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 FOR RESPONDENTS

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QUESTION PRESENTED

The 2010 Congress authorized the Consumer Financial Protection Bureau (CFPB or Bureau) to fund its operations by drawing up to $600 million each year (plus an inflation adjustment) directly from the Federal Reserve System. 12 U.S.C. § 5497. Relying on those funds, the CFPB promulgated a Rule to regulate covered lenders' preauthorized attempts to withdraw loan repayments from consumers' bank accounts. 82 Fed. Reg. 54,472, 54,877-79 (Nov. 17, 2017). Properly framed, the question presented by the Bureau's petition is:

Whether the Rule should be vacated because the CFPB's statutory authorization to choose its own amount of annual public funding subject only to an illusory cap, in perpetuity and for core executive powers, violates the Appropriations Clause.

RULE 29.6 STATEMENT

Community Financial Services Association of America, Limited has no parent corporation, and no publicly held corporation holds a ten percent or more ownership stake. Consumer Service Alliance of Texas has no parent corporation, and no publicly held corporation holds a ten percent or more ownership stake.

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INTRODUCTION

The Appropriations Clause is "a bulwark of the … separation of powers" that gives Congress "exclusive power over the federal purse" as "a restraint on Executive Branch officers." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012) (Kavanaugh, J.). But as part of a broad plan to free the CFPB from any political accountability, the 2010 Congress granted the Bureau sui generis authority to *choose its own amount* of annual public funding, in *perpetuity* and for *core executive powers*, subject only to an illusory cap (currently around $750 million, with unspent funds available for roll-over and investment). *See* 12 U.S.C. § 5497; Pet.App. 33a-36a. In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020), this Court rejected another piece of the plan. It held that the 2010 Congress violated Article II's vesting of executive power in the President, by shielding the CFPB from attempts to supervise the agency through the removal power. Here, the Court should hold that the 2010 Congress likewise violated Article I's vesting of appropriations power in Congress, by shielding the CFPB from efforts to supervise the agency through fiscal oversight.

The CFPB's funding scheme violates the basic requirement that money may not be "drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Rather than pass legislation selecting the specific sum of public funds that the CFPB receives annually, the 2010 Congress abdicated that critical decision to the agency itself. The CFPB can take as much money from the Federal Reserve System as *it deems* "reasonably necessary," so long as it does not exceed

a nine-figure ceiling set so high the agency has never come close to hitting it (let alone also exhausting the agency's accumulated endowment). *See* 12 U.S.C. § 5497(a). Moreover, as this transfer of the power of the purse has no end date, it abrogates the authority of future Congresses and flips the appropriations baseline. Instead of *each* chamber of Congress needing to consent before the Executive may loosen the federal purse strings, now *both* chambers must agree, *and* persuade or override the President, to take the strings back from the CFPB. Furthermore, the CFPB uses this perpetual, self-selected revenue stream to "act[] as a mini legislature, prosecutor, and court." *Seila Law*, 140 S. Ct. at 2202 n.8. In sum, this is the "unification of the purse and the sword in the executive" that "the Framers warned would destroy that division of powers on which political liberty is founded." Pet.App. 37a (cleaned up).

The Bureau acknowledges that the Appropriations Clause is "particularly important as a restraint on Executive Branch officers," but contends that the Clause "does not *limit* Congress's authority" when enacting statutes that authorize spending. Br. 15-16. Indeed, the Bureau's conceded view is that only "the political process" prevents one Congress from authorizing the Executive to spend as much public funds as desired in perpetuity for virtually any purpose. Br. 31. That limitless position is wrong, because the Clause does not permit Congress to "cede" away its fiscal control over the Executive under our "structural separation of powers." Pet.App. 34a-35a, 38a-39a. The Bureau rejoins that other agencies fund themselves through "sources other than annual appropriations bills." Br. 27. But

"[e]ven among self-funded agencies, the Bureau is unique" because its funding is "double-insulated." Pet.App. 40a-41a. Unlike agencies that are fiscally and politically accountable directly to the public because they are funded through fees or assessments charged to the very people they serve or regulate, there is no check on the CFPB because it draws funds directly from the Federal Reserve System. *See* Pet.App. 34a-35a. Plus, this Court has already concluded that "the CFPB is in an entirely different league" from "financial institutions like … the Federal Reserve." *Seila Law*, 140 S. Ct. at 2202 n.8.

The Bureau retreats to the position that the Rule cannot be set aside even if the CFPB's funding statute is invalid. But as the CFPB "lacked any other means to promulgate the [R]ule" "without its unconstitutional funding," the Rule must be set aside "as the product of the Bureau's unconstitutional funding scheme." Pet.App. 44a-45a. The Bureau's assertion that ancillary provisions of the funding statute could be severed instead, Br. 40-41, disregards that the core defects can be cured only by Congress, not by judicial blue-penciling. And while the Bureau argues that it at least should be permitted to enforce the Rule once it obtains valid funding, Br. 39, the APA instructs that agency action "shall" be "set aside" when issued unconstitutionally. 5 U.S.C. § 706(2). Although there are remedial defenses that will permit the Bureau to sustain many of its other past actions, none of them justifies denying relief here, where the Rule was promptly challenged and has never taken effect.

STATEMENT OF THE CASE

A. Legal Background

1. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the Act), the 2010 Congress created the CFPB to serve "as an independent financial regulator." *Seila Law*, 140 S. Ct. at 2193. In addition to moving 18 existing consumer financial protection statutes to the CFPB's domain, Congress tasked the agency with enforcing a new proscription on "any unfair, deceptive, or abusive act or practice" by certain members of the consumer-finance sector. *Id.* (quoting 12 U.S.C. § 5536(a)(1)(B)). Congress also armed the CFPB with "potent enforcement powers." *Id.* The agency can "issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions." *Id.* And it can "seek restitution, disgorgement, and injunctive relief, as well as civil penalties." *Id.*

Despite vesting the CFPB with all this authority, the 2010 Congress took unprecedented steps to shield it from supervision by the politically accountable branches. The CFPB's creators wanted it to be "totally independent." 156 Cong. Rec. 5,220 (2010) (Sen. Dodd). To start, they restricted the President's ability to remove the CFPB Director to cases of "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)(1), (c)(3). Such restrictions had rarely been extended beyond multi-member agencies exercising only quasi-legislative or quasi-judicial powers. *Seila Law*, 140 S. Ct. at 2198-99, 2201-02. This Court held that the removal restriction was unconstitutional. *Id.* at 2192.

2. The 2010 Congress likewise tried to insulate the CFPB from oversight by future Congresses. The CFPB's architects deemed it "absolutely essential" to fund the agency through a mechanism "independent of the Congressional appropriations process." S. Rep. No. 111-176, at 163 (2010). They wanted the CFPB to avoid "the difficulties faced by the Office of Federal Housing Enterprise Oversight (OFHEO)," which confronted "repeated Congressional pressure because it was forced to go through the annual appropriations process." *Id.* Perceiving it as a bug rather than a feature that the "threat" of withheld appropriations "could very well have served to circumscribe the actions OFHEO was willing to take," they "did not want to repeat that mistake." 156 Cong. Rec. 13,195 (2010) (Sen. Dodd). And they also wanted to avoid the so-called "capture" of "the agencies that previously administered the CFPB's statutes, in part because those agencies depended on industry fees." *PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc).

The 2010 Congress therefore "took steps to ensure that the [CFPB's] funding will be independent and reliable so that its mission cannot be compromised by political maneuvering." 156 Cong. Rec. 8,931 (2010) (Sen. Dodd). The CFPB can requisition the Federal Reserve Board each year, in perpetuity, for an "amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau." 12 U.S.C. § 5497(a)(1). The Board "shall" transfer that amount from the "combined earnings" of the Federal Reserve Banks, so long as it does not exceed $597.6 million, adjusted for inflation. *See id.* § 5497(a)(1), (2)(A)-(B); CFPB Br. 3-4.

The CFPB's yearly funding demands have varied dramatically *and* never come close to exhausting the statutory "cap." In the most recent fiscal year, for instance, the agency took only $641.5 million of $734 million available. CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2022*, at 44-45 (Nov. 15, 2022), https://bit.ly/3WCVoke (*2022 Report*). The agency took far less in fiscal year 2018, however, seeking only $381.3 million of $602 million available. CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2018*, at 44, 49 (Nov. 15, 2018), https://bit.ly/3NakTWH. And even when the agency came closest to the cap—in fiscal year 2017—it still had no need for $44 million. CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2017*, at 54 (Nov. 15, 2017), https://bit.ly/42dFK13. On average, the CFPB has been about $150 million below the cap each year. *See* CFPB, *Financial Reports*, https://bit.ly/3BXAZhv (last visited June 27, 2013).

Yet the CFPB also spends far less than it takes, holding the considerable surplus in reserve. Excess funds do not revert to the Federal Reserve System and "shall remain available" to the CFPB "until expended" in future years. 12 U.S.C. § 5497(c)(1). And the agency may use the Federal Reserve System to "invest[]" the portion "that is not, in the judgment of the Bureau, required to meet [its] current needs." *Id.* § 5497(b)(3). As of September 30, 2022, the CFPB had built an endowment worth nearly $340 million, including $128 million in unobligated funds. *2022 Report*, at 86.

B. Procedural History

1. In 2017, Director Cordray invoked the Act's new ban on "unfair" or "abusive" conduct to issue a regulation focusing on payday and other similar loans. 82 Fed. Reg. 54,472 (Nov. 17, 2017). The Rule's payment provisions regulated preauthorized attempts to withdraw repayments of loans from consumers' bank accounts. 12 C.F.R. §§ 1041.7-1041.8. The Rule's underwriting provisions regulated ability-to-repay determinations needed to offer loans to consumers. 82 Fed. Reg. at 54,874-77.

Respondents, two associations of regulated entities (the Lenders), filed suit in April 2018, seeking that the Rule be set aside. Pet.App. 6a. Around that time, Acting Director Mulvaney announced that the CFPB intended to reconsider the Rule. *Id.* In July 2020, Director Kraninger rescinded the underwriting provisions, 85 Fed. Reg. 44,382 (July 22, 2020), but purported to ratify the payment provisions, 85 Fed. Reg. 41,905 (July 13, 2020). Before the payment provisions could take effect, however, they were stayed during this litigation. Pet. 10 n.3.

The district court granted summary judgment to the Bureau. Pet.App. 47a-76a. Two of its holdings are relevant here. The court recognized that the Rule was issued by Cordray while he was unconstitutionally shielded from removal, but concluded that the Rule was not void under *Collins v. Yellen*, 141 S. Ct. 1761 (2021). Pet.App. 52a-54a. And the court decided that there was "no Appropriations Clause issue" because "a statute authorizes" the CFPB "to receive funds up to a certain cap." Pet.App. 66a.

2. The Fifth Circuit affirmed on some issues but ultimately reversed the judgment and vacated the Rule. Pet.App. 1a-46a.

The court of appeals acknowledged that the Rule had been "promulgated by a director who was unconstitutionally shielded from removal" under *Seila Law*. Pet.App. 18a-19a. It nevertheless held that the Lenders could not "obtain a remedy" under *Collins*. Pet.App. 19a-23a.

But the court vacated the Rule as "the product of the Bureau's unconstitutional funding scheme." Pet.App. 45a; *see* Pet.App. 27a-46a. Following a path previously proposed by Judge Edith Jones, the court held that "the Bureau's funding structure violates the Appropriations Clause." Pet.App. 27a; *see CFPB v. All American Check Cashing, Inc.*, 33 F.4th 218, 220-42 (5th Cir. 2022) (en banc) (Jones, J., concurring). The court reasoned that Congress had "abdicate[d] its appropriations power" by granting the CFPB a "self-actualizing, perpetual funding mechanism" to bankroll sweeping "executive power." Pet.App. 2a, 33a. "By abandoning its most complete and effectual check" on the Executive Branch and thereby unifying "the purse and the sword," "Congress ran afoul of the separation of powers embodied in the Appropriations Clause." Pet.App. 37a (cleaned up). And because the Bureau had no "means to promulgate the [R]ule" "without its unconstitutional funding," the court concluded that the proper remedy under *Collins* was to vacate the Rule. Pet.App. 44a-45a.

SUMMARY OF ARGUMENT

I. This case is about checks and balances. The Appropriations Clause gives Congress, and therefore the People, the ability to protect the federal fisc and restrain Executive authority. Frustrated with the separation of powers, however, the 2010 Congress crafted the CFPB to operate free of any political accountability, including fiscal oversight.

The 2010 Congress thus abdicated the power of the purse. The CFPB self-determines how much public funding it needs each year, subject only to an illusory cap set so high that the agency has never come close to hitting it. The CFPB's funding thus is not "drawn … in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, but rather taken based on the agency's say-so. Moreover, the 2010 Congress abrogated the ability of future Congresses to wrest back the CFPB's purse. As the agency's self-funding authority is perpetual, the appropriations baseline has been flipped. Rather than *one* chamber of Congress having the power to block the CFPB's spending, *both* chambers must agree *and* persuade or override the President. Furthermore, the 2010 Congress gave this fiscal freedom to a powerful law-enforcement agency, combining the purse with the sword in the most dangerous manner.

Indeed, the Bureau *concedes* that its constitutional theory provides no limiting principle that would prevent Congress from writing the President a blank check payable each year forever to set the budget for the entire federal government (except the Army). Yet the Bureau cannot support that startling proposition by identifying any agency from the dawn

of the Republic through the Dodd-Frank Act with comparable funding authority. Whether one looks back in time or down the slippery slope, the threat to separated powers and individual liberty is obvious.

II. While the Bureau claims that text, history, and precedent support it, none of them does. Whatever the breadth of Congress's discretion, a statute that cedes to the Executive the power to decide the total sum that will be drawn, in perpetuity and for a law-enforcement agency, is neither an "Appropriation" nor a valid "Law"—it is a void delegation of exclusive legislative power. Although the Bureau cobbles together a handful of purportedly analogous schemes, not one involves permanently eliminating *all* fiscal oversight from both the People's Representatives *and* the People themselves. Nor can the Bureau invoke anything in this Court's cases besides a sentence of out-of-context dicta. The Bureau thus is left to urge deference to the political process, which is especially inapt since the Act's perpetual delegation to the CFPB has itself distorted the political process in multiple ways.

III. The Bureau fares no better in defending the Rule despite the Act's unconstitutionality. As to severability, the Bureau fixates on ancillary aspects of the statute while ignoring that the critical defects can be cured only through legislative revision. As to relief, the Bureau seeks to enforce the Rule once funding is fixed, but disregards the APA's mandate that invalid rules "shall" be "set aside." 5 U.S.C. § 706(2). And while the Bureau worries about other agency actions, various remedial defenses will apply there but do not apply here, as this Rule was promptly challenged and never took effect.

ARGUMENT

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

The Appropriations Clause vests the power of the purse in Congress. It enables the most politically accountable branch to both protect the federal fisc and check executive power. The 2010 Congress, however, deliberately destroyed that safeguard. The Act permits the CFPB to fund its sweeping enforcement authority by choosing its own amount of funding from the Federal Reserve System forever, subject only to an illusory nine-figure cap each year. That abdication of Congress's fiscal oversight subverts the Clause's text and structure, has no basis in history or tradition, and is not susceptible to any limiting principle.

A. The Appropriations Clause Plays A Key Role In the Separation Of Powers

The Appropriations Clause commands 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 "Treasury" refers both to the funds held by the Executive Department later created by Congress and all other "public money," including "all the taxes raised from the people[] as well as revenues arising from other sources." *OPM v. Richmond*, 496 U.S. 414, 427 (1990) (quoting 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858)). The parties thus agree that the CFPB's drawing of public funds, transferred from the Federal Reserve pursuant to an Act of Congress, must comply with the Clause. CFPB Br. 13, 16.

The parties also agree that the Appropriations Clause was "uncontroversial" at the Founding because "[t]he principle of legislative control over appropriations" was "already" established. CFPB Br. 15. With a "pedigree in the English Revolution," the practice of "giving the legislature control of the purse strings" had been embraced by "American colonial assemblies." *CFPB v. All American Check Cashing, Inc.*, 33 F.4th 218, 225-27 (5th Cir. 2022) (en banc) (Jones, J., concurring) (*All American*). Likewise, all but one of the states that had adopted "a constitution between independence and the drafting of the federal Constitution" included a "mechanism of legislative control over appropriations." Josh Chafetz, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 55 (2017).

Rooted in this tradition, the Appropriations Clause "protects Congress's exclusive power over the federal purse"—"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 (D.C. Cir. 2012) (Kavanaugh, J.) (cleaned up). The Clause serves two separation-of-powers functions.

1. The Clause ensures congressional oversight of the federal fisc

"[V]esting Congress with control over fiscal matters" best "ensur[es] transparency and accountability to the people." Pet.App. 29a. The Framers provided that "the purse was to have two strings"—one for the House of Representatives and the other for the Senate—so that "[b]oth houses must concur in untying" before public money could be

spent. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 390 (Jonathan Elliot ed., 1891) (DEBATES) (J. Wilson). This guarantees the people's most "immediate representatives" in the House can alone "refuse … the supplies requisite for the support of government." THE FEDERALIST NO. 58, at 394 (J. Cooke ed. 1961) (J. Madison). And that protects "the right of the people" to be "consulted upon the disposal of the money" taken from them to pay "[a]ll the expences of government." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES App. 362 (1803). The Clause therefore makes Congress "the guardian" of "the common fund of all." 2 Story § 1348.

By contrast, giving the President the purse strings could lead to fiscal abuse by "a rapacious, ambitious, or otherwise unfaithful executive." 1 BLACKSTONE'S COMMENTARIES App., at 362. The Executive then "would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." 2 Story § 1348. Congress's "power to control and direct the appropriations" therefore "constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation." *Id.*

This Court too has recognized that the Clause restricts "the disbursing authority of the Executive department." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). And it has emphasized that the Clause does so in part "to secure regularity, punctuality, and fidelity[] in the disbursements of the public money." *Richmond*, 496 U.S. at 427.

2. The Clause ensures congressional oversight of executive power

Beyond the fiscal safeguard, the power of the purse gives Congress, and thus the People, "an indispensable check" on Executive action itself. Pet.App. 29a. The Framers recognized that giving both "the sword and the purse" to a single Branch "would furnish one body with all the means of tyranny." 2 DEBATES, at 348-49 (A. Hamilton). To neutralize that threat, they vested Congress with "the power over the purse" so that it would maintain "a controlling influence over the executive power," by "hold[ing] at its own command all the resources[] by which a chief magistrate could make himself formidable." 1 Story § 531.

Indeed, "the separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." Chafetz, *supra*, at 57. Madison stressed that Congress's hold over "the purse" would be its "most compleat and effectual weapon" for defeating "the overgrown prerogatives of the other branches." THE FEDERALIST NO. 58, at 394. Congress in effect could "unnerve the power of the sword by striking down the arm, which wields it." 1 Story § 531.

Contrary to the Bureau's assertion (Br. 29), this fear of the figurative "sword," and the need to keep it "distinct[]" from the "purse," extended beyond the military to "execut[ing] the laws." 2 DEBATES, at 349 (A. Hamilton); *accord* 1 Story § 531 ("the executive power"). As future Treasury Secretary Gallatin observed, the "power in the House to appropriate or not to appropriate for any object" existed to "check[]

the other branches of Government whenever necessary," including in "Civil" contexts. 4 Annals of Cong. 254 (1796). And one of the most prominent early exercises of appropriations power to check the Executive was the House's assertion of control over funds to implement the Jay Treaty. David P. Currie, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789—1801, at 211-15 (1997).

This Court has thus described "the 'power of the purse'" as "[t]he ultimate weapon … available to the Congress" against the Executive. *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974). The Clause is "particularly important as a restraint on Executive Branch officers," *Dep't of Navy*, 665 F.3d at 1347, because even the "exercise of a power" previously granted remains "limited by a valid reservation of congressional control over funds" needed to carry it out, *Richmond*, 496 U.S. at 425.

B. The CFPB's Funding Scheme Nullifies Congress's Appropriations Power

The CFPB's unique funding scheme constitutes a deliberate effort to circumvent the role the Appropriations Clause assigns to the Legislative Branch in preserving the separation of powers. The 2010 Congress abdicated its fiscal power over the CFPB's budget and abrogated the ability of its successors to wield that check against the agency's exercise of executive power. Instead of the CFPB drawing money in consequence of appropriations made by Congress—as the Clause's text requires—the 2010 Congress ceded to the CFPB the power to write its own appropriation each year, subject only to an illusory cap (and supplemented by a growing

endowment). Furthermore, rather than placing any restraints on that extraordinary transfer of fiscal power to the agency itself, the 2010 Congress authorized the CFPB to take funds in perpetuity and spend them even on core executive powers like law enforcement. This structure nullifies the Clause by allowing a single Congress to unite purse and sword in an Executive agency that it wishes to permanently shield from political accountability, unless and until the President and both chambers of Congress are willing to restore fiscal oversight.

1. The CFPB selects its own annual funding amount

The 2010 Congress gave the CFPB "unilateral[]" authority to "self-determine[]" the amount of its own funding. Pet.App. 35a. Unlike most agencies, the CFPB is freed from the duty to seek funding from Congress. *See* Pet.App. 33a; *All American*, 33 F.4th at 230-31. Rather, it can directly requisition from the Federal Reserve Board "the amount determined by the Director to be reasonably necessary to carry out" the agency's functions each year. 12 U.S.C. § 5497(a)(1). That cuts out Congress, because the Federal Reserve System's earnings are "outside the appropriations process." Pet.App. 35a; *see infra* p. 37. Thus, instead of "plead[ing] with Congress for funds," "the CFPB Director need only send a perfunctory letter to the Fed[.]" *All American*, 33 F.4th at 223 & n.7.

As the CFPB rather than Congress decides the amount of annual funding, the funds are not "drawn … in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. At the Founding, "[a]n

appropriation was a specific sum." 4 Annals of Cong. 611 (1796) (Rep. Reed). Hamilton thus treated the early congressional practice of "appropriating certain sums for the various branches" as "constructive of the clause," emphasizing that "[t]he *object*, the *sum*, and the *fund*" were the essential elements of "appropriations laws." 8 THE WORKS OF ALEXANDER HAMILTON 122, 129 (H.C. Lodge ed., 1904). Likewise, Madison stressed that "the Legislature alone possessed the competent authority" to fix the two types of appropriations—"specified funds" for "specified objects" and "aggregate fund[s]" for "several objects." 3 Annals of Cong. 938 (1793). At minimum, therefore, "[t]he 'Appropriations' required by the Constitution are … legislative specifications of money *amounts*." Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352 (1988).

Indeed, that base requirement was reflected in "[t]he concept of 'appropriations' as developed through the centuries in England and as adopted by the colonies." *Id.* at 1353 (cleaned up). Parliament traditionally began the appropriations process by "settl[ing] the quantum of [its] supply" before choosing "the ways and means of raising the supply so voted." 2 BLACKSTONE'S COMMENTARIES, at 308. Under the Articles of Confederation, the Continental Congress similarly appropriated "specific sums for everything from buying good musquets to reimbursing for troops' clothing that was taken by the enemy." Chafetz, *supra*, at 55 (cleaned up). And state constitutions with appropriations provisions adopted between independence and the federal convention referred to "sums" of money (with one exception). *See id.* at 55, 340 n.119; *cf. infra* Part

II.B.1 (addressing certain Founding-era statutes allowing the Executive limited discretion to spend sums "not exceeding" estimated budget amounts).

In contrast, the only "appropriation" that determines the "sum" that the CFPB takes each year is made by the agency itself, not Congress. Specific funds are not "drawn" in "Consequence" of any "Law," but rather based on the CFPB's own determinations of what is "reasonably necessary." As the 2010 Congress intended, this allows the agency to spend and regulate free from so-called "interference" by Congress, 156 Cong. Rec. 13,195 (2010) (Sen. Dodd); *see supra* pp. 4-5, while allowing Congress to "disclaim responsibility" for the agency's spending and regulatory decisions, *All American*, 33 F.4th at 238. But that is the opposite of a "fundamental and comprehensive purpose" of the Appropriations Clause—"to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Richmond*, 496 U.S. at 428. The 2010 Congress's "machinations" thus "blur the lines of accountability," leaving "the public … [to] wonder on whom the blame or the punishment … ought really to fall." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (cleaned up).

The sole limit the 2010 Congress placed on the CFPB's yearly ability to "self-direct[] how much money to draw," Pet.App. 41a n.16, is a nine-figure ceiling on the amount: almost $600 million (*i.e.*, 12% of the Federal Reserve's total operating expenses reported in 2009), which is now nearly $750 million after inflation adjustment. *See* 12 U.S.C. § 5497(a)

(2)(A)-(B); CFPB Br. 30. Even the CFPB's self-assessed needs have *never* reached that illusory "cap." *See supra* p. 6. This hypothetical constraint is especially toothless because the CFPB also enjoys the rare freedom to "'roll over' the self-determined funds it draws *ad infinitum*," effectively creating a "permanently available" endowment to supplement its annual draws. Pet.App. 35a-36a. Unlike most other agencies, the CFPB's unused funds all "remain available until expended" and may even be "invest[ed]" to the extent they are "not, in the judgment of the Bureau, required to meet [its] current needs." 12 U.S.C. § 5497(b)(3), (c)(1); *see* Pet.App. 34a-35a. In just over a decade, the agency has amassed nearly $340 million, including $128 million in unobligated funds, *2022 Report*, at 86—sums dwarfing many agencies' annual budgets, *see* USAspending.gov, *Agency Profiles*, https://bit.ly/3Wu2s2u (last visited June 27, 2023).

2. The CFPB's self-funding stream is perpetual

The 2010 Congress also gave up its appropriations power to the CFPB without any temporal limit. This "self-actualizing … funding mechanism" is "so egregious" due to its "perpetual funding feature," Pet.App. 33a, 36a n.14, which "reverses the baseline" under Article I, *All American*, 33 F.4th at 238.

For the Framers, one of the key features of the appropriations power was the ability of the People's House *alone* to "refuse … the supplies requisite for the support of government." THE FEDERALIST NO. 58, at 394 (J. Madison); *see supra* pp. 12-13. Accordingly, "the practice from the beginning of the

Republic has largely been one of annual appropriations," as that "reset[s] the legislative baseline" and "forces the president to negotiate with Congress each year." Chafetz, *supra*, at 58-62; *accord All American*, 33 F.4th at 225-30.

Here, by contrast, rather than both chambers of Congress needing to periodically *agree* to fund the CFPB, the agency can continue to set its own funding "forever" "unless *prohibited* by Congress." *All American*, 33 F.4th at 238. In short, "both houses must concur in []*tying*" the purse shut. 2 DEBATES, at 390 (J. Wilson). The Bureau notes that legislative "committees" can still ask for "reports" or "hearings," Br. 38, but Congress cannot do anything with the information unless both chambers are on board *and* can persuade or override the President.

Combined with the fact that *no* Congress ever appropriated the specific sums chosen by the CFPB, this inversion of the appropriations baseline is analogous to the unconstitutional granting of legislative power to the President or one chamber alone. *See Clinton v. City of New York*, 524 U.S. 417, 447 (1998); *INS v. Chadha*, 462 U.S. 919, 959 (1983). If the people's representatives ever try to take back the power over the CFPB's purse, the President or either chamber can "veto" that effort. *All American*, 33 F.4th at 238; *cf. Chadha*, 462 U.S. at 958 n.23 (refusing "[t]o allow Congress" to "in effect enact Executive proposals into law by mere silence"). Although "one legislature cannot abridge the powers of a succeeding legislature," *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.), "the masterminds behind the CFPB" caused Congress "to

bind its own hands in the future when political winds change." *All American*, 33 F.4th at 239 & n.64.

Notably, the Framers were so concerned about this dynamic in the context of standing armies that the Constitution expressly bans Army appropriations "for a longer Term than two Years." U.S. Const. art. I, § 8, cl. 12; *see* THE FEDERALIST NO. 26, at 167-68 (A. Hamilton). This restriction applies *even if* Congress itself chooses a specific sum for the Army's specified use. It makes a mockery of this provision and the underlying concern for Congress to grant a law-enforcement agency nearly unfettered discretion to choose its own amount of funding in perpetuity.

The Bureau rejoins that "[t]he express restriction on army appropriations" implies "the *absence*" of any other temporal limits on Congress. Br. 28. But this Court does not construe the Constitution's structural provisions so mechanically. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982) (rejecting the inference that "the Framers must be assumed to have rejected … executive immunity" merely because "the Speech and Debate Clause provides a textual basis for congressional immunity"). The Army provision is a categorical, stringent restriction that reflects the Framers' special concern about standing armies. While its limited scope indicates that non-Army appropriations may *sometimes* "be used over a timespan longer than two years," it "does not imply" that Congress may *always* authorize such spending "ad infinitum." *All American*, 33 F.4th at 232 n.50.

3. The unchecked CFPB wields core law-enforcement powers

The 2010 Congress did not even limit the scope of powers that the CFPB can perpetually self-fund. The agency's funding is available to carry out any and all of its "authorities." 12 U.S.C. § 5497(a)(1). It therefore "may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203-04 (2020).

These "significant executive power[s]" were a key reason why this Court voided the 2010 Congress's effort to make the CFPB independent from the President. *Id.* at 2201. *Seila Law* rejected "vesting significant governmental power in the hands of a single individual accountable to no one." *Id.* at 2203.

Notwithstanding *Seila Law*, however, the CFPB's "financial freedom" from congressional oversight continues to threaten the exercise of significant executive power unleashed from "control … of the people." *Id.* at 2204. Although the agency has become accountable to the President, the People's "immediate representatives" in the House, FEDERALIST NO. 58, at 394 (J. Madison), cannot wield appropriations as "the great bulwark which our Constitution ha[s] carefully and jealously established against Executive usurpations," 3 Annals of Cong. 938 (1793) (Rep. Madison). The critical one-chamber check the Framers envisioned has been eviscerated. And "[a]n expansive executive agency insulated … from Congress's purse strings" is "the unification of

the purse and the sword in the executive—an abomination the Framers warned 'would destroy that division of powers on which political liberty is founded.'" Pet.App. 37a (quoting 2 HAMILTON 61).

C. The CFPB's Funding Scheme Is Unprecedented And Must Be Stopped Before It Spreads Without Limit

The unconstitutionality of the CFPB's funding scheme is confirmed by both its unprecedented nature and lack of any limiting principle. Whether viewed with an eye toward the past or the future, the threat to separated powers and individual liberty is easy to see.

1. "Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it." *Seila Law*, 140 S. Ct. at 2201 (cleaned up). And the CFPB, a "law-enforcement agency with complete fiscal independence[,] is unprecedented." *All American*, 33 F.4th at 235. The Bureau resorts to various analogies, but they all are fundamentally dissimilar. *See infra* Part II.B. Simply put, as far as the Lenders are aware, no other agency from the Founding until the present was permanently ceded the power to choose the amount of its own governmental funding for core executive powers.

"It is thus no surprise that the Bureau brought to the forefront the subject of agency self-funding, a topic previously relegated to passing scholarly references." Pet.App. 41a (cleaned up). As with the CFPB's removal protection, the lack of any "foothold in history or tradition" for the agency's funding structure is fatal. *Seila Law*, 140 S. Ct. at 2202.

2. Worse still, the CFPB "provides a blueprint" for destroying our "system of checks and balances." *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 500 (2010). "Other powerful agencies are already champing at the bit for such budgetary independence," *All American*, 33 F.4th at 237, and there is "no limiting principle" to prevent its extension to any or every civilian executive agency, Pet.App. 41a. If the Bureau is correct that there is no constitutional "limit on Congress's power to pass laws providing funding to agencies," Br. 28, then a single Congress could allocate, each year forever, up to a trillion dollars to an agency like the FBI or FTC, or even up to a quadrillion dollars for the President to fund as he deems fit the entire federal government besides the Army. Indeed, the Bureau *concedes the point*. *See infra* Part II.D.

In short, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). The Act invites the "tyranny" of letting a single Congress place the "purse [and] the sword … into the same hands," Pet.App. 28a-29a n.8, unless a later Congress manages the "nearly insurmountable" task of wresting back the purse strings, *All American*, 33 F.4th at 238. As a seminal separation-of-powers thinker warned long ago, "[i]f the legislative power was to settle the subsidies … for ever, … the executive power would be no longer dependent." 1 Charles Montesquieu, THE SPIRIT OF LAWS, bk. XI, ch. VI, at 172 (J.V. Prichard ed., T. Nugent trans. 1914).

II. THE BUREAU'S MERITS DEFENSES OF ITS FUNDING STATUTE ALL FAIL

The Bureau contends that "constitutional text, history, and precedent" all support its funding scheme. Br. 11. Wrong, wrong, and wrong again. And the Bureau's concession that, under its view, only "the political process" checks Congress from extending this scheme government-wide, Br. 31, proves that it has misconstrued the Constitution.

A. The Constitutional Text Does Not Permit Congress To Write The CFPB A Blank Check

The Bureau principally contends that the Appropriations Clause "prohibits expenditures of public money without an appropriation made by law, but does not limit Congress's authority to determine the specificity, duration, and source" of the funds. Br. 13. As applied here, that argument ignores the Clause's text and context as well as the Constitution's structure and division of power.

1. Just any "Law" won't do

The Appropriations Clause requires more than merely "enacting a statute explicitly authorizing" spending. Br. 13. It requires the funds to be "drawn … in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Whatever discretion that may leave Congress on *other* issues, it at minimum requires Congress to determine the total *amount* of funding itself, rather than letting the Executive Branch choose what it deems "reasonably necessary," 12 U.S.C. § 5497(a)(1). *See supra* pp. 16-18.

The Bureau's so-called "textual" analysis does not show otherwise. Br. 16-17. The Bureau leads with

Justice Story's observation that the Clause "is a limitation, not upon the powers of congress, but upon the acts of the executive." 1 Story § 925. But that begs the question here: the CFPB's spending exceeds the Clause's limits unless the "Law" that Congress enacts to fund the agency is a valid "Appropriation." And while the Bureau trots out a few Founding-era sources defining "appropriation," none of them says or even implies that Congress may let the Executive *choose whatever amount* it wants, let alone in perpetuity for law-enforcement powers. Especially given the Clause's separation-of-powers role, that would not be a "Law" making an "Appropriation," but rather a disavowal of the duty to pass one.

Contrary to the Bureau's suggestion (Br. 30-31), Congress did not satisfy its duty by enacting a "cap" so high that the Bureau's own self-serving assessments of its needs have never come close to exceeding it, as confirmed by the Bureau's growing endowment. Indeed, nothing would be different under the Bureau's theory if Congress set the "cap" at a *trillion* dollars—either way, the cap would be a theoretical constraint but a practical irrelevance given the Bureau's real-world needs. On that view, however, the First Congress could have made liars out of the Federalists by passing a law allowing all future Presidents to spend as much public money as they want on any lawful executive action (besides Army activity). *But see supra* Part I.A.2. "Extended to its logical conclusion," therefore, the Bureau's position "could in fact render the Appropriations Clause a nullity." *Richmond*, 496 U.S. at 428.

Richmond rejected another theory with that flaw. The case involved whether a federal employee's

"erroneous … advice" may "entitle" a benefits "claimant to a monetary payment not otherwise permitted by law." *Id.* at 415-16. In holding that the Appropriations Clause bars "judicial use of the equitable doctrine of estoppel" to grant "a money remedy that Congress has not authorized," *id.* at 426, this Court reasoned that estoppel would allow "Executive Branch officials" to "evade" spending restrictions by providing inaccurate "advice," *id.* at 428. So the Judicial Branch declined to adopt a rule where "the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Id.* Likewise, neither the Clause nor the separation of powers permits the Legislative Branch itself to effectuate such a transfer by law.

2. A statute that delegates Congress's appropriations power to an agency is no "Law" at all

The Bureau insists that the CFPB's funding statute raises no "'separation of powers' concerns" because "Congress has enacted" it. Br. 38. But "the separation of powers does not depend … on whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund*, 561 U.S. at 497. Just as "an individual President" cannot "choose to bind his successors by diminishing their powers," *id.*, "one Congress cannot yield up its own powers, much less those of other Congresses to follow," *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). That is the essence of the legislative nondelegation doctrine.

This Court has long held that Article I's "text permits no delegation" of the "legislative Powers" "vest[ed]" in Congress. *Whitman v. Am. Trucking*

Ass'ns, 531 U.S. 457, 472 (2001). The Court, though, also has acknowledged that "[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." *Id.* at 475. The challenge of reconciling those maxims is what has divided Justices when applying the nondelegation doctrine to an agency's *substantive authority*. *Compare Gundy v. United States*, 139 S. Ct. 2116, 2129-30 (2019) (plurality op.), *with id.* at 2131-48 (Gorsuch, J., dissenting), *and id.* at 2130-31 (Alito, J., concurring in the judgment).

Happily, the analysis is more straightforward for delegations of the *amount of an agency's funding*. Everyone agrees that "Congress … may not transfer to another branch powers which are strictly and exclusively legislative." *Id.* at 2123 (plurality op.) (cleaned up). And everyone also agrees that the Appropriations Clause grants Congress "'exclusive power over the federal purse.'" CFPB Br. 15 (quoting *Dep't of Navy*, 665 F.3d at 1346). Indeed, as the Bureau's own *amici* highlight, "[b]y 1787, the power of the purse was uniformly recognized as legislative, not executive, in character." Professors Br. 18.

So when the 2010 Congress ceded authority to the CFPB to choose its own amount of funding, that was "a pure delegation of legislative power" not "related to the exercise of executive … powers." *Mistretta v. United States*, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting). In *Mistretta*, the Court upheld the Sentencing Commission only because "the sentencing function long has been a peculiarly shared responsibility … and has never been thought of as the exclusive constitutional province of any one Branch." *Id.* at 390 (majority op.). By contrast,

determining *the amount* of funding drawn from the public fisc is the core exercise of Congress's exclusive power over the purse. *See supra* pp. 16-18. This case is thus akin to *Chadha*, which concluded that "[a] one-House veto is clearly legislative" and could not be upheld under the "delegation doctrine." 462 U.S. at 953-54 n.16.

Regardless, even "[a]pplying th[e] 'intelligible principle' test" for nondelegation challenges to agencies' substantive authority, *Mistretta*, 488 U.S. at 372, the CFPB's funding statute falls short. Unlike in most cases but like in *Chadha*, there is no "judicial review" to ensure the CFPB's "adherence to statutory standards." 462 U.S. at 953 n.16. Because the Act mandates that the Federal Reserve Board "*shall* transfer … the amount *determined by the Director* to be reasonably necessary to carry out the [CFPB's] authorities," 12 U.S.C. § 5497(a)(1) (emphasis added), it "foreclose[s] the application of any meaningful judicial standard of review," *Webster v. Doe*, 486 U.S. 592, 600 (1988). And especially given the lack of any judicial check, it is "delegation running riot" to grant a law-enforcement agency perpetual authority to fill in a blank check from the public fisc every year so long as it does not exceed more than half a billion dollars (plus inflation adjustment and surplus funds). *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

That goes well beyond merely "fill[ing] up the details,'" engaging in "executive fact-finding," or carrying out "non-legislative responsibilities." *Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting). In fact, it gives the Director "plenary

power to determine" the agency's funding as he "sees fit, and to change" his approach "for any reason and at any time." *Id.* at 2123 (plurality op.). This may explain why the Bureau's funding demands have swung wildly from year to year. *See supra* p. 6.[1]

B. None Of The Bureau's Proffered Historical Analogues Is Apposite

The Bureau contends that "longstanding practice" supports its funding statute, citing various examples to show the historical breadth of Congress's "power to determine the specificity, duration, and source of appropriations." Br. 18-19; *see* Br. 19-24, 29-36. Even taking each aspect on its own, the Bureau exaggerates the similarity of the examples offered. More fundamentally, while the Bureau asserts that *each* aspect of its funding scheme has some historical analogue to some extent, it identifies no historical counterpart that has combined *all* those aspects into a single agency to the same degree.

1. Lump-sum appropriations

The Bureau begins by comparing its unique ability to self-assess the amount of necessary funding with certain Founding-era statutes that made "lump-sum

[1] Even though the Fifth Circuit stressed the "self-actualizing," "self-determined," and "self-direct[ed]" nature of the CFPB's funding, Pet.App. 33a, 35a, 41a n.16, it declined to consider the nondelegation doctrine, Pet.App. 24a n.6. Yet its rationale—that the Lenders had "forfeited" this "argument" in district court, *id.*—contravenes this Court's precedent. "[P]arties are not limited to the precise arguments they made below" and "can make any argument in support of" a "claim [that] is properly presented." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995).

appropriations" to Executive departments for "'sums not exceeding' specified amounts." Br. 19. Although the "lump-sum" nature conferred broad discretion as to the *purposes* for which the funds were spent, the Bureau overstates the discretion that the "sums not exceeding" language conferred as to the *amount* of funds to be drawn.

For starters, unlike the CFPB's statute, those laws did not operate *in perpetuity*. They were all "annual appropriations." Chafetz, *supra*, at 58 (discussing, for example, "[t]he nation's very first appropriations bill," Act of Sept. 29, 1789, ch. 23, 1 Stat. 95, 95). As these enactments required the Executive to regularly return to Congress to keep operating, they did not subvert a single chamber's ability to block further funding as a means of checking those operations. Although the Constitution does not require that all appropriations be annual, *see supra* p. 21, annual lump-sum appropriations provide no support for a law ceding the power of the purse to an executive agency in perpetuity, *see Whitman*, 531 U.S. at 475 ("the degree of agency discretion that is acceptable" under the nondelegation doctrine "varies according to the scope of the power congressionally conferred").

Moreover, the sums specified in these early laws closely tracked (often to the penny) detailed estimates submitted to Congress by Treasury Secretary Hamilton, "covering everything" down to "the prorated salaries of various doorkeepers." Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L. Rev. 1, 10 (1990); *see, e.g.*, Act of Mar. 26, 1790, ch. 4, § 4, 1 Stat. 104, 105 (referring to one report's inclusion of "a provision for building a light-house on Cape Henry"). As such, the estimates

"were, in effect, integral parts of the appropriations acts." Lucius Wilmerding, Jr., THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES 22 (1971).

Recognizing that the estimates could end up somewhat higher than actually needed, the First Congress reasonably gave President Washington's subordinates limited discretion not to overspend and instead to return the surplus funds to the Treasury. *See, e.g.*, Act of Feb. 11, 1791, ch. 6, 1 Stat. 190; *cf. Clinton*, 524 U.S. at 467-68 (Scalia, J., dissenting) (describing disputes over whether the Executive can decline to spend, or "impound," appropriated funds without permission from Congress). That historical practice is a far cry from the 2010 Congress's decision to give the CFPB *carte blanche* to draw whatever the Director deems "reasonably necessary" each year in perpetuity, 12 U.S.C. § 5497(a)(1)-(2), *and* to retain and invest any excess funds unspent, *id.* § 5497(b)(3), (c)(1), limited only by an illusory nine-figure "cap" that the agency has never come close to surpassing.

Thus, while Congress has long given the Executive "wide discretion" as to how a lump sum "would be allocated among different functions," the Bureau overreads the scope of discretion historically conferred as to the total "amount[] to be spent." *See Clinton*, 524 U.S. at 446-47 (briefly recounting the government's characterization of these early laws before holding that they could not justify a presidential line-item veto regardless). Again, determining the *amount* of the sum to be drawn is the core element of Congress's exclusive power over the purse. Delegating to the CFPB the annual power

to determine whether it is "reasonably necessary" to draw $750 million, $0, or some amount in between allows Congress to escape making "the difficult judgments" required by the Appropriations Clause, *Richmond*, 496 U.S. at 428, thereby "blur[ring] the lines of accountability," *Arthrex*, 141 S. Ct. at 1982.

2. Permanent appropriations

The Bureau next emphasizes the existence of "standing" or "permanent" appropriations for certain spending programs. Br. 20. But such programs do not involve a single Congress *either* abdicating to the Executive its power over an agency's purse *or* abrogating the ability of future Congresses to check the agency through fiscal oversight.

Take Social Security, for instance. Rather than delegating to the Social Security Administration (SSA) the power to choose how much money to spend, *Congress itself* "determined" what "amounts" should be paid to which "beneficiaries." Pet.App. 41a n.16. And while the SSA has bounded discretion in implementing those decisions, future Congresses "retain[] control over the SSA via the *agency's* annual appropriations" for its operating budget. *Id.* The SSA would be analogous to the CFPB only if it had permanent power to choose both the amount of benefits payments "reasonably necessary" to distribute *and* the sum of funding "reasonably necessary" to administer the program (subject to a quadrillion-dollar "cap"). The SSA, however, can choose neither amount. Nor does the Bureau identify another permanent appropriation of that ilk.

Instead, as with the SSA, the Bureau's other examples (Br. 21) involve standing appropriations for

spending tied to the activities of federal entities that *lack* permanent appropriations for their *operating budgets*. The reason that "a standing, capped appropriation" for these entities' underlying programs does not "threaten[]" the "separation of purse and sword," CFPB Br. 29, is that Congress can use the appropriations process for their annual budgets to exercise control over any discretion they possess. The 2010 Congress, however, deliberately eliminated that check on the CFPB. Furthermore, the "sword" is less of a threat to the People in the hands of agencies that, unlike the CFPB, merely *provide benefits* and do not take coercive action.

3. Fees, assessments, and the like

The Board lastly claims kinship with a small set of agencies that are fully self-funded, outside the appropriations process, "through fees, assessments, investments, or other similar sources" flowing from commercial or regulatory relationships with private parties. Br. 21; *see* Br. 21-24. But these agencies are in an entirely unrelated family, given their historical pedigree and their comparative accountability due to their direct dependence on the public.

a. Some of these agencies are funded by fees they charge for services they render. CFPB Br. 22. This category includes the Post Office, the National Mint, and the early Patent Office. *Id.*

As the Bureau emphasizes, "Congress's practice of funding federal entities through fees" on customers "began in the Founding era." *Id.* That a practice traces back to the Constitution's enactment is "contemporaneous and weighty evidence" of its validity. *Seila Law*, 140 S. Ct. at 2197.

And it is not too surprising that the Framers were untroubled by this practice: Such agencies lacked fiscal independence and public unaccountability. Far from being able to choose their own funding levels, their fee revenue was inherently constrained by market forces. They could not demand funds from the federal fisc, but rather needed to persuade the people they served to pay them, and the public could refuse to purchase to influence their conduct. *Cf.* Nicholas R. Parrillo, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT 1780-1940, at 76 (2013) (discussing these incentives for other Founding-era officials who charged fees for services). As a result, "the people" *themselves* had at least some power "to refuse … the supplies requisite for the support of [these agencies]." THE FEDERALIST NO. 58, at 394 (J. Madison).[2]

b. Close cousins to the fee-for-service agencies are financial regulators funded by assessments they charge to entities they regulate. CFPB Br. 22-23. This category includes the OCC, the FDIC, the NCUA, the FCA, and the FHFA. *Id.*

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[2] Three other fee-charging entities cited by the Bureau—USCIS, CBP, and APHIS, Br. 23-24—are inapposite for additional reasons. Each is a *sub*-agency that expends its revenues only on certain "functions" or "services," 8 U.S.C. § 1356(n); 19 U.S.C. § 58c(f)(2); 21 U.S.C. § 136a(a)(6), and has a parent agency that is reliant on regular appropriations, *see, e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 52-81, 312-34. Moreover, the Bureau is just wrong about CBP, which may expend its revenues only "to the extent provided for in appropriations Acts," 19 U.S.C. § 58c(f)(2), like the modern Patent Office, 35 U.S.C. § 42(c)(1).

As the Bureau explains, assessment-funded agencies began in the late 1800s and took root in the early 1900s. *Id.* Again, that a practice is "[l]ong settled and established" is "a consideration of great weight" in separation-of-powers cases. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014).

And again, at least "some level of political accountability is preserved" for these financial regulators, *All American*, 33 F.4th at 236, because they must consider the risk of losing funding if entities exit their regulatory sphere due to imprudent regulation. "Before the CFPB came to be, financial institutions" could hold their regulators accountable "by 'charter shopping'" among state and federal regulators. Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 111 (2013). The OCC, for instance, has long faced "pressure to regulate" national banks "more benignly," *id.*, because those banks may convert to state banks "at their own discretion and without any form of administrative approval," Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 12 (1977); *see id.* at 8, 23-30. While this type of accountability may be less effective than appropriations oversight, assessment-funded regulators, like the Founding-era fee-for-service agencies, still are not entirely immune from fiscal and thus political check—which is precisely why the 2010 Congress rejected the assessment-funded model for the CFPB, *see* p. 40, *infra*.

c. The Federal Reserve Board—which the Bureau repeatedly invokes, *e.g.*, Br. 11-12, 23, 26, 29-30, 32-34—fits comfortably within this tradition.

And more fundamentally, the Federal Reserve System is sui generis in our constitutional regime due to its hybrid public-private status.

For starters, the Federal Reserve Board funds itself through assessments on the Federal Reserve Banks, 12 U.S.C. § 243—private corporations that operate under federal charters, subject to the Board's "supervision," *id.* §§ 248(j), 341. In turn, the Reserve Banks charge fees for banking services to member banks, *id.* § 248a—national banks and state banks that have applied for membership, *id.* §§ 222, 321. Thus, although the Reserve Banks are creatures of the System and cannot exit in response to imprudent regulation by the Board, their fee-funding *member banks* have greater liberty to do so: state banks may withdraw from the System, *id.* § 328, and national banks can convert to state charters, *see supra* p. 36.

In all events, the Federal Reserve System's primary functions are not quintessential executive powers, or even inherently governmental ones. The Board implements monetary policy mainly through traditional banking activities, such as loaning money and directing open-market transactions. *The Fed Explained: What The Central Bank Does* 36-38 (11th ed. 2021), https://bit.ly/43lXCrS. Such activities are not the exclusive province of government agencies. In fact, the First and Second Banks of the United States were federally-chartered corporations that had *private* directors and stockholders, *see* Act of Feb. 25, 1791, 1 Stat. 191, 191-93; Act of Apr. 10, 1816, 3 Stat. 266, 266-70, and lacked the "privileges" of government agencies, *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 908 (1824). The Founders placed those Banks "under

a private not a public Direction," deeming their activities to fall *outside* the executive power. Alexander Hamilton, *Report on a National Bank* (Dec. 13, 1790), *in* 1 REPORTS OF THE SECRETARY OF THE TREASURY 70-71 (1828). The Federal Reserve System continues to reflect that understanding, by permitting the presidents of the private Reserve Banks to sit on the Federal Open Market Committee, which directs the System's open market operations. 12 U.S.C. § 263(a)-(b).

Thus, while the Board has gained some ordinary executive powers over the years, *see, e.g.*, 12 U.S.C. § 371b, its independence is a "historical anomaly … due to [its] special functions." *PHH Corp. v. CFPB*, 881 F.3d 75, 192 n.17 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). It "is certainly not a model or precedent for wholesale creation of a vast independent regulatory state" immune from political oversight. *Id.*; *see Seila Law*, 140 S. Ct. at 2202 n.8 (contemplating "a special historical status" for "financial institutions like the Second Bank and the Federal Reserve").

d. The CFPB, in contrast, is not "remotely comparable" to traditional agencies funded by fees or assessments. *All American*, 33 F.4th at 237. It is materially different both as to its sweeping powers and its unaccountable funding.

First, this Court has already recognized that "the CFPB is in an entirely different league" than "the Federal Reserve." *Seila Law*, 140 S. Ct. at 2202 n.8. Unlike "financial institutions," the CFPB "acts as a mini legislature, prosecutor, and court." *Id.* Indeed, even if this Court squarely holds that "multimember

expert agencies" that "wield substantial executive power" must be removable at will by the President, *id.* at 2199-2200, the government presumably still will not take the position that *the Fed's* removal protections must then fall. The quasi-private banking features that will distinguish the Board from other government agencies with respect to presidential removal also distinguish it from the Bureau with respect to congressional appropriations.

The Bureau objects, however, that this Court has declined "to weigh the relative importance" of an agency's executive powers. Br. 35 (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1785 (2021)). *Seila Law* makes clear, though, that the CFPB differs from the Federal Reserve *in kind*, not just degree, given the latter's historical, quasi-private status. Moreover, even if differences in degree are not relevant in the removal context addressed in *Collins*, "the degree of agency discretion that is acceptable" under the *nondelegation* doctrine *does* "var[y] according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475.

Second, unlike agencies funded through *their own* operations, the funds drawn by the Bureau are already in the federal fisc for *unrelated reasons*. Unique among self-funded agencies, therefore, the Bureau faces no check even from the private parties that are the ultimate source of its funds. Neither the Federal Reserve Banks nor the counter-parties with which they do banking business are specifically focused on whether the CFPB is prudently regulating consumer finance. They certainly are not going to try to reduce the Reserve Banks' profits just to indirectly starve the CFPB of resources. The

Bureau thus fails to understand that the fact that its funding source is the "same" as the Federal Reserve Board's, Br. 26, 33, is a vice, not a virtue, because the Reserve Board can be checked by the Reserve Banks and their member banks in a way that the Bureau cannot. This contrived structure causes the CFPB to be "doubly insulated"—from Congress *and* the People themselves. *All American*, 33 F.4th at 236; *see* Pet.App. 35a.

In fact, the 2010 Congress *rejected* a "fee"-based model for the *very purpose* of insulating the CFPB from any accountability. The Obama administration initially had proposed funding the agency through "a mix of appropriations and fees." *Creating a Consumer Financial Protection Agency: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 111th Cong. 31 (2009). But Congress declined to adopt that approach because it knew that "[i]ndustry assessments or user fees can provide the regulated entity with considerable leverage over the budget of the agency," particularly "if the regulated party … is allowed to decide who regulates them." *Id.* at 86, 99. It instead opted for a "funding base that … is not subject to political manipulation by regulated entities." *Id.* at 98; *see PHH*, 881 F.3d at 95 (majority op.); Pearson, *supra*, at 110-12.

The Bureau rejoins that this difference in "'accountability'" has no "relevance under the Appropriations Clause," which purportedly is *only* "concerned with preserving *Congress's* control over spending—not with agencies' accountability to the *private* entities they regulate." Br. 34-35. To the contrary, the Clause vests the power of the purse in Congress so that the People's *Representatives* can

check Executive abuse. *See supra* Part I.A. Accordingly, in assessing whether Congress has unconstitutionally abdicated the appropriations power, it is quite relevant whether the People themselves retain a check on the Executive. That the Clause can accommodate agencies funded by exactions paid by the affected populace hardly means that it can tolerate a law-enforcement agency that is financially accountable *neither* to future Congresses *nor* the People they serve. That "innovation with no foothold in history or tradition" cannot stand. Pet.App. 41a (quoting *Seila Law*, 140 S. Ct. at 2202).

C. This Court's Cases Do Not Support The CFPB

The Bureau asserts that this Court's precedents in *Cincinnati Soap* and *Richmond* validate its funding scheme. Br. 14, 24, 38. But the Bureau wrenches one sentence of dicta out of context while disregarding actual holdings.

Cincinnati Soap involved a federal tax that was challenged because the "entire proceeds" would be transferred to a territorial government without "direct[ing]" or "specif[ying]" any "particular uses" for the funds. 301 U.S. at 312, 321. The case thus did not even implicate whether Congress may allow an executive agency to choose the *amount* of its public funding in perpetuity. Moreover, while stating that 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," the Court held only that "interjection of the question into the present cases is premature." *Id.* at 321. Because the proceeds had not yet been transferred, "[i]f Congress

ha[d] not made [a valid] appropriation, it [could] still do so." *Id.* And though the Court did reject the claim that the lump-sum transfer was "an unlawful delegation of legislative power," it emphasized that "the important point [was] that Congress was here dealing with a dependency"—*i.e.*, paying the "local government" of a "territor[y]" (as opposed to funding an executive agency). *Id.* at 321-23; *accord Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020) (stating that *Cincinnati Soap* held that "territorial legislators may exercise the legislative power of the Territories without violating the nondelegation doctrine").

Richmond is even further afield. That case held only that courts cannot apply equitable estoppel to provide monetary relief that Congress has not authorized. *See supra* p. 27. In quoting the *Cincinnati Soap* dicta, *Richmond* was making the "straightforward" point that legislative authorization is *necessary*, not establishing the novel proposition that *any* legislation is *sufficient*. 496 U.S. at 424. If anything, *Richmond*'s reasoning cuts against that proposition. *See supra* pp. 26-27.

D. The Bureau Admits That It Has No Limiting Principle

Finally, the Bureau concedes that, on its capacious view of text, history, and precedent, nothing besides "the political process" would stop a single Congress from giving a law-enforcement agency "up to a trillion dollars annually forever," or even from permanently eliminating the appropriations process by extending the Act's funding scheme government-wide (besides the Army). Br. 31. That the Bureau

has "no real limiting principle," *Seila Law*, 140 S. Ct. at 2206 n.11, confirms that its toothless theory of the Appropriations Clause is both wrong and dangerous.

The fact that "our Nation's elected leaders … can be thrown out of office" is no basis for ignoring the structural "restraints" on those officials that "the Constitution carefully constructed." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (op. of Roberts, C.J.). All the more so where, as here, the Act *itself distorts* the political process. By abdicating Congress's power of the purse to the CFPB, the Act "blur[s] the lines of accountability." *Arthrex*, 141 S. Ct. at 1982. And by inverting the appropriations baseline and giving the President or either chamber a veto over future efforts to shut the CFPB's purse strings, the Act undermines the "structure" that underlies "the deference usually given to the judgment of legislators." *Cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969). This Court should hold the CFPB's funding scheme unconstitutional.

III. THE BUREAU'S REMEDIAL DEFENSES OF THE RULE ALSO FAIL

The Bureau retreats to the position that, even if the Act's funding provision is unconstitutional, the Rule is not tainted. Each of its arguments is wrong.

A. The Fundamental Flaws In The Funding Statute Cannot Be Severed

The Bureau first objects that the Fifth Circuit "failed to … conduct a severability analysis" and instead "presume[ed] that the funding mechanism established in Section 5497(a)-(c) is entirely invalid." Br. 39. This objection knocks down a straw man.

The Bureau's objection is premised on the view that the decision below turned on certain ancillary provisions in Section 5497 that arguably could be severed and purportedly did not affect the CFPB's funding to issue the Rule. Br. 40-42. But the court made clear that those provisions just "underscore" the flaws inherent in this "egregious" "funding scheme." Pet.App. 36a & n.14. The court's actual holding rests on three key aspects of the scheme: it is (1) "self-actualizing" and "double-insulated," Pet.App. 33a-36a; (2) "perpetual," Pet.App. 36a & n.14; and (3) funding a "capacious portfolio" of executive powers, Pet.App. 37a. *Accord* Pet.App. 40a-41a (reiterating these aspects, "[t]aken together").

Those are the same three aspects that the Lenders highlight here. *See supra* Part I.B. And notably, even though those aspects were also highlighted at the cert-stage, BIO 13-16, 26, the Bureau does not even try to argue that *they* can be severed from Section 5497. They plainly cannot be.

First, while courts have "the negative power to disregard an unconstitutional [provision]," they cannot "re-write Congress's work." *Seila Law*, 140 S. Ct. at 2211. Judges lack the "editorial freedom" to "blue-pencil" legislation, *Free Enter. Fund*, 561 U.S. at 509, especially if that would require "writ[ing] words into the statute," *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality op.). Here, in particular, the Judiciary cannot replace CFPB's self-funding discretion with either a specific sum or assessments from regulated parties; cannot adopt a durational limit to super-impose on the CFPB's self-funding authority; and cannot choose which of the CFPB's

executive powers to jettison. *See* 12 U.S.C. § 5497(a)(1); *Seila Law*, 140 S. Ct. at 2193, 2211.

Second, while courts can select a provision to sever when the statutory structure and constitutional rule at issue "chart a clear course" for the proper remedy, *Arthrex*, 141 S. Ct. at 1986, severance is improper when courts would be "require[d] … to foresee which of many different possible ways the legislature might respond to the constitutional objections," *Randall*, 548 U.S. at 262 (plurality op.). Here, the Bureau cannot contend that an Article III court should first analyze a set of hypothetical statutes varying some or all of the key aspects identified above; next issue a series of advisory opinions about which permutations would be constitutional; and then determine whether there is a valid permutation that Congress would prefer as second-best and that the court could effectuate through severance of other provisions.

Third, a severance remedy is especially improper in this context. The Appropriations Clause bars the "judicial use" of "doctrine[s]" that would expend federal funds that "Congress has not authorized." *Richmond*, 496 U.S. at 426. Severability doctrine thus should not be used to fund the CFPB in a manner that no Congress ever wrote into law.

In sum, rather than following the Bureau's quixotic path, the Fifth Circuit properly applied "the negative power to disregard [Section 5497 as] an unconstitutional enactment." *Seila Law*, 140 S. Ct. at 2211. The Bureau therefore lacked a valid appropriation for the funds used to promulgate the Rule. Pet.App. 44a.

B. This Rule Should Be Set Aside As It Was Unlawfully Issued, Promptly Challenged, And Never Took Effect

The Bureau also comes up short in its fallback objection to the Fifth Circuit's holding that "vacatur" of the Rule is the "appropriate remedy." Br. 13. Rather than challenge the court's application of the remedial framework in *Collins*, the Bureau contends that *Collins* should not be "transpose[d] … into the Appropriations Clause context." Br. 42. But none of the Bureau's arguments for this remedial exceptionalism withstands scrutiny.

1. Under both *Collins* and common sense, the threshold remedial question is whether the CFPB's lack of a valid appropriation meant it "did not lawfully possess" the "power" to promulgate the Rule. 141 S. Ct. at 1788. The answer is simple. A valid appropriation "is as much a precondition to every exercise of executive authority … as a constitutionally proper appointment or delegation of authority." *All American*, 33 F.4th at 242; *see* Pet.App. 42a-43a. Indeed, that is a fundamental purpose of the Appropriations Clause. *See supra* Part I.A.2. As the CFPB "lacked any other means" to issue the Rule "without its unconstitutional funding," the Rule's issuance was unlawful. Pet.App. 44a.

The Bureau has wisely abandoned its cert-stage argument that *Collins* requires evidence that "the CFPB would not have promulgated" the Rule if it had "been funded by 'valid' appropriations." Pet. 27. That "nexus" requirement (*id.*) misconstrues *Collins* and disregards traditional remedial principles: courts treat actions actually taken without lawful

authority as invalid even without evidence whether the action hypothetically would have been taken if lawful authority existed. *See* 22-663 Pet. 15-19.

The Bureau instead makes the immaterial observations that it had "statutory" authority to promulgate the Rule and that setting it aside would not "restore any funds to the federal fisc." Br. 45. This Court regularly vacates actions by invalidly appointed officers *notwithstanding* that they had statutory authority and vacatur would not install valid appointees. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). Likewise, a remedy is warranted when action is taken by an officer shielded by an invalid removal restriction that "clearly cause[d] harm," *without regard* to the officer's statutory authority or continued service in office. *See Collins*, 141 S. Ct. at 1788-89. So the Bureau's red herrings cannot rehabilitate a regulation promulgated without lawfully appropriated funding.

2. The next question is what remedy to provide for the invalidly promulgated Rule. That answer is even easier. Unlike *Collins*, this case challenges an agency regulation under the APA, which mandates that courts "shall … set aside" unconstitutional agency action. 5 U.S.C. § 706(2). This Court need not resolve here the recent controversy over whether Section 706(2) means that a court should "'vacate'" an unlawful regulation or simply "'disregard'" it and award injunctive or declaratory relief. *United States v. Texas*, No. 22-58, slip op. at 11 (U.S. June 23, 2023) (Gorsuch, J., concurring in the judgment); *see id.* at 8-17. Either way, "shall … set aside" at minimum means the Bureau *cannot enforce* the Rule against the Lenders.

The Bureau opposes "retrospective invalidation" and proposes that it be permitted to enforce the Rule against the Lenders once Congress appropriates valid "funding from another source." Br. 45-46. But that would neither be "prospective relief" nor "set aside" the Rule—it would treat the Rule *as in effect and enforceable* going forward once valid funding is obtained. That result cannot be squared with Section 706(2), and the Bureau does not even try. The Bureau likewise flouts this Court's precept that separation-of-powers remedies should be "designed … to create incentives to raise … challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (cleaned up).

3. The Bureau makes only two legal arguments for its non-remedy. They both fail.

The Bureau primarily contends that courts should not vacate agency actions taken without lawful funding because Congress has provided forward-looking remedies *the Executive* can pursue *against officials* who unlawfully expend funds. Br. 43-44. There is no basis, though, to conclude that "Congress intended" those remedies to be "*the exclusive avenue*" of relief for an Appropriations Clause violation. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, No. 21-806, 2023 WL 3872515, at *11 (U.S. June 8, 2023). Far from being "incompatible" with those officer-focused remedies, setting aside an officer's action under the APA would "complement, not supplant" them. *Id.* at *11, 13 (cleaned up). "The fact that the Federal Government can exercise oversight of … federal spending … []does not demonstrate that Congress has displayed an intent" to displace APA remedies. *Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256 n.3 (2011).

The Bureau additionally lists remedial doctrines that permit denying "retrospective relief" in certain contexts. Br. 46. Again, though, the Bureau is asking for the Rule to be deemed *valid prospectively*. Only the "de facto validity" doctrine might have supported such an extraordinary result in these circumstances, *id.*, and the Bureau fails to mention that this Court long ago repudiated it, *Ryder v. United States*, 515 U.S. 177, 184 (1995).

The Bureau's law-free remedial theory also would incentivize lawless conduct. The Executive Branch *could intentionally flout* the Appropriations Clause, as it would be the sole enforcer of the only meaningful remedies. Indeed, rejection of so-called "retrospective" relief would leave courts unable to vacate even *criminal convictions* secured in defiance of express appropriations riders. *But see United States v. Gentile*, No. 12-cr-360, 2017 WL 1437532, at *6 (E.D. Cal. Apr. 24, 2017) (noting that "vacat[ing] defendant's convictions" would be "appropriate remedy" for violation of rider prohibiting expenditure of funds on certain medical-marijuana prosecutions), *aff'd*, 782 F. App'x 559 (9th Cir. 2019). This Court should not "adopt[] a remedial approach with such sweeping and inequitable results." CFPB Br. 13.

4. Lacking any viable legal argument, the Bureau resorts to fear-mongering about "significant disruption" if *all* "the CFPB's past actions" are vacated. Br. 47. But the Bureau grossly exaggerates the effects and implications of setting aside *this Rule*.

Most importantly, the Bureau does not argue that there would be *any* harm from setting aside the Rule itself. As the Rule has been stayed and never gone

into effect, *see supra* p. 7, no one has "reasonably relied" on it, CFPB Br. 13. Likewise, because the Lenders pursued "a timely challenge" before the Rule ever took effect, refusing to set it aside would "create a disincentive to raise" such challenges in the future, *Ryder*, 515 U.S. at 182-83, while granting relief will impose no cognizable "prejudice[]" on the CFPB, *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967).

Turning to *other* CFPB actions, the Bureau's sky-may-fall rhetoric is unwarranted. Unlike with this Rule, the Bureau will have numerous remedial defenses that address its concerns.

Starting with adjudications, only "timely" claims can lead to relief. *See, e.g.*, *Lucia*, 138 S. Ct. at 2055. The Bureau never claims that the number of pending proceedings with timely claims is substantial. *Compare Ryder*, 515 U.S. at 185 (dismissing concerns about "7 to 10 cases"), *with* Cert. Reply 9-10 (identifying 12 cases).

Turning to other rules, the Bureau concedes that an appropriate remedy at minimum would limit their enforcement "until Congress provides … funding." Br. 45. And if Congress chooses to appropriate funds for the agency, it can also choose *at the same time* whether to legislatively ratify any existing rules. Of course, Congress may not support all those rules, but that underscores why the rules should not be immune from a remedy for the CFPB's unconstitutional insulation from Congress. This Court also can delay its judgment to "afford Congress

an opportunity" to act. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982).[3]

Moreover, many of the Bureau's rules were issued outside the six-year limitations period, 28 U.S.C. § 2401(a), including substantial portions of its mortgage-related disclosure rules, *see* CFPB Br. 47-48. Even for timely challenges, "equitable defenses" such as "laches" "may be interposed." *Abbott Labs.*, 387 U.S. at 155; *see Ryder*, 515 U.S. at 184-85 (contemplating possibility that "retrospective relief" might be denied under "remedial discretion" to avoid "grave disruption or inequity"). Courts thus have ample means to protect "the mortgage markets," CFPB Br. 48, while setting aside this Rule that was promptly challenged and has never been in effect.

Finally, setting aside this Rule is particularly warranted because it *also* "was initially promulgated by a director who was unconstitutionally shielded from removal." Pet.App. 18a. The Fifth Circuit did not deny the obvious fact that President Trump would have fired Director Cordray but for the removal restriction, but rejected this claim because it read *Collins* to require a counterfactual showing that Cordray's replacement would not have issued the Rule. Pet.App. 19a-23a. Even the Bureau has abandoned that flawed position. *See supra* pp. 46-47. Setting aside this Rule is thus warranted twice over.

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[3] The Bureau previously argued that "courts of appeals have repeatedly" allowed *agencies* to "ratif[y] … notice-and-comment rulemaking." 22-663 BIO 16. Thus, while the Lenders dispute that agency ratification is appropriate for such rules, 22-663 Cert. Reply 6-7, the Bureau cannot deny that this agency-ratification defense may also be available.

CONCLUSION

The judgment below should be affirmed.

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