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 *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE, THE BUCKEYE INSTITUTE, THE MANHATTAN INSTITUTE FOR POLICY RESEARCH, AND LAW OFFICES OF CRYSTAL MORONEY, P.C. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Consumer Financial Protection Bureau's funding structure—which imposes no meaningful constraints on the authority of the President or CFPB to choose the Bureau's amount of annual public funding—violates the Appropriations Clause, U.S. Const. Art. I, § 9, cl. 7, and renders unenforceable the regulation at issue in this case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 12

I. THE APPROPRIATIONS CLAUSE BARS CFPB FROM DRAWING FEDERAL FUNDS WHERE, AS HERE, CONGRESS HAS NOT APPROPRIATED ANY FUNDS 12

A. The Appropriations Clause Is Designed to Ensure that Congress Maintains the Exclusive Power of the Purse 13

B. CFPB's Funding Mechanism Violates the Appropriations Clause Because It Circumvents Congress's Exclusive Power of the Purse 15

C. This Court's Case Law Provides No Support for CFPB's Interpretation of the Appropriations Clause 20

Page

D. The Constitutional Problem Created by CFPB's Funding Structure Is Exacerbated by the Tremendous Authority It Wields 22

II. *AMICUS*'S ABUSIVE TREATMENT BY CFPB WELL ILLUSTRATES THE NEGATIVE CONSEQUENCES OF PERMITTING AN AGENCY TO OPERATE OUTSIDE THE NORMAL APPROPRIATIONS PROCESS 27

A. CFPB's Non-Stop Investigative Demands Forced the Law-Abiding Moroney Law Firm to Shutter Its Operations. 28

B. CFPB's Funding Structure May Have Played a Role in Its Unwarranted Destruction of the Law Firm. 32

CONCLUSION. 34

TABLE OF AUTHORITIES

Page(s)

Cases:

Biden v. Nebraska,
600 U.S. __, 2023 WL 4277210 (2023) 19
CFPB v. All American Check Cashing, Inc.,
33 F.4th 218 (5th Cir. 2022) (*en banc*) 6
CFPB v. Law Offices of Crystal Moroney, P.C.,
63 F.4th 174 (2d Cir. 2023) 2, 14, 21
Cincinnati Soap Co. v. United States,
301 U.S. 308 (1937) 8, 20, 21
Clinton v. City of New York,
524 U.S. 417 (1998) 13
Collins v. Yellin,
141 S. Ct. 1761 (2021) 24, 25
FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 23
Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477 (2010) 22
Gundy v. United States,
139 S. Ct. 2116 (2019) 14
Office of Personnel Management v. Richmond,
496 U.S. 414 (1990) 14
Reeside v. Walker,
52 U.S. 272 (1850) 12
Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020) 4, 7, 8, 12, 18, 19, 22-25, 30
United States v. Texas,
599 U.S. __, 2023 WL 4139000 (2023) 19
U.S. Dep't of Navy v. Federal Labor Relations Authority, 665 F.3d 1339 (D.C. Cir. 2012) 9, 14
West Virginia v. EPA,
142 S. Ct. 2587 (2022) 23

Page(s)

Statutes and Constitutional Provisions:

U.S. Const., Art. I, § 7, Cl. 2 19

U.S. Const., Art. I, § 9, cl. 7
(Appropriations Clause) 2, 4, 6-9, 12-15, 19-23, 25-26, 32

Consumer Financial Protection Act (CFPA), Title X of Pub. L. No. 111-203, 124 Stat. at 1955-2113, 12 U.S.C. §§ 5481-5603 . . . . 4, 9, 14-18, 21, 22, 28

12 U.S.C. § 5491(b)(1) 18
12 U.S.C. § 5491(c)(1) 18
12 U.S.C. § 5491(c)(3) 18
12 U.S.C. § 5497(a) 15
12 U.S.C. § 5497(a)(1) 4, 8
12 U.S.C. § 5497(a)(1)-(2) 5
12 U.S.C. § 5497(a)(2) 16
12 U.S.C. § 5497(a)(2)(A)-(B). 15, 16
12 U.S.C. § 5497(a)(2)(C). 5, 17
12 U.S.C. § 5497(b) 5, 17
12 U.S.C. § 5497(c). 5, 17
12 U.S.C. § 5497(c)(2) 4
12 U.S.C. § 5511(a) 22
12 U.S.C. § 5536(a)(1)(B). 22
12 U.S.C. § 5562(c)(1) 26

Fair Debt Collection Practices Act,
15 U.S.C. § 1692 *et seq*. 28

Fair Credit Reporting Act,
15 U.S.C. § 1681 *et seq*. 29

Page(s)

12 U.S.C. § 289(a)(3)(B) 16

15 U.S.C. § 57b-1(i) 27

15 U.S.C. § 78u(b). 28

15 U.S.C. § 2076(b). 26

26 U.S.C. § 7602(a)(2)-(3). 26

29 U.S.C. § 161 (1) 26

42 U.S.C. § 2000e-9 25

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Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 Am. Polit. Sci. Rev. 283 (1996). . . 33

CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2022* (Nov. 15, 2022) 16

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The Federalist No. 48 (J. Madison) 5, 13

Page(s)

The Federalist No. 58 (J. Madison) 6, 13

Walter J. Oleszek, *Congressional Oversight: An Overview*, Congr. Research Serv. (Feb. 22, 2010) 33

Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988) 6

Joseph Story, *Commentaries on the Constitution of the United States* § 531 (1933) 13

Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking in the Federal Trade Commission*, 91 J. of Polit. Econ. 765-800 (1983) 33

Adam J. White, *The CFPB's Blank Check— Or, Delegating Congress's Power of the Purse*, Yale J. on Reg. (Nov. 28, 2022) (available at https://www.aei.org/op-eds/the-cfpbs-blank-check-or-delegating-congresss-power-of-the-purse/) . . . 17

S. REP. NO. 111-176 (2010) 16, 34

INTERESTS OF *AMICI CURIAE*

The Law Offices of Crystal Moroney, P.C. (Moroney) is a defunct law firm that, during its period of active operations, principally provided legal advice and services to clients seeking to collect debt.[1] Beginning in 2017, Petitioner Consumer Financial Protection Bureau (CFPB) served Moroney with a series of Civil Investigative Demands (CIDs), demanding that Moroney answer interrogatories, produce a massive number of documents and tangible things, and submit detailed written reports. Although CFPB never accused Moroney of any wrongdoing, the time and money required to respond to the CIDs eventually forced Moroney to shutter its operations. Moroney believes that CFPB's financial structure played a role in CFPB's decision to conduct its abusive investigation; other federal enforcement agencies are answerable to Congress for their conduct and thus would not have so carelessly driven a law-abiding law firm out of business.

After producing to CFPB a large number of documents, Moroney refused to comply with one of a series of CIDs issued to her by CFPB. That CID demanded production of many documents protected by attorney-client privilege. In response to CFPB's action to enforce the CID, Moroney asserted, among other things, that CFPB's funding structure—which permits CFPB to choose its own funding level without seeking

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

congressional appropriations—violates the Appropriations Clause. U.S. Const., Art. I, § 9, cl. 7. In March 2023, the U.S. Court of Appeals for the Second Circuit rejected that constitutional claim and affirmed enforcement of the CID. *CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174 (2d Cir. 2023). Moroney has filed a petition for a writ of certiorari, seeking review of that decision. No. 22-1233 (filed June 21, 2023). The Second Circuit has stayed its mandate pending resolution of the certiorari petition. The New Civil Liberties Alliance (NCLA) serves as Moroney's counsel on the petition.

NCLA is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the

Constitution's United States is the focus of NCLA's concern.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions. The Buckeye Institute is a nonpartisan, nonprofit tax-exempt organization, as defined by I.R.C. § 501(c)(3). Through its legal center, The Buckeye Institute engages in litigation in support of the principles of federalism and separation of powers and the protection of individual liberties. The Buckeye Institute also advocates on behalf of regulated entities when agencies have exceeded their constitutional authority or their congressionally authorized role. More and more often government overreach comes in the form of agency action by unelected bureaucrats—and in this case by bureaucrats that are utterly unaccountable because of the CFPB's funding structure. Indeed, this structure gives the agency absolute, unchecked power. Absolute power is never good, even if those that wield it have the best of intentions. The challenging journey of the Law Offices of Crystal Moroney, P.C. through the CFPB impositions illustrates this. The Buckeye Institute opposes the CFPB's structure because it removes the CFPB beyond the reach of "we the people" and because it is antithetical to the Constitution and the concept of American liberty.

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically

sponsored scholarship and filed briefs supporting economic freedom and property rights.

STATEMENT OF THE CASE

This case addresses whether CFPB's unique funding structure violates the Constitution's Appropriations Clause. The evidence is uncontested that the 2010 Congress created that structure to ensure that CFPB—an agency to which it assigned massive enforcement powers—would not be subject to political pressures from future Congresses. The 2010 Congress feared that such pressures might temper CFPB's enforcement of the federal statutes newly assigned to it, including laws involving debt-collection practices.

To shield CFPB from oversight by future Congresses, the Consumer Financial Protection Act (CFPA), 124 Stat. at 1955-2113 (2010), 12 U.S.C. §§ 5481-5603, provides that CFPB does not have to "rely on the annual appropriations process for funding." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2193-94 (2020). Instead, it establishes the Bureau as an independent regulatory agency housed within the Federal Reserve System and provides that CFPB receives funding "directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments." *Id.* at 2194. Each quarter, CFPB simply requests funding in an amount "determined by the Director to be reasonably necessary to carry out the" Bureau's functions. 12 U.S.C. § 5497(a)(1). The Federal Reserve must then transfer that amount so long as it does not exceed 12% of the

Federal Reserve's "total operating expenses." *Id.* § 5497(a)(1)-(2).

Other features of the CFPA that ensure CFPB's independence from fiscal control by future Congresses include provisions: (1) mandating that the Bureau's "funds derived from the Federal Reserve System ... shall not be subject to review by the Committees of Appropriations of the House of Representatives and the Senate," *id.* § 5497(a)(2)(C); (2) authorizing CFPB to accumulate a financial nest egg by providing that unused funds "shall remain available" to the Bureau "until expended" in future years, *id.* § 5497(c)(1); and (3) providing that rather than being deposited in a Treasury fund, the Bureau's money is to be maintained in a separate fund under the sole control of CFPB's Director. *Id.* § 5497(b) & (c). To underscore the Bureau's financial independence, the CFPA states that money "obtained by or transferred to" CFPB's separate fund "shall not be construed to be Government funds or appropriated monies." *Id.* § 5497(c)(2).

The U.S. Court of Appeals for the Fifth Circuit held that CFPB's funding scheme is unconstitutional, concluding that it "cannot be reconciled with the Appropriations Clause and the clause's underpinning, the constitutional separation of powers." Pet. App. 42a. The court explained that the Framers "viewed Congress's exclusive 'power over the purse' as an indispensable check on 'the overgrown prerogatives of the other branches of government,'" *id.* at 29a (quoting *The Federalist* No. 58 (J. Madison)), and "believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people." *Ibid.* (citing *The*

Federalist No. 48 (J. Madison)). To safeguard those principles, the Framers adopted the Appropriations Clause; its "straightforward and explicit command ensures Congress's *exclusive* power over the federal purse" and "'takes away from Congress ... the option *not* to require legislative appropriations prior to expenditure.'" *Id.* at 31a (quoting Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1349 (1988) (emphasis in original)).

The Fifth Circuit concluded that the *sui generis* CFPB funding structure established by the 2010 Congress fails to meet those standards:

> Congress did not merely cede *direct* control over the Bureau's budget by insulating it from annual or other time limited appropriations. It also ceded *indirect control* by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process—a double insulation from Congress's purse strings that is "unprecedented" across the government.

Id. at 34a-35a (quoting *CFPB v. All American Check Cashing, Inc.*, 33 F.4th 218, 225 (5th Cir. 2022) (*en banc*) (Jones, J., concurring)). The court held, "Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it." *Id.* at 36a.

The court added that "[t]he constitutional problem is more acute" because of the Bureau's

"capacious portfolio of authority." *Id.* at 37a. The appeals court noted this Court's observation that CFPB "acts 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." *Ibid.* (quoting *Seila Law*, 140 S. Ct. at 2202 n.8).

As a remedy for the constitutional violation, the court vacated CFPB's Payday Lending Rule, the regulation challenged by Respondents. *Id.* at 45a. The court held that vacatur was the appropriate remedy because the Rule was "the product of the Bureau's unconstitutional funding scheme" and "inflicted harm" on Respondents. *Id.* at 44a-45a.

SUMMARY OF ARGUMENT

The Appropriations Clause, U.S. Const., Art. I, § 9, cl. 7, provides in relevant part, "No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." The issue here is whether funds CFPB requisitions from the Federal Reserve Board pursuant to the CFPA are obtained "in consequence of Appropriations made by Law." The issue is one of first impression before this Court. But the Appropriations Clause's language and the history surrounding its adoption indicate that Congress has *not* "Appropriat[ed]" the hundreds of millions of dollars that CFPB has been requisitioning each year.

CFPB concedes that—unlike every other major federal enforcement agency—it "does not rely on [Congress's] annual appropriations process for funding." *Seila Law*, 140 S. Ct. at 2193-94. It

nonetheless contends that its funding should be deemed "in consequence of Appropriations" because its authority to requisition funds in an amount it determines to be "reasonably necessary to carry out" its statutory functions, 12 U.S.C. § 5497(a)(1), ultimately derives from a statute adopted by the 2010 Congress. Pet. Br. at 10.

The principal Supreme Court decision CFPB cites for that counter-intuitive proposition, *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), is inapposite. That decision states that an Appropriations Clause violation is not established simply because "the particular uses to which the appropriated money are to be put have not been specified" by Congress. *Id.* at 321. But the Court's statement presupposes that Congress has, in fact, "appropriated money." *Cincinnati Soap* is silent regarding when a congressional act constitutes an "appropriation" of money within the meaning of the Appropriations Clause.

CFPB argues that the Appropriations Clause "does not *limit* Congress's authority when making such appropriations." Pet. Br. 16 (emphasis in original). True enough. But the Fifth Circuit's decision does not in any way limit Congress's power to appropriate funds. Rather, the appeals court held that the 2010 Congress's authorization to CFPB's Director to requisition whatever funds are reasonably necessary to finance its operations—in perpetuity and without any meaningful funding limits—was not an "Appropriation" and thus does not provide CFPB with constitutional authority to obtain federal funds. Pet. App. 33a-42a.

As the Fifth Circuit explained, the Founders deemed it essential that Congress maintain "*exclusive* power over the federal purse as an indispensable check on the overgrown prerogatives of the other branches of government." *Id.* at 29a (citations omitted). The Appropriations Clause is the principal means by which the Constitution ensures that Congress maintains the exclusive power of the purse. "The Appropriations Clause is thus a bulwark of the Constitution's separation of powers among the three branches of the National Government." *United States Dep't of Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.). Those separation-of-powers concerns make clear that the Appropriations Clause bars the Executive Branch from seeking to requisition federal funds based on congressional legislation that purports to surrender the power of the purse to the Executive Branch.

As explained in more detail below, the CFPA hands CFPB a blank check and authorizes the Bureau to requisition any amount it deems appropriate, in perpetuity and without meaningful constraints on the amount requisitioned. Indeed, the evidence is undisputed that the 2010 Congress very much wanted to surrender future Congresses' power of the purse to CFPB; backers of the legislation concluded that CFPB's enforcement activities would be too constrained if future Congresses could control the size of CFPB's budget. Such legislation is not an "Appropriation[ ] made by Law" within the meaning of the Appropriations Clause because it is inconsistent with the Clause's acknowledged purpose of maintaining Congress's exclusive power over the federal purse.

As the Fifth Circuit noted, "[t]he constitutional problem is more acute because of the Bureau's capacious portfolio of authority." Pet. App. 37. Moreover, the 2010 Congress bolstered that authority by granting CFPB potent enforcement powers—significantly broader than those available to other federal enforcement agencies.

The negative consequences of CFPB's exercise of unconstrained power and unlimited budget are well illustrated by CFPB's unwarranted destruction of the law practice of *amicus curiae* Law Offices of Crystal Moroney, P.C., a small but once-thriving law firm. CFPB has hounded Moroney to respond to discovery requests about her clients since 2017, issuing four separate Civil Investigative Demands (CIDs) that directed Moroney to answer interrogatories, produce a massive number of documents and tangible things (including many attorney-client privileged documents), and prepare detailed written reports. Moroney did its best to cooperate with CFPB and voluntarily produced a large amount of material. The time and expense required to respond to the CIDs had an extremely negative impact on Moroney's business operations. Throughout the past six years, CFPB never told Moroney that it was suspected of violating any federal debt-collection law. CFPB nonetheless declared that it was dissatisfied with Moroney's response to the CIDs and filed an enforcement action seeking additional materials. CFPB persisted despite Moroney's warning that the cost of further compliance would force it to shutter its operations. Overwhelmed by compliance costs, Moroney ceased active operations in the summer of 2021 after the district court and appeals court upheld CFPB's demand for further compliance.

There is reason to believe that CFPB's unwarranted destruction of Moroney's business operations might have been avoided if CFPB were subject to the normal, annual appropriations process. Congressional control over an agency's funding constrains agency overreach in several distinct ways. Agencies that must live within a budget determined by Congress are forced to limit their regulatory activities by prioritizing those cases they consider to be the most pressing. Also, cautious agency officials will avoid overly aggressive enforcement activity that might generate constituent complaints and induce Congress to reduce future appropriations.

Both of those constraints are absent when, as here, an agency is granted perpetual authority to determine its own funding. CFPB had no reason to impose reasonable limits on its investigation of Moroney—an investigation not prompted by any articulated suspicion that Moroney was not fully complying with the law—because its funding is (for all practical purposes) unlimited, and it had no fear of being answerable to Congress for overly aggressive investigations. The result was the destruction of a law-abiding and once-thriving small business.

ARGUMENT

I. THE APPROPRIATIONS CLAUSE BARS CFPB FROM DRAWING FEDERAL FUNDS WHERE, AS HERE, CONGRESS HAS NOT APPROPRIATED ANY FUNDS

The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. Const., Art. I, § 9, cl. 7. CFPB's funding structure cannot be squared with that language. The Bureau does not obtain its funds "in consequence of Appropriations made by Law." Rather, the 2010 Congress handed CFPB a blank check and authorized the Bureau in perpetuity to fill in virtually any amount it deems appropriate. This Court has recognized the highly unorthodox nature of CFPB funding: "CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process." *Seila Law*, 140 S. Ct. at 2193-94. Both the language and history of the Appropriations Clause demonstrate that the funds CFPB requisitions from the Federal Reserve have not been "appropriat[ed]" by Congress. And as the Court has consistently held, "no money can be taken or drawn from the Treasury except under an appropriation by Congress." *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

A. The Appropriations Clause Is Designed to Ensure that Congress Maintains the Exclusive Power of the Purse

As the decision below correctly recognized, the Framers "viewed Congress's 'exclusive power over the purse' as an indispensable check on 'the overgrown prerogatives of the other branches of the government,'" Pet. App. 29a (quoting *The Federalist* No. 58 (J. Madison)), and "believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people." *Ibid.* (citing *The Federalist* No. 48 (J. Madison)). Assigning the power of the purse to Congress was viewed as an essential element of the separation of powers because, Joseph Story explained, Congress could thereby maintain "a controlling influence over the executive power, since it holds at its command all the resources by which a chief magistrate could make himself formidable." Joseph Story, *Commentaries on the Constitution of the United States* § 531 (1833). This Court has repeatedly recognized that protecting Congress's exclusive power over the purse is essential to maintaining the separation of powers. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 451 (Kennedy, J., concurring) (stating that "if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's representatives in Congress, liberty is threatened").

The Appropriations Clause is the principal means by which the Constitution ensures that Congress maintains the exclusive power of the purse. The Clause dictates that "Congress's control over

federal spending is absolute." *U.S. Dep't of Navy*, 665 F.3d at 1348. It bars the payment of federal funds for any purpose unless they have been "appropriated by an act of Congress." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990).

The Second Circuit held that the CFPB funding mechanism satisfies Appropriations Clause requirements because "[t]here can be no dispute that the CFPB's funding structure was authorized by the CFPA—a statute passed by Congress and signed into law by the President." *CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 181 (2d Cir. 2023). But as the Fifth Circuit explained, Congress's mere enactment of a law does not, by itself, satisfy the Appropriations Clause's requirements. Were it otherwise, "no federal statute could ever violate the Appropriations Clause because Congress, by definition, enacts them." Pet. App. 39a. The improper concentration of power within the Executive Branch is no less a separation-of-powers violation simply because Congress itself has acquiesced in the violation. *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting). As Justice Gorsuch put it, "[E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone." *Ibid.*

The text of the Appropriations Clause refutes the Second Circuit's adoption-of-a-statute-suffices argument. The Clause provides that money may be withdrawn from the Treasury only "in consequence of *Appropriations* made by law." U.S. Const., Art I, § 9 cl. 7 (emphasis added). As the Fifth Circuit recognized,

"A law alone does not suffice—an *appropriation* is required." Pet. App. 38a.

B. CFPB's Funding Mechanism Violates the Appropriations Clause Because It Circumvents Congress's Exclusive Power of the Purse

CFPB asserts that the CFPA constitutes an adequate "appropriation" of federal funds because it "prescribe[s] the source, amount, duration, and purpose of the CFPB's funding." Pet. Br. 17. That assertion is incorrect; the CFPA prescribes neither the amount nor the duration of funding.

The CFPA grants the Bureau "unilateral[]" authority to "self-determine[]" the amount of its own funding. Pet. App. 35a. As the court below noted:

> While the great majority of executive agencies rely on annual appropriations for funding, the Bureau does not. ... Instead, each year, the Bureau simply requisitions from the Federal Reserve an amount "determined by the Director to be reasonably necessary to carry out" the Bureau's functions.

Id. at 33a-34a (citing 12 U.S.C. § 5497(a)).

Citing 12 U.S.C. § 5497(a)(2)(A)-(B), CFPB states that "Congress capped the amount that the Bureau may request and receive each year at a fixed number, adjusted only for inflation." But the supposed "cap" is illusory and places no meaningful restraints on

CFPB spending authority. CFPB is authorized to requisition up to 12% of the Federal Reserve's "total operating expenses"—an amount (adjusted for inflation) now totaling nearly $750 million per year. The annual "cap" has at all times been far in excess of the amount actually requisitioned by CFPB.[2]

Indeed, the CFPA's legislative history demonstrates that the 2010 Congress *intended* the cap to be illusory. The 2010 Congress, elected in the aftermath of the 2008 financial crisis, included a Senate with 59 Democrats—a number higher than in any other Congress since 1980. In explaining its decision to craft CFPB's unorthodox funding structure, the Senate Banking Committee stated candidly, "the assurance of adequate funding, independent of the Congressional appropriations process, *is absolutely essential* to the independent operations of any financial regulator." S. REP. NO. 111-176 (2010), at 163 (emphasis added). By stating openly that it deemed it "essential" that CFPB's operations be kept "independent" of oversight and budgetary constraints from future Congresses, the 2010 Congress made plain that it did not intend § 5497(a)(2) to serve as a meaningful constraint on CFPB's authority to unilaterally establish its own funding level. CFPB

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[2] *See, e.g.,* CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2022*, at 44-45 (Nov. 15, 2022) (CFPB granted itself $100 million less than it was authorized to requisition under § 5497(a)(2)(A)-(B)). Funds requisitioned by the Bureau reduce amounts that would otherwise flow to the general fund of the Treasury, as the Federal Reserve is required to remit surplus funds in excess of a limit set by Congress. *See* Pet. App. 34a (citing 12 U.S.C. § 289(a)(3)(B)).

would not have been "independent of the Congressional appropriations process" unless the nominal "cap" on funding was significantly higher than an amount that even its strongest congressional supporters deemed necessary to carry out its assigned functions. The CFPA set the cap at 12% of the Federal Reserve's total operating expenses; had the 2010 Congress thought it possible that an independently funded CFPB might *ever* need a higher funding level, the Senate Report's "absolutely essential" language makes clear that the CFPA would have included a correspondingly higher cap.[3]

Throughout its existence, CFPB has stated that its ability to procure funding outside the congressional appropriations process ensures its "full independence." Indeed, CFPB has repeatedly described its own funding as *not* coming from "appropriations." *See* Adam J. White, *The CFPB's Blank Check—Or, Delegating Congress's Power of the Purse*, Yale J. on Reg. (Nov. 28, 2022) (available at https://www.aei.org/op-eds/the-cfpbs-blank-check-or-delegating-congresss-power-of-the-purse/).

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[3] The CFPA's efforts to ensure CFPB's "independent operation" went well beyond exempting CFPB from the normal budgetary process and authorizing the Bureau to requisition a practically unlimited amount of funds. The CFPA also includes two other novel provisions mandating that the Bureau's "funds derived from the Federal Reserve System ... shall not be subject to review by the Committees of Appropriations of the House of Representatives and the Senate," 12 U.S.C. § 5497(a)(2)(C), and authorizing CFPB to accumulate a financial nest egg by providing that unused funds "shall remain available" to the Bureau "until expended" in future years. *Id.* § 5497(b) & (c).

In other words, the CFPA imposes no meaningful constraints on the amount of funds that CFPB may requisition from the Federal Reserve each quarter. Its funding structure is unique among federal agencies and is not compatible with the Founders' design that Congress should maintain the exclusive power of the purse.

The constitutional violation is compounded by the CFPA's failure to impose any durational limit on CFPB's funding. CFPB insists that its perpetual funding is of no constitutional significance because "Congress can of course repeal or modify standing appropriations at any time." Pet. Br. 20. But that argument simply ignores the substantial obstacles to change.

Indeed, this Court's *Seila Law* decision substantially increased those obstacles. *See* Markham S. Chenoweth & Michael P. DeGrandis, *Out of the Separation-of-Powers Frying Pan and Into the Nondelegation Fire: How the Court's Decision in* Seila Law *Makes CFPB's Unlawful Structure Even Worse*, Chicago L. Rev. Online (Aug. 27, 2020) (available at bit.ly/44s1V4T). As initially enacted, the CFPA granted CFPB independence from the President as well. It placed CFPB leadership under a single Director appointed to a five-year term, 12 U.S.C. §§ 5491(b)(1) & (c)(1), and limited the President's authority to remove the Director to cases of "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). *Seila Law* held that the Director's removal protection was unconstitutional; it severed that removal protection from other CFPA provisions and held that while CFPB may "continue to

operate," the Director would henceforth "be removable by the President at will." 140 S. Ct. at 2192.

By severing the Director's tenure protection, *Seila Law* has in effect transferred the unilateral requisitioning authority from the Director to the President. Now that the President has been granted broad power to unilaterally expand CFPB's funding as he sees fit, he can be expected to veto any legislation designed to restore Congress's appropriations authority over the Bureau. Thus, any such legislation would need the support of overwhelming majorities in both houses of Congress in order to pass. *See* U.S. Const., Art. I, § 7, cl. 2 (requiring a 2/3 vote of both the Senate and House of Representatives to override a presidential veto). The result is that the 2010 Congress has effectively blocked future Congresses from exercising the power of the purse over CFPB activities. And as the Court recently stressed, "among Congress's most important authorities is its control of the purse." *Biden v. Nebraska*, No. 22-506, 600 U.S. __, 2023 WL 4277210 at *9 (June 30, 2023) (citing U.S. Const., Art. I, § 9, cl. 7).[4]

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[4] In declining to hear a separation-of-powers challenge to Executive Branch immigration policies, the Court stressed the availability of an alternative forum (Congress) in which the plaintiffs (the States of Texas and Louisiana) could press their claims. *United States v. Texas*, No. 22-58, 599 U.S. __, 2023 WL 4139000 (June 23, 2023) (stating that "Congress possesses an array of tools to analyze and influence these policies—oversight, appropriations, the legislative process, and Senate confirmation, to name a few"). But, as explained above, the 2010 Congress largely deprived future Congresses of those traditional tools. Respondents have no place to turn other than the judiciary.

C. This Court's Case Law Provides No Support for CFPB's Interpretation of the Appropriations Clause

CFPB asserts that "[p]recedent accords" with its narrow construction of the Appropriations Clause. Pet. Br. 11. But it concedes that on only one occasion has the Court "encountered [a claim] asserting that a statute violated the Appropriations Clause." *Ibid.* (citing *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937)). And contrary to CFPB's contention, *Cincinnati Soap* has no relevance to this case.

The case involved a challenge to a statute that imposed a tax on certain coconut oil producers located in the Philippines. The statute provided that the proceeds of the tax would be forwarded to the territorial Philippines government under specified circumstances. The plaintiffs claimed that the statute violated the Appropriations Clause because it did not specify the uses to which the territorial government was to put the tax revenues. The Court rejected the claim, stating that the Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." 301 U.S. at 321. The Court's actual holding was that "all other considerations aside," addressing the Appointments Clause issue was "premature" because the Executive Branch had not yet disbursed any of the tax revenues collected under the statute; it noted that even if Congress had not yet "made an appropriation" of the tax revenues, it might still do so. *Id.*

CFPB mistakenly asserts that *Cincinnati Soap* held that the Appropriations Clause claim was without

merit "because" the Clause requires nothing more than that Congress adopt a statute authorizing funding. Pet. Br. 24.[5] As the preceding paragraph makes clear, *Cincinnati Soap* includes no such holding; indeed, its only holding was that consideration of the petitioners' Appropriations Clause claim was premature. Moreover, CFPB takes out of context the sentence in *Cincinnati Soap* on which it mistakenly relies ("[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"). Read in context, the quoted sentence conveys nothing more than that the Appropriations Clause is not violated simply because "the particular uses to which the appropriated money are to be put have not been specified" by Congress. 301 U.S. at 321. The sentence presupposes that Congress has, in fact, "appropriated money." *Cincinnati Soap* is silent regarding the key issue now before the Court: when does a congressional act constitute an "appropriation" of money within the meaning of the Appropriations Clause?

CFPB asserts that its funding structure should be upheld because it is not materially different from the funding structures under which other federal agencies operate. But, as the Fifth Circuit demonstrates, CFPB's funding structure is truly unique. No other federal agency has *ever* enjoyed

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[5] The Second Circuit similarly misread the decision. Relying on *Cincinnati Soap*, the Second Circuit upheld CFPB's funding structure, stating, "There can be no dispute that the CFPB's funding structure was authorized by the CFPA—a statute passed by Congress and signed into law by the President." *CFPB v. Law Offices*, 65 F.4th at 181.

similar authority to requisition funding in whatever amount it deems appropriate. In evaluating other federal agencies facing separation-of-powers challenges, the Court has viewed "the lack of historical precedent" for a challenged government structure as "perhaps the most telling indication" of a "severe constitutional problem" with that structure. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010). *See Seila Law*, 140 S. Ct. at 2201 (citing *Free Enterprise Fund* and noting, "An agency with a structure like that of the CFPB is almost wholly unprecedented"). The absence of any historical precedent for CFPB's funding structure, a structure expressly designed to prevent agency oversight by future Congresses, weighs heavily against the constitutionality of that structure.

D. The Constitutional Problem Created by CFPB's Funding Structure Is Exacerbated by the Tremendous Authority It Wields

As this Court has recognized, the CFPA "tasked the CFPB with 'implement[ing]' and 'enforc[ing]' a large body of financial consumer protection laws." *Seila Law*, 140 S. Ct. at 2193 (quoting 12 U.S.C. § 5511(a)). "Congress transferred the administration of 18 existing federal statutes to the CFPB" and also directed the Bureau to enforce "a new prohibition on 'any unfair, deceptive, or abusive act or practice' by certain participants in the consumer-finance sector." *Ibid.* (quoting 12 U.S.C. § 5536(a)(1)(B)). Congress also granted CFPB "potent enforcement powers." *Ibid.* The Bureau "has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute

civil actions in federal court." *Ibid.* It "may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs." *Ibid.*

The Fifth Circuit correctly ruled that "[t]he constitutional problem" created by CFPB's funding structure "is more acute because of the Bureau's capacious portfolio of authority." Pet. App. 37a. It is axiomatic that the greater the amount of federal funds being expended independently of Congress's direct control, the greater the threat to Congress's exclusive power over the purse. CFPB unilaterally requisitioned nearly $700 million in federal funds last year alone, without any need to seek funding through Congress's annual appropriations process. Executive Branch self-funding of that magnitude—funding that CFPB uses to regulate a broad segment of the nation's economy—unquestionably increases concerns that CFPB's novel funding structure violates the Appropriations Clause.[6]

[6] In analogous circumstances, the Court recently held that when a federal agency's proposed actions are novel and have large economic and political impact, the Major Questions Doctrine creates a presumption that an ambiguous statute did not authorize those actions. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (stating that "our precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). Similarly, the novelty of CFPB's funding structure and the vast scope of its spending and regulatory authority heighten the

Indeed, in concluding that the tenure protection afforded to CFPB's Director violated the separation of powers, *Seila Law* distinguished historical examples of regulators who enjoyed arguably similar tenure protection by noting the vastly greater budget and regulatory authority enjoyed by CFPB:

> The dissent categorizes the CFPB as one of many "financial regulators" that have historically enjoyed some insulation from the President. See [140 S. Ct.] at 2230-2233. But even assuming financial institutions like the Second Bank and the Federal Reserve can claim a special historical status, the CFPB is in an entirely different league. It acts 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.

140 S. Ct. at 2202 n.8.

In contesting the relevance of the scope of its regulatory authority, CFPB relies solely on *Collins v. Yellin*, 141 S. Ct. 1761 (2021). That reliance is misplaced. *Collins*, decided the year following *Seila Law*, challenged statutory tenure protection afforded

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inference that the Founders would have disapproved of this Executive Branch incursion on Congress's appropriations authority.

to the Director of the Federal Housing Finance Agency (FHFA). Concluding that *Seila Law* was "all but dispositive," the Court held that the for-cause restriction on the President's removal authority unconstitutionally interfered with the President's exercise of his Article II powers. 141 S. Ct. at 1783-84. The Court rejected claims that *Seila Law* was distinguishable because FHFA's regulatory authority arguably was somewhat more limited than CFPB's, stating that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." *Id.* at 1784.

Collins is inapposite. An agency's size may not be "dispositive" in determining whether Congress may restrict the President's authority to remove the agency's head at will. But *Collins*'s holding is inapplicable to the separate question of whether the quantity of federal funds an agency obtains outside the normal appropriations process is relevant to whether that funding complies with the Appropriations Clause. CFPB inaccurately asserts that *Collins* "disapproved" of taking into account agency "power" when "assessing separation-of-powers questions." Pet. Br. 35. *Collins* stated that "the constitutionality of *removal* restrictions" should not hinge on such inquiries. *Collins*, 141 S. Ct. at 1785 (emphasis added). But contrary to CFPB's assertion, *Collins* did not suggest that an agency's size and power are irrelevant in determining other separation-of-powers issues, such as whether an agency's funding structure complies with the Appropriations Clause.

Moreover, it is not merely CFPB's capacious portfolio that sets the Bureau apart and accentuates the Appropriations Clause problems created by the Bureau's funding structure. CFPB's enforcement tools are significantly stronger and more extensive than those possessed by other enforcement agencies. In particular, CFPB's CID authority permits the Bureau not only to require individuals to produce documents and tangible things but also to provide oral testimony, file written reports, and answer interrogatories, 12 U.S.C. § 5562(c)(1), regardless of whether the agency has reason to suspect that the subject of the investigation has violated any statute. It is the latter two enforcement tools that proved so disruptive for Moroney; its principal attorney and sole owner spent countless hours responding to detailed interrogatories and preparing reports in formats specified by CFPB instead of running her firm.

Amici are aware of no other federal agency with as broad a set of enforcement tools. For example, the Internal Revenue Service possesses no authority to demand that a taxpayer provide written reports or answer interrogatories (26 U.S.C. § 7602(a)(2)-(3)), nor does the Securities and Exchange Commission (15 U.S.C. § 78u(b)), nor the National Labor Relations Board (29 U.S.C. § 161(1)), nor the Equal Employment Opportunity Commission (42 U.S.C. § 2000e-9). All investigative orders issued by the Consumer Product Safety Commission must contain a "complete statement of the reason the [CPSC] requires the report or answers" and be designed to place the smallest burden on the person to whom the discovery request is directed (15 U.S.C. § 2076(b)—two requirements inapplicable to CFPB discovery requests. Even the

agency with investigative authority most similar to CFPB's—the Federal Trade Commission—is subject to restrictions inapplicable to CFPB. For example, the FTC has "no authority to ... make demands for information ... unless such ... demand for information is signed by a Commissioner acting pursuant to a Commission resolution." 15 U.S.C. § 57b-1(i). CFPB investigators need no similar top-level sign-off before initiating investigations. And, of course, CFPB undertakes its investigations using funds procured without resort to Congress's normal appropriations process.

II. *AMICUS*'S ABUSIVE TREATMENT BY CFPB WELL ILLUSTRATES THE NEGATIVE CONSEQUENCES OF PERMITTING AN AGENCY TO OPERATE OUTSIDE THE NORMAL APPROPRIATIONS PROCESS

Amicus curiae Law Offices of Crystal Moroney, P.C. was a tiny but profitable law firm in 2017, when it first came into contact with CFPB. Between 2017 and 2021, CFPB served four separate CIDs on Moroney that totally disrupted the law firm's operations and caused employees to devote an extraordinary amount of time and expense responding to the CIDs—including preparation of a costly expert report concluding that the withheld documents were, indeed, protected by attorney-client privilege. CFPB has never suggested that Moroney ever violated any federal debt-collection laws. But CFPB-induced disruptions eventually forced the law firm to shutter its operations in 2021.

The evidence suggests that CFPB's funding structure may have played a role in the Bureau's

mistreatment of Moroney. In Section II.A below, Moroney recounts its interactions with CFPB in detail, for the purpose of relating a cautionary tale regarding the sorts of agency abuse that can arise when, as here, agencies are largely unaccountable to Congress.

A. CFPB's Non-Stop Investigative Demands Forced the Law-abiding Moroney Law Firm to Shutter Its Operations

During its period of active operations in New York, Moroney principally provided legal advice and services to clients seeking to collect debt.[7] Its principal attorney, Crystal G. Moroney, is licensed to practice law in New York and New Jersey. CFPB has not alleged that either Moroney or its principal attorney ever violated any federal statute governing debt-collection practices.

On June 23, 2017, CFPB served a Civil Investigative Demand on Moroney, the first of four CIDs it served on Moroney between 2017 and 2021. The CID made clear that CFPB was not accusing Moroney of any legal infractions. Rather, it stated that CFPB was undertaking an investigation to determine whether "debt collectors, furnishers or other persons in connection with collection of debt and furnishing of information" had violated the CFPA; the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*; or the

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[7] Most of Moroney's clients were debt-recovery agencies seeking soft-collection debt recovery solutions. Soft-collection debt recovery is the practice of offering debtors affordable repayment terms to cure their defaulted accounts and rehabilitate their credit scores without litigation.

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. The CID demanded that Moroney provide extensive information regarding its business operations for the previous 3½ years; it directed Moroney to answer interrogatories, produce a massive number of documents and tangible things, and submit detailed written reports.

In the ensuing months, the law firm and its employees devoted much of their time to responding to the First CID. According to her sworn affidavit, between June and October 2017 alone, Crystal Moroney spent about seven hours *every* workday and three hours *every* weekend day—a total of about 650 hours—"reviewing the First CID, sorting responsive and nonresponsive documents, identifying privileged materials, conferring with my attorneys, conferring with my clients, conferring with my in-house IT manager, coordinating with outside IT consultants, and preparing answers to interrogatories." The time devoted to responding to the First CID "had a significant negative impact on law firm revenue and expenses" because she "could not spend this time providing legal services or managing the business." The law firm incurred $75,000 in legal fees and costs "negotiating, complying with, and defending against the First CID."

Although Moroney "produced thousands of pages of documents and other data," it "withheld a subset of documents, claiming that producing those documents would compromise its obligations to its clients," including ethical obligations not to disclose confidential attorney-client information. CFPB filed a petition to enforce full compliance with the CID but later

withdrew the CID, and the district court denied the petition to enforce as moot.

Inexplicably, CFPB then served Moroney with its Second CID in November 2019, just days after withdrawing the first one. The Second CID sought information substantially similar to its predecessor, except that it demanded information spanning a far greater period of time—nearly seven years. Moreover, CFPB demanded that Moroney again provide the very same information it had already supplied in connection with the First CID.

Negotiations between the parties eventually broke down, and Moroney informed CFPB in March 2020 that it would not provide any additional material. Moroney stated, among other things, that the Second CID was invalid because CFPB was unconstitutionally structured—citing both the tenure protection afforded the Bureau's Director and the funding structure that permits CFPB to choose its own funding level without seeking congressional appropriations. Moroney also warned that the costs of complying further with the Second CID would likely force it to shut down.

CFPB filed a petition to enforce the Second CID in April 2020. Two months later, this Court issued *Seila Law*, which vindicated Moroney's contention that the CFPA provision granting tenure protection to the Director was unconstitutional. *See* 140 S. Ct. at 2211. Three days after release of *Seila Law*, CFPB issued a notice purporting to ratify its pending enforcement petition.

In August 2020, the district court granted CFPB's enforcement petition. In particular, the court rejected Moroney's constitutional challenge to CFPB's funding structure. Moroney appealed to the Second Circuit, where it sought a stay pending appeal. Moroney's stay motion stated that the costs of fully complying with the Second CID would force it to cease operations. The Second Circuit denied the motion for a stay in March 2021. Moroney thereafter ceased active operations in the summer of 2021 and complied as best it could with the Second CID.[8]

Crystal Moroney moved away from New York and is no longer engaged in the private practice of law. In the two years since the law firm provided a large quantity of material in response to the Second and Third CIDs, CFPB has never stated whether the law firm adequately responded to the CIDs. Indeed, when CFPB investigators last communicated with Crystal Moroney in 2022, they indicated that their investigation was ongoing.

CFPB has repeatedly pointed out that it is authorized under various debt-collection statutes to investigate whether law firms (even firms such as Moroney that do not file debt-collection suits) are complying with those statutes, and it insists that it was well within its statutory rights to undertake an

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[8] In September 2021, Moroney fully responded to a third CID, which sought consumer information with respect to 52 specific accounts, including consumer identification information and copies of all documents associated with those accounts. Pursuant to a fourth CID, CFPB deposed Crystal Moroney in 2022.

investigation of Moroney notwithstanding the absence of evidence of wrongdoing. Even if that is true, the scope of that investigation—particularly in the absence of any claim that Moroney was suspected of violating debt-collection statutes—was wholly disproportionate and unwarranted.[9]

B. CFPB's Funding Structure May Have Played a Role in Its Unwarranted Destruction of the Law Firm

The facts surrounding CFPB's investigation of Moroney starkly illustrates what can happen when, in violation of the Appropriations Clause, an administrative agency is freed from normal budgetary constraints. Congressional control over an agency's funding constrains agency overreach in three distinct ways. First, agencies that must live within a budget determined by Congress are forced to limit their regulatory activities by prioritizing those cases they consider to be the most pressing. Second, cautious agency officials will avoid overly aggressive enforcement activity that might generate constituent complaints and induce Congress to reduce future appropriations. Third, agency officials desist from spending funds on specified matters when, as routinely occurs, Congress attaches provisions to annual funding bills that expressly prohibit such spending. Numerous empirical studies support the hypothethis that administrative officials behave in this manner in the

[9] CFPB has not identified any consumer complaints against Moroney. During the course of CFPB's investigation, the Better Business Bureau upgraded Moroney's rating from A- to A.

face of congressional oversight of their budgets. *See, e.g.*, Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking in the Federal Trade Commission*, 91 J. of Polit. Econ. 765-800 (1983); Walter J. Oleszek, *Congressional Oversight: An Overview*, Congr. Research Serv. (Feb. 22, 2010); Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 Am. Polit. Sci. Rev. 283 (1996).

Those constraints are absent when, as here, an agency is granted perpetual authority to determine its own funding. CFPB had no reason to impose reasonable limits on its investigation of Moroney—an investigation not prompted by any articulated suspicion that Moroney was not fully complying with the law—because its funding is (for all practical purposes) unlimited, and it had no fear of being answerable to Congress for overly aggressive investigations. The result was the needless destruction of a once-thriving small business.

Proponents of "independent" administrative agencies view the absence of budgetary and oversight constraints as a plus that enables agencies to avoid the "regulatory capture" that allegedly can arise from excessive congressional oversight. *See, e.g., Amicus* Brief of Community Development Financial Institutions and Credit Unions at 13 (stating that "Congress's chosen method for funding the Bureau ... is integral to effectuating Dodd-Frank's central purpose: financial oversight free from regulatory capture. As the [Senate Banking] Committee explained, 'the assurance of adequate funding,

independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator.' S. REP. NO. 11-176, at 163.") But that is not the system of government adopted by the Founders, who viewed the separation of powers as a feature, not a bug.

CONCLUSION

The Court should affirm the judgment of the Fifth Circuit that CFPB's funding structure violates the Appropriations Clause. *Amici* take no position regarding whether vacatur of the Payday Lending Rule is the appropriate remedy for that violation.

Respectfully submitted,

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