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 FOR NEW ENGLAND LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The New England Legal Foundation ("NELF") is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its members consist of business corporations, foundations, law firms, and individuals who believe in NELF's mission of promoting balanced economic growth, protecting the free-enterprise system, and de-

[1] No counsel for a party authored this brief in whole or in part and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission. S. Ct. Rule 37.6.

fending individual economic rights and the rights of private property. In service of its mission, NELF has filed numerous *amicus* briefs in this Court.

NELF appears as an *amicus* in this case because the Appropriations Clause (U.S. Const. art. I, § 9) is one of the textual bases for the separation-of-powers principles that are necessary to our system of ordered liberty. NELF submits this brief to explain why—contrary to the government's submission—the scope of the powers wielded by the Consumer Financial Protection Bureau ("CFPB") is relevant to this Court's analysis of whether that agency's funding structure runs afoul of the Appropriations Clause.

SUMMARY OF ARGUMENT

Although the CFPB indisputably has been vested with a unique and sweeping amalgamation of executive, quasi-legislative, and quasi-judicial powers, the government boldly contends that the agency's vast authority is irrelevant to the Appropriations Clause challenge in this case. U.S. Br. 35. That position cannot be reconciled with the origin and design of the Appropriations Clause, one purpose of which was to prevent the unbounded exercise of consolidated power. To argue that the Appropriations Clause is unconcerned with the power exercised by an agency or officer is to deny the very nature of the Clause.

The principal concern of the Appropriations Clause is the arrogation of power within the Executive Branch. That is apparent from the text and structure of the Appropriations Clause—which acts as a structural limitation on how money may be drawn from the Treasury—as well as from the historical roots of the Clause. And the legislative check imposed by the Appropriations Clause is intended to be both pervasive and ongoing, not subject to abdication by one Congress under the political sway of the sitting President.

Viewed in that light, there can be no serious debate that the breadth of the powers an agency enjoys and exercises is relevant to assessing whether that agency's funding structure is consistent with the Appropriations Clause. The very purpose of the Clause is to protect against Executive overreach, and thus assessing whether and to what extent the Executive has, in fact, overreached is a necessary step in understanding the precise limits of the Clause. If an agency possesses and exercises substantial authority, the limitations of the Appropriations Clause become all the more important. The greater the executive power wielded, the tighter the restrictions imposed by the Appropriations Clause.

These principles are front and center here. The CFPB represents the consolidation of power previously dispersed among several agencies. It has quasi-legislative rulemaking power, executive enforcement power, and quasi-judicial power to adjudicate administrative proceedings—and it exercises all of that power over a tremendous range of conduct. Moreover, the CFPB has demonstrated a willingness to exercise those powers to their full effect and has amassed even more power since its inception, confirming the importance of rigorously enforcing the limitations embodied in the Appropriations Clause.

The Court should not accept the government's invitation to turn a blind eye to the practical reality that the CFPB represents the precise kind of Executive overreach the Appropriations Clause was designed to prevent. The government offers no support for its argument, other than to suggest that this type of holistic analysis is "inconsistent" with a passing statement in

Collins v. *Yellen*, 141 S. Ct. 1761 (2021). U.S. Br. 35. But the Court's *dictum* in *Collins* that consideration of the scope of the agency's powers was not "dispositive" in that removal case (141 S. Ct. at 1784) plainly does not foreclose such consideration in the appropriations context, where the *inter*-Branch balance of powers is at stake. If the Appropriations Clause is to effect any meaningful limitation on Executive power, then the powers wielded by the agency must be considered in evaluating the constitutionality of that agency's funding structure.

ARGUMENT

I. The Nature and Scope of an Agency's Powers Are Relevant to Analysis Under the Appropriations Clause

The government takes the astonishing position that the scope of an agency's authority "is unrelated to any purported Appropriations Clause issue," and that "nothing in the constitutional text or history supports distinctions based on the size or nature of an agency's portfolio." U.S. Br. 35. That is wrong—both "text" and "history" confirm that the Appropriations Clause operates as an ongoing check against overreach and arrogation of power by the Executive. The nature of the authority wielded by the Executive is directly relevant to the function of the Clause.

A. The Appropriations Clause Makes Congress Responsible for Oversight of Executive Power

The government's error begins with its assertion that the Appropriations Clause imposes "no[] limit[ations]" on Congress when it is "making . . . appropriations" (U.S. Br. 16), that is, that legislative action can *never* violate the Appropriations Clause (*see id.* at 10–11;

Profs. Br. 4; Former Members Br. 5–6). That is incorrect—the Appropriations Clause was designed to protect against the Executive's arrogation of power in any form, whether facilitated by the Legislature or not.

1. The Appropriations Clause is not an affirmative grant of legislative power to Congress. It is not located in Article I, Section 8, in which the Constitution gives Congress various spending powers, including the ability "to pay the Debts and provide for the common Defence and General Welfare of the United States" (U.S. Const. art. I, § 8, cls. 1–2), and to make all laws "necessary and proper" for executing its enumerated powers (*id.*, cl. 18). The "power of the purse" is thus vested to Congress not through the Appropriations Clause, but through Section 8.

Instead, the Appropriations Clause appears in Article I, Section 9, as one of several *limitations* on the exercise of congressional power. *See, e.g.*, U.S. Const. art. I, § 9 (prohibiting Congress from enacting bills of attainder); *id.*, cl. 5 (prohibiting Congress from granting titles of nobility). The Clause thus acts as a "structural imperative" for Congress. Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1349–50 (1988).

The Clause is therefore "a bulwark of the Constitution's separation of powers among the three branches of the National Government." *U.S. Dep't of Navy* v. *Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012); *Cmty. Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB*, 51 F.4th 616, 637 (5th Cir. 2022). The Clause "function[s]" as a "prophylactic . . . that reinforces the Constitution's version of separation of powers by thwarting potential claims of inherent power." Gerhard Casper, *Appropriations of Power*, 13 U. Ark. Little Rock L.J. 1, 2 (1990);

Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 56 (2017). As this Court recently confirmed, the power of the purse is "[a]mong Congress's most important authorities." *Biden* v. *Nebraska*, slip op. at 24 (U.S. June 30, 2023). It is not a *pro forma* requirement for legislative action, but a substantive limitation on government action.

As with other separation-of-powers limitations, the Appropriations Clause dictates a balance of authority and prevents any Branch from disrupting that balance—even by willfully ceding its allocated powers and responsibilities to another Branch. *See New York* v. *United States*, 505 U.S. 144, 182 (1992); *Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (whether a "congressional cession of power is voluntary does not make it innocuous").

2. The history of the Appropriations Clause confirms that it was designed to impose meaningful restraints on the exercise of government power and a "responsibility" on Congress to effect those restraints. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213–14 (1st ed. 1833).

a. The Appropriations Clause has its roots in English parliamentary history. Throughout the Middle Ages, the British monarchy had its own source of revenues through various channels (e.g., rents and feudal dues). *See* 1 William Blackstone, Commentaries on the Laws of England 286, 289 (1791 ed.); F.W. Maitland, *The Constitutional History of England* 306–09 (1926). Over time, however, the monarchy became more dependent on Parliament to raise revenues. 2 W.S. Holdsworth, *A History of English Law* 366 (1909); Maitland, *supra*, at 306–09. Accordingly, Parliament began to use its "revenue-raising authority to exact legislative concessions from the Crown, threatening to withhold funds if their demands were not met." Colonel Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 28 (1998). The monarchy responded by raising its own revenues and diverting appropriations to other purposes beyond what Parliament had intended. Maitland, *supra*, at 308–09.

This power struggle was settled by the Glorious Revolution. Parliament, recognizing the importance of the purse, enshrined in the English Bill of Rights a precursor to the Appropriations Clause: "[L]evying money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is illegal." 1 W. & M., Sess. 2, c. 2, § 4 (1689). This provision gave rise to a new system of governance under which "[m]oney raised by taxation was appropriated to this purpose and to that, and a clause was inserted in the statute forbidding the Lords of the Treasury to use money for any other purpose than that for which it was appropriated." Maitland, *supra*, at 310. It was the "most important part of the work of every session" and was part of the reason Parliament was convened annually. *Id.* at 310, 296, 385. By granting appropriations for short durations, the House of Commons "forced regular negotiation with Parliament, and those negotiations often led to concessions." Chafetz, *supra*, at 51.

By the eighteenth century, the House of Commons had asserted exclusive control over the public finances, making it the "predominant partner" in British parliamentary governance. 10 W.S. Holdsworth, *A History of English Law* 584–85 (1938). Its direct control of the purse allowed it "to criticize all the acts of the executive government, to stop projects of which it disapproved," and "to force the executive to adopt policies of which it approved." *Id.* at 585. Because the King needed to return to Parliament for funding, the House "could always demand to see the accounts" of the Chancellor of the Exchequer and survey all executive activities. *Id.* at 588. The King's ministers, moreover—knowing their actions were "always open to criticism of the House"—were careful not act "indefensibl[y]," lest the House "insist upon [their] dismissal." *Id.* at 585. This leverage over the King and his subordinates gave the House of Commons "a decisive influence on the executive government," which it "jealously guarded." 10 Holdsworth, *supra*, at 585–86.

b. This history informed and ultimately gave birth to the Appropriations Clause as memorialized in the Constitution. Although the Framers understood the need for a strong Executive, they were also cautious of consolidating too much power within the Executive, lest the new government devolve into the kind of despotic regime from which the colonies had just liberated themselves. The Crown's influence over life in the colonies had already contributed to such "social and political rancor," that Americans by 1776 "felt compelled to isolate their legislatures from any sort of executive influence or impingement." Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 158 (2011).

Accordingly, while the Framers gave the President a broad grant of executive power, they ensured that the strings of the federal purse would remain with the direct representatives of the People, not the Executive. As had proven true in English history, control of money would allow the People to "enlarg[e] the sphere of [their] activity and importance," while also "reducing . . . overgrown prerogatives of the other branches of the government," namely the Executive. The Federalist No. 58 (James Madison). They understood the power of the purse would be "the most complete and effectual weapon" for Congress—*i.e.*, the "immediate representatives of the people"—to obtain "redress of every grievance, and for carrying into effect every just and salutary measure." *Ibid.*

Control over public finances was a key issue in debates to ratify the Constitution. "[T]he separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." Chafetz, *supra*, at 57. In response to concerns that the President would become a de facto king, James Madison responded that "[t]he purse is in the hands of the representatives of the people. They have the appropriation of all moneys." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 393 (Jonathan Elliot ed., 2d ed. 1907). Likewise, Alexander Hamilton—a proponent of a strong executive—recognized that "[t]he legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78 (Alexander Hamilton).

As Joseph Story explained a half century later in his famous *Commentaries*: The Appropriations Clause creates a check "upon profusion and extravagance, as well as upon corrupt influence" and "arbitrary" government, like that of the "prince"; Congress is therefore made the "guardian" of the public fisc. 3 Story, *supra* § 1342, at 213.

3. What text, structure, and history all show is that the Appropriations Clause is designed to operate as an ongoing check by the Legislature over the power of the

Executive. Each Congress retains the power to "define the character, extent, and scope of authorized activities." Stith, *supra*, at 1356; *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury"). And one Congress cannot bind a future Congress. *See United States* v. *Winstar Corp.*, 518 U.S. 839, 873 (1996); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.) ("[O]ne legislature cannot abridge the powers of a succeeding legislature"). Hence, if the Executive acts contrary to the political will of Congress, each chamber retains an effective "veto" over the Executive's activities by refusing to continue funding such activities. *See* 2 The Records of The Federal Convention 1787, at 275 (Max Farrand ed., 1911) (noting that there are "two strings, one of which [i]s in the hands of the H. of Reps").

Because the Clause operates by forcing the Executive back to Congress periodically, the longer Congress designates for any given appropriation period, the more diluted its check becomes. The Executive faces fewer impediments in that instance and can more easily expand its powers before any contemporary political headwinds take effect. An annual appropriation, by contrast "resets to zero in the absence of congressional action and thereby forces the president to negotiate with Congress each year, just as post-Glorious Revolution monarchs were forced to negotiate annually with Parliament." Chafetz, *supra*, at 62. For that reason, early Congresses typically limited appropriations to one year. *Ibid.*; *see also* Stith, *supra*, at 1354 n.53 ("From the First Congress, operating funds have usually been appropriated annually"); Allen Schick, Cong. Rsch. Serv. Rep. No. 84-106, *Legislation, Appropriations, and Budgets: The Development of Spending Decision Making in Congress* 6–26 (1984).

In short, Congress has an ongoing *responsibility* (not just a power) to control the Nation's finances. That responsibility arises from the long-recognized need to cabin executive power, lest the Executive be unaccountable to the people.

B. The Court Can Undertake a Holistic Review of the CFPB in its Separation-of-Powers Analysis

Against this textual, structural, and historical backdrop, the government's assertion that the Appropriations Clause is unconcerned with the nature and scope of the authority being exercised is plainly incorrect, and even somewhat bizarre. U.S. Br. 35. The entire purpose of the Appropriations Clause is to give Congress an ongoing check against the unauthorized, excessive, or oppressive use of Executive authority. It cannot be gainsaid that the extent of the authority in question is relevant to the measures needed to control it, and for the government to maintain otherwise is to untether the Clause from its purpose and context.

1. As set forth above, the Appropriations Clause serves two purposes relevant here. The first is to provide a check on "overgrown prerogatives of the other branches of the government." The Federalist No. 58 (James Madison). The second is to make the Executive accountable to Congress, giving the Legislature the power to "stop projects of which it disapprove[s]" and a "decisive influence on the executive government" (10 Holdsworth, *supra*, at 585).

Plainly, the level of power the Executive seeks to exercise is germane to both of those purposes. The greater the effort of the Executive to expand its influence and effect "prerogatives" outside its constitutionally delegated scope of authority, the more important the Appropriations Clause's limits on those efforts. And the more significant the "projects" undertaken by the Executive, the more power Congress must retain to impede those projects out of step with the will of the people. In other words, for the Appropriations Clause to act as a functional guard against Executive overreach, its contours must be defined in view of such overreach.

That is consistent with the purpose of all separation-of-powers principles, which is to prevent "[t]he *accumulation* of all powers, legislative, executive, and judiciary, in the same hands," which "may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison) (emphasis added); *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("Concentration of power in the hands of a single branch is a threat to liberty."); *Mistretta* v. *United States*, 488 U.S. 361, 381 (1989) (the separation of powers is a "security against tyranny—the accumulation of excessive authority in a single Branch"). The greater the accumulation of power—such as, here, the consolidation of quasi-legislative, quasi-judicial, and quintessentially executive powers into a single agency—the greater the threat of tyranny and the more essential checks against that tyranny become. Put differently, Congress has less flexibility with respect to the timing, source, and specificity of agency funding when that agency carries out core executive tasks.

This Court recognized a similar proposition in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020). There, this Court indexed the sweeping power the CFPB enjoys, from broad rulemaking authority, to "potent enforcement powers," to "extensive adjudicatory authority." *Id.* at 2193. Then, in holding that the CFPB's structure violated the separation of powers, the Court emphasized that the Director—not removable by the President at the time—could "issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties," all without any accountability. *Id.* at 2203–04.

Indeed, the expansion of the administrative state in the modern era makes these checks all the more critical. As the Chief Justice has observed, the Framers "could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities"—not only do these agencies have an unprecedented "scope of . . . authority," they also have "practical independence." *City of Arlington* v. *FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting); *see also FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("[A]dministrative bodies . . . have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . .); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994). Congress's most effective control over the administrative state continues to be the power of the purse. *See, e.g.*, Bruce Yandle, *Regulators, Legislators and Budget Manipulation*, 56 Pub. Choice 167, 178 (1988) ("[B]udget manipulation is the most effective sanction available to Congress."); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary*

Autonomy with Removal Protection, 125 Harv. L. Rev. 1822, 1824–27 (2012).

2. The government argues that consideration of the CFPB's sweeping authority would be "inconsistent" with a statement in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021). *See* U.S. Br. 35. But *Collins* involved neither the CFPB nor the Appropriations Clause. The Court's observation that the scope of a different agency's authority was not "dispositive" (141 S. Ct. at 1784) of a different constitutional challenge does not suggest, let alone require, that the Court should ignore the vast powers wielded by the CFPB in evaluating the Appropriations Clause issue presented here.

In *Collins*, the Court held that Congress violated the separation of powers by imposing for-cause restrictions on the President's ability to remove the head of the Federal Housing Finance Agency (FHFA). *Id.* at 1784. But the holding in that case was based on a "straightforward application" of the Court's reasoning in *Seila Law*: "The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power." *Ibid.* In short, the FHFA clearly did *not* fall within one of the two exceptions to the removal power, and that fact was case-determinative. *Ibid.*

The Court-appointed *amicus* in *Collins* had raised a second argument—that the FHFA was distinguishable from the CFPB with respect to the power it wields and thus the removal restrictions were constitutional. 141 S. Ct. at 1784. In rejecting that argument, the Court explained that "the nature and breadth of an agency's authority is not *dispositive* in determining whether Congress may limit the President's power to remove its head." *Ibid*. (emphasis added). But that the scope of power was not *dispositive* of the removal issue in *Collins* does not suggest that it is *irrelevant* in all circumstances, particularly since the Court had already decided the removal issue on a straightforward application of *Seila Law*.

Moreover, while both the Appropriations Clause and the removal power implicate the separation of powers, the removal power is an *intra*-Branch check, whereas the Appropriations Clause is an *inter*-Branch check. It makes perfect sense that the nature of the Executive authority concerned is less relevant when the question is how that authority ought to be managed within the Executive Branch. But when the Executive is attempting to wrest authority away *from Congress* (or where a previous Congress is attempting to cede authority to the Executive), and the question is whether the constitutional requirement of congressional appropriations has been satisfied, the nature and extent of the authority wrested (or ceded) is unequivocally and emphatically relevant.

II. The CFPB Wields, Amasses, and Abuses Significant Authority

The government urges the Court to disregard the nature and scope of the CFPB's authority presumably because it understands how damning those facts are to its case. Both in the breadth of its authority and in the manner the agency has exercised it, the CFPB embodies the very breed of Executive overreach that the Appointments Clause was designed to combat. Accordingly, this Court should afford Congress less freedom to broadly define the terms of the CFPB's funding.

A. The CFPB Wields Tremendous Power

This Court has already recognized that the CFPB is an agency with remarkable powers and independence, and without historical parallel. *See Seila Law*, 140 S. Ct. at 2204. As then-Judge Kavanaugh observed, "the CFPB wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). Its powers are "massive in scope" and "concentrated in a single person." *Id.* at 166. It contains elements of each branch of government all in one—it has a "staggering amalgam of legislative, judicial, and executive power in the hands of a single Director." *CFPB* v. *All Am. Check Cashing, Inc.*, 33 F.4th 218, 221-22 (5th Cir. 2022) (Jones, J., concurring). In short, the agency represents everything the Appropriations Clause was meant to resist.

1. The CFPB wields quasi-legislative, executive, and quasi-adjudicatory power, and it does so over a vast jurisdiction covering eighteen federal consumer laws. 12 U.S.C. §§ 5481(12)(A)–(R). The government argues that the CFPB "inherited most of its authorities from agencies with similar funding mechanisms" (U.S. Br. 36)—overlooking the important fact that those powers were previously *dispersed* across seven different agencies, but are now consolidated into the CFPB. Those powers include, for example, the authority to implement regulations regarding "enumerated consumer law[s]" previously under the purview of the Federal Trade Commission and to enforce regulations issued by the Federal Trade Commission regarding unfair or deceptive acts or practices regarding consumer financial products. *See* 12 U.S.C. § 5581(b)(5); *see also id.* § 5581(b)(7) (transferring similar powers from the Department of Housing and Urban Development). The Act further gives the CFPB new jurisdiction over "unfair, deceptive, or abusive" consumer lending practices, *id.* § 5531(a)—a highly subjective and open-ended grant of power, susceptible to even more expansion.

The CFPB has broad quasi-legislative power to bind the public and control private behavior through rulemaking. 12 U.S.C. § 5512(b). The agency is authorized to promulgate any rule that it deems "necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof," a grant of authority that, as noted above, combines the existing powers of no fewer than seven agencies with a new grant of broad power to regulate "unfair" practices. *Ibid.* Breaches of those rules carry significant consequences: Even innocent violations of CFPB regulations carry a civil penalty of as much as $5,000 in fines for *each day* a violation is ongoing (*id.* § 5565(c)(2)(A)), while offenders who "knowingly" breach CFPB rules face fines of up to $1 million for each day (*id.* § 5565(c)(2)(C)).

The CFPB also has significant enforcement authority, with the power to initiate investigations and issue subpoenas. 12 U.S.C. § 5562(a)–(b). It can issue a civil investigative demand to anyone who "may have any information[] relevant to a violation" of consumer financial laws, even if the target is not alleged to itself have committed any violation of law. *Id.* § 5562(c). It can bring suit against alleged violators in federal court (*id.* § 5564) or in its own courts (*id.* § 5563). And it has the power "to seek a dizzying array of penalties, including restitution, rescission of contracts, disgorgement, injunctive relief, and civil penalties." *All Am. Check Cashing, Inc.*, 33 F.4th at 222 (Jones, J., concurring).

Finally, the CFPB has its own in-house agency adjudication system, with the power to grant itself any appropriate legal or equitable relief. 12 U.S.C. § 5563. The CFPB director initiates those proceedings, and also acts as the final decision-maker, thus combining the roles of prosecutor and adjudicator into a single role. *Ibid.*

2. These tripartite powers are coupled with a unique level of independence from supervision and political accountability. 12 U.S.C. § 5491(a); 44 U.S.C. § 3502(5). Rather than create the traditional, bipartisan "independent commission," in which several commissioners can check and balance each other, Congress vested the CFPB's power in a single director (12 U.S.C. § 5491(b)(1)), who "other than the President . . . enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government" (*PHH*, 881 F.3d at 166 (Kavanaugh, J., dissenting)). And ironically, in striking a portion of the statute in *Seila Law* to render the Director wholly accountable to the President, this Court further cemented the President's hold on the agency's broad swath of powers and arguably exacerbated the Appropriations Clause problem.

The heart of the CFPB's independence is its power to draw money from the government at its discretion. Under the Dodd-Frank Act, the Director can draw funds from the Federal Reserve, at his discretion and in perpetuity, provided only that the annual draws do not exceed 12% of the Federal Reserve's operating expenses that 2009, adjusted for inflation. 12 U.S.C. § 5497(a)(1)–(2). The statute creates "a separate fund" for the CFPB, entirely "under the control of the Director" and available to him without any further act of Congress, allowing the Director to "roll over" any funds that are unused from prior years. *Id.* § 5497(b)(1), (c)(1). Additionally, the Director can use civil penalties the agency obtains from enforcement actions to supplement the agency's resources for redressing consumer harm, educating consumers, and offering financial literacy programs (*id.* § 5497(d))—even if those activities are not core executive functions, the agency's ability to fund them through enforcement actions necessarily frees up other funds in the CFPB's deep pockets for whatever purpose the Director sees fit.

The structural independence of the CFPB from congressional oversight is no accident. The architects of the CFPB gave the agency budgetary independence precisely *because* they wanted to avoid the accountability to Congress that the Appropriations Clause is meant to ensure. For example, the Senate Banking Committee described the CFPB's funding as "independent of the Congressional appropriations process." S. Rep. No. 111-176, at 163 (2010). The CFPB likewise touts its ability to obtain "funding outside the appropriations process." CFPB, *Strategic Plan, Budget, and Performance Plan and Report* 81 (Apr. 2013); *see also* CFPB, *Financial Report of the Consumer Financial Protection Bureau* 45 (Nov. 2021), https://perma.cc/K4AC-TFFH (describing the CFPB as a "non-appropriated bureau"). And not only does the Director not need to abide by the normal appropriations process, but the Dodd-Frank Act expressly *protects* his decisions from review by congressional committees on appropriations. 12 U.S.C. § 5497(a)(2)(C). Thus, by design, Congress has no ongoing, effective check on the agency's exercise of its vast powers.

In defense of the CFPB, one set of *amici* cites Founding-era departments that were given the ability to selffund through duties and collections. Profs. Br. 22–31. These purported exceptions prove the point—none of them wielded anything close to the scope of authority the CFPB does.

The Customs Service (Profs. Br. 22–24), for example, dealt with "external" duties rather than "internal" taxes—and these "import duties held the virtue of minimal intrusiveness" on domestic activity, affecting only coastal merchants. Aaron T. Knapp, *From Empire to Law: Customs Collection in the American Founding*, 43 Law & Soc. Inquiry 554, 555 (2018). The Distilled Spirits Act revenue officers (Profs. Br. 25–26) had narrow jurisdiction to collect duties only on distilled spirits, subject to strict congressionally-imposed rules regarding the amount of duties, documentation required, methods of forfeiture, etc. Act of Mar. 3, 1791, ch. 15, §§ 1–62, 1 Stat. 199, 199–214.

The *amici* further cite the President's ability to "make allowances" out of the annual duties for the administrative activities (Profs. Br. 25)—but, unlike the CFPB, this self-funding was hard-capped at $45,000 per year without annual increase, there was no revolving account in which funds could be rolled over, and the net receipts were appropriated specifically for the payment of certain foreign loans and other public debt. Act of Mar. 3, 1791, ch. 15, §§ 58–62, 1 Stat. at 213–14. The Post Office (Profs. Br. 26–27) likewise had similar funding caps and restrictions (*see* Act of Feb. 20, 1792, ch. 7, §§ 3, 4, 8, 1 Stat. 232, 234–35; *see also* Act of May 8, 1794, ch. 23, §§ 8, 23, 1 Stat. 354, 358–59, 363 (imposing cap on commissions, with no annual increase, and requiring the Postmaster General to pay the balance of revenues into the treasury)), and was subject to direct oversight by a standing congressional committee (*see*

Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 Yale L.J. 1636, 1724 (2007)).

In short, these agencies were much less powerful than modern administrative agencies, and had much less funding freedom, particularly when compared to independent agencies like the CFPB. The scope of their jurisdiction was narrower and, while they exercised some enforcements powers, they did not wield congressional and judicial power, too, like the CFPB.

B. The CFPB Has Exercised and Expanded Its Power Aggressively

In light of the vast amount of executive, quasi-legislative, and quasi-adjudicatory power the agency wields—almost entirely free from congressional oversight—it is unsurprising that the CFPB has exercised those powers to their farthest reaches. It has resisted congressional supervision, acted in secret, and amalgamated more power through unsupported interpretations of the law. The CFPB is a paradigmatic example of why the Framers insisted on a robust Appropriations Clause and of why rigorous enforcement of the Clause is necessary.

1. Legislative rulemaking is a taxing and uncertain affair. Rulemaking is constrained by the Administrative Procedure Act ("APA"), which requires notice-and-comment, consideration of all relevant comments, and a written adopting release. *See generally* 5 U.S.C. § 701 et seq. This entire process—and the output—is then reviewable in federal court, which can strike down the rule as arbitrary and capricious or contrary to law. *See id.* § 702. Thus, years of work and substantial resources can go wasted if, when it is all said and done, a court overrules the agency and vacates the rule.

The CFPB has devised a way around these intentionally obtrusive barriers through the prolific use of interpretive rules and advisory opinions. *See, e.g.*, Fair Debt Collection Practices Act (Regulation F): Time-Barred Debt, 88 Fed. Reg. 26,475 (May 1, 2023); Real Estate Settlement Procedures Act (Regulation X): Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators, 88 Fed. Reg. 9,162 (Feb. 13, 2023).[2] Although the agency purports to use this mechanism only to clarify existing regulations, many of these opinions contain novel interpretations of law and thus expand the agency's powers. For example, in a recent opinion, the agency described activities related to mortgage shopping and settlement services, which it claims violate the Real Estate Settlement Procedures Act ("RESPA").[3] The underlying statute dates back to the early 1970s and was last amended in 1983 (*id.* at 4–5), but the advisory opinion nonetheless "interprets" the statute to apply to modern digital platforms, purportedly based on a 1996 policy statement issued by the Department of Housing and Urban Development (*id.* at 6–9). Plainly, that effort has significant consequence for numerous private parties.

Unlike formal rulemaking, these documents can be issued without notice-and-comment and generally are not subject to judicial review. *See, e.g.*, *Ctr. for Auto Safety* v. *Nat'l Highway Traffic Safety Admin.*, 452 F.3d

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[2] Advisory opinions available at https://www.consumerfinance.gov/compliance/advisory-opinion-program/.

[3] https://files.consumerfinance.gov/f/documents/cfpb_respa-advisory-opinion-on-online-mortgage-comparison-shopping-tools_2023-02.pdf.

798, 800 (D.C. Cir. 2006). They are thus an ideal tool for evading both *ex ante* and *ex post* restraints on agency action.

Compounding this overreach, the CFPB frequently uses such advisory opinions to effectively "expand its jurisdiction to persons and businesses either not covered or even specifically excluded from its jurisdiction by Dodd-Frank." U.S. Treasury Dep't, *A Financial System That Creates Economic Opportunities* 85 (June 2017). For example, the CFPB has "attempted to extend its reach to entities including college accreditors and auto dealers and it has taken these actions outside the discipline and transparency of notice-and-comment rulemaking." *Ibid.* As one court found, none of the laws that the CFPB implements "even tangentially implicate the accrediting process of for-profit colleges." *CFPB* v. *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 83 (D.D.C. 2016), *aff'd on other grounds*, 854 F.3d 683 (D.C. Cir. 2017). And while Congress conferred the CFPB with authority to regulate auto lenders, it expressly excluded jurisdiction to regulate auto dealers. 12 U.S.C. § 5519(a).

The CFPB is thus able to avoid the traditional checks on agency power—APA rulemaking, limitations in the organic statute, and congressional review of final rules—through the use of advisory and interpretive opinions. Ordinarily, the backstop for these checks would be the power of the purse: Even if Congress could not directly stop the CFPB from overstepping its boundaries, it could indirectly do so simply by refusing to fund the CFPB until it altered its behavior. But the Dodd-Frank Act stymies that effort, stopping Congress from exercising that check unless it can muster enough support from both chambers to overcome a presidential veto.

2. The CFPB has likewise exercised its enforcement power liberally, initiating highly aggressive enforcement actions targeting a wide variety of practices, including some that are standard in the financial services sector.

According to a 2017 Treasury Report, the CFPB has "sanctioned companies for complying in good faith with an interpretation adopted by a previous agency with respect to conduct that pre-dated the CFPB's establishment." U.S. Treasury, *supra*, at 82–83. In *PHH*, the CFPB prosecuted a company after reversing a longstanding statutory interpretation and then applying its new interpretation retrospectively to conduct that was previously permissible. *PHH Corp.* v. *CFPB*, 839 F.3d 1, 12 (D.C. Cir. 2016). The D.C. Circuit ultimately struck down that effort as unlawful. *PHH*, 881 F.3d at 83; *see also Accrediting Council*, 183 F. Supp. at 79 (criticizing the CFPB for "plow[ing] head long into fields not clearly ceded to them by Congress").

When the CFPB initiates enforcement proceedings in its home forum, moreover, it has control of and can exploit procedural rules to its advantage. In 2022, for example, the CFPB revised its Rules of Practice for Adjudication Proceedings—without notice-and-comment—to give the Director the power to review and override ALJ decisions on dispositive motions. Interim Final Rule: Rules of Practice for Adjudication Proceedings, CFPB, 87 Fed. Reg. 10,028, 10,032 (Feb. 22, 2022). This system is highly problematic, given that it is the Director who initiates these in-house adjudications *qua* prosecutor. *See Williams* v. *Pennsylvania*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case"). The results are predictable: In *PHH*, an ALJ found the respondent liable and ordered a $6.4 million disgorgement, but based on an interpretation of the law an Article III court ultimately adjudicated to be incorrect, the CFPB Director overruled the ALJ and ordered disgorgement of $109 million. *PHH*, 881 F.3d at 83.

The CFPB has also used its control over in-house adjudications to set highly expedited schedules, making it much more difficult for respondents to prepare their defenses. U.S. Treasury, *supra*, at 84. And it has taken "the remarkable position that Dodd-Frank does not impose any statute of limitations on administrative enforcement actions, regardless of the limitations period in the underlying statute." *Ibid.*

3. The CFPB has engaged in a range of other conduct that bespeaks the absence of meaningful congressional control. For example, one court struck down a civil investigative demand issued by the CFPB for failure to advise the target of the nature of the allegedly unlawful conduct. *See CFPB* v. *Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683, 692 (D.C. Cir. 2017). And just weeks ago, the Eleventh Circuit affirmed a dismissal sanction against the CFPB for exhibiting "willful disregard" for the district court's discovery orders, including through "obstructionist" and "contumacious" conduct. *See CFPB* v. *Brown*, 69 F.4th 1321, 1326, 1328, 1332 (11th Cir. 2023).

Finally, the CFPB has resisted legislative efforts to probe its actions, often failing to respond to congressional inquiries. For example, in 2016, the CFPB refused to cooperate with a House Financial Services Committee subpoena investigating a settlement with

Wells Fargo in an enforcement action. Staff of H. Comm. on Fin. Servs., Subcomm. Oversight & Investigations, *Was the "Cop on the Beat"? Interim Majority Staff Report on the Wells Fargo Fraudulent Account Scandal* (June 6, 2017), https://perma.cc/98UZ-GEN5. Representatives from the CFPB refused to answer questions from Congressional Staff about the investigation, citing a lack of authorization. *Id.* at 5–8. The subcommittee then reached out to the CFPB Director and requested that he participate and authorize document productions. *Ibid.* After months of delay, he responded to the document request with no internal CFPB documents, and thus none relevant to the investigation. *Ibid.* The Committee then subpoenaed the records, and yet the CFPB produced records that Wells Fargo had already produced to the Committee—records the CFPB knew that Wells Fargo had already produced. *Ibid.* The Staff report found that the Director was in default and recommended contempt proceedings. *Id.* at 13.

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The point of these examples is not to show whether the CFPB is a good agency or a bad one, or whether its work is important to society or not. The point is that the agency has acted exactly as one would expect an agency with vast authority to act if set free from any ongoing supervision from Congress. The government's insistence that the Court ought to turn a blind eye to the practical reality that the CFPB is engaged in the precise kind of behavior the Appropriations Clause is designed to guard against cannot be squared with any rational or commonsense view of the Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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