federal government was not in charge of every aspect of Americans' lives. For example, the government trusted people to know which dogs could be housed together. Now, however, a federal agency decrees which dogs may be kept together and which must be in different pens. *See* 9 C.F.R. § 3.6(c)(2).

Yet no crisis arose from this lack of federal regulations. Our nation grew from a collection of States indebted to our European allies into the world's largest and strongest economy. Despite what some top-side amici argue, the period before the growth of the administrative state saw great strides in standards of living for most Americans. *See* Richard H. Steckel, *A History of the Standard of Living in the United States*, Econ. Hist. Assoc. (July 12, 2002), https://tinyurl.com/mwdx489k (life expectancy grew the most between 1880 and 1890). In short, Americans thrived before the rise of independent regulatory agencies and before Congress created the CFPB.

So if the CFPB's historical arguments are wrong, then the sky-is-falling argument must also fail. There is no harm in returning to a governmental structure that requires political accountability. Requiring federal agencies to justify their appropriations yearly just means a return to the past. And on that score, the past was not so bad. Thus, the top-side briefs get it all wrong. History shows that the CFPB's funding mechanism is not only novel but also unconstitutional. Thus, this Court should affirm the Fifth Circuit's ruling and make the CFPB accountable to Congress.

STATEMENT

I. STATUTORY BACKGROUND

"In the midst of the Great Recession, (soon-to-be White House Chief of Staff) Rahm Emanuel" quipped that politicians should "[n]ever let a serious crisis go to waste." *United States v. Winchester*, 335

F.R.D. 82, 94 (M.D.N.C. 2020) (cleaned up). So after the 2008 financial crisis, Congress created the CFPB. The independent agency is part of the Federal Reserve System. 12 U.S.C. § 5491(a). The CFPB has administrative and enforcement authority over eighteen federal statutes which, before 2010, were enforced by seven agencies. *See id.* §§ 5512(a), 5481(12), (14). These statutes "cover everything from credit cards and car payments to mortgages and student loans." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020). The CFPB's director may "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1).

The CFPB does not receive periodic congressional appropriations. Rather, it "receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments." *Seila Law*, 140 S. Ct. at 2194. Annually, the CFPB's director decides what is "reasonably necessary to carry out the" agency's functions. 12 U.S.C. § 5497(a)(1). The Federal Reserve must then give the CFPB that requested amount if it is less than a fixed percentage of the Federal Reserve's "total operating expenses." *Id.* § 5497(a)(2)(A).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The CFPB director issued a final rule regulating payday, vehicle title, and certain high-cost installment loans. *Payday, Vehicle Title, and Certain*

High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017). The rule bars lenders from using preauthorized account access to receive payment after two successive withdrawal attempts fail for insufficient funds. 12 C.F.R. §§ 1041.8(b)(1), (c)(1).

In April 2018, the Community Financial Services Association challenged the rule. Among several challenges, the CFSA alleged that the CFPB's self-funding mechanism violated the Constitution's separation of powers. After *Seila Law* declared the CFPB's structure unconstitutional, the CFPB's director purported to ratify the rule. *Payday, Vehicle Title, and Certain High-Cost Installment Loans; Ratification of Payment Provisions*, 85 Fed. Reg. 41,905 (July 13, 2020). In a single paragraph, the District Court declared the CFPB's self-funding mechanism constitutional. Pet. App. 72a. The Fifth Circuit reversed. Pet. App. 33a-42a. This Court then granted certiorari to decide whether the CFPB's funding mechanism is constitutional.

SUMMARY OF ARGUMENT

I.A. Founding-era statutes that provided funding for agencies through fees and bounties do not support reversing the Fifth Circuit's decision. The CFPB's funding mechanism differs from those fee-based systems. Unlike fee-based funding mechanisms, which encourage accountability to the public, the CFPB's funding scheme discourages accountability. Rather than having to answer to the people's representatives—and thus the people—unelected bureaucrats can operate without any political checks. They can bankroll their own regulatory enforcement agenda and implement it without meaningful oversight. This has happened throughout the CFPB's short existence.

B. Nor do social welfare programs support the CFPB's arguments. The programs the founding generation enacted were all fully funded through taxes, bounties, or other fee-based systems. There was no blank check for unelected bureaucrats to write for themselves. Congress authorized various agencies to spend the fees and bounties they collected to provide a safety net for those at risk. So reliance on these programs by the CFPB and its amici is misplaced.

C. Finally, other statutes do not support the CFPB's argument. Those statutes authorized expending a specific sum of money. In one instance that was a fraction of a bequest. Two other cases involved debt that Congress authorized through prior enactments. Thus, no precedent supports the CFPB's argument that its funding mechanism satisfies the Appropriations Clause.

II. The CFPB's supporters argue that affirming the Fifth Circuit decision would violate separation-of-powers principles by "second-guessing" Congress. This argument lacks merit. The Constitution's careful separation of powers allows the judicial branch to decide disputes about the constitutionality of statutes. Barring review simply because Congress passed a statute would remove any barrier to Congress's establishing a national religion or allowing the FBI to search residences without a warrant. The absurdity of such a rule is obvious.

ARGUMENT

I. THE CFPB'S FUNDING MECHANISM LACKS ANY HISTORICAL PRECEDENT.

Professors represented by the Constitutional Accountability Center argue that the CFPB's funding mechanism has many historical analogs. A careful review of the cited statutes, however, reveals that the CFPB's funding method is novel. Every cited statute falls into one of three categories. Yet the CFPB falls into none of those categories for both practical and legal reasons.

These differences matter. This Court has looked to historical practice when deciding what the Constitution's structural protections require. For example, the key to the Court's *Seila Law* decision was that the CFPB's structure was "novel." 140 S. Ct. at 2192. True, the Court had previously blessed for-cause removal protections for some federal officers. But in *Seila Law* this Court emphasized the context of those historical protections versus the context of the CFPB's director's protection. Because the contexts differed, the Court held that the structure was unconstitutional. It is hard to imagine that Congress discovered a constitutional agency structure that was unknown for 220 years.

Seila Law was not the only time the Court examined historical practice when scrutinizing structural constitutional protections. In *NLRB v. Noel Canning*, the Court reviewed historical precedent to determine the contours of the Appointments Clause. *See* 573 U.S. 513, 528-29 (2014). There too, the Court found "context" important. *Id.* at 537.

This Court's focus on history is why the CFPB devotes so much of its merits brief—as do its amici—to arguing for some historical precedent for its funding mechanism. If the contexts are dissimilar, the examples cannot be used as historical precedent supporting the CFPB's argument. So if this Court agrees that the context of the examples the CFPB and its amici cite differ from the context of the CFPB's funding mechanism, it should affirm the Fifth Circuit's decision declaring that funding mechanism violates the Appropriations Clause.

A. Agencies That Provide Services And Spend No More Than The Amount Of Fees They Collect Are Dissimilar To The CFPB.

The first set of statutes that the professors cite all arose in a context far different from the aftermath of the 2008 financial crisis. All the cited examples deal with agencies' expenditure of fees that they collected. When Congress created the CFPB, it did not envision a revenue-neutral agency that spent fees it collected. This contextual difference means the Court can easily distinguish the cited statutes.

1. The professors cite the Customs Service as an example of Congress's "authoriz[ing] self-funding and indefinite appropriations since the founding." Professors' Br. 23 (capitalization altered). But the Customs Service was just one of the first agencies that Congress authorized to collect fees and duties. These agencies then used the fees and duties they collected to fund their operations and returned the remainder to the treasury.

Congress created the Customs Service soon after it first convened in New York City. *See* Act of July 31, 1789, ch. 5, 1 Stat. 29. The statute provided, in excruciating detail, how the Customs Service was to be run. Some ports of entry were staffed with "a collector, naval officer and surveyor." *Id.* § 1, 1 Stat. at 30. Other ports received a "collector and surveyor." *Id.* And still others received only a "collector." *Id.*

Congress also detailed how the Customs Service's employees were compensated. Act of July 31, 1789, §§ 29, 30, 1 Stat. at 44-45. They got a fixed sum for some actions and received a percentage of the fees collected for others. *See id.* § 29, 1 Stat. at 44-45.

Besides detailing compensation, Congress also ensured that Customs Service employees were overseen by officers who received annual appropriations from Congress. Customs officers had to keep records of their transactions as directed by "the proper department or officer having the superintendence of the collection of the revenue" and to "submit their books, papers, and accounts to the inspection of such persons as may be appointed for that purpose." Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 155. There are no similar checks on the CFPB.

The same holds true for revenue officers. Some of these positions were created at the end of the First Congress. Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200. Like customs agents, the revenue officers just received a portion—up to seven percent—of what they collected. *See id.* § 58, 1 Stat. at 213. Besides those collections, the revenue officers kept some proceeds of the penalties they collected. *See id.* § 44, 1 Stat. at 209.

Again, this does not resemble the CFPB's funding mechanism. The CFPB does not earn revenue for the United States. Its budget far outpaces any money that it collects. This contrasts sharply with revenue officers, who collected over 13 times their salaries and expenses.

The executive branch quickly recognized its supervisory authority over customs agents and revenue officers. The first Treasury Secretary, Alexander Hamilton, "claimed authority as Secretary to make binding legal determinations for executive officials regarding interpretation of customs and revenue laws," and "engaged in extensive correspondence with customs collectors and revenue officers regarding the proper performance of their duties." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 734 n.271 (2014) (citations omitted). Again, there is no such executive oversight of the CFPB.

The last agency on which the professors elaborate is the Post Office. Like customs agents and revenue officers, postal officials were paid from their receipts. *See* Act of Feb. 20, 1792, ch. 7, §§ 3, 8, 1 Stat. 232, 234-35.

Today, we think of the United States Postal Service as a money-losing prospect. And it is. *See* David Shepardson, *U.S. Postal Service reports $4.9 billion 2021 net loss*, Reuters (Nov. 11, 2021), https://tinyurl.com/4t4xuhrt. But that is because Congress refuses to allow the USPS to operate based on market principles. It also stems from USPS union contracts that ignore market forces. At the time of its founding, however, the Post Office made ample revenue for the country. And like the other revenue-positive agencies, Congress allowed it to pay its employees with those funds.

The professors spill substantial ink on these three examples. But all three are inapt. Each example is of an agency collecting money and then keeping some for its expenses and remitting the rest to the treasury. Here, the CFPB is not in the black. So the main examples that the professors cite support the CFSA's argument that the CFPB's funding mechanism lacks any historical basis.

2. "In America today, the lawful income of a public official consists of a salary. However, in the eighteenth century and often far into the nineteenth and early twentieth centuries, American law authorized a wider variety of ways for officials to make money." Nick Parrillo, *Against the Profit Motive: The Salary Revolution in American Government*, *1780-1940*, 1 (2013). Before the change to salary-based compensation, "[t]here were two basic" ways that federal officers made money—"facilitative payments and bounties." *Id.* at 2. Facilitative payments were fees that companies or individuals paid for a license or some other service. *See id.* Bounties were fees that officials received for seizing another's person or property. *See id.*

Facilitative payments had a long history. Parliament passed statutes authorizing facilitative fees "to cover certain offices in England." Parrillo at 65. The same year the U.S. Constitution was written, a British parliamentary commission observed that the practice brought governmental officials and the public "into a mutual relation[ship]," which encouraged "habits of pecuniary obligation or exchange of private interest." 2 *The Reports of the Commissioners Appointed to Examine, Take, and State the Public Accounts of the Kingdom* 187 (H.M. Printers, 1787).

"[N]early all the American colonial legislatures" followed this example and used facilitative payments "to cover many and sometimes all of the offices within their respective bounds." Parrillo at 65. The Maryland legislature thought that governmental officials "would not perform their duties with as much diligence when paid a fixed salary as when paid for each particular service." Newton D. Mereness, *Maryland as a Proprietary Province* 387 (1901). Facilitative payments were, however, most often used when the services provided "were common, well known, of an uniform value, and whose nature was such that a fair price could be put upon them before they were performed." *Walker v. Ham*, 2 N.H. 238, 239 (1820).

Officers who received facilitative payments "viewed service recipients as 'customers' to be attracted, and service recipients viewed officers as vendors offering valuable benefits to be purchased." Parrillo at 2. This led to better customer service. If a government official did not provide quality services promptly, the customer would likely go to a different governmental official the next time he had a need. Or he may just break the law and not pay the fee. In other words, the fee-based system incentivized government employees and officers to treat the public as their customers.

The shift from good customer service to bad customer service was slow. Even when facilitative payments became highly regulated, "[c]ustomer service lived on. This was partly because officers and service recipients continued to reach individualized bargains over the prices of services (albeit illegally)." Parrillo at 125. But "even in cases where officers and service recipients conformed to uniform statutory prices, fees still caused officers to view recipients as a class as their 'customer base.' They continued to cater to the wishes of that base, for they wanted to encourage its members to keep showing up and requesting services." *Id.*

Things went downhill after the facilitative payments ended. Between "1870-1920, lawmakers concluded that fee-based compensation of officers, even when regulated by statute, led unavoidably to 'corrupt' fee-taking outside the statute. To stop officers from taking unlawful fees, one had to prohibit them from taking any fees and give them salaries instead." Parrillo at 111.

Anyone who has had the pleasure of going to the local department of motor vehicles knows that government employees no longer see citizens as customers to please. Rather, they are seen as an inconvenience that must be dealt with to collect a salary at the end of every two-week period. This is the opposite of what happened during our founding era when employees' and officers' livelihoods depended on providing good customer service. *Cf.* William Hawkins, 1 *A Treatise of the Pleas of the Crown* 171 (1716) (unreasonable to expect "officers who depend upon a known fixed salary" to "be so ready in undertaking, or diligent in executing" their jobs as officers who receive facilitative payments).

The CFPB, of course, does not provide services to regulated parties in return for fees that fund its operations. Rather, it gets to write itself a blank check each year to fund operations. It then promulgates regulations that are bad for the pocketbooks of both businesses and consumers.

Because "the CFPB's jurisdiction is not optional," it "need not make any effort to attract fee-paying entities." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 77 (2010). The only people to benefit are the unelected bureaucrats seated in the CFPB's headquarters. This helps explain why all the fee-based statutes cited in the top-side briefs do not support the CFPB's argument about how its funding mechanism fits with founding-era precedent.

3. The professors also string cite other statutes that supposedly support their position. But again, those statutes merely allowed agencies to pay for their operations through the collection of fees, which bears no resemblance to the CFPB's funding. The first mint was established during the Second Congress. *See* Act of Apr. 2, 1792, ch. 1, 1 Stat. 246. Unlike today's mint, at the founding any citizen could bring gold and silver and request that it be made into coins. *Id.* § 14, 1 Stat. at 249. The mint, however, charged a 0.5% fee for this service. *See id.* This fee then helped fund the mint's operations. In other words, the funding structure did not resemble the CFPB's funding mechanism.

Having fees fund public programs was common early in our nation's history. When Congress established a permanent patent office, it established a fee schedule under which U.S. citizens paid $30, British citizens paid $500, and other foreign citizens paid $300 to submit a patent application. *See* Act of July 4, 1836, ch. 357, § 9, 5 Stat. 117, 121. These fees "constituted a fund" to pay the Patent Office employees "and [cover] all other expenses of the Patent Office." *Id.* Again, this was not an open check for the Patent Office to spend whatever it pleased without Congressional authorization. Rather, it was a way for the Patent Office to fund its operations in a manner Congress controlled.

The practice of having agencies funded through fees continued after the Civil War. In 1871, Congress passed a statute aimed at increasing the safety of steamboats that carried passengers or freight in the waters of the United States. *See generally* Act of Feb. 28, 1871, ch. 100, 16 Stat. 440. Of course, this entailed having government inspectors and other officials run the safety program. Funding for the entire Steamboat Inspection Service came from "the revenues received into the treasury from the inspection of steam-vessels, and the licensing of the officers of such vessels." *Id.* § 66, 16 Stat. at 458.

Finally, in 1875 Congress changed how bank examiners were paid. Rather than receive a salary or mileage, bank examiners received a flat fee "assessed by the Comptroller of the Currency upon, and paid by, the" bank being examined. Act of Feb. 19, 1875, ch. 89, 18 Stat. 329, 329. In other words, there was no federal expenditure of tax revenue. The banks paid the examiners a fee for their service depending on the size of the bank. Again, this does not remotely resemble the CFPB's funding mechanism.

B. Social Welfare Programs Are Dissimilar To The CFPB.

The next set of statutes cited to support the CFPB's argument fares no better. All those laws arose in the social welfare context. The CFPB is not a social welfare agency. So these laws also arose in a context dissimilar to the CFPB.

In 1798, Congress passed a workers' compensation program for seamen. Act of July 16, 1798, ch. 77, § 2, 1 Stat. 605, 606. The program's funding came from taxing seamen's wages twenty cents per month. *See id.* § 1, 1 Stat. at 605-06. These funds were withheld from the seamen's paychecks, just as workers' compensation funds are withheld from many employees' paychecks today.

No outside funds went to caring for the sickened seamen. The federal officials responsible for the care did not receive a salary; they were entitled to only recovery of expenses. Act of July 16, 1798, § 4, 1 Stat. at 606. Any excess funds collected from the tax on seamen's salaries were used to build hospitals to provide better care of the seamen. In other words, every penny collected from the tax was expended on the care of seamen. No outside money was deposited in the United States treasury and no money was expended from the treasury's general fund.

This differs significantly from the CFPB's funding scheme. The whole point of the seamen's program was to be net revenue neutral. Again, all funds received were to be spent on caring for sick seamen, and no other government funds were to be used for that purpose. As shown by this 1798 statute, these types of social welfare programs have a long history in America. Congress has recognized the need for a social safety net for some people for over 225 years.

The professors next rely on a wartime statute that authorized private parties to capture vessels helping Great Britain during the War of 1812. Under the statute, when a private party captured a vessel, he had to hand over two percent of the net proceeds to the government. *See* Act of June 26, 1812, ch. 107, § 17, 2 Stat. 759, 763. This money was used "as a fund for the support and maintenance of the widows and orphans of such persons as [were] slain; and for the support and maintenance of such persons as [were] wounded and disabled on board of the private armed vessels of the United States, in any engagement with the enemy." *Id.*, 2 Stat. at 764.

Like the fund for injured seamen that the First Congress exacted, this wartime statute provided funding for those injured or killed while capturing enemy vessels. There was no outside appropriation of funds. Rather, it was funded through a tax on captured goods and vessels.

The wartime statute also shows how bounty statutes generally operated. They prescribed fixed bounties or formulas. *See, e.g.*, Act of May 8, 1792, ch. 36, § 3, 1 Stat. 275, 276-77; Act of Feb. 28, 1799, ch. 19, § 4, 1 Stat. 624, 625-26. For example, Congress limited the bounties for each prosecution. U.S. attorneys' earnings were, therefore, a function of how much work they did. In contrast, the CFPB has nearly unbounded discretion to decide what it wants to do and how much money it spends.

These safety-net programs did not have a blank check for unaccountable bureaucrats to decide how much of the general treasury's funds to spend. Rather, Congress established a detailed scheme where the needy would receive assistance from the government in a manner that did not cost the government money. Such programs cannot be used to support the CFPB's funding mechanism.

The CFPB does not provide a safety net. Rather, it does the opposite. It hurts the most vulnerable among us by causing the prices for necessary goods and services to rise due to wasteful regulations. This contrasts with the programs the professors cite in support of the CFPB.

C. Other Founding-Era Statutes Do Not Support Reversal.

The final group of cited statutes also arose in contexts dissimilar to the CFPB—bequests and the national debt. Bequests are different because they involve gifts to the United States. The national debt is a unique issue, and it is hard to believe that a law allowing for spending on the national debt would authorize the CFPB's funding mechanism.

The professors argue that the statute providing for the building of the Smithsonian Institute supports reversing the Fifth Circuit. But that enactment undercuts the CFPB's argument. There was no blank check for the Smithsonian Institute. Rather, the statute provided that interest on the bequest made—6% annually—would be used to build the museums and fund their operations. *See* Act of Aug. 10, 1846, ch. 178, § 5, 9 Stat. 102, 104. This differs from the CFPB's ability to sign its own check without any meaningful limit on the amount it spends.

The antebellum statute providing for the payment of interest on the national debt also does the CFPB no favors. For a national debt to exist, Congress must pass multiple statutes. First, it must decide to go into debt. Recent negotiations between the President and Congress have shown just how contentious this type of legislation can be. After deciding to authorize debt, Congress must appropriate money for that debt to become a reality.

The statute authorizing payment of interest on the national debt, Act of Feb. 9, 1847, ch. 7, 9 Stat. 123, must be read in tandem with these other statutes. The nation did not assume debt without knowing how much it would cost, that is, the interest rate. And every time it made an appropriation requiring new debt, Congress knew that it had to expend money for interest on that debt. So Congress did not write a blank check by allowing officers to pay interest on the national debt. Rather, it passed several pieces of legislation which, together, amounted to a constitutional appropriation of funds.

After the deadline for top-side briefs, another professor stepped forward and claimed that she found new historical evidence supporting the CFPB's funding mechanism. *See generally* Christine Kexel Chabot, *The Founders' Purse* (June 20, 2023), available at https://tinyurl.com/yjeu2474. But the statutes she cites are even less relevant than the others. For example, she contends that the Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, is on point. But it's not.

That was yet another statute relating to the national debt. It provided that when revenue exceeded expenditures during a year, a committee was to use the surplus to buy back outstanding debt at or below par value. *See* Act of August 12, 1790, 1 Stat. at 186. In other words, there was no blank check. Rather, it gave the committee a fixed amount to expend each year—the amount by which revenues outpaced expenditures. This is the opposite of the CFPB's funding mechanism. Professor Chabot's other examples are so far afield that they do not warrant a detailed explanation of how they are dissimilar to the CFPB's funding mechanism.

* * *

From our nation's founding until the 2008 financial crisis, no executive agency was funded like the CFPB is funded. The Fifth Circuit was thus correct to hold that there is no historical precedent supporting the CFPB's arguments. Combined with the text of the Appropriations Clause, the CFPB's funding mechanism is unconstitutional.

II. THE JUDICIARY MUST ENFORCE CHECKS AND BALANCES BETWEEN THE OTHER BRANCHES.

The professors lob another attack on the Fifth Circuit's decision. They claim that "judicial second-guessing of Congress's funding choices is at odds with the [Appropriation] Clause's history." Professors' Br.

11 (capitalization altered). But that is not what a ruling affirming the Fifth Circuit's decision would do.

The Constitution sets up ways for each of the three branches of government to check the power of the others. Particularly when it comes to disputes between the executive and legislative branches, there must be some ultimate arbiter that decides which party prevails.

The Framers agreed that the proper way to adjudicate many of these disputes is through the judicial branch. There, the courts can settle the dispute through a reasoned decision.

Two examples prove the point. Congress likes having power. But it often doesn't like the work that comes with that power. One solution to this problem was giving the Attorney General the ability to suspend deportation of an alien who was otherwise removeable. *See* 8 U.S.C. § 1254(c)(1) (1982). To maintain its power, Congress gave each house the ability to "veto" the Attorney General's decision to suspend a deportation. *See id.* § 1254(c)(2).

The House used its authority to "veto" the Attorney General's decision about once in every two hundred cases. *See INS v. Chadha*, 462 U.S. 919, 926 (1983) (citation omitted). Two of the individuals who Congress wanted deported despite the Attorney General's decision challenged the constitutionality of Section 1254(c)(2).

As the losing party usually does in separation-of-powers disputes, the House of Representatives argued that the case presented a political question that was outside the Court's Article III authority. *See Chadha*, 462 U.S. at 940. But, as the Court explained, "the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress." *Id.* at 942-43 (citation omitted).

The same understanding of judicial review applies here. This case is about whether an executive agency has power to fund itself without yearly appropriations or whether Congress must approve the funding. This is the type of purely legal question that the Framers trusted the judicial branch to decide. The argument that the Judiciary's deciding a case or controversy under Article III is somehow second-guessing Congress is just an attempt at avoiding judicial review of an unconstitutional funding mechanism. *See Chadha*, 462 U.S. at 942-43.

Recently, the Court has reaffirmed the principle that the judicial branch may resolve separation-of-powers disputes. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, 566 U.S. 189 (2015) a child's parents sought to enforce a Congressional statute requiring the Department of State to list "Israel" as the place of birth for those born in Jerusalem. The D.C. Circuit held that courts could not resolve the dispute. This Court reversed because "the only real question for the courts [wa]s whether the statute is constitutional." *Id.* at 196. Such decisions lie at the heart of the judicial power. *Id.* (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

Taken to its logical conclusion, the professors' argument would bar this Court from considering the constitutionality of any statute that becomes law. Every time this Court declares a statute unconstitutional it is, in the professors' words, "second-guessing" Congress's decision. This argument is nonsensical. Without the judicial branch's ability to consider the constitutionality of a statute, there would be no limits on Congress's power to enact laws. The professors' failure to realize this shows that their only goal here is to save the CFPB's structure, not advance the rule of law.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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