

No. 22-448

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IN THE  
**Supreme Court of the United States**

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CONSUMER FINANCIAL  
PROTECTION BUREAU, ET AL.,  
*Petitioners,*

v.

COMMUNITY FINANCIAL SERVICES  
ASSOCIATION OF AMERICA, LIMITED, ET AL.,  
*Respondents.*

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit**

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**BRIEF FOR THE NATIONAL TREASURY  
EMPLOYEES UNION AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF THE AMICUS<sup>1</sup>

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents employees in thirty-four federal agencies and departments nationwide. NTEU has been before this Court often to advocate for federal employee interests, as a party (*see, e.g., United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989)) and as an *amicus* (*see, e.g., Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023); *Babb v. Wilkie*, 140 S. Ct. 1168 (2020)).

NTEU represents bargaining unit employees at the Consumer Financial Protection Bureau (CFPB or Bureau), including professional accountants, auditors, examiners, and consumer finance experts. These dedicated civil servants work to fulfill Congress’s mandate that “all consumers have access to markets for consumer financial products and services . . . [which] are fair, transparent, and competitive.” 12 U.S.C. § 5511(a).

NTEU files this brief to urge this Court to reverse the Fifth Circuit’s plainly deficient ruling that the CFPB’s funding structure is unconstitutional, so that the Bureau’s employees can continue to protect the American people from “unfair, deceptive, or abusive acts or practices.” *See id.* §§ 5511(b)(2), 5531(b).

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The Fifth Circuit’s ruling that the CFPB’s funding structure violates the Constitution’s Appropriations Clause is at odds with the conclusions of every other federal court to consider the issue, including two courts of appeals. The ruling conflicts with this Court’s teaching that the Appropriations Clause requires only that the payment of Treasury funds “be authorized by statute.” *OPM v. Richmond*, 496 U.S. 414, 424 (1990). Here, Congress authorized the CFPB’s funding through the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5481-5603.

If the Fifth Circuit’s ruling stands, the Bureau’s important work will grind to a halt. Its dedicated workforce will no longer be able to pursue enforcement actions against those who violate federal law, issue guidance to industry, or respond to consumer complaints. The American people, in other words, would be the ultimate losers of this litigation.

## ARGUMENT

### **I. The Fifth Circuit’s Ruling is Incorrect and Contrary to the Decisions of Every Other Court to Consider the Issue.**

In conflict with the Second Circuit and the D.C. Circuit (and every other federal court to rule upon the question), the Fifth Circuit held that Congress’s method of funding the CFPB through the Federal Reserve “violates the Appropriations Clause of the Constitution and the separation of powers principles enshrined in it.” *Compare* Pet. App. 27a, *with CFPB v. Law Offices of Crystal Moroney*, 63 F.4th 174, 181-83 (2d Cir. 2023) (*Moroney*) and *PHH Corp. v. CFPB*, 881 F.3d 75, 95-96

(D.C. Cir. 2018) (en banc), *abrogated on other grounds by Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).<sup>2</sup>

The Appropriations Clause provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. Art. I, § 9, Cl. 7. The Clause’s “straightforward” text means that “the payment of money from the Treasury must be authorized by a statute.” *Richmond*, 496 U.S. at 424. The Appropriations Clause thus serves as a “restriction upon the disbursing authority of the Executive department.” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

Despite this executive branch-facing purpose, the Fifth Circuit held that *Congress* violated the Appropriations Clause when it passed a statute that requires the Federal Reserve to transfer funds to the CFPB each year at the Bureau’s request, up to a certain capped amount, and that further allows the Bureau to roll over unspent funds for later use. Pet. App. 33a-38a. Left standing, the Fifth Circuit reasoned, Congress’s funding authorization would impermissibly vest “the purse and the sword in the executive” and “destroy” our government’s “division of powers.” Pet. App. 37a (internal citation omitted).

The Fifth Circuit’s baseless ruling must be reversed.

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<sup>2</sup> The Fifth Circuit’s ruling conflicts with a number of federal district court decisions. *See, e.g., CFPB v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 57 (D.R.I. 2020); *CFPB v. Fair Collections & Outsourcing, Inc.*, No. GJH-19-cv-2817, 2020 WL 7043847, at \*7-9 (D. Md. Nov. 30, 2020); *CFPB v. Think Finance LLC*, No. 17-cv-127, 2018 WL 3707911, at \*1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at \*16 (M.D. Pa. Aug. 4, 2017); *CFPB v. ITT Educ. Services, Inc.*, 219 F. Supp. 3d 878, 896-97 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014).

## **A. The CFPB's Funding Structure is Consistent with the Appropriations Clause.**

1. Given the Appropriations Clause's purpose of checking the executive branch, it is no surprise that for the over two centuries preceding the Fifth Circuit's ruling below, no court had ever held that a statute through which Congress authorized funds for expenditure violates the Clause. That is because once Congress authorizes funds for expenditure, the Clause, on its face and as interpreted by this Court, is satisfied and the executive branch may then disburse the funds. *Richmond*, 496 U.S. at 424.

Because the Appropriations Clause serves to limit the executive branch and to protect Congress, "Congress has plenary power to give meaning to" the Clause. *Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977). Congress has thus shaped the meaning of the Appropriations Clause through, for example, the Purpose Statute (31 U.S.C. § 1301) and the Anti-Deficiency Act (31 U.S.C. § 1341). *See U.S. Dep't of Navy v. Fed. Labor Rel. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) ("Federal statutes reinforce Congress's control over appropriated funds.").

This power to define the Clause also means that Congress "may choose . . . to loosen its own reins on public expenditure." *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. Fed. Labor Rel. Auth.*, 388 F.3d 405, 409 (3d Cir. 2004). "So, for example, although Congress ordinarily requires that appropriations be spent within a single year, it may also authorize appropriations that continue for a longer period of time." *Id.*

2. On this understanding, the Appropriations Clause is plainly satisfied here. The Clause requires only that

the payment of Treasury monies “must be authorized by statute.” *Richmond*, 496 U.S. at 424. As the Second Circuit unanimously concluded, “[t]here can be no dispute” that there is such an authorizing statute in this case: the CFPA. *Moroney*, 63 F.4th at 181.

The CFPA provides that “[f]unds obtained by, transferred to, or credited to the [CFPB] . . . shall remain available until expended[] to pay the expenses of the [CFPB] in carrying out its duties and responsibilities.” *Id.* (quoting 12 U.S.C. § 5497(c)(1)). The CFPA also “limit[s] the amount of funding the CFPB can draw from the Federal Reserve System to—at most—twelve percent of the Federal Reserve System’s 2009 Operating Expenses with adjustments for increases in labor costs.” *Id.* (citing 12 U.S.C. § 5497(a)(2)(A)-(B)).

Neither the Appropriations Clause’s text nor this Court’s interpreting precedent requires more. “Because the CFPB’s funding structure was authorized by Congress and bound by specific statutory provisions,” the Appropriations Clause is satisfied. *Id. Accord PHH Corp.*, 881 F.3d at 95 (holding that Congress’s method of funding the CFPB is “consistent with the Appropriations Clause”).

## **B. The Fifth Circuit’s Contrary Ruling is Without Merit.**

The Fifth Circuit’s ruling—that Congress has violated the Appropriations Clause’s separation of powers principles through its funding of the CFPB (Pet. App. 27a)—is untenable. Relying solely on a law review article, the Fifth Circuit held that the CFPB’s funding structure violates the Appropriations Clause because, as a standing appropriation that does not require annual authorization, it “takes away from Congress[] the option *not* to require legislative appropria-

tions prior to expenditure.” See Pet. App. 31a (quoting Kate Stith, *Congress’ Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988)).<sup>3</sup> See also Pet. App. 38a (concluding that “[a] law alone does not suffice—an *appropriation* is required,” without defining “appropriation” or grappling with its accepted meaning).<sup>4</sup>

1. As a threshold matter, there is “no support for the Fifth Circuit’s reasoning in the Constitution’s text.” *Moroney*, 63 F.4th at 182. “Nothing in the Constitution . . . requires that agency appropriations be ‘time limited’ or that appropriated funds be drawn from a particular ‘source.’” *Id.* (quoting Pet. App. 35a). See *Am. Fed’n of Gov’t Emps., AFL-CIO, Local 1647*, 388 F.3d at 409 (Congress may authorize appropriations that last longer than a year).

2. Neither is the Fifth Circuit’s ruling supported by the history of the Appropriations Clause. *Moroney*, 63 F.4th at 183. “Consistent with the historical practices of English, colonial, and state governments that formed the basis of the Founders’ understanding of the appropriations process at the time of the Constitution’s enactment, Congress specified ‘the *purpose*, the *limit*, and the *fund*’ of its appropriation for the CFPB in ‘a previous law.’” *Id.* (quoting 7 Alexander Hamil-

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<sup>3</sup> This radical view, if affirmed, appears to call into question more than half of all federal spending and centuries of historical practice. See Pet. 14 (noting \$4.8 trillion out of approximately \$7 trillion in FY2021 spending did not come in the form of an annual appropriation).

<sup>4</sup> See Government Accountability Office, *Principles of Federal Appropriations Law*, 2-22 (4th ed. 2016 rev.) (“[A]ny time the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation.”).

ton, *The Works of Alexander Hamilton* 532 (John C. Hamilton ed. 1851)). Historical practice thus confirms that the Appropriations Clause was satisfied here.

3. The Fifth Circuit’s holding is likewise incompatible with this Court’s precedent. The purpose of the separation of powers doctrine is to “safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). These concerns are not present here. Congress has exercised its constitutional prerogative to fund the CFPB in a manner of its choosing; the CFPB, in turn, has abided by the limits that Congress has set on its funding.

Congress’s method of funding the CFPB therefore does not give rise to “elected despotism” that impermissibly puts “the purse and the sword” in the hands of the executive branch, as the Fifth Circuit contends. Pet. App. 1a, 37a. See *PHH Corp.*, 881 F.3d at 96 (“who controls the agency’s budget requests and funding” is “bureaucratic minutiae—questions of institutional design outside the ambit of the separation-of-powers inquiry”) (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499-500 (2010)).

Ultimately, Congress has appropriated funds to the CFPB through the CFPA, and the Clause—as this Court has interpreted it—requires nothing more. See *Richmond*, 496 U.S. at 424 (holding that the Clause means that “the payment of money from the Treasury must be authorized by a statute”); *Moroney*, 63 F.4th at 182 (“We are not aware of any Supreme Court decision holding (or even suggesting) that the Appropriations Clause requires more than this ‘straightforward and explicit’ command.”).

In sum, the Fifth Circuit’s ruling is unsustainable. Once scrutinized, it reflects nothing more than a policy disagreement with the “capacious portfolio” and the corresponding funding that Congress has provided to the CFPB (*see* Pet. App. 37a)—and it must be reversed.

## **II. If Affirmed, the Fifth Circuit’s Ruling Would Bring a Federal Agency that Congress Created and Charged with Protecting the American People to a Standstill.**

If the Fifth Circuit’s ruling stands, the Bureau’s important work would stop until Congress and the President act to revise the CFPB’s funding structure. That would be contrary to Congress’s intent and to the detriment of the American people.

### **A. The CFPB Would No Longer Be Able to Stop Abusive Credit Practices, Process Consumer Complaints, or Provide Consumers with Financial Guidance.**

The CFPB has delivered over \$16 billion to American consumers through its supervisory and enforcement efforts, which have entailed handling over three million complaints.<sup>5</sup> The CFPB has brought enforcement actions to curb abuses in the credit card, auto finance, and mortgage lending markets.<sup>6</sup> These actions not only benefit the consumers submitting the complaints, but they deter consumer abuses from occurring in the first place.

The Bureau also takes many steps short of enforcement actions that significantly help consumers. For

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<sup>5</sup> CFPB, <https://www.consumerfinance.gov> (last visited May 9, 2023).

<sup>6</sup> Dave Uejio, Acting Director, CFPB, Celebrating 10 years of Consumer Protection (July 21, 2021), <https://www.consumerfinance.gov/about-us/blog/celebrating-10-years-consumer-protection/>.



example, between April 2021, and March 2022, the CFPB received approximately 1,104,400 consumer complaints.<sup>7</sup> The CFPB sent about two-thirds of these complaints on to the appropriate companies for review and response.<sup>8</sup> “Companies responded to approximately 99 percent of complaints that the CFPB sent to them for response during the period.”<sup>9</sup> That is, just giving consumers an avenue to lodge a complaint, and giving companies an opportunity to respond, provides a critically useful public service.

The CFPB also publishes important financial information for consumers.<sup>10</sup> It explains mortgages for potential homeowners, how credit card interest rates work and when terms can change, and how to protect one’s finances during emergencies such as the COVID-19 pandemic.<sup>11</sup>

If the Fifth Circuit’s ruling stands, CFPB would no longer be able to curb abusive business practices or to otherwise help consumers.

## **B. The CFPB Would No Longer Be Able to Work with the States to Protect Consumers.**

Congress intended for the CFPB and the states to work together to protect consumers. Congress tasked the CFPB with setting consistent nationwide consumer

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<sup>7</sup> CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* (Spring 2022) at 15.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.*

<sup>10</sup> CFPB, <https://www.consumerfinance.gov/consumer-tools/> (last visited May 9, 2023).

<sup>11</sup> *Id.*

protection standards. 12 U.S.C. § 5511(a). But Congress also required the CFPB to initiate a rulemaking “when-ever a majority of the States has enacted a resolution in support of the establishment or modification” of one of its consumer protection regulations. *Id.* § 5551(c).

Similarly, Congress recognized that states should have a complementary role in consumer protection enforcement actions because they are “much closer to abuses and able to move more quickly” to address problems. S. Rep. No. 111-176, at 174 (2010). The CFPB thus does not preempt state consumer protection laws. 12 U.S.C. § 5551(a). State attorney generals may sue to enforce CFPB statutes and regulations. *Id.* § 5552(a)(1).

The CFPB and the states have embraced Congress’s desire that they partner to vindicate consumer rights. For example, the CFPB collaborated with forty-seven states and the District of Columbia in seeking relief against the loan originator for ITT Technical Institute, a for-profit educational institution.<sup>12</sup> The CFPB alleged that the loan originator knew or was reckless in not knowing that many student borrowers did not understand the terms of their loans and in some cases did not even know they had them. The stipulated judgment provided hundreds of millions in debt relief to approximately 35,000 student loan borrowers.<sup>13</sup>

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<sup>12</sup> CFPB, Press Release, *Consumer Financial Protection Bureau and Multiple States Enter into Settlement with Owner of ITT Private Loans for Substantially Assisting ITT in Unfair Practices* (Sept. 15, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-multiple-states-enter-settlement-itt-private-loans-owner-assisting-itt-unfair-practices/> (noting that 47 states and the District of Columbia settled the same day).

<sup>13</sup> See Stipulated Final J. & Order, *CFPB v. Peaks Trust 2009-1*, No. 20-cv-2386 (S.D. Ind. Oct. 1, 2020), ECF No. 9.

In another action against mortgage servicer Nationwide Mortgage, LLC, for violating consumer financial laws,<sup>14</sup> the CFPB was joined by *all fifty states*, as well as the District of Columbia.<sup>15</sup> Nationwide was required to pay approximately \$73 million in redress to more than 40,000 harmed borrowers.<sup>16</sup>

These actions reflect Congress's intent that the CFPB and the states work together to protect consumers. If the Fifth Circuit's ruling stands, these critical cooperative efforts will cease.

### **C. The CFPB Would No Longer Be Able to Help Servicemembers with Their Unique Credit Challenges.**

Another important part of the CFPB's work is assisting military servicemembers and their families. The CFPB has received more than 250,000 complaints from such individuals, and the numbers are rising.<sup>17</sup> Servicemembers face distinct credit-related problems.<sup>18</sup> Servicemembers, for example, are often required to have security clearance checks which include detailed credit history reviews.<sup>19</sup> A problem with a credit check, there-

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<sup>14</sup> See Stipulated Final Judgment & Order, *CFPB v. Nationstar Mortg. LLC*, No. 20-cv-3550 (D.D.C. Dec. 8, 2020), ECF No. 3.

<sup>15</sup> CFPB, Press Release, *Consumer Financial Protection Bureau and Multiple States Enter into Settlement with Nationstar Mortgage, LLC for Unlawful Servicing Practices* (Dec. 7, 2020), <https://www.consumerfinance.gov/enforcement/actions/nationstar-mortgage-llc-dba-mr-cooper/>.

<sup>16</sup> *Id.*

<sup>17</sup> CFPB, *Office of Servicemember Affairs Annual Report for 2021* (June 2022) at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 12.

fore, can result in a denial or revocation of a security clearance, which can jeopardize one's job.<sup>20</sup>

Another challenge that military members face is that they frequently relocate—about 400,000 make a permanent change of station each year.<sup>21</sup> Upon moving, servicemembers often have to repurchase big-ticket items such as new housing, cars, or appliances. These purchases can be derailed if credit reports are inaccurate.<sup>22</sup> National Guard members, moreover, face particular challenges with medical insurance because they cycle between private insurance and government-funded insurance when on federal orders for more than thirty days.<sup>23</sup>

Recognizing our nation's obligation to help those who serve, the CFPB specifically focuses on assisting servicemembers by responding to hundreds of thousands of complaints annually and by issuing recommendations specific to servicemembers and their families.<sup>24</sup> The Fifth Circuit's ruling, if upheld, would mean that this important work will stop.

#### **D. The CFPB Would No Longer Be Able to Offer Helpful Guidance to Industry, Including Small Institutions and New Entrants.**

The CFPB does not just pursue enforcement actions against businesses; it helps them. It offers guidance to industry through advisory opinions, compliance bul-

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 17.

<sup>24</sup> *Id.* at 2-4.

letins, and policy statements, which help businesses comply with laws and regulations.<sup>25</sup>

The Bureau’s guidance is particularly helpful to smaller institutions or to new entrants who may be less familiar with financial protection laws and regulations.<sup>26</sup> While large depository and non-depository institutions have direct access to the CFPB through its supervision program, a “key priority” for the Bureau now is “to engage with institutions without direct access to the CFPB, including small banks and credit unions.”<sup>27</sup>

Upholding the Fifth Circuit’s ruling would spell the end of these efforts to offer critical guidance to disadvantaged industry members.

### **E. The CFPB Workforce Would Suffer and Possibly Deteriorate While Awaiting a Political Fix.**

If the CFPB’s funding is halted, the Bureau’s more than 1500 employees would not be able to do the work that they joined the CFPB to do. Many of these dedicated public servants might leave their posts instead of waiting indefinitely—potentially for years—for the

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<sup>25</sup> CFPB, *Compliance*, <https://www.consumerfinance.gov/compliance/> (last visited May 9, 2023).

<sup>26</sup> CFPB, Press Release, *CFPB Launches New Effort to Promote Competition and Innovation in Consumer Finance* (May 24, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/> (new CFPB Office of Competition and Innovation will identify stumbling blocks for new market entrants and will support CFPB’s initiative to understand how big players are squeezing out smaller players).

<sup>27</sup> *Id.*

House, Senate, and President to cure any purported defects through the enactment of legislation.

This would thwart Congress’s will in a way that would last beyond the enactment of new funding legislation. The atrophy of a talented workforce that has been built over the last dozen years to execute a “capacious portfolio” of vital work might take a substantial amount of time to ameliorate. *See* Pet. App. 37a. It would be a travesty if the Fifth Circuit’s untenable ruling is allowed to inflict that kind of lasting damage on the CFPB and its statutory mission—and, ultimately, on the American public.

## CONCLUSION

For the foregoing reasons and for those set forth in the Petitioners’ brief, NTEU respectfully requests that this Court reverse the Fifth Circuit’s ruling that the CFPB’s funding structure is unconstitutional.

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May 15, 2023



