No. 22-448

In the Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL., PETITIONERS

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

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The Appropriations Clause preserves Congress's power to determine when and how public funds will be spent. Congress exercised that power when it provided by law that the Consumer Financial Protection Bureau (CFPB or Bureau) may spend up to a specified amount from a specified source for specified purposes. That appropriation comports with the constitutional text and with historical practice dating back to the Founding.

In arguing otherwise, respondents gesture at radical new rules that would invalidate much of the federal budget—suggesting, for example, that Congress must specify the precise dollar amount to be spent, or that multi-year appropriations are suspect. Ultimately, however, respondents retreat to a variation on the Fifth Circuit's approach: An assertion that the particular

combination of features in the CFPB's funding statute violates some ill-defined and previously unrecognized limit on Congress's spending power. But respondents offer no principled basis for distinguishing the CFPB from other agencies with longstanding and concededly valid funding mechanisms.

This Court should decline respondents' request to mint a constitutional exception applicable to the CFPB alone. And even if respondents could establish an Appropriations Clause violation, the Court should reject the Fifth Circuit's vacatur remedy, which would threaten profound disruption for consumers, regulated businesses, and the Nation's financial markets.

A. Congress Did Not Violate The Appropriations Clause By Appropriating The Funds Necessary For The CFPB's Operations Up To A Fixed Cap

Respondents assert (Br. 16-19, 25-30) that the Appropriations Clause requires Congress to specify a particular dollar amount when authorizing spending, and that the CFPB's appropriation fails to satisfy that requirement. But the Appropriations Clause contains no dollar-amount requirement. Even if it did, Congress fixed the CFPB's maximum annual funding. And nondelegation principles provide no support for respondents' assertion that Congress violated the Appropriations Clause by allowing the Bureau to spend *less* than the maximum authorized amount.

1. The Appropriations Clause does not require Congress to specify the precise dollar amount to be spent

a. Respondents begin with the premise that a dollar-specific "'money *amount*[]'" is a "base requirement" for a constitutional appropriation. Br. 17 (citation omitted); see Br. 25-26, 32. No such requirement exists. Our

opening brief cited (at 16-17) both Founding-era and modern authorities showing that an "appropriation" is simply a law making a particular source of funding available to an entity for particular uses. Respondents do not address, much less refute, those authorities.

The Founders certainly did not understand the Constitution to require that appropriations specify a set amount. In 1792, when Congress made standing appropriations for the Post Office and National Mint, it did not "decide[] the amount of annual funding" they would receive. Resp. Br. 16; see U.S. Br. 22. And as amici Professors of History and Constitutional Law explain (Br. 22-26), the First Congress adopted similar funding mechanisms for the Customs Service and Revenue Officers. Those examples "provide[] contemporaneous and weighty evidence of the Constitution's meaning." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2197 (2020) (citation omitted). And they foreclose respondents' assertion that the Appropriations Clause requires Congress to specify the precise amount to be spent.

Congress continued to make standing, uncapped appropriations in the 1800s and 1900s, adopting them for agencies including the Office of the Comptroller of the Currency (OCC) and Federal Reserve Board. The OCC, for instance, can collect the assessments it "determines [are] necessary or appropriate to carry out the responsibilities of the Office," with no fixed cap. 12 U.S.C. 16; see 12 U.S.C. 243 (similar for Federal Reserve Board).

Congress's practice of making appropriations without specifying dollar amounts remains routine today. Indeed, much of the federal budget has long consisted of such spending. U.S. Br. 21. Respondents' theory would call into question the validity of countless appropriations

that provide sums sufficient to carry out a program without specifying a particular amount—from appropriations for Social Security payments, 42 U.S.C. 301, 401(a) and (b), to unemployment assistance, 15 U.S.C. 9021(g)(1)(B), 9023(d)(3) (Supp. II 2020), to the Judgment Fund, 31 U.S.C. 1304(a) (2018 & Supp. I 2019), to interest payments on the national debt, 31 U.S.C. 1305(2).

b. Respondents offer no meaningful support for their dollar-amount requirement. The James Madison statement they quote (Br. 17) simply described line-item and lump-sum appropriations as two competing "plans into which appropriations might be moulded." 3 Annals of Cong. 938 (1793). Similarly, Alexander Hamilton described Congress's *practice* of passing annual appropriations acts specifying "[t]he *object*, the *sum*, and the *fund.*" 8 *The Works of Alexander Hamilton* 129 (Henry Cabot Lodge ed., 1904) (Hamilton). But Hamilton never called a sum an "essential element[]" (Resp. Br. 17) of an appropriation. Rather, he articulated the Appropriations Clause's "general injunction" in the same way we have: "[B]efore money can legally issue from the Treasury for any purpose, there must be a law authorizing an expenditure, and designating the object and the fund." Hamilton 127.

Nor is there evidence that Madison or Hamilton thought that appropriations without set dollar amounts—like those funding the Post Office, Mint, and Customs Service—violated the Constitution. To the contrary, Hamilton proposed and Congress adopted a Sinking Fund Commission designed to reduce the Nation's debt; consistent with Hamilton's recommendation, the Commission's statute "appropriated and pledged" a standing source of revenue without specifying

any dollar amount. Act of May 8, 1792, ch. 38, § 7, 1 Stat. 283; see Act of Mar. 3, 1795, ch. 45, § 9, 1 Stat. 435; Treasury Dep't, *Report on the Public Debt and Loans* (Jan. 23, 1792).

That leaves respondents (Br. 16-17) with a floor statement by Representative John Reed suggesting in passing that "[a]n appropriation was a specific sum." 5 Annals of Cong. 611 (1796). But Reed also emphasized that "wherein there was no restriction or limitations, the whole affair [of appropriations] seemed left to the direction of those whom the Constitution had authorized to transact such business." *Ibid.* Reed's "contradictory" sentiments exemplify "why floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 307 (2017).[1]

To be sure, Parliament, state legislatures, and Congress have often chosen to specify funding amounts in appropriations laws. Resp. Br. 17-18. But those choices were driven by considerations of policy, not constitutional imperative. See Gerhard Casper, *Appropriations of Power*, 13 U. Ark. Little Rock L.J. 1, 16-18 (1990). As a matter of constitutional law, the Founders gave Congress "the power to decide, how and when any money should be applied for [public] purposes," 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1342, at 213 (1833)—including the power to appropriate the sums necessary to accomplish particular purposes without specifying a dollar amount.

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[1] Respondents also rely (Br. 17) on a law review article, but that article sought to "propose[]" "appropriation norms," Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1393 (1988)—not to interpret the Constitution's original meaning.

2. Congress satisfied any dollar-amount requirement by specifying a cap on the CFPB's funding

Even if respondents' dollar-amount theory were valid, it would not assist them. Respondents contend that the CFPB's funding statute gives the Bureau "'unilateral[]' authority to 'self-determine[]' the amount of its own funding." Br. 16 (quoting Pet. App. 35a) (brackets in original). But Congress provided a capped amount of annual funding ($597.6 million), adjusted only for inflation. 12 U.S.C. 5497(a)(2)(A) and (B). The only "discretion" the CFPB has is to request *less* than that congressionally determined amount. Resp. Br. 21.

Respondents insist that this limited discretion means that the CFPB's "funds are not 'drawn . . . in Consequence of Appropriations made by Law.'" Br. 16 (quoting U.S. Const. Art. I, § 9, Cl. 7). On that logic, the CFPB's appropriation would be constitutional if Congress required the Bureau to accept the full amount each year but is unconstitutional because the Bureau may request and spend less.

That is not how the Appropriations Clause works. Since the Founding, appropriations laws have often "le[ft] the decision whether to spend the money to the President's unfettered discretion." *Clinton* v. *City of New York*, 524 U.S. 417, 466 (1998) (Scalia, J., concurring in part and dissenting in part). For instance, the First Congress funded "the entire Government" through appropriations of "'sum[s] not exceeding' specified amounts for broad purposes." *Ibid.* (quoting Act of Sept. 29, 1789, ch. 23, 1 Stat. 95) (brackets in original). Those laws allowed the Executive Branch to "spend less than [the specified] amount," and "[b]eginning with George Washington, Presidents did not spend all the funds that Congress appropriated." Michael B.

Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto*, 76 Tul. L. Rev. 265, 335-336 (2001).

To this day, Congress routinely appropriates sums "not to exceed" a particular amount; that phrase appears more than 400 times in the Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49. Under such appropriations, "the agency is not required to spend the entire amount." 2 U.S. Gen. Accountability Office, *Principles of Federal Appropriations Law*, 6-28 (3d ed. Jan. 2004). The constitutionality of laws allowing agencies to decline to spend appropriated funds "has never seriously been questioned." *Clinton*, 524 U.S. at 467 (Scalia, J., concurring in part and dissenting in part). Allowing the CFPB to request and spend a sum not exceeding a fixed limit is no different.

Respondents likewise err (Br. 19) in labeling the CFPB's funding cap "toothless." They ignore our showing (Br. 30-31 & nn.4-5) that the CFPB's cap is well below the budgets of various agencies with similar funding mechanisms. And they offer no judicially manageable standard—because none exists—for determining when an agency's funding amount is "so high" that it becomes "illusory." Resp. Br. 9. More fundamentally, asking a court to invalidate a law appropriating funds on the theory that Congress's chosen amount is too high would override—not vindicate—Congress's spending authority. And it would run counter to the Founders' determination that "[t]he judiciary" would "ha[ve] no influence over * * * the purse." *The Federalist No. 78*, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Respondents emphasize (Br. 6, 19, 26) that the CFPB has requested less money than it could have. But it cannot be that the constitutionality of a statute enacted in 2010 depends on the amounts the Bureau requested over

the ensuing decade—or that the Bureau could have cured any purported constitutional defect by asking for *more* money. The Bureau's requests simply show that it has followed its mandate to determine the amount "reasonably necessary to carry out [its] authorities." 12 U.S.C. 5497(a)(1).[2]

3. The CFPB's funding statute does not impermissibly delegate Congress's appropriations power

Respondents attempt to bolster their dollar-amount requirement by asserting that the CFPB's appropriation is an impermissible "delegation[]" of Congress's power to choose "the amount of an agency's funding." Br. 28 (emphasis omitted). The court of appeals did not address respondents' nondelegation claim, finding it "forfeited." Pet. App. 24a n.6. In any event, that claim lacks merit. As the only court of appeals to address such a claim concluded, "the CFPB's funding structure is proper under the nondelegation doctrine." *CFPB* v. *Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 184 (2d Cir. 2023), petition for cert. pending, No. 22-1233 (filed June 21, 2023).

"[A]cts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937). "Examples of appropriations committed

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[2] Nor is it constitutionally significant that the Bureau's funding "remain[s] available until expended" and can be invested. 12 U.S.C. 5497(c)(1); see 12 U.S.C. 5497(b)(3). As respondents recognize (Br. 19), the same is true of other agencies, including the OCC and Farm Credit Administration. U.S. Br. 32. And Congress directed the CFPB to consider rolled-over funding that remains available in determining the amount of funding needed to carry out its authorities. 12 U.S.C. 5497(a)(1).

to the discretion of the" Executive Branch "abound in our history," dating back to "the founding." *Clinton*, 524 U.S. at 466-467 (Scalia, J., concurring in part and dissenting in part). And again, "[t]he constitutionality of such appropriations has never seriously been questioned." *Id.* at 467.

Section 5497 easily fits within that tradition. It allows the CFPB to request "the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau"—subject to the annual cap—while "taking into account such other sums made available to the Bureau from the preceding year." 12 U.S.C. 5497(a)(1). That appropriation is functionally identical to the First Congress's appropriations of "'sum[s] not exceeding' specified amounts for broad purposes." *Clinton*, 524 U.S. at 466 (Scalia, J., concurring in part and dissenting in part) (citation omitted). Those appropriations comply with the doctrine prohibiting delegation of "'lawmaking' power" to "the Executive." *Ibid.* Indeed, Justice Scalia explained that if "the Line Item Veto Act authorized the President to 'decline to spend' any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional." *Id.* at 468-469. Those well-established principles foreclose respondents' claim that Congress impermissibly delegated the power to determine "the amount" of the CFPB's funding by authorizing the Bureau to request and spend up to a fixed sum.

Respondents alternatively contend (Br. 29) that Section 5497 violates the intelligible-principle test applicable to "nondelegation challenges to agencies' substantive authority." But this Court has never applied that test in the appropriations context, which from the Founding has involved broad "delegation[s] of authority" inherent

in lump-sum and permissive appropriations. *Cincinnati Soap*, 301 U.S. at 322. The First Congress, for example, appropriated "a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government," with no further instructions for how to spend the money. Act of Mar. 26, 1790, ch. 4, § 3, 1 Stat. 105; see *Clinton*, 524 U.S. at 467 (Scalia, J., concurring in part and dissenting in part).

Regardless, "Congress has plainly provided an intelligible principle to guide the CFPB in setting and spending its budget." *Crystal Moroney*, 63 F.4th at 184. By referencing the Bureau's "authorities," "duties," and "responsibilities," 12 U.S.C. 5497(a)(1) and (c)(1), Congress required the CFPB to consider the full scope of its statutory mandate, which includes "five 'objectives,'" "six 'primary functions,'" and numerous other activities. *Crystal Moroney*, 63 F.4th at 184 (quoting 12 U.S.C. 5511(b) and (c)). And Congress instructed the CFPB to request an amount "reasonably necessary to carry out [those] authorities." 12 U.S.C. 5497(a)(1).

That "reasonably necessary" instruction resembles others this Court has upheld—including to regulate pollutants at a level "'sufficient, but not more than necessary,'" and to designate a drug as a controlled substance if "'necessary to avoid an imminent hazard.'" *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (citation omitted). In those cases, the Court "did not require the statute to decree * * * how 'necessary' was necessary enough." *Id.* at 475 (citation omitted). The same logic applies here. Accordingly, Section 5497's delegation "fits comfortably within the scope of discretion permitted by [the Court's] precedent" even in the area of substantive regulation. *Id.* at 476.

B. The Appropriations Clause Does Not Require Time-Limited Funding Laws

Respondents next contend (Br. 19) that Congress impermissibly "gave up its appropriations power" by omitting a "temporal limit" from the CFPB's appropriation. But the Appropriations Clause does not restrict Congress's authority to choose the duration of the "Appropriations" it makes "by Law." U.S. Const. Art. I, § 9, Cl. 7. Respondents' contrary argument contradicts the Constitution's text and historical practice, and respondents offer no principled or administrable way to implement their novel temporal restriction.

On respondents' telling (Br. 20), the Appropriations Clause seeks to ensure that "both chambers of Congress" must "periodically *agree* to fund the [government]," such that either chamber can block funding through inaction. Respondents insist (Br. 2) that a standing appropriation is suspect because it "flips the appropriations baseline" by requiring Congress to pass a new law if it wishes to withhold funding.

The Founders were well aware of that dynamic, but they conspicuously declined to adopt respondents' approach. Rather than imposing temporal limits on *all* appropriations, they included a provision restricting appropriations for the army to "two Years." U.S. Const. Art. I, § 8, Cl. 12. That specific restriction ensures that for the army—and only the army—Congress may not "vest in the executive department permanent funds" and must instead "come to a new resolution" and take "a formal vote" to continue funding. *The Federalist No. 26*, at 168 (Alexander Hamilton). Respondents get it backwards in asserting (Br. 21) that "the underlying concern" behind that restriction requires reading a similar but unstated restriction into the Appropriations

Clause. Rather, "[b]y 'negative implication,'" the express restriction on army appropriations evinces "the absence" of comparable "restrictions in the Appropriations Clause." *Crystal Moroney*, 63 F.4th at 182 (citation omitted).

Respondents ultimately acknowledge that the restriction on army appropriations proves that "non-Army appropriations may *sometimes* 'be used over a timespan longer than two years.'" Br. 21 (citation omitted). That concession is unavoidable: Congress has enacted standing appropriations since the Founding. U.S. Br. 20-21; see Professors Br. 22-29. Respondents insist, however, that the absence of a time limit on non-army appropriations "'does not imply' that Congress may *always* authorize" longer-term spending. Br. 21 (citation omitted). But respondents' acceptance of some appropriations spanning more than two years belies their claim (*ibid.*) that the Founders intended every new Congress to be able to deny agencies funding through mere inaction. And respondents offer no principled standard for determining when Congress may authorize spending for longer than two years, or for determining how long is too long.

Respondents invoke Madison's statement that the Constitution ensures that the House of Representatives may "refuse . . . the supplies requisite for the support of government." Br. 13 (quoting *The Federalist No. 58*, at 394 (James Madison)); see Br. 19, 35. But the ellipsis omits the part of that statement making clear that Madison was referring primarily to the House's role in raising revenue, not approving spending. See *The Federalist No. 58*, at 394 ("The house of representatives can not only refuse, *but they alone can propose* the supplies requisite for the support of government.") (emphasis

added); U.S. Const. Art. I, § 7, Cl. 1. Respondents do not suggest that tax statutes must sunset periodically to "reset[] the legislative baseline." Br. 20 (citation omitted). And they offer no reason for treating non-army appropriations differently.

Instead, the Appropriations Clause protects the House's role through the requirement that appropriations be made "by Law," U.S. Const. Art. I, § 9, Cl. 7—that is, by the ordinary bicameral legislative process. The 2010 House could have refused to fund the CFPB, but it made a different choice. The Appropriations Clause imposes no mandatory sunset on that legislative judgment. But contrary to respondents' claim (Br. 15, 23), that choice does not "permanently cede[]" Congress's power or "abrogate[] the ability of" a future Congress to "check" the Bureau. Congress could repeal or revise the CFPB's funding mechanism tomorrow—as it has repeatedly done with other standing appropriations. U.S. Br. 20.

C. The Appropriations Clause Does Not Impose Special Rules For "Law-Enforcement" Agencies

Even respondents ultimately prove unwilling to accept the logical implications of their principal arguments. They do not appear to contend, for example, that Congress violates the Appropriations Clause whenever it gives the Executive Branch discretion by appropriating sums "not to exceed" a particular amount. And respondents concede (Br. 33) the constitutionality of standing appropriations for "spending programs" like Social Security. But they insist (*ibid.*) that different rules apply for agencies' "operating budget[s]." And they further assert (Br. 9) that whatever rules apply to other agencies, special rules apply here because the CFPB is a "powerful law-enforcement agency."

Respondents' gerrymandered theory contradicts constitutional text, history, and precedent.

By its terms, the Appropriations Clause's "straightforward and explicit command," *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990), prohibits *any* agency from "draw[ing]" public money for *any* purpose without an "Appropriation[] made by Law," U.S. Const. Art. I, § 9, Cl. 7. Nothing in that text supports distinctions between spending programs and operating budgets, or between agencies with different powers or portfolios. If the Founders had intended such distinctions, they would have made them express—as they did with army appropriations.

History likewise refutes respondents' special, atextual limits on "law-enforcement agency" appropriations. Both the Customs Service and Revenue Officers exercised law-enforcement powers—including seizing vessels and goods, searching homes, and initiating prosecutions, Professors Br. 24-26 (citing authorities)—yet Congress funded them through standing sources without specifying any annual amount. Likewise, Congress provided for the compensation of U.S. Attorneys—quintessential law-enforcement officials—in part through "conviction fees." Nicholas R. Parillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*, at 263 (2013). And the OCC, Federal Reserve Board, and Federal Deposit Insurance Corporation (FDIC) all possess significant policymaking and enforcement authority, and all are sustained through standing funding sources. U.S. Br. 36.

Nor can respondents' proposed "law-enforcement agency" exception be reconciled with this Court's precedent. In *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), the Court refused to "weigh the relative importance of the

regulatory and enforcement authority of disparate agencies" when assessing a removal restriction's constitutionality. *Id.* at 1785. Nothing justifies a different approach here.

D. The Combination Of Features In The CFPB's Appropriation Is Commonplace

1. Respondents maintain that even if "*each* aspect [of the CFPB's] funding scheme has some historical analogue," the Bureau has "no historical counterpart that has combined *all* those aspects into a single agency to the same degree." Br. 30 (emphasis added). But Congress need not make each new agency a carbon copy of some previous one. In any event, the CFPB's funding mechanism is far from novel. The agencies from which the Bureau inherited most of its authorities (the OCC, Federal Reserve Board, and FDIC) have standing sources of *uncapped* funding, larger budgets, and significant regulatory and enforcement authority. U.S. Br. 22-23, 30-36. In fact, the Federal Reserve Board and CFPB are funded from the same source: the "earnings of the Federal Reserve System." 12 U.S.C. 5497(a)(1); see U.S. Br. 33. There is thus no basis for respondents' assertion (Br. 34) that "these agencies are in an entirely unrelated family."

Respondents argue that "the Federal Reserve *System* is sui generis * * * due to its hybrid public-private status." Br. 37 (emphasis added). But the CFPB itself is "in the Federal Reserve System." 12 U.S.C. 5491(a). In any event, respondents' argument conflates the Federal Reserve *Board* with the Federal Reserve *System*. The Board is an agency exercising "executive powers," Resp. Br. 38, including regulating banks and financial holding companies, see, *e.g.*, 12 U.S.C. 248. By contrast, the Federal Reserve *System* encompasses the public-

private Federal Reserve Banks. See Fin. Regulation Scholars Amici Br. 16. The hybrid nature of the *System* does not change the *Board*'s status as an executive agency with a funding mechanism that largely mirrors the CFPB's.

2. Respondents also seek (Br. 34-41) to distinguish the CFPB's historical analogues on the ground that those agencies are funded through fees or assessments imposed by the agencies themselves, whereas the CFPB receives its funding through transfers from the Federal Reserve Board. According to respondents (Br. 35-36), the other agencies' funding mechanisms comply with the Appropriations Clause because those agencies "must consider the risk of losing funding if entities exit their regulatory sphere," thus making the agencies' revenue "inherently constrained by market forces." That market-constraint theory is both conceptually flawed and descriptively inaccurate.

As respondents recognize, the "purpose," Br. 18 (citation omitted), of the Appropriations Clause "is to assure that public funds will be spent according to the letter of the difficult judgments reached by *Congress*," *Richmond*, 496 U.S. at 428 (emphasis added). That purpose is fulfilled when Congress passes a law funding an agency's activities, and the agency spends that funding in accordance with the law. Nothing in the Clause's text or history suggests any concern with whether an agency's funding is sufficiently "constrained" by the very "private parties" that Congress tasked the agency with regulating. Resp. Br. 35, 39. Nor has the Court suggested that such private-party constraints are relevant in any other separation-of-powers context. In *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477 (2010), for example, the removal restriction's constitutionality turned on

whether the relevant agency remained "accountable to the President," *id.* at 495—not whether regulated entities could "influence [the agency's] conduct," Resp. Br. 35.

Even setting that aside, respondents' theory (Br. 35) ignores that many agencies' standing funding sources have *not* been "constrained by market forces." The First Congress funded the Customs Service and Revenue Officers in part through the officers' collection of "penalties, fines and forfeitures." Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48; see Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 209; Professors Br. 23, 25. Congress provided for the compensation of U.S. Attorneys in part through "conviction fees." Parillo 263. And today, U.S. Customs and Border Protection (CBP) receives funding from immigration inspection fees, 8 U.S.C. 1356(d), and related "civil fines or penalties," 8 U.S.C. 1356(h)(1)(B).[3] Those standing funding sources all flow from "core executive" officials taking "coercive action"; they do not depend on officials "persuad[ing] the people they serve[] to pay them." Resp. Br. 1, 34-35 (emphasis omitted).

Respondents' market-constraint theory relies almost exclusively on the practice of bank "charter shopping," Br. 36 (citation omitted), but that practice affects "[o]nly the OCC," not "other federal bank regulators," Fin. Regulation Scholars Amici Br. 20. Respondents'

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[3] Respondents assert (Br. 35 n.2) that the CBP lacks a standing appropriation to spend fee revenues, but they misconstrue the only CBP fee-funding provision they cite, see 19 U.S.C. 58c(f)(2) (applicable "[e]xcept as otherwise provided in this subsection"); 19 U.S.C. 58c(f)(1) and (3) (providing for automatic reimbursement for certain activities from standing fee source). In any event, different provisions set forth other sources of CBP fee revenue, much of which "remain[s] available until expended," 8 U.S.C. 1356(h)(1)(A); see 8 U.S.C. 1356(d); 19 U.S.C. 58b(e); U.S. Br. 23.

theory also fails to account for the Federal Reserve Board. To fund its expenses, the Board levies assessments not on "private parties" (Resp. Br. 39) but on Federal Reserve Banks, 12 U.S.C. 243, which respondents admit (Br. 37) "cannot exit [the market] in response to imprudent regulation by the Board." Respondents speculate (Br. 39) that if Federal Reserve Banks charged their private-bank "counter-parties" too much, the private banks could stop transacting with the Reserve Banks, which could then "indirectly starve" the Board "of resources." But that attenuated possibility hardly "check[s]" (*ibid.*) the Board's authority to levy "assessment[s]" on Reserve Banks "sufficient to pay its estimated expenses," 12 U.S.C. 243.

3. Respondents assert (Br. 23-24, 42-43) that our position lacks limiting principles. But our position is firmly grounded in the principle that "'long settled and established practice is a consideration of great weight in the proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014) (brackets and citation omitted). As we have shown, centuries of practice confirm the breadth of Congress's discretion to determine the specificity, duration, source, and scope of the appropriations it makes by law.

Respondents are also wrong to assert (Br. 24) that a decision upholding the CFPB's funding statute would necessarily allow Congress to enact a standing appropriation of "up to a quadrillion dollars for the President to fund as he deems fit the entire federal government besides the Army." Even accounting for Congress's broad discretion in this area, that hypothetical (and implausible) law would fall far outside Congress's historical practices. By contrast, the CFPB's funding law—a

capped, lump-sum appropriation for a single agency to carry out prescribed functions—fits comfortably within a tradition tracing back to the Founding.

In fact, respondents' hypothetical only highlights why the CFPB's appropriation comes nowhere close to any plausible constitutional line. Congress authorized the CFPB to spend up to $734 million in fiscal year 2022—roughly 0.01% of the federal budget. U.S. Br. 3-4; see Cong. Budget Office, *The Federal Budget in Fiscal Year 2022* (Mar. 2023), https://perma.cc/YK9D-XEY5. And the CFPB's appropriation is far smaller and more constrained than the appropriations for many other programs and agencies that respondents concede are constitutional. See p. 15, *supra*.

Ultimately, then, respondents have attempted to single out the CFPB without "offer[ing] a theory for" determining when an appropriations law violates the Constitution. *Haaland* v. *Brackeen*, 143 S. Ct. 1609, 1631 (2023). The Fifth Circuit likewise never attempted to draw the "line between a constitutionally and unconstitutionally funded agency"; it simply concluded that the CFPB must "cross[] it." Pet. App. 36a. Without any coherent and principled "theory," respondents cannot "bear the burden of establishing [Section 5497's] unconstitutionality." *Brackeen*, 143 S. Ct. at 1630-1631.

E. Vacating The Rule Would Not Be A Proper Remedy

Even if the Court were to find that some or all of Section 5497's funding mechanism is invalid, vacating the Payday Lending Rule would be an inappropriate remedy.

1. Respondents offer no sound defense of the Fifth Circuit's failure to consider whether the defect it perceived could be cured by severing some portions of Section 5497. U.S. Br. 39-42. Respondents contend that

courts lack the "editorial freedom" to sever one or more provisions while upholding the CFPB's expenditures under the remainder of the statute. Br. 44 (citation omitted). But far from "re-writ[ing] Congress's work," *ibid.* (citation omitted), severing any unconstitutional provisions and allowing the remaining funding provisions to operate "[un]affected," 12 U.S.C. 5302, would adhere to the express severability clause that Congress enacted—and that respondents ignore.

Respondents separately contend (Br. 44) that the asserted unconstitutionality here flows from "key aspects" of Section 5497 that "cannot be" severed. But respondents' own arguments suggest two straightforward candidates for severance. First, in arguing that the CFPB's funding is "self-actualizing," *ibid.* (citation omitted), respondents rely on the Director's discretion under Section 5497(a)(1) to request less than the full statutory cap in any year. See Br. 1, 5, 15-18, 25, 29, 32-33. Second, respondents also rely on the provision under which CFPB funds "remain available until expended," 12 U.S.C. 5497(c)(1), contending that it contributes to the purportedly "illusory" nature of the statutory funding cap, Br. 15. See Br. 1, 6, 19, 32. A decision severing either or both of those provisions would provide no basis for upsetting the Rule. U.S. Br. 41-42.

2. Even if severance were impossible, respondents have not shown they are entitled to retrospective relief. They begin with the "threshold" assertion that "[a] valid appropriation 'is as much a precondition to every exercise of executive authority . . . as a constitutionally proper appointment or delegation of authority.'" Resp. Br. 46 (quoting *CFPB* v. *All Am. Check Cashing, Inc.*, 33 F.4th 218, 242 (5th Cir. 2022) (Jones, J. concurring)).

But the concurrence on which respondents rely offered no authority for that premise, and it is incorrect.

A valid appropriation is, of course, a precondition to every expenditure of federal funds. And because exercises of executive authority ordinarily require at least some expenditures, Congress's control over spending is a powerful check on the Executive Branch. But it does not follow that an executive action carried out using unappropriated funds is itself unconstitutional, or that it must necessarily be treated as a nullity. Cf. *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (explaining that an executive official who incurs an obligation without an appropriation can nevertheless bind the United States). The violation in such a case is the unauthorized *expenditure*, not the action it facilitated.

Contrary to respondents' contention, therefore, any lack of properly appropriated funds did not deprive the Director of "the 'power' to promulgate the Rule." Br. 46 (citation omitted). Even the Fifth Circuit recognized that any flaws in the CFPB's "funding mechanism 'did not strip the Director of the power to undertake the * * * responsibilities of his office.'" Pet. App. 43a-44a (brackets and citation omitted). Respondents thus err in contending (Br. 47) that the Rule itself is "unconstitutional."

Respondents likewise have not shown that retrospective relief would accord with traditional remedial principles. As our opening brief demonstrated (at 43-44), remedies for Appropriations Clause violations have historically been limited to forward-looking relief. Respondents claim (Br. 49) that adhering to such limits here would be "extraordinary." But respondents have not identified any prior decision by any court vacating

agency action merely because it was carried out with unappropriated funds.[4]

Respondents argue that their novel remedy would "create incentives to raise . . . challenges." Br. 48 (quoting *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018)). But prospective relief serves that goal: Regulated entities would have ample incentive to challenge an agency's purported lack of valid funding because a successful challenge of that kind would curtail the agency's activity until the defect was cured.

Respondents also ignore or misstate other contexts in which the Court has embraced analogous limits on remedies. For example, the unconstitutional seizure of evidence does not prevent its use at trial unless the violation was "sufficiently deliberate" and "sufficiently culpable" to make exclusion "worth the price." *Herring* v. *United States*, 555 U.S. 135, 144 (2009). So too here: Even if the Bureau adopted the Rule using unconstitutionally appropriated funds, automatic vacatur of the Rule does not follow—particularly given that the Bureau was not disregarding Congress's directions, but instead was acting "in good-faith reliance on a statute later declared unconstitutional." *Id.* at 142.

Similarly, under the *de facto* doctrine, this Court has refused to invalidate past actions by unconstitutionally appointed officials because such relief would cause unwarranted disruption. U.S. Br. 46-47. Respondents incorrectly contend (Br. 49) that the Court "repudiated" that doctrine in *Ryder* v. *United States*, 515 U.S. 177

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[4] The most respondents can muster (Br. 49) is dictum in an unpublished district court decision suggesting that the court would vacate a criminal conviction if it determined that prosecutors had spent funds in violation of an appropriations rider—a materially different scenario.

(1995). *Ryder* focused on adjudications, framing its holding in terms of the remedies on direct appeal for challenges to "the appointment of an officer who adjudicates [the challenger's] case." *Id.* at 182. Sound reasons justify treating adjudications differently. Retrospective relief from past adjudications generally will not inflict the sort of "grave disruption" that the *de facto* doctrine serves to prevent. *Id.* at 185. And the costs of applying the *de facto* doctrine to adjudicators are uniquely high: A prospective remedy prohibiting an adjudicator from continuing to exercise her office would not benefit most litigants, who cannot expect to appear before the same adjudicator again. Here, conversely, prospective relief would provide a meaningful remedy and strong incentives to challenge invalid appropriations.

3. Finally, respondents have no persuasive response to our showing (Br. 46-48) that a decision invalidating the CFPB's past actions would be deeply destabilizing. Indeed, they tacitly acknowledge the disruption by suggesting (Br. 50) the extraordinary step of "delay[ing] [this Court's] judgment" to allow Congress to mitigate the damage. Respondents also observe (*ibid.*) that the Bureau could invoke "remedial defenses," such as laches and the statute of limitations. But even if those defenses ultimately prevailed in some cases, the widespread uncertainty about the validity of the CFPB's past acts would itself be profoundly disruptive. Much of the housing finance industry, for example, has filed an amicus brief underscoring "the catastrophic economic consequences that would occur if the Court rules in a manner that calls the lawfulness of all the CFPB's rules into question." Mortg. Bankers Ass'n et al. Amici Br. 19. The Court should not adopt a remedy that would

"unnecessarily infringe on [those] competing interests" in such potentially destructive ways. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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