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 CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are over 140 current and former members of Congress who are familiar with the congressional appropriations process and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376. Specifically, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies, serve or served on appropriations committees, serve or served in congressional leadership, or otherwise serve or served in Congress. This legislative experience makes them well aware of the critical role that the Consumer Financial Protection Bureau plays in Congress's plan to prevent debilitating national crises like the financial crisis of 2008. *Amici* appreciate the importance of Congress's ability to use a flexible and diverse range of funding models to provide comprehensive solutions to pressing problems, and understand how the Bureau's chosen funding structure helps it to succeed in its mission of avoiding future financial crises.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

From the first days of the Republic, Congress has appropriated funds, and exercised control over those

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

appropriations, in a wide variety of ways. As the constitutional text establishes, and courts have universally accepted until now, making such choices is within Congress's plenary power. Congress's long-exercised authority to structure appropriations as it sees fit to solve a wide array of national problems is as crucial now as it was at the Founding. The history underpinning the establishment of the Consumer Financial Protection Bureau (CFPB) well illustrates Congress's authority to craft appropriations that are tailored to the problem at hand.

In 2010, Congress enacted the Dodd-Frank Act in response to the financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings and wealth, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010). After extensively studying the crisis, Congress determined that consumer protection was fragmented across numerous agencies, some of which were prioritizing other responsibilities, and collectively were failing to adequately implement and enforce consumer protection laws. Some of the agencies were dependent on unpredictable funding that varied from year to year. To solve these problems, Congress consolidated federal regulatory authority for certain consumer protection laws into a single new agency—the CFPB—and provided the CFPB with a steady but capped appropriation.

By appropriating funds on a standing basis, rather than year by year, Congress matched the CFPB's funding structure to the approach that it had already determined effective for other financial regulators, some going back over 150 years—but

imposed more constraints on the CFPB. Unlike most other financial regulators (which are subject to no budget cap), Congress set an annual cap for the Bureau's budget at a "modest" level using a portion of the Federal Reserve System's earnings, S. Rep. No. 111-176, at 163-164, and also required the Director to justify its budget to Congress biannually. The CFPB's funding structure was carefully crafted to allow the agency to best accomplish the critical tasks it was created to perform.

Such funding flexibility is precisely how the Framers drafted the Constitution, leaving the ultimate choice of how to appropriate in Congress's hands. The Appropriations Clause is designed to safeguard Congress's power of the purse by ensuring that the Executive Branch cannot spend unless Congress has authorized it, but the Constitution leaves the details of how the appropriations are organized to Congress.

There is no dispute here that Congress has authorized the CFPB's relevant expenditures: it specified how much the CFPB may spend (no more than $597.6 million per year, adjusted for inflation), for what purposes ("to carry out the authorities of the Bureau"), and from what federal funds (the Federal Reserve System's earnings). 12 U.S.C. § 5497(a)(1-2). Nothing in the Constitution's text or historical understanding demands that Congress do anything more to "ma[k]e by Law" an "Appropriation." U.S. Const. art. I, § 9, cl. 7. Certainly, no time limit is required; the Constitution requires periodic review only when Congress appropriates funds for the Army, *id*. art. I, § 8, cl. 12.

Congress's power over the purse is otherwise plenary, as recognized by this Court and courts of appeals, and the choices Congress made in funding the CFPB—a standing appropriation, capped lump sum, and funding sources other than general revenue—are commonplace, not controversial. And have been common since the early days of the Republic. If anything, much of the current practice regarding appropriations committees developing annual appropriations acts is a relatively new innovation.

Annual appropriations are also far from the most common way to appropriate funds, representing less than one-third of federal outlays. Permanent (or standing) appropriations are common for entitlement programs like Social Security and Medicare, as well as for must-pay items like the judgment fund and interest on the national debt. Unlike the CFPB's funding, most such appropriations are not capped. It is also routine—and has been since 1789—to fund programs through assessments, fees, and other agency revenues. Again, often without a cap like the Bureau's.

The CFPB's funding is thus more constrained than many other long-standing congressional modes of appropriation and falls well within Congress's constitutional prerogative. Congress did not, moreover, free the Bureau from congressional oversight writ large. Oversight over the CFPB is more robust than for many other federal agencies, including required semiannual testimony before two Committees of Congress and extensive financial auditing and reporting. As a result of keeping close tabs on the Bureau's activities, Congress has disapproved two Bureau regulations and amended the

Bureau's governing statutes on several occasions in the decade following enactment of Dodd-Frank. But even as it has exercised such oversight, Congress has chosen to keep the Bureau's steady funding level in place, reflecting its considered and unchanged judgment that steady funding is essential for the Bureau to effectively help avoid future financial crises.

The CFPB thus remains politically accountable. And Congress's decision to maintain its steady funding falls squarely within the power of the purse that the Constitution assigns to Congress alone.

ARGUMENT

I. Congress Has Broad Authority To Shape Appropriations To Best Fit The Program Or Problem At Hand.

A. The Constitution Gives Congress Near-Plenary Authority over Appropriations.

The Appropriations Clause provides 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. The Clause thus limits *Executive* authority to spend funds, requiring that spending must "be authorized by a statute." *OPM v. Richmond*, 496 U.S. 414, 424 (1990). Nothing in the Clause , however, limits how *Congress* may "ma[k]e by Law" an "Appropriation[]."

There is only one textual constraint on Congress's power to authorize spending: the prohibition on appropriating funds "for a longer Term than two

Years" to "raise and support Armies." U.S. Const. art. I, § 8, cl. 12. The Framers included such a limit to require a biennial legislative vote on Army appropriations as a "precaution against danger from standing armies." *The Federalist No. 41*, at 273 (James Madison) (Jacob Cooke ed., 1961). If the Framers "had thought it necessary to" guard against any other continuing government activity, to require annual or biennial votes on other programs, or to impose some other constraint on Congress's broader appropriations authority, "they would have" done so. *Clinton v. Jones*, 520 U.S. 681, 706 (1997). They did not.

This Court's cases have long suggested as much. In *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937), the Court considered a law that remitted certain tax proceeds to the treasury of the Philippines, without specifying "the particular uses to which the appropriated money is to be put." *Id.* at 321. Although holding the question was "premature" (as no tax proceeds had yet been transferred), the Court also suggested any challenge under the Appropriations Clause was "without merit," because the Clause is "intended as a restriction upon the disbursing authority of the Executive department, and is without significance here." *Id.* More recent cases reiterate that the "straightforward and explicit command of the Appropriations Clause" "'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Richmond*, 496 U.S. at 424 (quoting *Cincinnati Soap*, 301 U.S. at 321); *see also Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020) (Appropriations Clause

"constrain[s] how federal employees and officers may make or authorize payments.").

As described below, hewing to constitutional text and this Court's understanding of the Appropriations Clause as a limit on Executive power—rather than engrafting unwritten limitations on Congress's appropriations authority—is fully consistent with the Congress's unbroken practice, from the early Republic to today, of structuring appropriations in a wide variety of ways to meet a wide array of disparate problems. Such "'[l]ong settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

The appropriated amount need not even be a dollar figure; from the early days, Congress set appropriation amounts for certain activities by reference to amounts collected. For example, the statutes establishing a national post office funded it through the collection of postage rates. *See* Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70 (continuing Post Office salary and powers "the same as they last were" under enactments under the Articles of Confederation); Articles of Confederation of 1781, art. IX, para. 4 (authorizing Congress to establish post office "exacting such postage … as may be requisite to defray the expenses of the said office"); Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232. As this Court has held, there is "no valid basis for challenging [Congress's] power" to "adopt the quantum of receipts from [a] particular tax as the measure of the appropriation." *Cincinnati Soap*, 301 U.S. at 313.

As the Government explains and other courts of appeals have concluded, even if—contrary to authority—the Appropriations Clause limits not only the disbursement authority of the Executive, but also "takes away from Congress … the option *not* to require legislative appropriations prior to expenditure," Pet. App. 31a (quoting Kate Stith, *Congress's Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988)), Congress has met any obligation to make an "appropriation" here. *See* Gov't Br. 24-25; *CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 182-183 (2d Cir. 2023); *see also PHH Corp. v. CFPB,* 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc) ("Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process."), abrogated on other grounds by *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183 (2020).

In fact, comparison to Congress's practice—both historical and modern—shows that Congress has, in many ways, placed greater limits on the Bureau's funding than it does for many other long-standing government programs that Respondents concede are constitutionally funded. *See* Br. in Opp. 21-23 (conceding constitutionality of permanent appropriations for entitlement programs, agencies funded by assessments on regulated entities, and agencies funded by fees for services they provide).

B. Historic and Contemporary Practice Confirms Congress's Authority to Flexibly Structure Appropriations.

In holding that Dodd-Frank's appropriation choices were constitutionally flawed, the Fifth Circuit was primarily concerned that the funding was "perpetual" and "insulat[ed] … from annual or other time limited" appropriations, as well as "drawn from a source that is itself outside the appropriations process," because the Federal Reserve's funding comes from bank assessments and other revenues. Pet. App. 34a-36a. But these features—lack of time limitation and sourcing from a revolving fund—are commonplace in appropriations practice, stretching back to the Founding era. In contrast, the regularized process of tightly time-constrained annual appropriations legislation developed in appropriations committees—to which the Fifth Circuit unfavorably compared the CFPB's funding—is a comparatively recent development. Annual appropriations now represent around a quarter of federal outlays. They are far from the norm in appropriations practice, much less a constitutional imperative.

1. The current appropriations process is a relatively recent legislative choice.

Not until the latter part of the twentieth century, and especially following the Congressional Budget Act of 1974, was the modern budgeting process distilled into a series of regularized steps. In broad brush terms, the process works like this: after the President

submits a budget, the House and Senate Budget Committees adopt a concurrent resolution specifying an overall budget amount. U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law*, 2-16 (4th ed. 2016 rev.) (*GAO Redbook*). The total amount is divided among appropriations subcommittees with jurisdiction over different agencies, and the House Appropriations subcommittees then produce appropriations bills that are generally divided by subject matter aligned with congressional committee jurisdiction (e.g., Department of Defense; Departments of Labor, Health and Human Services, and Education, and related agencies, etc.). *Id.* at 2-17–2-18; Gillian Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075, 1090-91 (2021).

This process—and the role of the appropriations committees—is often described as the "regular order" of appropriations. Metzger, at 1092. And the Fifth Circuit implicitly viewed this relatively recent appropriations process as the norm against which the CFPB's funding was found wanting. But this process is a creature of statute, did not exist at the Founding, and is not, in fact, the most common way that appropriations are made. More federal funds are expended outside of this process than within it.

"There were few statutory funding controls in the early years of the nation." *GAO Redbook*, at 1-7. Over "the span of more than two centuries," Congress developed various statutory frameworks for controlling expenditures, as well as the more regularized appropriations process described above. *Id.* at 1-8; *Harrington v. Bush*, 553 F.2d 190, 195 (D.C. Cir. 1977).

Until modern times, even nominally annual appropriations were not subject to stringent time limitations. Although "most operating expenses of the federal government were appropriated annually (following the colonial practice)," in practice the "annual" limits were quite permeable. *See* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 Calif. L. Rev. 593, 601 (1988). Congress did not set a fiscal year or begin developing a regular timetable for spending legislation until 1842. *Id.* at 601. And, until the Anti-Deficiency Act of 1870, there was no general prohibition on the government obligating funds—meaning committing to making a payment—in the absence of an appropriation, so before the Anti-Deficiency Act the government often borrowed money and spent it before funds were appropriated. Stith*, Congress's Power of the Purse*, at 1371-72. Even after the Anti-Deficiency Act, Congress did not for some time impose strict time limits on when annual appropriations must be obligated. *See* Stith, *Rewriting the Fiscal Constitution*, at 603. It was only after World War II that Congress first made explicit that agencies must obligate their annual appropriations within a year. *Id*. at 604.

The permissible purposes for lump sum appropriations were not highly constrained in the early years, either. In Congress's very first years, a single lump sum appropriation was made for nearly the entire federal government. Act of Sept. 29, 1789, ch. 23, 1 Stat. 95 (single sum "for defraying the expenses of the civil list"); Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104 (same); Act of Feb. 11, 1791, ch. 6, 1 Stat. 190 (same). A "purpose statute" was first adopted

in 1809, specifying that "[a]ppropriations shall be applied only to the objects for which [they] . . . were made." Metzger, at 1088. But the permissible purposes were often stated at a very high level of generality, leaving much to executive branch discretion. "Early Congresses appropriated funds with varying specificity." Cong. Rsch. Serv., R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, at 27-28 (June 16, 2020) (collecting examples). "Appropriation … acts 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*, 301 U.S. at 322.

As for the appropriations committees, they were first established after the Civil War and only assumed something closer to their current form in the 1920s, when the proliferation of federal spending programs and new revenue from the federal income tax generated under the Sixteenth Amendment prompted the need for a more coordinated budget process. *See* Stith, *Rewriting the Fiscal Constitution*, at 601-02; *see also GAO Redbook*, at 2-12–2-13. Even still, appropriations committees are far from the sole center of congressional control over appropriations; much control over spending is exercised by traditional substantive committees as well. *See* Metzger, at 1089-90.

Thus, although a lump sum annual appropriation enacted through an appropriations bill originating in an appropriations committee may appear to be the paradigmatic form of appropriations, it is neither the historical nor contemporary norm. Far more

expenditures are appropriated through different funding models, discussed below. So-called "regular order" annual appropriations represented only about 27% of the federal government's expenditures in 2022. *See* Cong. Budget Office, *The Federal Budget in 2022* (Mar. 2023), https://tinyurl.com/mr23sddx.

By giving short shrift to the complete appropriations picture, the Fifth Circuit mistakenly confused removal of the Bureau's funds from "review by the Committees on Appropriations," 12 U.S.C. § 5497(a)(2)(C), with "express exemption from *congressional* review of [the Bureau's] funding," Pet App. 36a-37a (emphasis added). But the Bureau is not exempted from congressional oversight; there is only a shift in how such oversight authority is apportioned within Congress. Unlike most other financial regulators, twice a year, the Bureau's Director must justify its budget request to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committees on Financial Services and Energy and Commerce of the House of Representatives, 12 U.S.C. § 5496(a), (c)(2). Agencies like the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and National Credit Union Administration—none of which are subject to an annual funding cap like the CFPB's—have no such congressional testimony requirements. *See* Section III, *infra*.

2. From the Early Republic to today, Congress has often structured appropriations in a wide variety of ways beyond annual appropriations acts.

Congress retains, and courts have affirmed, the prerogative to depart from the statutory and parliamentary rules-based annual budget and appropriations process for any particular program or expenditure. And Congress regularly does so. Such common alternative appropriations structures feature elements that the Fifth Circuit (wrongly) deemed constitutionally suspect, Pet. App. 35a: they are not "time limited," they draw from a funding source that is "outside the appropriations process"—meaning revenues Congress authorized agencies to collect and use—or both. Congress's early and frequent use of these alternative approaches confirms their constitutionality—as well as the importance of flexibility to the Legislative Branch's capacity to address the wide variety of issues facing the Nation.

a. For starters, Congress frequently appropriates funds with time horizons much greater than a year, or with no time limit at all. For projects that need longer time horizons, Congress often makes multi-year appropriations. *See* Stith, *Rewriting the Fiscal Constitution*, at 605. For example, military construction appropriations are usually available for five years. Cong. Rsch. Serv., R44710, *Military Construction: Authorities, Process, and Frequently Asked Questions*, at 18 (Nov. 22, 2019). Often, Congress sets no time limit. It is routine for lump sum appropriations to be made available "until expended,"

as the CFPB's funding is. *See GAO Redbook*, at 2-9; 12 U.S.C. § 5497(c)(1). Such "no year" appropriations, which afford the Executive Branch discretion on expenditure timing, are consistent with the historical practice of making appropriations subject to expenditure at the Executive Branch's discretion. *See Clinton v. City of New York*, 524 U.S. 417, 466-67 (1998) (Scalia, J., concurring in part and dissenting in part) ("Examples of appropriations committed to the discretion of the President abound in our history.").

Though not time limited, such lump sum appropriations (like the CFPB's) are capped in amount. Congress also makes standing or "permanent" appropriations that are neither time limited nor capped in amount. *See GAO Redbook*, at 2-10. Although Congress can always repeal them, such appropriations do not "require repeated action by Congress to authorize [their] use." *Id.* Examples include the appropriation to pay the interest on the national debt, 31 U.S.C. § 3123, and entitlement programs like Social Security and Medicare, *see* Stith, *Rewriting the Fiscal Constitution*, at 601-02. With such programs, congressional constraints on spending typically reside within the substantive legislation that establishes the program, rather than annual funding caps. *See* Stith, *Congress's Power of the Purse*, at 1379-80.

But depending on the appropriation, those substantive constraints may not be particularly constraining or determinative of the funding level in any particular year. For example, the judgment fund is a standing appropriation to pay final money judgments and administrative awards against the

United States, as well as compromise settlements of lawsuits against the United States. 31 U.S.C. § 1304. Rather than requiring Congress to make case-by-case, sum-by-sum decisions about whether to pay each claim against the United States (as was the practice in the nineteenth century), Congress judged it more appropriate to establish a standing source of funding, even though the amounts paid vary significantly from year to year. *See* Cong. Rsch. Serv., R42835, *The Judgment Fund: History, Administration, and Common Usage* (Mar. 17, 2013); Bureau of Fiscal Serv., Dep't of Treasury, *Judgment Fund: Frequently Asked Questions*, https://tinyurl.com/bdemb2nf (last modified Jan. 31, 2023).

Permanent appropriations like the judgment fund's are a "longstanding practice" by Congress, Metzger, at 1158, and less constraining than the capped lump sum appropriation the Fifth Circuit deemed problematic here.

b. The other feature of the CFPB's funding that troubled the Fifth Circuit—the use of dedicated revenues "outside the appropriations process," Pet. App. 35a—likewise has a long historical pedigree and is common in modern practice.

Congress has long appropriated funds to agencies using a "revolving fund" model, meaning "Congress permits some agencies that collect fees or otherwise obtain receipts in the course of their activities to retain and spend such collections ... without any further legislative process." Stith, *Congress's Power of the Purse*, at 1366. "Revolving funds … have been legislatively authorized to support various activities since the earliest years of the

nation." *Id.* at 1367. Early examples include the Post Office and the National Mint, which were funded in whole or in part by postage revenues and user fees. *See* Act of Feb. 20, 1792, ch. 7, §§ 2-3, 1 Stat. 233-234; Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 249. Government agencies and entities funded in part through fees are commonplace, including the Patent and Trademark Office, the Food and Drug Administration, and the federal courts. *See* 21 U.S.C. § 379f et seq.; 35 U.S.C. §§ 41-42; Cong. Rsch. Serv., R45965, *Judiciary Appropriations, FY2020*, at 9-11 (May 18, 2020).

Many financial regulators, too, fall into this category. *See* Cong. Rsch. Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues*, at Table 5 (Feb. 28, 2017). Unlike the Bureau, many such agencies have plenary authority to set the level of their budgets and the assessments that fund them, and are subject to no annual cap on spending. *See id.* The Office of the Comptroller of the Currency (OCC) is an early example. First established in 1863, National Bank Act of 1863, ch. 58, § 19, 12 Stat. 665, 670, the OCC has been funded through assessments at a level it establishes, with no cap (unlike the Bureau), and has been operating in that manner for more than 150 years. Although the Fifth Circuit would term this funding "outside the appropriations process," the OCC's funding model is a well-established part of the centuries-old appropriations process writ large. As the United States explains, the Fifth Circuit's decision wrongly questions a funding model that has been used since the early Republic, which now applies to the

OCC and a host of other crucial federal programs. *See* Gov't Br. 22-24. [2] The annual appropriations-committee-driven process by no means defines the bounds of the allowable appropriations universe.

As these examples indicate, Congress has routinely exercised its constitutional flexibility throughout the Nation's history to choose different funding structures and forms of control, depending on the circumstances. Making such choices is Congress's constitutional prerogative.

II. Exercising Its Constitutional Flexibility, Congress Chose To Fund The CFPB With A Steady But Capped Appropriation To Avoid The Regulatory Failings That Contributed To The 2008 Financial Crisis.

When deciding how to fund the newly created Bureau, Congress extensively examined the causes of the 2008 financial crisis and determined that the lack of steady funding for key financial regulatory agencies was a contributing factor. Congress therefore crafted the Bureau's current appropriations regime specifically with the intent to ensure predictable funding, while maintaining political accountability.

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[2] A non-exhaustive list of agencies funded in whole or in part by fees or assessments includes, besides the OCC: the Patent and Trademark Office, Act of July 4, 1836, ch. 357, §§ 1, 9, 5 Stat. 117, 121 (then the Patent Office); the Federal Reserve Board, 12 U.S.C. §§ 243-244; the Federal Deposit Insurance Corporation, 12 U.S.C. §§ 1815(d), 1820(e); the National Credit Union Administration, 12 U.S.C. § 1755; the Farm Credit Administration, 12 U.S.C. § 2250; and the U.S. Citizenship and Immigration Services, 8 U.S.C. § 1356(m)-(n).

In 2008, the nation was plunged into the worst financial crisis since the Great Depression, a calamity that destroyed livelihoods and pushed the country to the brink of economic ruin. In response, Congress held more than fifty hearings in which it evaluated the causes of the financial crisis to "assess the types of reforms needed." S. Rep. No. 111-176, at 44. Based on that investigation, Congress concluded that the crisis was largely caused by "a long-standing failure of our regulatory structure to keep pace with the changing financial system," particularly "the proliferation of poorly underwritten mortgages with abusive terms." *Id.* at 40, 11.

In particular, Congress found a "hard learned lesson" in the experience of the Office of Federal Housing Enterprise Oversight (OFHEO). *Id.* at 163. OFHEO was the regulator that was supposed to ensure the financial safety and soundness of Fannie Mae and Freddie Mac, but post-crisis analysis concluded OFHEO's effectiveness had been hindered by needing to seek annual appropriations, rather than having a steady stream of regular funding. *Id.*

For that reason, Congress had already chosen by 2008 to have OFHEO's successor agency, the Federal Housing Finance Agency, funded through assessments on regulated entities—set at a level determined by the Agency, with no cap—rather than annual appropriations. *Id.*; Housing and Economic Recovery Act of 2008, § 1106, Pub. L. No. 110-289, 122 Stat. 2653, 2669 (providing for agency to "collect from the regulated entities annual assessments in an amount not exceeding the amount sufficient to provide for reasonable costs ... and expenses").

Armed with its assessment of what went wrong in the financial crisis, Congress determined that to be effective, the CFPB needed independence from unpredictable annual funding cycles. *See* S. Rep. No. 111-176, at 163 (finding "that the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator"). This choice was consistent with Congress's approach to many other financial regulators—some of which had previously exercised responsibilities now transferred to the Bureau, including the Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency. *See* Cong. Rsch. Serv., *Independence of Federal Financial Regulators*, at Table 5; 12 U.S.C. § 5581(a)(2) (list of agencies transferring functions to the Bureau).

Congress thus provided for the CFPB to be funded by an annual transfer from the earnings of the Federal Reserve, up to a cap of $597.6 million, adjusted for inflation. 12 U.S.C. § 5497(a)(2)(A)(iii); Bd. of Governors of the Fed. Reserve Sys., *96th Annual Report 2009*, at 491 (May 2010). Although transferred funds that are unused can be rolled over to future years, 12 U.S.C. § 5497(c)(1), the CFPB must account for "sums made available to the Bureau from the preceding year" in determining the amount "reasonably necessary to carry out the authorities of the Bureau" each year, *id.* § 5497(a)(1).

Congress set the amount of the cap to ensure that "the CFPB budget is modest" in comparison with the budgets of "other financial regulatory bodies." S. Rep.

No. 111-176, at 163. Even at the maximum cap, the CFPB's annual funding is a fraction of the budgets for the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, or the Federal Reserve. *Id.* Although Respondents decry the cap as "illusory" on the theory that it is "astronomical," Br. In Opp. 14, a comparison to other financial regulators shows the contrary. And in any event, the size of the cap reflects political judgments made by Congress regarding the importance of regulatory efforts to avoid another devastating financial crisis, as well as the Bureau's extensive responsibilities, *see Seila Law*, 140 S. Ct. at 2191. The Appropriations Clause assigns these types of political judgments to Congress.[3]

III. Congress Exercises Robust Continued Oversight Over The CFPB And Its Budget.

While exercising its constitutional appropriations power to ensure a steady and predictable—but capped—funding level for the CFPB, Congress did not insulate the Bureau from political oversight. Rather, Congress set up oversight mechanisms for the Bureau

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[3] Congress also specified that funds transferred to the Bureau "shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 5497(c)(2). This provision does not relinquish congressional control over the Bureau's funding, *contra* Pet. App. 36a, but it is simply fiscal law shorthand to exempt the Bureau's funds from background statutes that otherwise apply to appropriated funds, such as the requirement to follow the procurement and property disposal requirements in the Federal Property and Administrative Services Act. *See GAO Redbook*, at 2-25–2-27.

that meet or exceed those applicable to agencies that are largely funded through annual appropriations.

To begin with, the CFPB's regulatory actions are subject to most of the same procedural constraints and congressional oversight safeguards as other agencies. The CFPB must comply with the Administrative Procedure Act for its rulemakings and adjudications. 5 U.S.C. §§ 553-554. Its regulations may be—and have been—disapproved under the Congressional Review Act, 5 U.S.C. §§ 801-808. *See, e.g.*, Pub. L. No. 115-74, 131 Stat. 1243 (2017) (disapproving CFPB rule related to arbitration agreements); Pub. L. No. 115-172, 132 Stat. 1290 (2018) (disapproving CFPB rule related to indirect auto lending). Congress has stopped the Bureau from enforcement efforts, too. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, § 522, 134 Stat. 1182, 2086 (2020) (prohibiting the CFPB from taking adverse action against a low- and moderate-income community financial institution or a community development financial institution for certain data collection practices). And Congress has not infrequently directed the CFPB to undertake rulemakings, for example:

- Directing the CFPB to issue a rule related to adverse information in consumer reports resulting from human trafficking, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 6102, 135 Stat. 1541, 2383-84 (2021);
- Directing the CFPB to provide authoritative guidance on the applicability of one of its rules to certain real estate transactions and the extent to which lenders can rely on model disclosures, Economic Growth, Regulatory Relief, and

Consumer Protection Act, Pub. L. No. 115-174, § 109, 132 Stat. 1296, 1305-06 (2018); and

- Directing the CFPB to establish an application process for designating an area as a rural area according to certain criteria, Helping Expand Lending Practices in Rural Communities Act of 2015, Pub. L. No. 114-94, § 89002, 129 Stat. 1311, 1799.

Moreover, the CFPB is one of only three agencies (also including the EPA and OSHA) subject to the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. § 609(d). That Act imposes special procedures for gathering input from small businesses and requires review by the Office of Information and Regulatory Affairs before a rule is issued. *Id.* § 609(b). The CFPB's rules may also be vetoed by the Financial Stability Oversight Council, chaired by the Treasury Secretary. 12 U.S.C. §§ 5321, 5513.

Beyond these substantive control mechanisms, the CFPB is subject to several congressional oversight provisions specific to its budget. As described above, the CFPB must account for any prior-year unspent funds when setting its below-cap budget, and justify its budget during the Director's semi-annual appearances before Congress. The agency also must provide an associated written report to Congress, covering the budget as well as a host of topics related to the Bureau's rulemaking and enforcement efforts. 12 U.S.C. §§ 5497(a)(1), 5496(a), (b), (c)(2). Moreover, in every fiscal year since 2015, Congress has also required the CFPB to notify the appropriations and other committees of its budget requests and to publish the notifications online. Consolidated Appropriations

Act, 2022, Pub. L. No. 117-103, div. E, § 746, 136 Stat. 49, 305; *see also* 134 Stat. 1182, 1442 (same for 2021); 133. Stat. 2317, 2496 (same for 2020); 133 Stat. 13, 199 (same for 2019); 132 Stat. 348, 601 (same for 2018); 131 Stat. 135, 390 (2017); 129 Stat. 2242, 2486 (same for 2016); 128 Stat. 2130, 2392 (same for 2015). And, like some other financial regulators, but unlike most agencies, the CFPB must submit its financial statements to annual audit by the Comptroller General. 12 U.S.C. §§ 5496a; 5497(a)(5); Cong. Rsch. Serv., *Independence of Federal Financial Regulators*, at 24-25.

Beyond the financial audit, moreover, the Government Accountability Office must also conduct an annual study of the Bureau's regulatory activities. 12 U.S.C. § 5496b. That study must include recommendations for legislative or administrative changes. *Id.* In addition, the Bureau must make numerous annual reports to Congress (beyond the semiannual report justifying its budget), including reports on its "financial literacy activities," efforts to "fulfill its fair lending mandate," and consumer complaints about financial products. 12 U.S.C. § 5493(b)(3)(C), (c)(2)(D), (d)(4).

Comparing oversight mechanisms for a "typical" executive branch agency (the Social Security Administration), another financial regulator (the Comptroller of the Currency), and the CFPB confirms the robust oversight that Congress established for the Bureau:

Constraint or Oversight Mechanism[4]	**CFPB**	**OCC**	**SSA**
Annual Dollar Limit on Budget	X		In part*
Budget Subject to Annual Appropriations			In part*
APA Requirements	X	X	X
OIRA Review of Significant Regulations			X
OIRA Review under Small Business Regulatory Enforcement Fairness Act	X		
Annual GAO Audit	X	X	
Annual GAO Regulatory Study	X		
Financial Stability Oversight Council Veto	X		
Congressional Review Act	X	X	X
*Social Security benefits are funded by a permanent appropriation, but the agency's operations (e.g., personnel costs) are largely funded through the annual appropriations process. *See* Cong. Rsch. Serv., R47097, *Social Security Administration (SSA): Trends in the Annual Limitation on Administrative Expenses (LAE) Appropriation Through FY2021*, at 1-3 & n.14 (May 11, 2022).			

[4] Table adapted and updated from Table 1 in Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 343 (2013).

Beyond statutory mechanisms, Congress has numerous other means of exercising oversight, including censure and impeachment; investigative oversight by committees including hearings, requests for information or testimony, and enforcement of subpoenas; and information and records requests by individual members. *See* Cong. Rsch. Serv., R45442, *Congress' Authority to Influence and Control Executive Branch Agencies*, at 18-20, 25-26, 33-44 (Mar. 30, 2023). Members of Congress and particular committees have frequently used these tools to monitor the Bureau's activities, leading the Bureau to establish a separate office dedicated to responding to congressional inquiries. *See* Kate Berry, *CFPB creates oversight office to deal with congressional requests*, Am. Banker (July 14, 2022), https://tinyurl.com/mys8hec6. Since 2011, CFPB personnel, including Directors, have testified 87 times in front of Congress. The CFPB has also responded to hundreds of information requests from members annually about the Bureau's activities and expenditures. For example, between 2014 and 2017 alone, the CFPB produced more than 170,000 pages of documents for the House Committee on Financial Services in response to over 90 letters of inquiry and 20 subpoenas. CFPB officials also sat for over 40 hours of depositions during that period for just one congressional committee. *See* House Financial Services Committee Democratic Staff, *The Consumer Financial Protection Bureau in Perspective* (Jul. 21, 2017).

And, when its oversight has indicated legislative changes are warranted, Congress has amended the

statutes governing the Bureau's authority. Alongside the congressional amendments and directives discussed above, these amendments have:

- Subjected the Bureau to additional oversight, Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1573(a), 125 Stat. 38, 138 (adding provisions requiring annual GAO audit and regulatory study);
- Required the Bureau to comply with additional administrative procedures, Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, div. O, title VII, § 704, 129 Stat. 2242, 3025 (2015) (applying the Federal Advisory Committee Act to CFPB advisory committees and subcommittees);
- Limited the scope of the Bureau's Truth in Lending Act authority over certain manufactured home retailers, Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, title I, § 107, 132 Stat. 1296, 1304 (2018);
- Required the Bureau to participate in additional or new working groups and multi-agency activities, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. Q, § 111, 136 Stat. 49, 809 (Senior Scams Prevention Advisory Group); Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 5, 133 Stat. 3274, 3280-81 (2019) (interagency working group related to criminal enforcement of robocall prohibitions); and
- Protected the confidential business information of regulated entities, Examination and Supervisory Privilege Parity Act of 2014, Pub. L. No. 113-173,

128 Stat. 1899 (specifying that privilege is maintained when information is shared by certain non-bank institutions with federal and state regulators); An Act to amend the Federal Deposit Insurance Act, Pub. L. No. 112-215, 126 Stat. 1589 (2012) (adding the CFPB to the list of entities where bank disclosures do not affect privileges).

Just as it has repeatedly amended other aspects of the Bureau's governing statute, Congress could repeal or alter its appropriation to the CFPB at any time. Moreover, it need not make changes on a permanent basis; it could also impose a different annual cap or otherwise alter the Bureau's funding for a particular year through an appropriations rider. *See* Stith, *Congress's Power of the Purse*, at 1352 & n.40 (describing riders). But Congress has left the CFPB's funding structure intact.

The extensive reporting and oversight mechanisms Congress established for the Bureau—including semiannual justifications of its budget—provide Congress ample information to make judgments about whether to alter the (capped) amount it has appropriated for the Bureau, the permissible uses of the funds, or their source. And Congress retains plenary power to make any such changes.

Because it has continued to judge predictable funding as beneficial for the Bureau's regulatory effectiveness, Congress has made no such changes. But as Congress's hearings, amendments, and regulatory disapproval indicate, it has by no means relinquished political oversight over the Bureau's activities.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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May 15, 2023

APPENDIX

LIST OF *AMICI CURIAE*

CURRENT MEMBERS OF CONGRESS

Colin Allred
Representative of Texas

Tammy Baldwin
Senator of Wisconsin

Becca Balint
Representative of Vermont

Nanette Diaz Barragán
Representative of California

Joyce Beatty
Representative of Ohio

Don Beyer
Representative of Virginia

Earl Blumenauer
Representative of Oregon

Richard Blumenthal
Senator of Connecticut

Suzanne Bonamici
Representative of Oregon

Cory A. Booker
Senator of New Jersey

Jamaal Bowman
Representative of New York

Brendan Boyle
Representative of Pennsylvania

Sherrod Brown
Senator of Ohio

Shontel Brown
Representative of Ohio

Julia Brownley
Representative of California

Salud Carbajal
Representative of California

Benjamin L. Cardin
Senator of Maryland

Andre Carson
Representative of Indiana

Troy Carter
Representative of Louisiana

Greg Casar
Representative of Texas

Robert P. Casey, Jr.
Senator of Pennsylvania

Sean Casten
Representative of Illinois

Judy Chu
Representative of California

Katherine Clark
Representative of Massachusetts

Yvette Clarke
Representative of New York

Emanuel Cleaver
Representative of Missouri

Jim Clyburn
Representative of South Carolina

Steve Cohen
Representative of Tennessee

Gerald E. Connolly
Representative of Virginia

Catherine Cortez Masto
Senator of Nevada

Danny Davis
Representative of Illinois

Don Davis
Representative of North Carolina

Madeleine Dean
Representative of Pennsylvania

Mark DeSaulnier
Representative of California

Debbie Dingell
Representative of Michigan

Tammy Duckworth
Senator of Illinois

Richard J. Durbin
Senator of Illinois

Vernoica Escobar
Representative of Texas

Adriano Espaillat
Representative of New York

Dianne Feinstein
Senator of California

Teresa Leger Fernández
Representative of New Mexico

John Fetterman
Senator of Pennsylvania

Maxwell Frost
Representative of Florida

Bill Foster
Representative of Illinois

Jesús "Chuy" Garcia
Representative of Illinois

Robert Garcia
Representative of California

Sylvia Garcia
Representative of Texas

Al Green
Representative of Texas

Raul Grijalva
Representative of Arizona

Dan Goldman
Representative of New York

Martin Heinrich
Senator of New Mexico

John Hickenlooper
Senator of Colorado

Jim Himes
Representative of Connecticut

Mazie K. Hirono
Senator of Hawaii

Steven Horsford
Representative of Nevada

Steny Hoyer
Representative of Maryland

Glenn Ivey
Representative of Maryland

Sheila Jackson Lee
Representative of Texas

Sara Jacobs
Representative of California

Pramila Jayapal
Representative of Washington

Hakeem Jeffries
Representative of New York

Hank Johnson
Representative of Georgia

Tim Kaine
Senator of Virginia

Marcy Kaptur
Representative of Ohio

Ro Khanna
Representative of California

Amy Klobuchar
Senator of Minnesota

Ann McLane Kuster
Representative of New Hampshire

Barbara Lee
Representative of California

Summer Lee
Representative of Pennsylvania

Ted W. Lieu
Representative of California

Ben Ray Lujan
Senator of New Mexico

Stephen Lynch
Representative of Massachusetts

Seth Magaziner
Representative of Rhode Island

Edward J. Markey
Senator of Masachusetts

Betty McCollum
Representative of Minnesota

Morgan McGarvey
Representative of Kentucky

James P. McGovern
Representative of Massachusetts

Gregory Meeks
Representative of New York

Robert Menendez
Senator of New Jersey

Grace Meng
Representative of New York

Jeffrey A. Merkley
Senator of Oregon

Gwen Moore
Representative of Wisconsin

Kevin Mullin
Representative of California

Patty Murray
Senator of Washington

Jerrold Nadler
Representative of New York

Wiley Nickel
Representative of North Carolina

Eleanor Holmes Norton
Representative of Washington, D.C.

Alexandria Ocasio-Cortez
Representative of New York

Ilhan Omar
Representative of Minnesota

Jon Ossoff
Senator of Georgia

Alex Padilla
Senator of California

Nancy Pelosi
Representative of California

Marie Gluesenkamp Perez
Representative of Washington

Brittany Pettersen
Representative of Colorado

Chellie Pingree
Representative of Maine

Mark Pocan
Representative of Wisconsin

Katie Porter
Representative of California

Ayanna Pressley
Representative of Massachusetts

Mike Quigley
Representative of Illinois

Delia Ramirez
Representative of Illinois

Jamie Raskin
Representative of Maryland

Jack Reed
Senator of Rhode Island

Deborah K. Ross
Representative of North Carolina

Linda T. Sánchez
Representative of California

Bernard Sanders
Senator of Vermont

Jan Schakowsky
Representative of Illinois

Brian Schatz
Senator of Hawaii

Chuck Schumer
Senator of New York

David Scott
Representative of Georgia

Robert "Bobby" Scott
Representative of Virginia

Jeanne Shaheen
Senator of New Hampshire

Brad Sherman
Representative of California

Tina Smith
Senator of Minnesota

Eric Swalwell
Representative of California

Mark Takano
Representative of California

Shri Thanedar
Representative of Michigan

Bennie Thompson
Representative of Mississippi

Dina Titus
Representative of Nevada

Rashida Tlaib
Representative of Michigan

Jill Tokuda
Representative of Hawaii

Ritchie Torres
Representative of New York

Chris Van Hollen
Senator of Maryland

Juan Vargas
Representative of California

Nydia Velázquez
Representative of New York

Mark Warner
Senator of Virginia

Raphael Warnock
Senator of Georgia

Elizabeth Warren
Senator of Massachusetts

Maxine Waters
Representative of California

Bonnie Watson Coleman
Representative of New Jersey

Peter Welch
Senator of Vermont

Sheldon Whitehouse
Senator of Rhode Island

Nikema Williams
Representative of Georgia

Frederica Wilson
Representative of Florida

Ron Wyden
Senator of Oregon

FORMER MEMBERS OF CONGRESS
(All of whom were serving during the enactment of Dodd-Frank.)

Christopher J. Dodd
Former Senator of Connecticut

Barney Frank
Former Representative of Massachusetts

Tom Harkin
Former Senator of Iowa

Tim Johnson
Former Senator of South Dakota

Paul Kanjorski
Former Representative of Pennsylvania

Ted Kaufman
Former Senator of Delaware

Patrick Leahy
Former Senator of Vermont

Carolyn Maloney
Former Representative of New York

Brad Miller
Former Representative of North Carolina

Melvin Watt
Former Representative of North Carolina