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

REPLY BRIEF FOR THE PETITIONERS

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Respondents' brief in opposition reinforces the need for prompt review of the court of appeals' unprecedented and destabilizing decision. Respondents do not seriously dispute that the court's novel interpretation of the Appropriations Clause warrants this Court's review. They could scarcely do so: The decision below declares invalid a federal statute, conflicts with the decision of another court of appeals, and marks the first time in our Nation's history that any court has held that Congress violated the Appropriations Clause by enacting a law authorizing spending.

Nor can respondents defend the decision below on the merits. They cannot reconcile their position with the constitutional text or history, which confirm that when the Founders sought to limit Congress's discretion in making appropriations, they did so expressly. Respondents also cannot meaningfully distinguish the CFPB's funding from Congress's longstanding and concededly valid practice of funding agencies from standing sources outside annual spending bills. And respondents cannot square the court of appeals' disruptive vacatur with traditional remedial principles.

Finally, respondents provide no good reason to defer review until next Term, which could delay this Court's resolution of the issue by up to a year. The decision below frustrates the CFPB's ongoing activities, calls into question more than a decade's worth of its past actions, and inflicts severe uncertainty on the financial-services industry. Even the States aligned with respondents on the merits thus urge this Court to "resolve this issue quickly." W. Va. Amici Br. 2. And respondents themselves suggest (Br. in Opp. 4, 34) that the uncertainty spawned by the decision below is sufficiently grave that Congress might feel compelled to enact "interim appropriations" absent prompt review by this Court. The Court has often heard and decided important cases on comparable or more expedited schedules. It should do the same here.

A. The Decision Below Is Incorrect

Respondents offer no persuasive defense of the court of appeals' holding that the CFPB's funding violates the Appropriations Clause or the court's conclusion that such a violation would justify vacating the Payday Lending Rule.

1. Text, history, and precedent refute respondents' assertion that Congress violated the Appropriations Clause by authorizing the CFPB to spend a specified amount from a specified source for a specified purpose.

a. Respondents do not and could not contend that the text of the Appropriations Clause restricts Congress's authority to choose the specificity and duration of the

"Appropriations" it makes "by Law." U.S. Const. Art. I, § 9, Cl. 7. The absence of any such limit is confirmed by the separate clause restricting appropriations for the army—and only the army—to "two Years." U.S. Const. Art. I, § 8, Cl. 12. Respondents get it backwards in asserting (Br. in Opp. 16) that the "concern" behind that restriction requires reading an analogous restriction into the Appropriations Clause. As in other contexts, an express limit in one constitutional provision confirms the absence of such a limit elsewhere. See, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (opinion of Harlan, J.).

Respondents also identify (Br. in Opp. 11-13) no evidence that the Founders intended the Appropriations Clause as a limit on Congress's power to pass laws authorizing spending. And they cite no prior decision holding that a statute authorizing spending violated the Appropriations Clause. Instead, this Court has long recognized that the Clause serves "as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937).

b. Lacking support in text, Framing-era history, and precedent, respondents stake their case on the assertion (*e.g.,* Br. in Opp. 16) that the CFPB's funding mechanism is "unprecedented." But they acknowledge (*id.* at 22) that agencies dating back to the Founding, including the Post Office and National Mint, were funded from sources other than annual appropriations. Respondents also concede (*id.* at 22-23) that the same is true of other financial regulators, including the Federal Reserve Board, Office of Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC). Like the CFPB's appropriation, those agencies' funding statutes contain "no temporal limitation" (*id.* at 15). But respondents do not question the constitutionality of those longstanding funding laws. And they offer no principled distinction between those laws and the CFPB's funding statute.

Respondents first assert (Br. in Opp. 16) that Congress gave the CFPB "nearly unfettered discretion" over its funding. But Congress did no such thing. It imposed an annual cap of $597.6 million, adjusted for inflation. 12 U.S.C. 5497(a)(2)(A) and (B). The only discretion the CFPB has is to request *less* than that congressionally determined amount. By contrast, Congress imposed no absolute cap on the funding of agencies like the Federal Reserve Board and OCC. The OCC, for example, is authorized to collect assessments "as the Comptroller determines is necessary or appropriate to carry out" the responsibilities that Congress has assigned to it by statute. 12 U.S.C. 16; see 12 U.S.C. 243 (similar for Federal Reserve Board).

Nor is the statutory cap on the CFPB's funding "illusory" or "astronomical" (Br. in Opp. i, 1, 14, 15). Congress set the cap to ensure that "the CFPB budget is modest" in comparison with the budgets of "other financial regulatory bodies." S. Rep. No. 176, 111th Cong., 2d Sess. 163 (2010). The operating expenditures of the OCC, Federal Reserve Board, and FDIC, for example, exceed the CFPB's cap.[1]

Respondents note (Br. in Opp. 14) that Congress provided that the Bureau's funds "remain available until expended." 12 U.S.C. 5497(c)(1). But such provisions

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[1] See, *e.g.*, OCC, *2022 Annual Report* 43 (OCC's FY2022 expenditures were approximately $1.1 billion); Bd. of Governors of the Fed. Reserve Sys., *108th Annual Report of the Board of Governors of the Federal Reserve System* 154 (2021) (Federal Reserve Board's FY2022 estimated operating expenses were approximately $970 million); FDIC, *2021 Annual Report* 123 (FDIC's FY2021 operating expenditures were $1.8 billion).

are commonplace. See 1 Office of Gen. Counsel, U.S. GAO, *Principles of Federal Appropriations Law* 5-7 to 5-9 (3d ed. Jan. 2004 update). The OCC, for example, may likewise retain unspent funds for use on its ongoing activities. See 12 U.S.C. 16, 192, 481; OCC, *2022 Annual Report* 43-44. Again, therefore, this feature of the CFPB's funding does not distinguish it from concededly valid funding mechanisms.[2]

Ultimately, then, respondents' insistence that the CFPB's funding is "unprecedented" reduces to a single distinction: Agencies like the Postal Service, Mint, Federal Reserve Board, OCC, and FDIC are funded through fees or assessments imposed by those agencies themselves, whereas the CFPB receives its funding from the earnings of the Federal Reserve System. 12 U.S.C. 5497(a)(1); see Br. in Opp. 22-23. But that distinction has nothing to do with the Appropriations Clause. If, as respondents concede, Congress made a valid "[a]ppropriation" "by [l]aw" when it authorized the Federal Reserve Board to use a portion of the Federal Reserve System's revenues to fund the Board's operations, Congress likewise made a valid appropriation when it authorized the CFPB—"an independent bureau" established "in the Federal Reserve System," 12

[2] Congress also specified that when requesting funding for a given year, the CFPB must "tak[e] into account such other sums made available to the Bureau from the preceding year," 12 U.S.C. 5397(a)(1), thus precluding the CFPB from "amass[ing] a surplus war chest," Br. in Opp. 15. The "investments" reported in the Bureau's annual report do not reflect any such surplus; instead, they are amounts needed to pay expenses the Bureau has already budgeted for that year, plus a smaller operating reserve. See CFPB, *Financial report of the Consumer Financial Protection Bureau: Fiscal year 2022*, at 85-86 (Nov. 15, 2022).

U.S.C. 5491(a)—to spend a portion of the same revenues on its operations.

Respondents assert (Br. in Opp. 22-23) that agencies that rely on their own fees and assessments are constrained "because they must consider the risk of losing funding if regulated entities exit their regulatory sphere." But even if that were true, respondents fail to explain why that sort of "accountability" (*id.* at 23) would have any relevance under the Appropriations Clause. Under respondents' own theory (*id.* at 11-13), the Clause is concerned with *Congress's* control over federal spending—not with agencies' accountability to the *private* entities they regulate.[3]

c. Finally, respondents briefly suggest (Br. in Opp. 23-24) that the CFPB exercises more regulatory authority than other agencies funded outside annual spending bills. But this Court has rejected reliance on such comparisons because "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1785 (2021). And in any event, respondents' argument is unpersuasive even on its own terms. The Federal Reserve Board, OCC, and FDIC have significant policymaking and enforcement authority over key segments of the financial industry. See 12 U.S.C. 248, 1818, 1828. Indeed, the CFPB inherited most of its authorities from those agencies and others with similar

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[3] Respondents' argument also rests on a faulty premise. The Federal Reserve Board is funded through assessments levied on Federal Reserve Banks, not private parties. 12 U.S.C. 243. As statutorily mandated components of the Federal Reserve System, those banks could not simply "exit the[] regulatory sphere" if they thought the assessments were too high. Br. in Opp. 22; see 12 U.S.C. 222, 263, 341.

funding structures. See 12 U.S.C. 5581. Respondents concede that those structures were valid means of funding the relevant activities before the CFPB's creation. Nothing justifies a different result now.

2. Respondents also fail to rehabilitate the court of appeals' disruptive remedy.

First, respondents cannot justify the court's failure to conduct a severability analysis. Respondents question (Br. in Opp. 26) whether the court could have identified "a valid permutation [of Section 5497] that Congress would prefer as second-best *and* that the Court could create by 'severing' parts of" the statute. But the primary ground on which the court distinguished the CFPB from the Federal Reserve Board was that "the Bureau may 'roll over'" funds from one year to the next. Pet. App. 35a-36a; see Br. in Opp. 14. At the very least, the court thus should have asked whether severing the provision allowing CFPB funds to "remain available until expended," 12 U.S.C. 5497(c)(1), would permit the remainder of Section 5497 to operate constitutionally. If so, then any vacatur of the Payday Lending Rule would require (at least) a showing that the rule could not have been adopted but for that provision—a showing that respondents have not made.

Respondents object (Br. in Opp. 26-27) that a severability analysis might have been complicated. But this Court's precedents required it—particularly because "the Dodd-Frank Act contains an express severability clause." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2209 (2020) (opinion of Roberts, C.J.); see 12 U.S.C. 5302. And as *Collins* illustrates, the obligation to determine whether a portion of the challenged statute is severable does not disappear where (as here) a plaintiff challenges past government actions. Cf. Br. in Opp. 26. In that circumstance, too, the plaintiff must show that any harm is attributable to the provision or provisions that make the challenged statute unconstitutional; without such a showing, the plaintiff cannot be entitled to a judicial remedy. See *Collins*, 141 S. Ct. at 1788-1789.

Second, even if respondents were correct that any unconstitutional features of Section 5497 cannot be severed, that would not justify the vacatur of the Payday Lending Rule. Respondents seek to defend vacatur as an exercise of "the negative power to disregard an unconstitutional enactment." Br. in Opp. 27 (quoting *Seila Law*, 140 S. Ct. at 2211 (opinion of Roberts, C.J.)). But the only consequence of "disregard[ing]" Section 5497 is the conclusion that the CFPB spent money that it was not validly authorized to spend. *Ibid.* Unlike a constitutional defect in the *substantive* statute authorizing agency action, an unconstitutional funding provision does not mean that the action itself is invalid. To the contrary, as even the court of appeals recognized, "Congress plainly (and properly) authorized the Bureau to promulgate the Payday Lending Rule." Pet. App. 43a.

Like the court of appeals, respondents simply presume that any agency action carried out using funds that were not validly appropriated is void. But respondents cite no precedent supporting that assumption. And they also make no attempt to justify that assumption under traditional remedial principles. Nor could they. Those principles require courts to craft remedies that are "tailored to the injury suffered from the constitutional violation," *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); that do "not unnecessarily infringe on competing interests," *ibid.*; and that take adequate account of "the public interest" and "the balance of equities," *Winter* v. *Natural Res. Def. Council, Inc.*, 555

U.S. 7, 20 (2008); see Pet. 24-27. The court of appeals' extraordinarily disruptive remedy of automatic vacatur does none of those things.

B. The Decision Below Warrants Review This Term

Respondents offer no sound basis for declining to review the decision below this Term.

1. Respondents do not and could not dispute that the question presented by the government's petition warrants certiorari. The decision below declares a federal statute unconstitutional. It also conflicts with the D.C. Circuit's determination that "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments," and that the CFPB "fits within th[at] tradition." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 95 (2018) (en banc). It is immaterial that the D.C. Circuit reached that determination in rejecting a broader challenge to the CFPB's structure. Cf. Br. in Opp. 32. What matters is that the D.C. Circuit saw no constitutional problem with the CFPB's funding, and the court of appeals here expressly "disagree[d] with" that decision. Pet. App. 39a-40a & n.15; see *CFPB* v. *Nationwide Biweekly Admin., Inc.*, No. 18-15431, 2023 WL 566112, at *2 (9th Cir. Jan. 27, 2023) (recognizing that the "circuit courts have split").

The decision below also carries immense legal and practical consequences that override any interest in "further percolation." Br. in Opp. 32. The decision frustrates the CFPB's ability to enforce the Nation's consumer-protection laws. It has already affected more than half of the Bureau's 22 active enforcement actions.

Five have been stayed.[4] Motions for relief based on the decision below are pending in seven others.[5] And if the CFPB initiated a new enforcement action within the Fifth Circuit, a stay or dismissal would be virtually guaranteed.

More broadly, the court of appeals' decision threatens the validity of virtually all past CFPB actions, including numerous regulations that are critical to consumers and the financial industry. Pet. 29-30. As even the States supporting respondents on the merits emphasize, therefore, "much of the country's financial industry sits in a state of regulatory limbo." W. Va. Amici Br. 2. This Court's intervention is urgently needed.

2. Respondents try to manufacture "vehicle" issues by reprising arguments about the CFPB Director's removal protection and the statutory basis for the Payday Lending Rule. Br. in Opp. 28; see *id.* at 28-32. That effort fails. As the government explained in its brief in opposition to respondents' cross-petition, the lower courts correctly rejected those arguments, 22-663 Br. in Opp. 11-23, and this Court need not and should not consider them, *id.* at 24-28. Those issues thus pose no obstacle to the Court's consideration of the Appropriations Clause question. And even if the Court concludes that those questions warrant review, the proper course

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[4] See 21-cv-7492 D. Ct. Doc. 123 (C.D. Cal. Jan. 3, 2023); 22-cv-3256 D. Ct. Doc. 52 (S.D.N.Y. Dec. 9, 2022); 22-cv-898 D. Ct. Doc. 14 (E.D. Tex. Nov. 29, 2022); 21-cv-1251 D. Ct. Doc. 67 (N.D. Tex. Nov. 4, 2022); 22-cv-1494 D. Ct. Doc. 28 (N.D. Tex. Oct. 31, 2022).

[5] See 21-cv-262 D. Ct. Doc. 130 (S.D. Ohio Jan. 25, 2023); 23-cv-38 D. Ct. Doc. 18 (S.D.N.Y. Jan. 13, 2023); 22-cv-8308 D. Ct. Doc. 58 (S.D.N.Y. Jan. 10, 2023); 22-cv-29 D. Ct. Doc. 47 (W.D.N.Y. Dec. 27, 2022); 21-cv-488 D. Ct. Docs. 124, 125 (C.D. Cal. Nov. 23, 2022); 15-cv-7522 D. Ct. Doc. 363 (C.D. Cal. Nov. 7, 2022); 19-cv-298 D. Ct. Doc. 484 (D. Utah Oct. 21, 2022).

would be to grant the government's petition and add the additional questions raised by respondents. In no event should the Court leave in place a decision declaring a federal statute invalid merely because respondents have re-raised alternative arguments rejected by every court to consider them.

3. This Court should accordingly grant the government's petition and set this case for argument in April 2023. Respondents do not suggest that they would suffer any meaningful prejudice from expedited briefing. And they cannot reasonably object to expedition that is required only because of their own concededly unnecessary cross-petition. See 22-663 Br. in Opp. 9-10, 29. The Court has expedited merits briefing to a comparable or even greater degree in many recent cases. See, *e.g.*, *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022) (No. 22-506); *Biden* v. *Texas*, 142 S. Ct. 1098 (2022) (No. 21-954); *Ramirez* v. *Collier*, 142 S. Ct. 50 (2021) (No. 21-5592); *United States* v. *Texas*, 142 S. Ct. 14 (2021) (No. 21-588); *Department of Commerce* v. *New York*, 139 S. Ct. 953 (2019) (No. 18-966). The same course is warranted here.

Respondents object (Br. in Opp. 35) that those past cases were more pressing than this one because the judgment below "vacat[es] only a single stayed regulation." But the effect of the Fifth Circuit's unprecedented holding extends far beyond the Payday Lending Rule. Respondents do not disagree. Instead, they suggest (*id.* at 34) that the CFPB should remove the cloud over its "ongoing activities" by asking Congress to provide "interim appropriations until this Court resolves the funding statute's validity." But the appropriate response to uncertainty spawned by an outlier decision of a lower court is not a demand for further congressional action; it is prompt review by this Court.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition and set the case for argument in April 2023.

Respectfully submitted.

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FEBRUARY 2023