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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 132 members of the United States Congress, including 99 Representatives and 33 Senators. They have a strong interest in preserving the legislative and spending powers that Article I of the Constitution vests exclusively in Congress.

Over 50 *amici* are members of the House Committee on Financial Services; the Senate Committee on Banking, Housing, and Urban Affairs; or the House or Senate Committees on Appropriations. These *amici* have an especially strong interest in oversight of the CFPB, as well as the judiciary's correct interpretation of Article I generally and the Appropriations Clause specifically.

The following is the full list of *amici*, starting with Senators and then Representatives:

Tim Scott
Mitch McConnell
John Thune
John Barrasso, M.D.
Marsha Blackburn
John Boozman
Katie Boyd Britt
Ted Budd
John Cornyn
Tom Cotton
Kevin Cramer
Mike Crapo
Ted Cruz
Steve Daines
Deb Fischer
Bill Hagerty
John Hoeven
Cindy Hyde-Smith
Ron Johnson
John Kennedy

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

James Lankford
Michael S. Lee
Cynthia M. Lummis
Roger Marshall, M.D.
Jerry Moran
Rand Paul, M.D.
James E. Risch
Mitt Romney
M. Michael Rounds
Eric Schmitt
Thom Tillis
Tommy Tuberville
Roger Wicker

Robert B. Aderholt
Mark Alford
Rick W. Allen
Kelly Armstrong
Jodey C. Arrington
Brian Babin
Don Bacon
Andy Barr
Stephanie Bice
Andy Biggs
Dan Bishop
Mike Bost
Josh Brecheen
Larry Bucshon
Tim Burchett
Michael C. Burgess
Kat Cammack
John R. Carter
Lori Chavez-DeRemer
Andrew S. Clyde
Tom Cole
Mike Collins
Dan Crenshaw
Warren Davidson
Mario Diaz-Balart
Byron Donalds
John S. Duarte
Jeff Duncan
Neal P. Dunn, M.D.
Chuck Edwards
Ron Estes
Mike Ezell
Brad Finstad
Michelle Fischbach
Scott Fitzgerald
Charles J. Fleischmann
Mike Flood
Lance Gooden
Paul A. Gosar
H. Morgan Griffith
Glenn Grothman
Michael Guest
Diana Harshbarger
Kevin Hern
Clay Higgins
Erin Houchin
Richard Hudson
Bill Huizenga
Ronny Jackson
Dusty Johnson
Mike Johnson
Jim Jordan

John Joyce
Trent Kelly
Young Kim
Mike Lawler
Laurel Lee
Barry Loudermilk
Frank Lucas
Blaine Luetkemeyer
Nancy Mace
Thomas Massie
Lisa McClain
Tom McClintock
Richard McCormick
Patrick McHenry
Cathy McMorris-Rodgers
Daniel Meuser
Mary Miller
John Moolenaar
Alex Mooney
Barry Moore
Gregory F. Murphy, M.D.
Ralph Norman
Andy Ogles
Bill Posey
Guy Reschenthaler
Mike Rogers
John Rose
Matt Rosendale
David Rouzer
George Santos
Steve Scalise
Keith Self
Pete Sessions
Adrian Smith
Chris Smith
Victoria Spartz
Elise Stefanik
Claudia Tenney
William Timmons
Beth Van Duyne
Ann Wagner
Tim Walberg
Randy Weber
Roger Williams
Steve Womack
Rudy Yakym
Ryan Zinke

SUMMARY OF THE ARGUMENT

The Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents" in the executive branch. *OPM v. Richmond*, 496 U.S. 414, 428 (1990); *see* Part I, *infra*.

But when it came to funding the CFPB, the Dodd-Frank Act delegated those "difficult judgments" wholesale to the CFPB itself, whose Director can unilaterally decide, in perpetuity, how much money he wants for the agency to carry out its "broad" and "potent" regulatory and enforcement powers, which extend to "levying knee-buckling penalties against private citizens," not just entities in highly regulated industries. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2193, 2202 n.8 (2020).

Dodd-Frank included a panoply of provisions designed to insulate the agency as much as possible from Congress's ordinary appropriations processes, the sum of which, when taken together, amount to a clear transfer of Congress's Appropriations Clause powers over the CFPB, as Congress itself would never determine the CFPB's funding, even indirectly. *See* Part II, *infra*. Constitutional separation of powers prevents Congress from handing its Article I powers to executive agencies. *See* Part III, *infra*; *see also New York v. United States*, 505 U.S. 144, 182 (1992) (a separation of powers violation is not absolved simply because "the encroached-upon branch approves the encroachment").

For example, the CFPB's funding comes not from an appropriation or even from fees collected, but rather from the Federal Reserve System (Fed), which itself does not obtain funding directly from Congress. These payments also continue in perpetuity without the CFPB ever needing to return to Congress, hat in hand. There is even an automatic inflation adjustment to ensure the CFPB would never face a *de facto* funding reduction due to rising costs. The CFPB can carry over extra money from year to year to ensure continued operations regardless of whether the Fed can keep sending money to the CFPB, which coincidentally has been aggressively hoarding cash—over $600 million in the first two quarters of 2023 alone. Dodd-Frank also neutered the House and Senate Committees on Appropriations' oversight of the CFPB by purporting to deprive them of the ability to review the CFPB's funding.

Because of these provisions, the only way for Congress to reduce the CFPB's funding level is to amend Dodd-Frank itself and then override an inevitable veto, necessitating supermajorities in both chambers.

Supporters justify this scheme by saying the CFPB needed to be "'independent of the Congressional appropriations process.'" Br. Current & Former Members of Congress ("Dodd-Frank.Br.") at 20. But periodically requiring elected representatives to make difficult policy choices about funding is a feature, not a bug, of Article I and the Appropriations Clause.

The CFPB insists that its funding mechanisms are analogous to those used by agencies like the Office of

the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the U.S. Postal Service. But that is wrong. Those agencies, and many others like them, generate most of their revenue from direct fees or assessments on regulated parties, a mechanism used since the nation's earliest days, and the ability to charge such fees is inherently limited because otherwise the agencies risk invoking "forbidden delegation of legislative power" by "carr[ying] [the] agency far from its customary orbit and put[ting] it in search of revenue in the manner of an Appropriations Committee of the House." *NCTA v. United States*, 415 U.S. 336, 341–42 (1974).

The CFPB's attempt to analogize to other agencies, including the Fed itself, likewise fails because they are funded in ways that differ materially from an Appropriations Clause perspective. *See* Part II.C, *infra*. In fact, the operations of some agencies the CFPB invokes, like the Social Security Administration, are funded via the normal appropriations process. *See id.*

The Court need not determine which particular aspect of the CFPB's funding scheme is the most problematic. This is the easy case. The CFPB "is in an entirely different league" from other entities when it comes to its insulation from Congress, *Seila Law*, 140 S. Ct. at 2202 n.8; *see* Part II.C, *infra*, to the point that the CFPB currently operates as "a sort of junior-varsity Congress" setting its own funding levels in perpetuity, *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Such insulation means that Congress itself is not determining the CFPB's funding.

The Court should affirm the judgment below, which will return the matter of the CFPB's funding to the normal political and legislative channels, as Article I and the Appropriations Clause require. *See* Part III, *infra*.

ARGUMENT

I. The Appropriations Clause Is a Bulwark of the Separation of Powers.

The Framers were likely aware of the "major loophole" then present in English law, which allowed executive departments to raise funds and set their own salaries, commissions, and expenses—and only then submit any remaining funds to the Exchequer. Paul Einzig, *The Control of the Purse: Progress and Decline of Parliament's Financial Control* 188 (1959). "This meant that a large proportion of public revenue and expenditure completely escaped Parliamentary control." *Id.* This ability "to dispose of millions of pounds each year without obtaining Parliamentary grants and without even having to account to Parliament provided immense scope for misuse." *Id.* at 189.

The Framers added the Appropriations Clause, along with the adjacent Statement-and-Account Clause, to prevent the executive from self-funding and to ensure it provided an accounting of receipts and expenditures to the legislature. *See* U.S. Const., art I, § 9.

James Madison argued that "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can

arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58 (James Madison).

Joseph Story agreed, explaining that if not for the Appropriations Clause, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (1833). The Clause ensures "regularity, punctuality, and fidelity, in the disbursements of the public money," defined as "all the taxes raised from the people, as well as the revenues arising [from] other sources." *Id.*

In his *Commentaries*, St. George Tucker criticized those systems without a check like the Appropriations Clause, where an executive "levies whatever sums he thinks proper; disposes of them as he thinks proper; and would deem it sedition against him and his government, if any account were required of him, in what manner he had disposed of any part of them." St. George Tucker, 1 *Blackstone's Commentaries*, App. at 362 (1803). As Tucker explained, accountability via the Appropriations Clause is "the difference between governments, where there is responsibility, and where there is none." *Id.*

Accordingly, as then-Judge Kavanaugh explained a decade ago, the "power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012)

(Kavanaugh, J.) (quoting The Federalist No. 51 (James Madison)). The Clause is "a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers." *Id.* at 1347.

The Appropriations Clause thus plays an especially important separation of powers role in the context of administrative agencies. "Appropriations lie at the core of the administrative state. Without appropriations, the executive branch cannot act, and thus choices about agency funding have a fundamental impact on how the government operates." Gillian E. Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075, 1077 (2021).

As explained next, however, the CFPB is insulated from the congressional oversight mandated by the Appropriations Clause. The Dodd-Frank Act deliberately strove to make the CFPB's funding mechanism far more independent from political oversight than any executive agency in the nation's history.

II. Dodd-Frank Violated Article I by Effectively Transferring Congress's Appropriations Clause Power to the CFPB Itself.

A. Congress Cannot Delegate Its Power of the Purse.

Under Article I, the "basic policy decisions governing society are to be made by the Legislature." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting); *see*

John Locke, *Two Treatises of Government* bk. II, ch. XI, § 141, at 381 (1690) ("The power of the legislative being derived from the people by a positive voluntary grant … , which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.").

As Chief Justice Marshall explained, there are certain "important subjects, which must be entirely regulated by the legislature itself," as distinguished from "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). Stated another way, "there are cases in which … the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

"Doubtless, what qualifies as an important subject and what constitutes a detail may be debated," but "the Constitution's rule vesting federal legislative power in Congress is 'vital to the integrity and maintenance of the system of government ordained by the Constitution.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (citation omitted).

Accordingly, "Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). Doing so would effectively create "a sort of junior-varsity Congress," *id.* at 427, which is

constitutionally problematic in any context but especially so when dealing with the power of the purse, given its extraordinary importance to the separation of powers, as discussed above. *See* Part I, *supra*.

The CFPB's perpetual funding is one such "legislative" matter because that determination is "heavily laden (or ought to be) with value judgments and policy assessments" that only Congress can make. *Mistretta*, 488 U.S. at 414 (Scalia, J., dissenting). The dollar values are not just significant in their own right but also represent 100% of the CFPB's general-purpose funding, which it currently can determine forever without returning to Congress. That money allows the CFPB to "act[] as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens," not just entities in highly regulated industries. *Seila Law*, 140 S. Ct. at 2202 n.8. And notably, the CFPB's funding level does not "depend on executive fact-finding" in any meaningful sense, but instead the Director simply demands the amount of money he wants, and the Fed must oblige. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

Given that the Appropriations Clause "is particularly important as a restraint on Executive Branch officers," *Navy*, 665 F.3d at 1347 (Kavanaugh, J.), it is critical that Congress itself meaningfully determine the CFPB's funding—and, by implication, determine the CFPB's ability to pursue those extensive executive powers identified above—rather

than let the executive itself make that decision for the rest of time.

The CFPB points to the Constitution's two-year limit for Army appropriations as evidence that Congress can otherwise do as it sees fit when it comes to appropriations. *See* Pet.Br.11 (citing U.S. Const. art. I, § 8, cl. 12). That clause may suggest an indefinite appropriation is not a *per se* violation of the Appropriations Clause, but here the CFPB benefits not only from indefinite funding but also from numerous other factors insulating it from the appropriations oversight process, as discussed next. Further, taken to its logical conclusion, the CFPB's argument would mean Congress could delegate its appropriations powers wholesale to any executive entity except the Army. But that cannot be right under separation of powers principles. "Members of Congress could not, even if they wished, vote all [appropriations] power to the President and adjourn *sine die*." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

B. Dodd-Frank Gave the CFPB a Unique Level of Control over Its Own Funding.

Despite Article I's requirement that Congress itself determine and maintain oversight of the CFPB's funding levels, the Dodd-Frank Act went out of its way to create a unique basket of provisions designed to insulate the CFPB from the normal appropriations oversight processes in a way unlike any other agency in the nation's history, let alone one that possesses core executive powers such as "creating substantive

rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law*, 140 S. Ct. at 2202 n.8. For example:

- The CFPB's funds come from the earnings of the Fed, "which is itself funded outside the appropriations process" and also has no say over the CFPB's funding. *Seila Law*, 140 S. Ct. at 2194; *see* Pet.3 n.1 (citing 12 U.S.C. §§ 342–361); 12 U.S.C. § 243; 12 U.S.C. § 5497(a). This means Congress currently lacks even indirect power to set the CFPB's level of funding. Moreover, those funds come at the expense of the Treasury's bottom line, as the Fed is obligated to remit revenues above a certain amount directly to the Treasury. 12 U.S.C. § 289(a)(3).

- This funding scheme is perpetual in the nature, so the CFPB never has to ask Congress for money again, and it even includes an automatic inflation adjustment to ensure that the weight of years' or decades' worth of inflation doesn't reduce the effective value of the CFPB's funding. 12 U.S.C. § 5497(a)(2)(B).

- The CFPB can carry over money year-to-year to ensure continued operations if the Fed runs low on revenues or if additional money is needed that would otherwise require the CFPB to exceed its annual cap in any particular year. *Id.* § 5497(c)(1). The CFPB had $340 million on hand at the end of 2022, *see* BIO7, and has been hoarding cash in FY2023, receiving over

$600 million from the Fed just in the first two quarters alone.[2]

- The House and Senate Committees on Appropriations are expressly barred from "review" of the CFPB's funding levels. 12 U.S.C. § 5497(a)(2)(C). This means not only are those Committees stymied from changing the CFPB's funding, but it also means they cannot use the implied threat of cuts as a mechanism for learning more about the agency and its activities. Not even Article III courts enjoy such detachment from oversight by the Committees on Appropriations. *See* Cong. Rsch. Serv., *Appearances by Sitting U.S. Supreme Court Justices at Congressional Committee and Subcommittee Hearings (1960-2022)* (May 2, 2023), https://crsreports.congress.gov/product/pdf/IN/IN12155 (listing over 160 appearances by Justices before the House or Senate Committees on Appropriations between 1960 and 2022).

These provisions demonstrate that those who passed Dodd-Frank "'acted deliberately and intentionally to bind [Congress's] own hands in the future when political winds change.'" *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 239 n.64 (5th Cir. 2022) (Jones, J., concurring) (citation omitted). By doing so, the CFPB was made into precisely the "sort

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[2] *Funds Transfer Request, FY 2023 Quarter 2* (Dec. 19, 2022), https://files.consumerfinance.gov/f/documents/cfpb_funds-transfer-request_fy2023-q2.pdf; *Funds Transfer Request, FY 2023 Quarter 1* (Oct. 14, 2022), https://files.consumerfinance.gov/f/documents/cfpb_funds-transfer-request_fy2023-q1.pdf.

of junior-varsity Congress" about which Justice Scalia warned: an executive agency with core executive powers that is so insulated that it would quite literally never have to return to Congress to seek funding. *See* Adam White, *The CFPB's Blank Check—or, Delegating Congress's Power of the Purse*, Yale J. Reg. Nov. 27, 2022, https://www.yalejreg.com/nc/the-cfpbs-blank-check-or-delegating-congresss-power-of-the-purse/.

Dodd-Frank worked a stunning role reversal, with the CFPB dictating its own level of funding each year, while Congress remained largely out of the picture. The CFPB certainly believes itself to be in the driver's seat. During a 2015 hearing, Rep. Ann Wagner asked then-CFPB Director Richard Cordray who had authorized over $200 million in renovations to the CFPB's building, to which Cordray snapped, "Why does that matter to you?" House. Fin. Servs. Comm., *Committee Pushes for Accountability and Transparency at the CFPB* (Mar. 6, 2015), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=398780.

It was predictable that the CFPB Director unwittingly imitated St. George Tucker's reviled "prince": a man who "would deem it sedition against him … if any account were required of him, in what manner he had disposed of any part of the[]" revenues. Tucker, *supra*, at 362.

Such responses to congressional oversight have been consistent across multiple agency directors. For example, in 2022, then-Ranking Member Patrick McHenry described CFPB Director Chopra's limited

responses to the House Committee on Financial Services' congressional inquiries as "glib and not as thoughtful as a major regulatory agency should take congressional oversight." Anna Hrushka, *CFPB to Face Reckoning in Next Congress, Republicans Warn Chopra*, Banking Dive (Dec. 15, 2022), https://www.bankingdive.com/news/cfpb-next-congress-republicans-rohit-chopra-patrick-mchenry-remittances/638868/. And while then-Director Mulvaney endeavored to answer Senators' questions when he appeared before the Senate Banking, Housing, and Urban Affairs Committee in 2018, he noted that "it would be my statutory right to just sit here and twiddle my thumbs while you all ask questions." Max Greenwood, *Mulvaney in Senate Testimony: I'm Required to Be Here, But Not to Answer Your Questions*, The Hill (Apr. 12, 2018), https://thehill.com/homenews/senate/382842-mulvaney-in-senate-testimony-im-required-to-be-here-but-not-to-answer-your/.

It likewise should come as no surprise that the CFPB itself has long bragged that its revenues were "non-appropriated funds." *See* Adam J. White, *The CFPB Engages in Legal Deception*, Wall St. J. (Dec. 4, 2022). The CFPB even maintained that position in litigation in an attempt to dodge bid protests.[3] Only now does the CFPB change its tune.

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[3] *See* Adam White, *The CFPB's Lack of Candor to the Court, Continued*, Yale J. Reg., Feb. 3, 2023, https://www.yalejreg.com/nc/the-cfpbs-lack-of-candor-to-the-court-continued/; *In re Information Experts*, Inc., Nos. B-413887,

In short, the CFPB knows it is insulated from the oversight and appropriations process, and it has acted accordingly.

As explained next, no other executive agency is in the same ballpark as the CFPB when it comes to the level of independence from the political oversight process required by the Appropriations Clause.

C. The CFPB Is in an Entirely Different League When It Comes to Insulation from Congressional Appropriations Oversight.

The CFPB claims entities like the Office of the Comptroller of the Currency (OCC), the Fed, the Social Security Administration, and others are similarly independent from Congress's appropriations review and thus there is nothing unique about the way the CFPB is funded or operates. *See* Pet.Br.22–24.

Although there may be other entities with one or two of the unusual features the CFPB possesses, no other agency comes close to having them all. That makes this an easy case. The "CFPB is in an entirely different league" from other agencies. *Seila Law*, 140 S. Ct. at 2202 n.8. "Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it." Pet.App.36a.

N-413887.2 (GAO Dec. 30, 2016), *available at* https://www.gao.gov/assets/b-413887%2Cb-413887.2.pdf.

Looking more granularly, the agencies to which the CFPB points as similar are in fact materially distinct from an Appropriations Clause perspective. *See* Pet.Br.23. The OCC, the Federal Housing Finance Agency, the National Credit Union Administration, the Federal Deposit Insurance Corporation, and U.S. Postal Service all generate most of their revenue from fees or assessments on the parties they regulate or to which they provide services.[4] This is a long-established mechanism for executive entities to obtain funding without going through the regular order of appropriations, as even the CFPB and its *amici* seem to acknowledge.[5] *See* Pet.Br.22; Dodd-Frank.Br.17. This historical practice provides "contemporaneous and weighty evidence" of the constitutionality of that practice. *Seila Law*, 140 S. Ct. at 2197. But the CFPB is not funded by imposing fees or assessments on the entities it regulates or to which it provides services. It therefore cannot invoke that narrow historical exception.

The power to raise money via fees is also inherently limited. This Court has held that a valid agency-imposed "fee" can reflect only the costs

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[4] *See* 12 U.S.C. § 243 (the Fed); *id.* § 16 (OCC); *id.* § 4516 (FHFA); *id.* § 1755 (NCUA); *id.* § 1815(d) (FDIC); 39 U.S.C. § 2401(a) (USPS).

[5] *See, e.g.*, Act of Feb. 20, 1792, ch. 7, §§ 1-3, 1 Stat. 232, 233–34 (funding Post Office through collection of postage); Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 249 (funding National Mint through collection of fees); Act of July 4, 1836, ch. 357, § 9, 5 Stat. 117, 121 (funding Patent Office through fees); Act of Feb. 19, 1875, ch. 89, 18 Stat. 329 (funding OCC through assessments on banks); *see also* BIO22.

incurred by the government or the benefit obtained by the recipient, because allowing agencies broader scope to raise money under the false label of "fees" would trigger the "forbidden delegation of legislative power" by "carr[ying] [the] agency far from its customary orbit and put[ting] it in search of revenue in the manner of an Appropriations Committee of the House." *NCTA*, 415 U.S. at 341–42; *see also* 31 U.S.C. § 9701(b)(2). Thus, "fees" must represent "a 'value-for-value' transaction, in which a feepayer pays the fee to receive a service or benefit in return, and is thus better off as a result of the transaction." *Trafigura Trading LLC v. United States*, 29 F.4th 286, 294 (5th Cir. 2022) (opinion of Ho, J.). This operates as an inherent limit on an agency's ability to self-fund. The CFPB has no such limit, however.

The CFPB asserts that the Fed's assessments on Federal Reserve Banks are a similar funding mechanism to other financial regulatory agencies. *See* Pet.Br.23. However, the Fed is unique among financial regulatory agencies because it assesses the Federal Reserve Banks to fund its operations. To the extent that it assesses fees on regulated entities for banking supervision activities, these assessments are not recognized as revenue and any funds derived from such activity are transferred directly to the Treasury.[6] Distinct from any other financial regulator, the Fed derives revenue from the Federal Reserve Bank's

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[6] Federal Reserve Board, *108th Annual Report of the Board of Governors of the Federal Reserve System* (2021), https://www.federalreserve.gov/publications/files/2021-annual-report.pdf.

income, which is largely derived from interest income on the Reserve Banks' holdings of Treasuries and various agency mortgage-backed securities. These holdings are the direct result of the Fed's monetary policy activity, which the Fed has unique authorization to conduct. Outside of the Fed, the CFPB is the only agency deriving its revenue from monetary policy activities. Finally, unlike the CFPB's power to roll over funds perpetually, the Fed is obligated to remit revenues above a certain amount directly to the Treasury. 12 U.S.C. § 289(a)(3).

The CFPB also points to benefits programs like Social Security that are funded by permanent appropriations and argues that this confirms the CFPB's perpetual funding scheme is not unique. *See* Pet.Br.21. But as the Fifth Circuit and the CFPB's own congressional *amici* have noted, the *operating expenses* of the agencies that administer those benefits programs are funded largely from annual appropriations. *See* Pet.App.41a n.16; Dodd-Frank.Br.25; Cong. Rsch. Serv., *Social Security Administration (SSA): Trends in the Annual Limitation on Administrative Expenses (LAE) Appropriation Through FY2021* at 1–3 & n.14 (May 11, 2022), https://crsreports.congress.gov/product/pdf/R/R47097. Moreover, Congress itself has already determined the level of benefits and recipients for programs like Social Security, *see* 42 U.S.C. §§ 402, 415, imposing a level of specificity conspicuously lacking in the CFPB statute, *see* 12 U.S.C. § 5497(a)(1); *see also* Pet.App.41a n.16.

That arrangement ensures that those agencies' operations remain subject to congressional

appropriations review, even though the benefit payments themselves come from permanent funds. By contrast, all of the CFPB's operations are funded in perpetuity outside of the normal appropriations process, and the CFPB certainly is not performing mere ministerial tasks dictated by Congress.

Nor is there any merit to the claim that the CFPB is somehow uniquely deserving of independence because of its role as an oversight agency. *See, e.g.*, Dodd-Frank.Br.20. The Department of Justice, for example, must obtain funding via the normal appropriations process, as must critically important agencies like the Department of Defense. And, as noted above, not even Article III courts receive the CFPB's level of detachment from appropriations oversight.

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The CFPB attempts to divide and conquer by focusing separately on each specific aspect of the CFPB's insulation from Congress's appropriations review, while disregarding the absence of any other executive entity that has anything like the combination of funding-insulating aspects the CFPB possesses. That unique combination is what sets the CFPB apart, putting it "in an entirely different league" from other agencies from an Appropriations Clause perspective. *Seila Law*, 140 S. Ct. at 2202 n.8.[7]

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[7] The CFPB and its *amici* also analogize the agency's funding to historical "lump-sum appropriations," Pet.13; Pet.Br.19; Dodd-Frank.Br.9–13, but those laws did not operate in perpetuity, *see*

III. The CFPB's and Its Supporters' Remaining Arguments Are Unpersuasive.

The CFPB and its *amici* raise a host of other arguments, but none undercuts the conclusion that Dodd-Frank violates Article I by purporting to transfer Congress's Appropriations Clause powers over the CFPB to the CFPB itself.

The CFPB claims its possession of expansive regulatory and enforcement powers is irrelevant because those powers have no tie to the Appropriations Clause. *See* Pet.Br.35. But as demonstrated in Part I, *supra*, the Appropriations Clause is designed specifically to act as a check on excesses of executive power, *see, e.g.*, *Navy*, 665 F.3d at 1346–47 (Kavanaugh, J.), and so of course it matters that the CFPB exercises "quintessential[] executive power[s]," including against private citizens in particular, *Seila Law*, 140 S. Ct. at 2200. The CFPB asks the Court to disregard an important check on the executive in a context where legislative oversight matters most.

Nor is it any answer to contend, as the CFPB and some of its supporters do, that Congress could simply change the Dodd-Frank Act to re-assert control over the CFPB's funding. *See* Pet.20; Br. New York *et al.* 4–6. A separation of powers violation is not absolved simply because "the encroached-upon branch approves the encroachment." *New York*, 505 U.S. at

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BIO20 (citing Josh Chafetz, *Congress's Constitution*, 160 U. Pa. L. Rev. 715, 727 (2012)), meaning the executive was required to return to Congress regularly to obtain ongoing funding.

182. "The diffusion of power carries with it a diffusion of accountability," and "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (citing The Federalist No. 70 (Alexander Hamilton)). Thus, Congress cannot "escape responsibility for [its] choices by pretending that they are not [its] own." *Id.* at 497.

Accordingly, "Congress is always capable of fixing statutes that impinge on its own authority, but that possibility does not excuse the underlying constitutional problems" because "[o]therwise, no law could run afoul of Article I." *CFPB*, 33 F.4th at 238 (Jones, J., concurring); *see also Texas v. Rettig*, 993 F.3d 408, 416–17 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing *en banc*) ("We might as well say that Congress can never violate the nondelegation doctrine, because the American people can always petition Congress to pass a new law and claw back its lawmaking power from an agency."). The point is thus not whether Congress *could* re-assert control, but rather that it *hasn't* done so. Unless and until it does, the Article I violation remains.

The CFPB and its *amici* claim there is already robust oversight of the CFPB, but the provisions they cite only confirm the magnitude of the CFPB's independence from the regular order of appropriations. *See* Pet.Br.4, 37; Br. New York *et al.* 6. For example, the CFPB Director must provide a report with a "justification" of the CFPB's "budget request," 12 U.S.C. § 5496(c)(2), but that is merely a

post hoc explanation that does not—and cannot—lead to any congressional changes to the CFPB's actual budget, short of amending Dodd-Frank itself.

Also missing the mark is the congressional *amicus* brief claiming that the CFPB is subject to sufficient oversight because its actions can be reviewed under the Administrative Procedure Act and Congressional Review Act. Dodd-Frank.Br.22. This says nothing about enforcement proceedings, and, in any event, *ex post* statutory review of completed agency rulemaking is no substitute for the robust approval of the CFPB's funding in advance of undertaking its full panoply of rulemaking, enforcement, and adjudicatory powers. "The power of the purse entirely precedes enforcement activities—and that, as Madison emphasized, is the point." White, *The CFPB's Blank Check*, *supra*.

IV. The Matter of the CFPB's Funding Should Return to the Normal Political Process.

The CFPB and its *amici* warn of supposed chaos in the financial world if the CFPB funding process were deemed unconstitutional, *see, e.g.*, Pet.Br.47–48; Br. New York *et al.* 11–17, but affirming the decision below would simply return CFPB funding to the normal political and legislative arena—precisely what the Appropriations Clause requires.

Congress has already begun preparing for that possibility. The House Committee on Financial Services has approved the *CFPB Transparency and Accountability Reform Act*, which would, among other reforms, authorize the CFPB to receive $650 million from unobligated amounts contained in the Consumer Financial Civil Penalty Fund for fiscal year 2024 to

carry out the authorities of the CFPB, then subject the agency to the annual congressional appropriations process. *See* H.R. 2798, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/2798/text.

Despite filling their briefs with doomsday predictions, the CFPB and its supporters largely ignore the consequences of *upholding* the CFPB funding process. If this Court were to bless that scheme, it is easy to "foresee all manner of 'expert' bodies, insulated from the political process," that will carry out extensive regulatory and enforcement powers. *Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting). As Judge Jones put it, "Why not make the IRS a self-funded agency? Why not OSHA, or EPA?" *CFPB*, 33 F.4th at 241 (Jones, J., concurring). This is not theoretical. "Other powerful agencies are already champing at the bit for such budgetary independence," including the Securities and Exchange Commission and the Commodity Futures Trading Commission. *Id.* at 237.

The CFPB never responds to this point, perhaps because it would lay bare the conclusion that such widespread and expansive insulation of agencies' funding is incompatible with the political accountability demanded by the Appropriations Clause.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm.

Respectfully submitted,

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