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 FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

HELGI C. WALKER
Counsel of Record
LUCAS C. TOWNSEND
RUSSELL BALIKIAN
LOCHLAN F. SHELFER
NATHANIEL J. TISA
HADHY H. AYAZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3692
HWalker@gibsondunn.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are 21 former members of Congress who have direct experience with the congressional appropriations process and, in some cases, also served in significant oversight roles with respect to the United States financial-services industry. *Amici* are intimately familiar with the Consumer Financial Protection Bureau ("CFPB") and its unprecedented insulation from the appropriations process and other mechanisms of congressional oversight and accountability. Many *amici* considered and voted on the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, and some served on committees with jurisdiction over financial regulatory agencies. Several *amici* sponsored bills that sought to repeal or modify portions of the Dodd-Frank Act, including proposals that sought to eliminate the CFPB's independent funding and subject the agency to the regular appropriations process. *Amici* know firsthand the challenges of persuading both chambers of Congress to approve such appropriations-restoring legislation and persuading or overriding the President to sign such legislation into law. As former members of Congress, *amici* have strong interests in promoting adherence to the Appropriations Clause, thereby protecting the Constitution's separation of powers and preserving individual liberty.

A full list of *amici* appears in the Appendix.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The Appropriations Clause is one of the most important structural features of our Constitution's separation of powers. It puts Congress in charge of appropriating funds for federal agencies and, at the same time, precludes the Executive Branch from exercising that power. This separation of financial powers is the primary means for holding Congress accountable to the voters for funding government policies and operations, but also operates as a check on the President's actions. As this Court long ago recognized, "[a]ny other course would give to the fiscal officers a most dangerous discretion." *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850).[2]

The CFPB's self-funding mechanism is an unprecedented departure from the plain text of the Appropriations Clause, as the Fifth Circuit correctly recognized below. The Director of the CFPB exercises core executive powers in administering and enforcing a wide swath of consumer-finance laws, yet Congress has not appropriated a penny for the CFPB's activities since its inception. 12 U.S.C. § 5497(e)(2). Instead, the Director funds these activities by unilaterally drawing hundreds of millions of dollars each year from the Federal Reserve System. *Id.* § 5497(a)(1). The Board of Governors of the Federal Reserve System generates these funds by assessing fees on federal reserve banks. *Id.* § 243. The federal reserve banks, in turn, generate income primarily from the buying and selling of debt securities through open-market operations. This multi-layered funding structure ensures that the CFPB's actions are completely divorced

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[2] All internal quotation marks, citations, and footnotes are omitted unless otherwise indicated.

from the congressional appropriations process and insulated from accountability to an unprecedented level by *multiple* degrees of independent funding. Moreover, the CFPB can accumulate any unspent funds in an uncapped account at the Federal Reserve, invest those funds to earn additional income, and use those funds and earnings in the Director's discretion to carry out the agency's activities in future fiscal years—all without *any* congressional involvement.

No other Executive Branch agency in the history of the Republic has enjoyed comparable funding autonomy. No agency enjoys the CFPB's automatic entitlement to demand funds, without any congressional review, that were themselves collected outside of congressional appropriations, and to create a self-directed endowment expendable at the CFPB Director's discretion for future years. Furthermore, the CFPB Director and the fiscal resources at his disposal are, since *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2201 (2020), necessarily subject to direct presidential control—thus placing in the President's hands the twin powers of the purse and the sword. This consolidation of power is the very evil that the Appropriations Clause was meant to prevent.

None of this was an accident. The proponents of the Dodd-Frank Act *intended* to create a powerful executive agency outside of the normal constitutional channels for funding accountability. And the seriousness of this deliberate separation-of-powers violation calls for a meaningful remedy to prevent future constitutional violations of this sort and to incentivize private challenges when the political branches fail to stay in their constitutional lane. When agencies act unlawfully, the well-established remedy is for courts

to set aside the agency action—by, for example, vacating a challenged regulation or dismissing a pending enforcement action. This Court's precedents for remedying structural constitutional violations require similar relief. Here, a meaningful remedy for this egregious violation is crucial for those who have preserved timely constitutional objections to the CFPB's Payday Lending Rule. As Respondents explain, that remedy is vacatur of the Rule. Without an effectual remedy, injured parties would have little incentive to challenge violations of the separation of powers when the political branches tolerate such infringements.

ARGUMENT

I. THE CFPB'S FUNDING MECHANISM VIOLATES THE APPROPRIATIONS CLAUSE.

"Among Congress's most important authorities is its control of the purse." *Biden* v. *Nebraska*, 2023 WL 4277210, at *14 (U.S. June 30, 2023). The Constitution mandates that "*No Money* shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7 (emphasis added). This requirement imposes an affirmative obligation on Congress to exercise control over and take responsibility for federal expenditures, including for federal agencies. This crucial duty reflects the ancient principle that the sword and the purse must never be held in the same hands—a principle that long predated even the Constitution's framing.

The CFPB is a federal agency wielding "significant executive power," *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2201 (2020), and thus its funding is properly subject to the constitutional requirement of congressional appropriations. The Dodd-Frank Act, however, violates this constitutional requirement by

giving the CFPB—and thus the Executive Branch—a perpetual entitlement to hundreds of millions of dollars that the Director of the CFPB may unilaterally demand from the Federal Reserve each year. 12 U.S.C. § 5497(a)(2). Thus, the CFPB's funding authority is protected by *multiple* levels of insulation from funding accountability: The CFPB has the power to self-fund by demanding funds from the Federal Reserve, which itself is independently funded through assessments on federal reserve banks that are themselves self-funded largely through open-market operations. *Id.* § 243. Congress may not so much as "review" the CFPB's budget, *id.* § 5497(a)(2)(C), and any budgetary surpluses revert not to the U.S. Treasury but to an independently maintained account for the CFPB to use as a self-directed endowment for future years, *id.* § 5497(b)–(c).

This is not how our separation of powers is supposed to work. The unprecedented departure from the requirements of the Appropriations Clause is unconstitutional.

A. The Framers well understood the fundamental principle that the legislature must maintain control over governmental spending to protect individual liberty. During the Summer of 1787, George Mason explained that "[t]he purse & the sword ought never to get into the same hands (whether Legislative or Executive)." 1 *The Records of the Federal Convention of 1787*, at 139–40 (Max Farrand ed., 1937). For this reason, the Framers proposed the Appropriations Clause, which places the funding power exclusively in Congress's hands.

The Constitution's champions continually repeated this axiom during the ratification debates. At the Virginia Convention on June 14, 1788, James

Madison defended the Constitution by pointing out that it embodied "the maxim, that the purse and sword ought not to be put in the same hands"; that is, "that the sword and purse are not to be given to the same member." 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 393–94 (Jonathan Elliot ed., 1891) ("*Elliot's Debates*"). In "the British government, . . . [t]he sword is in the hands of the British king; the purse in the hand of the Parliament," and so would these powers be separated under the proposed constitutional system. *Ibid.*; *see also* James Madison, *Letters of Helvidius, No. 1*, Gazette of the United States (Aug. 24, 1793) (describing the "principle in free government" that "separates the sword from the purse"), *reprinted in* 6 *The Writings of James Madison* 138, 148 (Gaillard Hunt ed., 1906). Alexander Hamilton, at the New York Convention, similarly underscored that "you shall not place these powers either in the legislative or executive, singly; neither one nor the other shall have both, because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny." 2 *Elliot's Debates* 348–49.

This Court, too, has long recognized the importance of the principle that Congress alone, and not officers within the Executive Branch, must authorize the withdrawal and use of particular public funds. *See*, *e.g.*, *Bradley* v. *United States*, 98 U.S. 104, 112 (1878) ("Moneys not appropriated cannot be drawn from the treasury."); *Knote* v. *United States*, 95 U.S. 149, 154 (1877) ("Moneys once in the treasury can only be withdrawn by an appropriation by law."); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("However much money may be in the Treasury at any one

time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned.").

This limitation, established by the Appropriations Clause, was intended both "as a restriction upon the disbursing authority of the Executive department," *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937), and as a duty on the part of Congress to "assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents," *OPM* v. *Richmond*, 496 U.S. 414, 428 (1990); *see also* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1346, 1394 (1988). As Justice Story explained, to preserve "in full vigor the constitutional barrier between each department," the Constitution grants Congress "a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable." Joseph Story, *Commentaries on the Constitution of the United States* § 531, at 372 (1833). St. George Tucker likewise characterized the Appropriations Clause as "a salutary check" on "any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make," thereby securing "the right of the people," through their elected representatives, to "be actually consulted upon the disposal of the money which they have brought into the treasury." St. George Tucker, *Views of the Constitution of the United States* 298 (1803).

The Framers knew firsthand how crucial it was to separate the power to appropriate funds from the power to use those funds in enforcing the law against individuals. "The Framers placed the power of the

purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power. *Noel Canning* v. *NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). The delegates to the Constitutional Convention gave Congress the sole power to provide "the supplies requisite for the support of government" because they saw how "that powerful instrument," in the hands of Parliament, had overcome the "overgrown prerogatives" of the British monarch. The Federalist No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961). The Appropriations Clause is therefore "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." *Ibid.*; *see also* Baron de Montesquieu, *The Spirit of the Laws* 119 (1748) (Thomas Nugent trans., 1793) ("Were the executive power to determine the raising of public money otherwise than by giving its consent, liberty would be at an end . . . because the executive power would be no longer dependent.").

Thus, as then-Judge Kavanaugh recognized, the legislature's "exclusive power over the federal purse" stands as "one of the most important authorities allocated to Congress" in the Constitution. *Dep't of Navy* v. *FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012); *see also* *Hart's Adm'r* v. *United States*, 16 Ct. Cl. 459, 484 (1880) ("The absolute control of the moneys of the United States is in Congress."), *aff'd*, 118 U.S. 62 (1886). The Appropriations Clause acts as a "bulwark of the Constitution's separation of powers" that is "particularly important as a restraint on Executive Branch officers." *Dep't of Navy*, 665 F.3d at 1347. "Any other course would give to the fiscal officers

a most dangerous discretion." *Reeside*, 52 U.S. (11 How.) at 291.

B. By vesting the duty of appropriation in Congress alone, the Appropriations Clause requires that the most politically accountable branch retain oversight of the federal fisc and the ability to check the exercise of executive power. But in designing the CFPB, the 111th Congress chose to disarm itself and future Congresses and to abdicate its duties under one of the Constitution's foremost structural protections. This law violated the Appropriations Clause in unprecedented fashion by insulating the CFPB from any funding accountability with *multiple* layers of fiscal independence. Congress even expressly waived its right to review the CFPB's budget or to reallocate unused funds, further abdicating Congress's exclusive power of the purse. Congress then exacerbated the constitutional violation by delegating the funding power to the Executive Branch, thereby placing the powers of the purse and the sword in the same hands.

1. The CFPB's funding structure is unique and unprecedented, which is itself a "telling indication of [a] severe constitutional problem." *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)). Unlike any other agency, the CFPB's funding is protected by several layers of insulation from fiscal accountability: Congress authorized the CFPB to unilaterally appropriate hundreds of millions of dollars each year directly from the Federal Reserve System, which *itself* is funded outside of the appropriations process through assessments on federal reserve banks, which are, in turn, largely funded by open-market operations and *not* through the appropriations process. 12 U.S.C. §§ 243, 5497(a)(1). The Federal Reserve *must*

grant the CFPB Director's request so long as it does not exceed 12 percent of the "total operating expenses of the Federal Reserve System" as of fiscal year 2009 (adjusted for inflation). *Id.* § 5497(a)(2)(A)(iii). Therefore, "rather than plead with Congress for funds" "the CFPB Director need only send a perfunctory letter to the Federal Reserve." *CFPB* v. *All Am. Check Cashing, Inc.*, 33 F.4th 218, 223 & n.7 (5th Cir. 2022) (en banc) (Jones, J., concurring). In fiscal year 2022, the CFPB requisitioned $641.5 million for itself. CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2022*, at 44–45 (Nov. 15, 2022).[3] By comparison, the Federal Trade Commission's appropriation was almost half that amount—$376.5 million for the 2022 fiscal year. FTC, *Fiscal Year 2022 Agency Financial Report*, at 69 (2022).[4]

The Director's power to draw funds is so great that the Federal Reserve must pay the funds even when it has negative net earnings. Right now, for instance, the Federal Reserve is regularly taking combined quarterly operating losses as it unwinds its balance sheet post-COVID.[5] These losses would suggest that there are no "combined earnings" from which to draw the CFBP's funding. 12 U.S.C. § 5497(a)(1). However, the Federal Reserve is booking its losses as

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[3] https://files.consumerfinance.gov/f/documents/cfpb_financial-report_fy2022.pdf.

[4] https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-FY2022-Agency-Financial.pdf.

[5] Alex J. Pollock & Paul H. Kupiec, *The Fed's Operating Losses Become Taxpayer Losses*, The Federalist Society (Feb. 13, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-fed-s-operating-losses-become-taxpayer-losses.

a "deferred asset" on its balance sheet.[6] Thus, even now, the Federal Reserve continues to fund the CFPB, even though doing so drives the Fed further into the red.

The Congress that passed the Dodd-Frank Act made it abundantly clear that the CFPB's funding autonomy is *not* a congressional appropriation within the meaning of the Appropriations Clause. The CFPB's funds are exempt from budgetary review by the Committees on Appropriations of the House of Representatives and the Senate, 12 U.S.C. § 5497(a)(2)(C), and from review or approval by the Director of the Office of Management and Budget, *id.* § 5497(a)(4)(E). This exemption thus impedes Congress's ability to oversee the CFPB's spending and propose new legislation in response to misspent funds.

Unique among Executive Branch agencies, Congress also empowered the CFPB to build up an unlimited, self-compounding cash reserve of unspent funds drawn from the Federal Reserve System. Typically, when an agency does not spend appropriated funds, those funds are cancelled. *See*, *e.g.*, GAO, *Federal Budget: A Few Agencies and Program-Specific Factors Explain Most Unspent Funds*, at 1 (May 2021). Not so for the CFPB. Rather than revert unspent funds to the U.S. Treasury, *see*, *e.g.*, 12 U.S.C. § 289(a)(3)(B), any funds that are "not, in the judgment of the Bureau, required to meet the current needs of the Bureau" "shall be deposited" into an independently maintained account at the Federal Reserve known as the "Bureau Fund," *id.* § 5497(b)(1)–(3). The CFPB may direct the Federal Reserve to invest these surplus

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[6] *See* Federal Reserve Banks Combined Quarterly Financial Report (Unaudited) at 25 (Mar. 31, 2023).

funds in "obligations of the United States or obligations that are guaranteed . . . by the United States, with maturities suitable to the needs of the Bureau Fund, as determined by the [CFPB]." *Id.* § 5497(b)(3)(A)–(B). Any "interest on" or "proceeds from" such investments "shall be credited" to the CFPB—again, not to the U.S. Treasury—for the CFPB to spend or reinvest at the agency's discretion. *Id.* § 5497(b)(3)(C), (c)(1). Taking a belt-and-suspenders approach to ensuring the perpetual unaccountability of this funding, the Dodd-Frank Act further provides that the Bureau Fund "shall not be construed to be Government funds or appropriated monies" and "[n]otwithstanding any other provision of law . . . shall not be subject to apportionment" under ordinary processes. *Id.* § 5497(c)(2)–(3). For example, former CFPB Director Richard Cordray had amassed an unobligated balance of $177.1 million in the Bureau Fund, an amount that would allow the CFPB to continue operations even if the Federal Reserve somehow cut off all funding (which it cannot). *See* Letter from Mick Mulvaney, Acting Director, CFPB, to Janet Yellen, Chair, Board of Governors of the Federal Reserve System (Jan. 17, 2018). Today, the Bureau Fund contains over $340 million in unobligated compounding funds useable at the CFPB Director's—and therefore the President's—sole discretion. *See 2022 Report*, *supra*, at 86.

The CFPB's proponents repeatedly stated that the CFPB's total insulation from accountability was a feature, not a flaw, notwithstanding the Constitution's requirements. As Senator Chris Dodd explained, "[t]he [CFPB's] funding will be independent and reliable so that its mission cannot be compromised by political maneuvering." 156 Cong. Rec. 8931 (2010). "In the eyes of the agency's architects, self-

funding was 'absolutely essential' to prevent future congresses from influencing the CFPB," *All Am. Check Cashing*, 33 F.4th at 223 (Jones, J., concurring) (quoting S. Rep. No. 111-176, at 163 (2010)), because "'[r]ecent history has demonstrated that even an agency with an undiluted mission to protect consumers . . . can be undermined by hostile or negligent leadership or by Congressional meddling on behalf of special interests,'" *id.* at 223 n.10 (quoting *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation*, Hr'g Before S. Comm. on Banking, Hous. & Urban Affs., 111th Cong. 87 (2009)).

No other Executive Branch agency in the Nation's history has wielded so much core executive power coupled with budgetary autonomy and multiple layers of insulation from public accountability and congressional oversight, as the Fifth Circuit rightly found. *Cmty. Fin. Servs. Ass'n of Am., Ltd*. v. *CFPB*, 51 F.4th 616, 639 (5th Cir. 2022). The CFPB is entitled to automatically draw funds—without normal congressional review—that were themselves raised outside of the congressional appropriations process.

By contrast, the handful of other agencies that are funded outside the typical appropriations process obtain funding by assessing fees against regulated entities. For example, the Federal Reserve levies fees from reserve banks, 12 U.S.C. § 243, the National Credit Union Administration ("NCUA") levies fees from credit unions, *id*. § 1755, the Federal Deposit Insurance Corporation ("FDIC") is funded by premiums from the banks and savings associations that it insures, *id.* § 1815(d), and the Office of the Comptroller of the Currency ("OCC") is funded by assessments and fees paid by banks, *id.* § 16. Congress has established

similar funding arrangements since the earliest days of the Republic. *See*, *e.g.*, Act of July 4, 1836, ch. 357, § 9, 5 Stat. 117, 121 (establishing the Patent Office, to be funded through its collection of fees paid by patent applicants). Whatever the merit of these funding arrangements, they at least establish a substitute check on the agencies' discretion, even though their funding is not subject to direct congressional control. This is because the agencies are at least restrained by the natural resistance of regulated parties. For example, regulated entities may resist excessive fees, or they may choose to exit an agency's regulatory sphere in response to excessive or overly burdensome regulation. Entities may also shift from one regulatory regime to another, including by modifying their governing charters, a practice termed "charter shopping." Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 Creighton L. Rev. 99, 111 (2013). This, in turn, causes the abandoned agency to lose fee income. Thus, the threatened loss of funding is one way that regulated entities could try to exert political pressure on the agency and maintain a certain level of accountability. *Ibid.*

The CFPB also has far less accountability than agencies funded by the fees they charge for the services they render, such as the Post Office and the National Mint—a practice that dates back to the earliest Congresses. *See* Act of Feb. 20, 1792, ch. 7, §§ 2–3, 1 Stat. 232, 233–34 (funding the Post Office through collection of postage rates); Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 249 (funding the National Mint in part through collection of fees). The fact that these fee-for-service agencies rely on the public to purchase their services creates at least some check on their power. The fees are inherently constrained by market

forces, and the public may refuse to buy the agencies' services in an effort to influence their conduct. In this way, the people themselves retain a way to resist and oppose unpopular agency action.

Thus, all other self-funded agencies have some modicum of accountability to regulated entities or the public itself. While these funding arrangements are not a substitute for congressional control through the appropriations process, they do force the agencies, to some extent, to "bear the brunt of public disapproval" for the consequences of their regulatory actions. *New York* v. *United States*, 505 U.S. 144, 169 (1992).

The CFPB's funding structure is totally different and leaves *no* room for accountability. Congress has impermissibly "encase[d]" the CFPB "within a Matryoshka doll of [funding] protections" and "immuniz[ed]" from congressional or public "oversight . . . the regulator of first resort . . . for a vital sector of our economy." *PHH Corp*. v. *CFPB*, 881 F.3d 75, 144 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) (quoting *Free Enter. Fund*, 561 U.S. at 497, 508). The CFPB represents a "'new situation'" never before authorized by Congress: an agency "insulated by" multiple layers of budgetary independence. *Seila Law*, 140 S. Ct. at 2198 (quoting *Free Enter. Fund*, 561 U.S. at 483). The "added layer of [budgetary] protection makes a difference." *Free Enter. Fund*, 561 U.S. at 495. The "novel structure does not merely add to the [CFPB's] independence, but transforms it," *id.* at 496, by thoroughly shielding the CFPB's expenditures from *any* accountability. "[W]here, in all this, is the role for oversight by an elected" Congress? *Id.* at 499. It has been left by the wayside on the highway of administrative "independence."

This political insulation has already yielded harmful real-world consequences. For years, the CFPB has evaded requests for information and even formal subpoenas authorized by legislators and congressional committees with jurisdiction over financial regulators and the U.S. financial system. From 2014 to 2017, for example, the CFPB refused to cooperate with inquiries by the House Financial Services Committee into the CFPB's efforts to ban or limit the use of arbitration clauses in financial contracts. *See* Pete Schroeder, *House Republicans Push for Contempt Charges Against CFPB Director*, Reuters (Aug. 4, 2017); Kevin Cirilli, *Hensarling Rips Obama for Unprecedented Secrecy*, The Hill (Mar. 3, 2015). That pattern continued into the tenure of the CFPB's second Director, who—in an effort to persuade Congress to fix the agency's constitutional defects—pointed to the CFPB's intentional insulation from political control when limiting the agency's responses to congressional inquiries. *See*, *e.g.*, Katy O'Donnell, *After War of Words, Warren Faces off with Mulvaney*, Politico (Apr. 12, 2018).

This loss of oversight does not just affect substantive policy issues: it also affects operational matters. In 2014, for example, investigators discovered that the CFPB had spent more than $215 million renovating an existing government building—with a total assessed value of only $154 million—to serve as the CFPB's new headquarters, including by hiring the exclusive architectural firm responsible for the Burj Khalifa in Dubai. *See* Letter from Mark Blalek, Inspector General, Board of Governors of the Federal Reserve System, to Patrick T. McHenry, Chairman, Subcommittee on Oversight and Investigation, Com-

mittee on Financial Services, U.S. House of Representatives, at 9 (June 30, 2014);[7] Richard Pollock, *Federal Reserve Inspector General to Probe Spiraling Building Renovation Costs at CFPB*, Wash. Examiner (Feb. 14, 2014).

These problems illustrate why the Founders proposed and adopted the Appropriations Clause as a bulwark for the separation of powers. Congress violated this restriction by giving the CFPB "open-ended spending authority that effectively escapes periodic legislative review and limitation." Stith, *supra*, at 1345.

2. In addition to the CFPB's unprecedented insulation from the appropriations process, the CFPB is different than the handful of financial agencies that deviate from the traditional appropriations process (such as the Federal Reserve, the FDIC, the NCUA, and the OCC) in another way. By law, Congress provides a benefit to depository institutions within these agencies' purview by guaranteeing their liabilities via deposit or share insurance. *See*, *e.g.*, 12 U.S.C. § 1821(a)(1)(A) ("The [FDIC] shall insure the deposits of all insured depository institutions"). Prudential regulators incur costs in providing these benefits, both in administering insurance funds and in regulating institutions and their holding companies to ensure safe and sound operations as a means of mitigating risks to taxpayers. Congress permits these regulators to assess fees to recover these costs (and thereby to fund associated operations).

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[7] https://oig.federalreserve.gov/reports/cfpb-congressional-request-headquarters-renovation-project-jun2014.pdf.

This regulatory approach requires prudential agencies to "balance the best interests of targeted financial institutions and the American public." *All Am. Check Cashing*, 33 F.4th at 236 (Jones, J., concurring). The CFPB, by contrast, was "devised as a watchdog" and has "a bare minimum of concern for the financial impact of its actions on regulated entities." *Ibid.*

The rationale for self-funded prudential regulators thus does not apply to the CFPB. The CFPB is not a prudential regulator and has no safety-and-soundness mission. It administers and enforces federal consumer-protection laws and regulates market conduct, much like the Securities and Exchange Commission, the Commodity Futures Trade Commission, and the FTC, all of which are funded by, and held accountable through, the annual congressional appropriations process. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2259 n.38 (2010) (noting that "Congress may hold its strongest hand in the appropriations process, if for no other reason than that passage of a budget is an annual requirement"). The FTC, for example, is similarly tasked with combatting "unfair or deceptive acts or practices." *Compare* 15 U.S.C. § 45(a), *with* 12 U.S.C. § 5531(a) ("unfair, deceptive, or abusive act or practice under Federal law"). Congress's control over appropriations gives it direct control of these agencies, and Congress has used that authority. For example, in 1980, Congress temporarily defunded the FTC when legislators believed that the agency had exceeded its mandate. *See* Merrill Brown, *FTC Temporarily Closed in Budget Dispute*, Wash. Post (May 1, 1980). Congress does not possess that sort of control over the CFPB.

3. The CFPB's potent executive power makes the Appropriations Clause violation even more of a threat to individual liberty. The agency possesses sweeping executive regulatory and enforcement authority held by a single Director who is (now) removable at will by the President. As then-Judge Kavanaugh observed, the Appropriations Clause "allocate[s] to Congress" the "exclusive" and non-delegable "power over the federal purse," acting as a "bulwark of the Constitution's separation of powers" that is "particularly important as a restraint on Executive Branch officers." *Dep't of Navy*, 665 F.3d at 1346–47. This stands as "one of the most important authorities allocated to Congress" and a crucial check on Executive power. *Id*. at 1346.

For this reason, when Congress has previously tolerated a measure of appropriations independence, it has done so only for agencies that do not exercise core enforcement powers over private market participants. Rather, "Congress has utilized self-funding in only a limited number of 'narrowly-focused' independent agencies." Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733, 1735 (2013). As noted above, *see supra* at 17, those agencies operate only as prudential regulators. Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1823 (2012).

The CFPB, by contrast, exercises core executive enforcement and regulatory authority and "wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting). Compared to other financial regulators, "the CFPB is

in an entirely different league. It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law*, 140 S. Ct. at 2202 n.8. To exempt an agency with such powers from the appropriations process is nothing less than total abdication of Congress's duty under the Appropriations Clause to control the power of the purse. The Constitution not only vests Congress with the power to spend but also removes "the option *not* to require legislative appropriations prior to expenditure." Stith, *supra*, at 1349. In the case of the CFPB, these requirements have been circumvented. When coupled with its "vast rulemaking, enforcement, and adjudicatory authority," *Seila Law*, 140 S. Ct. at 2191, the CFPB's virtually unfettered control over its funding threatens to give the agency all the resources it desires to make itself formidable, in precisely the manner that the Appropriations Clause was designed to prevent.

The President's direct control over the CFPB Director raises the stakes of this separation-of-powers violation. Coupled with the CFPB's unaccountable funding structure, the agency unites in the Executive Branch the powers of the purse and sword. *See All Am. Check Cashing*, 33 F.4th at 224 (Jones, J., concurring). The Appropriations Clause is designed to prevent exactly this kind of consolidation of power in the executive. *See*, *e.g.*, Baron de Montesquieu, *supra*, at 119; *Dep't of Navy*, 665 F.3d at 1346–47 (the Appropriations Clause responds to the fear that "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure").

This concentration of power in the Executive Branch erects yet another barrier to Congress reclaiming the purse strings from the CFPB, as any legislative effort to alter the CFPB's funding structure could be met by a presidential veto. *See All Am. Check Cashing*, 33 F.4th at 238 (Jones, J., concurring). Changing the CFPB's self-funding status quo is no easy task. On the contrary, it is quite difficult, as *amici* can attest.[8] To bring the CFPB back within the appropriations process through legislation would require majority votes of both chambers of Congress and presidential approval or sufficient votes to override a presidential veto. In the 13 years since Dodd-Frank, one or both houses of Congress have attempted this on numerous occasions, but all of these efforts were unsuccessful. *See id.* at 239 ("Seventeen failed attempts to alter the CFPB's funding structure in just over ten years seem to prove this point."). This experience shows the practical consequence of changing an organ of government from a baseline of appropriations to a baseline of self-funding. Our system of political accountability, and checks and balances, is not supposed to work this way.

In contrast, other independently funded agencies such as the Federal Reserve and the FDIC operate as independent agencies with multimember leadership structures drawn from both parties. This structure

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[8] *Amici* have sponsored or co-sponsored numerous bills that would have amended the CFPB's funding arrangement. *See*, *e.g.*, Bureau of Consumer Financial Protection Accountability Act of 2013, H.R. 3192, 113th Cong. (2013); Financial Services and General Government Appropriations Act, 2018, H.R. 3280, 115th Cong. (2017); TABS Act of 2017, H.R. 2553, 115th Cong. (2017); Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017); TABS Act of 2019, H.R. 969, 116th Cong. (2019).

can diminish the concentration of power in the President because the "minority party of a multimember agency is 'a built-in monitoring system,' dissenting when appropriate and serving as a 'fire alarm' for the . . . public." *PHH Corp.*, 881 F.3d at 148 (Henderson, J., dissenting). That "matters for accountability," as an independent agency with multimember leadership can exert internal control over the expenditure of their funds. *Ibid.* Because the CFPB has a single Director who serves at the pleasure of the President, the Bureau lacks even this modicum of substitute accountability.

As Justice Kennedy explained, Article I forbids a "decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress." *Clinton* v. *City of New York*, 524 U.S. 417, 451–42 (1998) (Kennedy, J., concurring). "It is no answer . . . to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish." *Ibid*. Congress could not enact a law that delegated all of its appropriations powers "to the President," or to the Senate, or to the King of Spain, *see* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1038 (2007), simply because it did so via an Act that could later be amended. "That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow, without intruding on the rights reserved to the sovereign people. Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 451–42 (Kennedy, J., concurring).

Here, Congress has abdicated its constitutional responsibility and ceded its appropriations power to the Executive Branch. If the CFPB's funding mechanism were constitutional, there would be nothing to stop Congress from giving the President authority to determine the funding and priorities of any other—or every other—federal agency. That is not the law. The CFPB's funding scheme violates the Constitution.

II. VACATUR IS THE APPROPRIATE REMEDY.

The Constitution's structural protections have force only if those who successfully challenge violations receive a meaningful remedy. The Appropriations Clause is no different—its violation must be remedied if the provision is to be more than a "parchment barrier[]." The Federalist No. 48, at 256 (James Madison).

This Court has emphasized that separation-of-powers violations inflict a "here-and-now" injury susceptible to judicial remedy. *Axon Enter., Inc.* v. *FTC*, 143 S. Ct. 890, 904 (2023) (quoting *Seila Law*, 140 S. Ct. at 2196). Litigants who "make[] a timely challenge to the constitutional validity" of government action are "entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder* v. *United States*, 515 U.S. 177, 182–83 (1995). After all, "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," for "where there is a legal right, there is also a legal remedy." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). Remedies are an essential aspect of the judicial power to hear challenges to illegal government action. *See Armstrong* v. *Exceptional Child Ctr.,*

Inc., 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.").

Individuals who are injured by unconstitutionally structured agencies will have little incentive to challenge the constitutional violation if they are deprived of a meaningful remedy for a successful challenge. That is why this Court has emphasized that "remedies" must be "designed . . . to create incentives to raise" structural constitutional challenges when the political branches are content to tolerate violations of the Constitution's protections for individual liberty. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018); *Ryder*, 515 U.S. at 182–83. If unconstitutionally structured agencies are permitted to evade any meaningful relief for the party at bar, no "rational litigant" will bring structural constitutional challenges going forward. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014). Indeed, without a remedy, agencies may argue that injured parties lack Article III standing to bring such challenges in the first place. *See Collins* v. *Yellen*, 141 S. Ct. 1761, 1796 n.1 (2021) (Gorsuch, J., concurring in part); *California* v. *Texas*, 141 S. Ct. 2104, 2113–15 (2021).

The Appropriations Clause is of a kind with the many other structural protections that this Court has vindicated with a robust judicial remedy. Under the Appointments Clause, for example, this Court has remedied the failure to follow confirmation requirements by invalidating actions taken by improperly appointed officials. *See*, *e.g.*, *Lucia*, 138 S. Ct. at 2055; *NLRB* v. *Noel Canning*, 573 U.S. 513, 557 (2014).

Similarly, this Court has enforced the Presentment Clause by invalidating unilateral presidential and congressional actions taken in violation of its terms. *Clinton*, 524 U.S. at 425 & n.9; *INS* v. *Chadha*, 462 U.S. 919, 936 (1983). And this Court has enforced other structural provisions by invalidating actions taken in violation of their terms. *See*, *e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 503 (2011) (dismissing state-law counterclaim brought in bankruptcy court that lacked requisite Article III authority); *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008) (habeas remedy must be made available under the Suspension Clause notwithstanding statutory language to the contrary). There is no basis in text, history, or tradition to distinguish the Appropriations Clause from the Constitution's other structural protections.

This Court's remedial discussion in *Collins* demonstrates why a violation of the Appropriations Clause requires a serious remedy. In *Collins*, the Court agreed that an unconstitutional statutory provision purporting to insulate an executive official from removal by the President could "inflict compensable harm" if, "[w]ere it not for th[e] provision," the official would have acted differently or would have been removed from office. 141 S. Ct. at 1789. The Court remanded for the lower courts to consider "the possibility that the unconstitutional removal restriction caused any such harm" because, barring such a causal relationship, no one disputed that the official had been lawfully appointed and acted within the scope of the agency's authority. *Ibid*. But here, as in this Court's "decisions in prior separation-of-powers cases" under provisions such as the Appointments Clause, the CFPB lacked authority to take the challenged actions because of a violation of the Constitution's structural protections: Congress never appropriated the

agency a penny to promulgate or enforce the Payday Lending Rule. *Id.* at 1788. Respondents therefore are necessarily harmed by the CFPB's violations of the Appropriations Clause.

The appropriate remedy in this case is, as Respondents explain, vacatur of the Payday Lending Rule. The CFPB's lack of appropriated funds means that the agency lacked the prior authorization to expend funds in order to promulgate or enforce regulations such as this one. Because the Payday Lending Rule was promulgated and reaffirmed using funds that Congress never appropriated to the CFPB—and was timely challenged by parties with standing to do so—the Rule is void and unenforceable. *See Collins*, 141 S. Ct. at 1788. Just as government officials cannot act without being properly vested with authority under the Appointments Clause, neither can officials promulgate and enforce regulations without lawful appropriations under the Appropriations Clause. The harm inflicted by the Payday Lending Rule is necessarily traceable to the Appropriations Clause violation because the Rule could never have been issued but for the unlawful funding scheme. *See id*. at 1789. Under the *Collins* test, the CFPB's lack of a valid appropriation meant it "did not lawfully possess" the "power" to promulgate the Rule. *Id*. at 1788. This is because a valid appropriation "is as much a precondition to every exercise of executive authority . . . as a constitutionally proper appointment or delegation of authority." *All Am. Check Cashing*, 33 F.4th at 242 (Jones, J., concurring).

When an agency acts unlawfully, the established remedy is to set aside the challenged agency action. *See* 5 U.S.C. § 706(2). That is true for all manner of

agency actions, whether undertaken in the rulemaking, adjudicatory, or enforcement contexts. And that is also true whenever an agency acts "not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity," *id.* § 706(2)(A), (B), as the CFPB has done here. Where such timely objections have been pressed, there should be a meaningful remedy commensurate with the seriousness of the legal violation. To fail to award real relief to a successful challenger under the Appropriations Clause would perversely incentivize future constitutional violations of this sort, and deter private parties from policing separation-of-powers violations that infringe individual liberty.

The CFPB is therefore wrong in suggesting that granting a meaningful remedy here would result in widespread chaos. *Cf.* Pets. Br. 47–48. Not every action the CFPB has ever taken without lawful appropriations must necessarily be reopened and set aside. Courts are not required to provide a remedy to parties that have not timely pressed their objections in an open rulemaking, adjudication, or enforcement action. This Court has recognized multiple limitations on the ability of litigants to bring structural challenges. Such challenges are subject to statutes of limitations, *Lucia*, 138 S. Ct. at 2055; *Ryder*, 515 U.S. at 182, and other ordinary requirements for timely raising legal arguments. And only litigants harmed by the agency action at issue have standing to bring the challenge in the first instance, meaning that regulated parties cannot challenge actions that do not apply to them or injure them.

A meaningful retrospective remedy is therefore crucial here to vindicate the constitutional violation at

issue and to properly incentivize litigants to bring separation-of-powers challenges in the first place.

CONCLUSION

Amici respectfully request that this Court vindicate the Constitution's separation of powers by declaring that the CFPB's unprecedented self-funding structure violates the Appropriations Clause and award Respondents meaningful relief. The Fifth Circuit's judgment should be affirmed.

Respectfully submitted,

HELGI C. WALKER
Counsel of Record
LUCAS C. TOWNSEND
RUSSELL BALIKIAN
LOCHLAN F. SHELFER
NATHANIEL J. TISA
HADHY H. AYAZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3692
HWalker@gibsondunn.com

Counsel for Amici Curiae

July 10, 2023

APPENDIX

APPENDIX

List of *Amici Curiae* 1a

LIST OF *AMICI CURIAE*

Former Members of Congress

Roy Blunt
Former Senator of Missouri

John Boehner
Former Speaker of the U.S. House of Representatives

Kevin Brady
Former Representative of Texas

Bradley Byrne
Former Representative of Alabama

Rodney Davis
Former Representative of Illinois

Stephen Fincher
Former Representative of Tennessee

Scott Garrett
Former Representative of New Jersey

Tom Graves
Former Representative of Georgia

Jeb Hensarling
Former Representative of Texas

Van Hilleary
Former Representative of Tennessee

Jack Kingston
Former Representative of Georgia

Trent Lott
Former Senator of Mississippi

Mia Love
Former Representative of Utah

Randy Neugebauer
Former Representative of Texas

Bruce Poliquin
Former Representative of Maine

Tom Price
Former Representative of Georgia

Peter Roskam
Former Representative of Illinois

Dennis A. Ross
Former Representative of Florida

Steve Southerland
Former Representative of Florida

Lynn Westmoreland
Former Representative of Georgia

Kevin Yoder
Former Representative of Kansas