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 AMICI CURIAE FINANCIAL REGULATION SCHOLARS SUPPORTING PETITIONERS

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TABLE OF CONTENTS

Page

Interests of Amici Curiae 1
Summary of Argument 2
Argument 3
I. If upheld, the court of appeals' decision would disrupt the market for consumer credit and expose the economy to recession. 3
A. Defunding the CPFB would produce a regulatory vacuum that undermines federal consumer-protection laws. 4
B. Because lenders depend on CFPB safe harbors, defunding the CFPB would expose them to intolerable legal risk. 6
1. Lenders depend on CFPB safe harbors under the Truth in Lending Act. 6
2. Lenders depend on CFPB safe harbors under laws governing credit-card accounts, remittance-transfer providers, and loans to distressed borrowers. 7
3. Lenders depend on CFPB safe harbors for residential mortgages meeting the safeguards of a Qualified Mortgage. 7
C. As the loss of CFPB safe harbors heightened lenders' legal risks, credit would become scarce and the economy could fall into recession. 9
D. Recent history confirms that these economic risks are concrete. 11
1. State and federal laws without safe harbors have disrupted certain credit markets. 11

Table of Contents—Continued: Page

2. A recent CFPB safe-harbor rulemaking reinforces the potential for widespread economic harm 12

II. These effects would reach entities regulated and protected by the other federal bank regulators, which are funded in the same way as the CFPB 14

A. No federal bank regulator is funded through annual appropriations 14

B. No "double insulation" distinguishes the CFPB from other federal bank regulators 15

C. No other circumstance materially distinguishes the CFPB's funding mechanism from those of other federal bank regulators 19

Conclusion 21

TABLE OF AUTHORITIES

Statutes and regulations:

Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301 *et seq* 5

12 U.S.C. 5413 5

12 U.S.C. 5481(12) 5

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12 U.S.C. 5497(a)(1) 15, 17, 18

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12 U.S.C. 5497(c)(1) 4

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12 U.S.C. 5514 5

Statutes and regulations—Continued: Page

12 U.S.C. 5514(c) 5
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12 U.S.C. 5581(a)(1) 5
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12 U.S.C. 241 16
12 U.S.C. 243 .... 14, 17
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Statutes and regulations—Continued: Page

15 U.S.C. 1639c(b) 8

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15 U.S.C. 1640 6

15 U.S.C. 1640(a) 8

15 U.S.C. 1640(e).......... 8

15 U.S.C. 1641 .... 6, 8, 10

15 U.S.C. 1641(d) 11

15 U.S.C. 1665d(a) 7

15 U.S.C. 1665d(b) 7

15 U.S.C. 1665e 7

12 U.S.C. 16.......... 14, 20

12 U.S.C. 93(b).......... 20

12 U.S.C. 1786.......... 20

12 U.S.C. 1818.......... 20

12 U.S.C. 2002.......... 15

12 U.S.C. 2250(a) 15, 21

12 U.S.C. 4516.......... 15, 21

12 C.F.R.:

Appendix G to Part 1026.......... 6

Appendix H to Part 1026 6

Section 8.2.......... 21

Statutes and regulations—Continued: Page

Section 1005.30(f)(2) 7

Section 1026.43(e)(1) 8

Section 1026.43(e)(2)(iii) 8

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INTERESTS OF AMICI CURIAE

Amici are financial regulation scholars who wish to describe the CFPB's role in the financial system, its role in maintaining stable credit markets, and the manner in which the CFPB and other bank regulators are funded.[1]

Adam J. Levitin is the Anne Fleming Research Professor and Professor of Law at Georgetown University Law Center. He previously served on the CFPB's Consumer Advisory Board and as counsel to the Congressional Oversight Panel for the Troubled Asset Relief Pro-

[1] As required by Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission.

gram. Professor Levitin repeatedly testified before Congress at hearings leading to enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301 *et seq.*

Patricia A. McCoy is the Liberty Mutual Insurance Professor at Boston College Law School. In 2011, she founded the CFPB's Mortgage Markets unit, and during her tenure she oversaw the agency's mortgage policy. She has also served on the Federal Reserve Board's Consumer Advisory Council and Insurance Policy Advisory Council.

Amici's institutional titles and affiliations are included for identification only.

SUMMARY OF ARGUMENT

If upheld, the court of appeals' decision would defund virtually all the work of the Consumer Financial Protection Bureau (CFPB). The ensuing regulatory chaos would stifle credit markets, destabilize banks, and likely throw the economy into recession. These effects, moreover, would not stop at the doors of the CFPB and the lenders it regulates; although the court of appeals purported to distinguish the CFPB from other federal bank regulators, its analysis depended on factual mistakes.

First, if the court of appeals were affirmed, the CFPB would be forced to suspend virtually all its activity. Not only would consumers be unprotected, but regulated lenders would lose important safe harbors, which ensure that innocent or reasonable mistakes do not lead to crushing monetary judgments. Even brief interruptions of CFPB safe harbors can stifle consumer lending; if those safe harbors disappeared entirely, lenders would deny credit to all but the most pristine applicants. Losing access to car loans, student loans, credit cards, and home mortgage loans would be bad enough, but the effects would reach

the secondary credit markets as well. Once credit markets collapsed, a full-blown recession would all but be assured.

Second, because no federal bank regulator is funded through annual appropriations, the court of appeals' reasoning would apply to every other federal bank regulator, including the Federal Reserve Board. Although the court of appeals tried to distinguish these other agencies from the CFPB, the court's analysis rested on mistakes. In particular, the court conflated the Federal Reserve System, the Federal Reserve Banks, and the Board of Governors of the Federal Reserve System (Board or Federal Reserve Board), claiming that the CFPB's funding is provided and overseen by an omnibus federal agency named "the Federal Reserve." It is not. Like the Federal Reserve Board, the CFPB is funded by fees assessed directly on the regional Federal Reserve Banks and itemized separately from the Reserve Banks' payments to the Board. Those fees happen to pass through Board accounts on their way to the CFPB, but that purely ministerial step gives the Board neither discretion nor control.

If upheld, the court of appeals' hasty and mistaken conclusion would expose credit markets to acute and systemic distress. The court's logic would further require defunding all federal banking regulators, not just the CFPB. The Appropriations Clause does not compel this result, and the financial system cannot withstand it.

ARGUMENT

I. If upheld, the court of appeals' decision would disrupt the market for consumer credit and expose the economy to recession.

Nearly every CFPB activity is funded, up to statutory limits, from the combined earnings of the Federal Reserve System. Employees' salaries and benefits, the data used for its economic research, procurement contracts

that support its operations, and even the rent—all this, and more, is funded through the mechanism invalidated by the court of appeals. See 12 U.S.C. 5497(c)(1); CFPB, *Annual Performance Plan and Report, and Budget Overview* 8, 13-18 (Feb. 2023), https://perma.cc/FW9S-A8YF. In other words, if the court of appeals' judgment were affirmed, the CFPB would effectively be defunded.

Defunding the CFPB would damage consumer lending and the economy as a whole. No agency would be authorized to issue regulations implementing federal consumer-financial statutes, enforce those statutes, or examine regulated entities. Among other problems, lenders would lose the safe harbors enabling them to manage their legal risk; they would compensate by lending less money at higher interest rates. At the same time, undue legal risk to secondary investors in loans would paralyze secondary-market financing and stifle consumer lending. And as credit markets go, economic recession usually follows.

A. Defunding the CPFB would produce a regulatory vacuum that undermines federal consumer-protection laws.

If defunding the CFPB prevented it from fulfilling its statutory obligations to protect consumers, no substitute agency would fill its shoes. Because statutory exclusivity provisions would remain, most financial laws protecting consumers and borrowers would enter suspended animation.

When creating the CFPB, Congress sought to centralize consumer-protection regulations and prevent the type of race to the bottom underlying the 2008 financial crisis. S. Rep. No. 176, 111th Cong., 2d Sess. 11 (2010). To do so, Congress relieved other regulators of their "consumer financial protection functions" and reassigned them to the newly formed CFPB. 12 U.S.C. 5581(a), (b). Now, the

CFPB has "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law." 12 U.S.C. 5581(a)(1). The CFPB also inherited the FTC's previous authority to prescribe rules, issue guidelines, conduct studies, and issue reports under the enumerated consumer laws. 12 U.S.C. 5581(b)(5)(A). Congress even abolished the Office of Thrift Supervision, a CFPB predecessor. 12 U.S.C. 5413.

Other measures, moreover, make the CFPB the "exclusive" administrator of federal consumer financial laws: Statutes providing the regulatory framework for consumer lending, payments, bank deposits, credit reporting, and debt collection. See 12 U.S.C. 5481(12), (14). The CFPB has exclusive rulemaking authority for these laws. 12 U.S.C. 5512(b)(4), 5514(d). With a few exceptions, it also has exclusive rulemaking, supervisory, and enforcement authority over nonbank entities. 12 U.S.C. 5514(c)–(d). Likewise, the CFPB received "exclusive" supervisory authority over banks, thrifts, and credit unions with assets exceeding $10 billion. 12 U.S.C. 5515(b)(1).

Defunding the CFPB, then, would halt key preventative measures. Before Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 12 U.S.C. 5301 *et seq.*, no federal agency examined the market-conduct risks posed by nonbank lenders and other nonbank consumer-finance companies—such as the nonbank mortgage lenders that helped to inflate the infamous mid-2000s housing bubble. These firms are now examined by the CFPB, 12 U.S.C. 5514; if the CFPB were defunded, they would again operate without federal supervision. CFPB is also solely responsible for consumer-compliance examinations of banks, thrifts, and credit unions whose total assets exceed $10 billion. 12 U.S.C.

5515(a)–(b). Suspending those examinations would increase the risks posed by the nation's largest lenders and disadvantage their smaller competitors.

B. Because lenders depend on CFPB safe harbors, defunding the CFPB would expose them to intolerable legal risk.

Lenders, too, would face acute harm if the CFPB were defunded, and this harm would spread to the credit markets as a whole. Whether or not the CFPB receives a dime, consumer lenders and other regulated entities are bound by the full suite of financial consumer-protection statutes. Many CFPB rules create or expand safe harbors from legal liability under those statutes; lenders rely on these safe harbors to manage their legal risk and raise money from investors. If the CFPB could no longer implement its safe harbors, legal risk to lenders would skyrocket.

1. Lenders depend on CFPB safe harbors under the Truth in Lending Act.

One of the most important CFPB safe-harbor rules helps lenders comply with the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* TILA requires myriad disclosures for all sorts of consumer credit. Creditors and assignees who violate TILA may face civil damages claims, including class actions, as well as criminal prosecution. 15 U.S.C. 1611, 1640, 1641. To manage this otherwise-acute legal risk, lenders rely on a CFPB-implemented safe harbor: For most required disclosures, creditors who use the CFPB's model forms are "deemed to be in compliance." 12 U.S.C. 5532(d); 15 U.S.C. 1604(b).

But this statutory safe harbor first requires the CFPB to issue rules and publish model forms. 12 U.S.C. 5532(b). So far, CFPB rules have yielded 123 model forms, helping lenders make scores of required disclosures. See 12 C.F.R. pt. 1026, apps. G, H. If the court of appeals were

affirmed and the CFPB's rules voided, safe harbors would no longer protect creditors who use those forms. TILA would still require creditors to make disclosures, but without safe harbors creditors would be more vulnerable to civil or criminal liability.

2. Lenders depend on CFPB safe harbors under laws governing credit-card accounts, remittance-transfer providers, and loans to distressed borrowers.

As under TILA, other statutory safe harbors do not take effect until the CFPB issues the necessary rules. One is the safe harbor for compliance with the ability-to-repay requirement for opening credit-card accounts. 15 U.S.C. 1665e; 12 C.F.R. 1026.51. Another is the safe harbor governing limits on credit-card penalty fees. 15 U.S.C. 1665d(a)–(b); 12 C.F.R. 1026.52(b)(ii). Yet another exempts certain small providers from disclosure obligations for remittance transfer providers under the Electronic Fund Transfer Act. See 15 U.S.C. 1693o-1(g)(3); 12 C.F.R. 1005.30(f)(2). In addition, mortgage servicers depend on a safe harbor allowing them to contact distressed borrowers about mitigating losses, without violating the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* See 81 Fed. Reg. 71977 (Oct. 19, 2016). If the CFPB's rules were voided, these safe harbors would be suspended as well.

3. Lenders depend on CFPB safe harbors for residential mortgages meeting the safeguards of a Qualified Mortgage.

If affirmed, the court of appeals' decision would also jeopardize the expanded safe harbors helping mortgage lenders manage risk under title XIV of Dodd-Frank. Under one provision, mortgage lenders must determine, as of when the loan commences, whether an applicant will be able to repay the loan. 15 U.S.C. 1639c(a)(1). If creditors

or assignees do not comply, they may be ordered to pay monetary damages. 15 U.S.C. 1640(a), (e), 1641. Although Congress included a safe harbor for residential mortgages meeting the Qualified Mortgage (QM) safeguards, Congress also authorized the CFPB to expand it. See 15 U.S.C. 1639c(b) & (b)(2)(A)(ii), (b)(2)(A)(vii), (b)(2)(D), (b)(2)(E), (b)(3)(B)(i).

Exercising its statutory authority, the CFPB has expanded the QM safe harbor for several types of loans: It has raised the fee cap on smaller loans, created a new QM for fixed-rate balloon loans by rural lenders, and relaxed the terms and underwriting for some mortgage loans originated by small creditors and held in portfolio. See 12 C.F.R. 1026.43(e)(2)(iii), (e)(3) (smaller loans); 12 C.F.R. 1026.43(f) (fixed-rate balloon loans by rural lenders); 12 C.F.R. 1026.43(e)(5) (mortgage loans originated by small creditors and held in portfolio). The CFPB also answered an important question that the statutory safe harbor left open: If and when the safe harbor's presumption of compliance is rebuttable. CFPB rules clarified that the presumption is rebuttable for higher-cost QMs and irrebuttable for other QMs. 12 C.F.R. 1026.43(e)(1). As a result of these safe-harbor rules, mortgage lenders can more reliably calibrate their lending to their legal risks.

If the CFPB safe-harbor rules and guidance were nullified, lenders in theory might still consult them. But in practice, lenders would feel pressure to deviate, because their competitors would no longer be bound by them. As fewer and fewer lenders relied on vestigial CFPB safe harbors, statutory violations—and accompanying monetary judgments—would become more and more likely.

C. As the loss of CFPB safe harbors heightened lenders' legal risks, credit would become scarce and the economy could fall into recession.

If lenders could no longer rely on CFPB safe harbors to control their legal (and hence financial) risk, consumer credit markets would shrink. Those effects would also reach secondary markets, and ultimately destabilize the financial markets and economy as a whole.

Eliminating the TILA safe harbor alone would cause havoc, because TILA's disclosure requirements reach lenders in every corner of the consumer credit market. Assignee liability for TILA violations would also jeopardize financing for mortgages and other types of securitized consumer loans, including credit card receivables and car loans. These secondary markets finance at least 70% of the current $13.4 trillion in outstanding home mortgages and over $1.5 trillion in other outstanding consumer loans. See Urban Institute, Housing Finance Policy Center, *Housing Finance at a Glance: A Monthly Chartbook* 6 (Apr. 2023), https://perma.cc/KKV6-2WGH (Housing Finance at a Glance); SIFMA, *US Asset Backed Securities Statistics* (May 4, 2023), https://perma.cc/2APC-S2HJ. The ensuing credit squeeze would affect home mortgages, auto loans, credit cards, and student loans—from every type of lender, for borrowers rich and poor.

Lenders, fearing financial liability for innocent or reasonable mistakes, would respond by slashing lending and raising interest rates. Credit is already tighter due to recent bank failures, interest rate hikes, and recession fears; losing the CFPB safe harbors would hasten these trends. Credit-card users would pay higher rates, and middle-class families would struggle to finance homes and cars. Based on recent market data, amici estimate that losing CFPB safe harbors would tighten credit access for at least 6 million home-mortgage applicants, 25 million

car-loan applicants, and 193 million credit-card customers. See Adam McCann, *Number of Credit Cards and Credit Card Holders*, WalletHub (Feb. 24, 2023), https://perma.cc/5HWC-A22E; TransUnion, *Consumers Turned to Credit in Q4 '22 to Ease Financial Strains* (Feb. 16, 2023), https://tinyurl.com/455xnmff; ATTOM, *Mortgage Lending Slumps Again Across U.S. In Fourth Quarter Of 2022, To Lowest Point In Almost Nine Years* (Mar. 2, 2023), https://perma.cc/GAF6-6EQS.

Soon, these effects would reach secondary markets, which finance many consumer lenders, because secondary-market investors in consumer loans also face liability under TILA and the ability-to-repay rule for mortgages. 15 U.S.C. 1641. A secondary-funding crunch would separately endanger whole categories of consumer lenders. Nonbank creditors, for example, dominate large portions of the consumer-lending markets and finance more than four in five new government-backed mortgages. See, *e.g.*, Housing Finance at a Glance 11 (83% of all government-backed originations in March 2023). Yet without secondary-market financing, they cannot afford to lend.

This paralysis would further destabilize banks, which would struggle to sell loans, and especially QM mortgage loans, to the secondary market. When banks cannot offload their long-term loans, bank runs become more likely, because depositors can demand their short-term deposits before borrowers repay their long-term loans. See Michael S. Barr et al., *Financial Regulation: Law and Policy* 8–10 (1st ed. 2016).

These primary and secondary effects might well tip an already frail economy into full recession. The downward spiral is familiar: When credit contracts, consumers buy fewer goods and services; as companies sell fewer goods and services, they lay off employees; as unemployment

rises, consumer spending craters. Small businesses financing their operations with credit cards would struggle to survive; and more banks and nonbank lenders would fail.

D. Recent history confirms that these economic risks are concrete.

If CFPB is defunded, severe economic effects are more than hypothetical. Certain state and federal laws without safe harbors have already caused specific types of credit to evaporate. Lenders' comments on a recent CFPB rulemaking confirm that losing more safe harbors would undermine financial markets more widely.

1. State and federal laws without safe harbors have disrupted certain credit markets.

In 2003, Georgia and New Jersey enacted anti-predatory-lending laws, which imposed liability on assignees of certain types of mortgage loans but offered no safe harbors. See David Reiss & Baher Azmy, *Modeling a Response to Predatory Lending: The New Jersey Home Ownership Security Act of 2002*, 35 Rutgers L.J. 645, 711–715 (2004). Citing the prospect of liability against bond purchasers sued by borrowers, top credit-rating agencies refused to rate issues containing the affected loans; the loss of credit ratings disrupted both states' mortgage markets. *Ibid.* Georgia later amended its law, but in New Jersey ratings agencies still refused to rate certain high-cost loans. *Ibid.*

At the federal level, investors refuse to buy—and ratings agencies refuse to rate—bonds backed by high-cost residential mortgage loans, because no safe harbor protects assignees from liability under the Home Ownership and Equity Protection Act, Pub. L. No. 103-325, 108 Stat. 2190. See 15 U.S.C. 1641(d). Without a safe harbor, financing for high-cost residential mortgages is scarce: Of 13.7 million closed-end home mortgage originations in 2021,

only 6,518 were high-cost home loans. See CFPB, *Summary of 2021 Data on Mortgage Lending*, https://perma.cc/LYR6-U7LA (June 16, 2022).

2. A recent CFPB safe-harbor rulemaking reinforces the potential for widespread economic harm.

A recent CFPB rulemaking—which proposed only to replace one safe harbor with another—documented the potential for broader harm to the credit markets and economy more generally. In 2020, the CFPB issued a proposed rule concerning the sunset date of the GSE Patch, a Qualified Mortgage safe harbor scheduled to expire on January 10, 2021. See Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): Extension of Sunset Date, 85 Fed. Reg. 41448 (proposed July 10, 2020). Although lenders liked the substance of the replacement, they warned that a rocky transition would disrupt the market for residential mortgages.

As explained by the Mortgage Bankers Association, suddenly terminating the safe harbor at the end of the Government Sponsored Entities' conservatorships could lead to "severe market disruption." Mortg. Bankers Ass'n, Comment Letter on Extension of Sunset Date 6 (Aug. 10, 2020), tinyurl.com/y5n89czd (Mortgage Bankers Comment). Creditors emphasized that they "cannot simply 'flip a switch' to transition" from one safe harbor to another. Iowa Bankers Ass'n, Comment Letter on Extension of Sunset Date 2 (Aug. 7, 2020), tinyurl.com/4m5y5an2 (Iowa Bankers Comment). Indeed, a hasty transition would give lenders "no choice but to cut back on their lending," because "rapid changes to the regulatory scheme governing mortgage lending are sure to create substantial compliance risk." Ctr. for Cap. Mkts. Competitiveness, Comment Letter on Extension of Sunset Date 2

(Sept. 16, 2019), https://tinyurl.com/52d7w57p (CCMC Comment).

Dire as they were, these warnings assumed that one CFPB rule would immediately replace another. An actual gap between safe harbors would have multiplied these risks, and the outlook would have been worse yet if the safe harbor disappeared entirely. See Mortgage Bankers Comment 4.[2] Because lenders have "little appetite for [ability-to-repay] uncertainty," failing to replace the GSE Patch would prompt "a steep increase in the cost of credit, or perhaps an inability for some borrowers to access credit entirely." *Id.* at 6. Even worse, there could be "significant knock-on effects across the economy." CCMC Comment 3.

Lenders feared these significant economic effects if a single CFPB safe harbor expired. A decision voiding all CFPB rules would increase that harm exponentially.

[2] See also, *e.g.*, Am. Bankers Ass'n, Comment Letter on Extension of Sunset Date 2 (Aug. 10, 2020), tinyurl.com/ycy695h3 (citing "risk of market disruption"); Credit Union Nat'l Ass'n, Comment Letter on Extension of Sunset Date 2 (Aug. 10, 2020), https://tinyurl.com/zyx8wvfj (urging CFPB to "avoid gaps in QM coverage that would disadvantage borrowers and create uncertainty in the nation's economically vital mortgage lending market"); Indep. Cmty. Bankers of Am., Comment Letter on Extension of Sunset Date 3 (Aug. 10, 2020), https://tinyurl.com/bd2bnupt (predicting "harmful effects on the availability and cost of credit if the GSE Patch expires before the Bureau amends the General QM requirements"); Real Est. Servs. Providers Council, Comment Letter on Extension of Sunset Date 1 (Aug. 6, 2020), https://tinyurl.com/yc895d73 ("We do not want consumers to lose any access to credit because of uncertainty under any new rule.").

II. These effects would reach entities regulated and protected by the other federal bank regulators, which are funded in the same way as the CFPB.

CFPB-related harms would only scratch the surface. Under the logic of the court of appeals' decision, other federal bank regulators would be subject to the same constitutional claim.

A. No federal bank regulator is funded through annual appropriations.

Among federal bank regulators, the CFPB's funding mechanism is typical. Not one federal bank regulator is funded by standard congressional appropriations.

For one, the Federal Reserve Board is funded through the same mechanism used to fund the CFPB: Assessments on Federal Reserve Banks. In the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, Congress authorized the Board "to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment" that suffices to "pay its estimated expenses and the salaries of its members and employees for the half year succeeding the levying of such assessment, together with any deficit carried forward from the preceding half year." 12 U.S.C. 243. Although the Board's funding "remains tethered to the Treasury by the requirement that it remit funds above a statutory limit" (Pet. App. 35a), no other federal bank regulator is subject to that requirement.

These other bank regulators, moreover, are funded using similar mechanisms. The Office of the Comptroller of the Currency (OCC) is funded through chartering and examination fees assessed on national banks. See 12 U.S.C. 16. Similarly, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Farm Credit System Insurance Corporation are funded with insurance premiums assessed on the mutual insurance funds that those agencies

administer. See Henry B. Hogue et al., Cong. Rsch. Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 27 (Feb. 28, 2017), https://perma.cc/XXM5-GH7N (Independence of Federal Financial Regulators); Farm Credit Sys. Ins. Corp., *Audited Financial Statements for the Years Ended December 31, 2022 and 2021* F5 (2023), https://perma.cc/VR2S-CTRM. The Farm Credit Administration is funded by assessments on the banks and credit associations that make up the Farm Credit System. See 12 U.S.C. 2002, 2250(a). And the Federal Housing Finance Agency is funded by assessments on Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. 4516.

B. No "double insulation" distinguishes the CFPB from other federal bank regulators.

In nonetheless attempting to distinguish the CFPB from other federal bank regulators, the court of appeals surmised that the CFPB's funding mechanism produced unprecedented "double insulation from Congress's purse strings." Pet. App. 35a. As described by the court of appeals, the CFPB is funded by a draw on the Federal Reserve Board, which itself is funded by a draw on the regional Federal Reserve Banks. See *id.* at 34a–35a. But that description is inaccurate.

In fact, the CFPB does not receive Board funds. Rather, Congress directed that (1) "the Board of Governors shall transfer to the [Consumer Financial Protection] Bureau," (2) "from the combined earnings of the Federal Reserve System," (3) "the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau," subject to a statutory cap. 12 U.S.C. 5497(a)(1)–(2). This funding comes from the "Federal Reserve System," not the Federal Reserve Board. 12 U.S.C. 5497(a)(1).

The Federal Reserve System includes several component entities, which the court of appeals conflated. One is the Federal Reserve Board: A federal agency whose leaders are appointed with the Senate's advice and consent. 12 U.S.C. 241. Others are the twelve regional Federal Reserve Banks: Each regional bank is federally chartered and privately owned, and each operates in an assigned region. 12 U.S.C. 341. Although the Federal Reserve Board appoints some of the Federal Reserve Banks' directors, a majority of each Reserve Bank's directors is appointed by others. 12 U.S.C. 302. Collectively, the Federal Reserve Board, regional Federal Reserve Banks, and Federal Open Market Committee make up the Federal Reserve System. See Federal Reserve System, *The Fed Explained: What the Central Bank Does* 2 (2021), https://perma.cc/4LQJ-8YFJ (Fed Explained).

What is more, the Federal Reserve System receives all but .01% of its revenue from the regional Federal Reserve Banks, not the Federal Reserve Board. In 2022, for example, the Federal Reserve Banks had combined revenues of $170 billion; as private entities, they earned income from investing in Treasury bonds and federally insured or guaranteed mortgage-backed securities. See Federal Reserve System, *Federal Reserve Banks Combined Financial Statements: As of and for the Years Ended December 31, 2022 and 2021 and Independent Auditors' Report* 7 (2023), https://perma.cc/V9H3-QW38 (2022 Reserve Banks Statements). The Federal Reserve Board, conversely, earned just $16.6 million on its own. See Office of Inspector General, *Board of Governors of the Federal Reserve System Financial Statements as of and for the Years Ended December 31, 2022 and 2021, and Independent Auditors' Reports* 6 (2023), https://perma.cc/DU49-JFTX (2022 Board Statements). Because it generates barely any income on its own, the Federal Reserve

Board is funded through a perpetual assessment on the regional Federal Reserve Banks, which in 2022 gave the Board $1.071 billion. See 12 U.S.C. 243; 2022 Board Statements 6.

Like the Board, the CFPB is funded by direct assessments on the Federal Reserve Banks. 12 U.S.C. 5497(a)(1). This funding source is documented in the Federal Reserve Banks' combined, audited financial statements. As illustrated below, their section on operating expenses itemizes two separate assessments on the Reserve Banks: (1) an assessment for the "Board of Governors operating expenses and currency costs," and (2) an assessment for the "Bureau of Consumer Financial Protection."

OPERATING EXPENSES			
Salaries and benefits		$ 3,943	$ 3,792
System pension service cost	Note 9	946	954
Occupancy		319	318
Equipment		250	231
Other		932	811
Assessments:			
Board of Governors operating expenses and currency costs		2,069	2,005
Bureau of Consumer Financial Protection		722	628
Total operating expenses		9,181	8,739
Reserve Bank net income from operations		58,795	107,880

2022 Reserve Banks Statements 7 (annotation added).

The Federal Reserve Board's own financial statements confirm that the same mechanism funds both the Board and the CFPB. In its statement of operations, the Board lists income from "Assessments levied on Federal Reserve Banks for Board operating expenses and capital expenditures" and "Assessments levied on Federal Reserve Banks for currency-related operating expenses and capital expenditures." 2022 Board Statements 6 (annotation added). The Board separately itemizes "Assessments

levied on the Federal Reserve Banks for the [Consumer Financial Protection] Bureau." *Ibid.*

Board operating revenues:		
Assessments levied on Federal Reserve Banks for Board operating expenses and capital expenditures	$ 1,015,000,000	$ 970,000,000
Assessments levied on Federal Reserve Banks for currency-related operating expenses and capital expenditures	56,078,349	56,063,364
Other revenues	16,623,654	17,137,417
Total operating revenues	1,087,702,003	1,043,200,781
Bureau of Consumer Financial Protection (Bureau):		
Assessments levied on the Federal Reserve Banks for the Bureau	722,200,000	627,500,000
Transfers to the Bureau	722,200,000	627,500,000
Bureau assessments over (under) transfers	-	-
Total net income	$ 64,393,212	$ 72,083,984

That exact sum—to the dollar—is reported under "Transfers to the Bureau." *Ibid.*

As these financial statements highlight, the Board's role in CFPB's funding is purely ministerial. Congress directed the Board to transfer, to the CFPB, a sum calculated by the CFPB Director using statutory criteria: The sum necessary to fund CFPB operations, capped at 12% of the inflation-adjusted "total operating expenses of the Federal Reserve System" as reported in the Board's 2009 Annual Report. 12 U.S.C. 5497(a)(2). The Board has no discretion: It "shall transfer" the requested sum to the CFPB. 12 U.S.C. 5497(a)(1). The Board does not transfer its own funds, because the CFPB's budget comes from the "combined earnings of the Federal Reserve System" (*ibid.*)—that is, from the regional Federal Reserve Banks.

Even the reason for the Board's ministerial role is mundane. The Federal Reserve Board already holds accounts for the Federal Reserve Banks and an account for the CFPB. See 12 U.S.C. 5497(b)(1)–(2). With these Board accounts already in place, transferring funds to the CFPB is mere bookkeeping, and also eliminates any uncertainty about how much surplus money the Board must remit to the Treasury Department. See 12 U.S.C. 289(a)(3).

To reach a different conclusion, the court of appeals combined the Federal Reserve Banks and the Federal Reserve Board into a chimeric federal agency—named "the Federal Reserve"—which both owns securities and levies assessments on Federal Reserve Banks. According to the court of appeals, the "Federal Reserve" is "funded through interest earned on the securities it owns and assessments the agency levies on banks within the Federal Reserve system." Pet. App. 34a–35a n.12. But no entity uses that name and no entity has all those characteristics. There is no "Federal Reserve"; there is only a Federal Reserve System, which includes the Federal Reserve Board and twelve regional Federal Reserve Banks. Although the Federal Reserve Board is a federal agency and levies assessments on Federal Reserve Banks, the Board owns no securities. See 2022 Board Statements 5. The securities are owned by the Federal Reserve Banks, which are not federal agencies.

In sum, each agency levies assessments on the regional Federal Reserve Banks. The regional banks pay those separate assessments and report them as separate line items. Although the Federal Reserve Banks send the CFPB's assessment to the Federal Reserve Board, the Board merely routs the CFPB's funds to the CFPB. The Board acts as the CFPB's payment processor, not its financier. But for that lone ministerial task, the CFPB and the Federal Reserve Board are funded in the same way.

C. No other circumstance materially distinguishes the CFPB's funding mechanism from those of other federal bank regulators.

In addition to relying on purported double insulation, the court of appeals claimed that no other federal bank regulator "wields enforcement or regulatory authority remotely comparable to the authority the Bureau may exercise throughout the economy." Pet. App. 40a (alteration

omitted). Of course, if size or scope mattered, then Congress could retain the current funding mechanism and divide the CFPB into smaller, niche bureaus: the Auto Loan Bureau, the Credit Reporting Bureau, the Installment Loan Bureau, and so on. In any event, the other federal bank regulators wield at least as much authority as the CFPB.

It is no accident that the Chairman of the Federal Reserve Board is often a household name while the CFPB Director usually is not. The Board regulates monetary policy to promote price stability and full employment in the entire economy—and also regulates all financial holding companies and Federal Reserve member banks and operates payment systems for checking and wire transfers. Fed Explained 21, 63, 63–66, 74, 85–86.

Although the CFPB regulates more entities than does the Federal Housing Finance Agency, the latter regulates entities that finance nearly all domestic residential mortgage lending. The Farm Credit Administration, moreover, regulates lenders that finance over 40% of the U.S. agriculture industry. See Farm Credit Admin., *History of FCA*, https://perma.cc/27ZV-F77B (updated Oct. 12, 2021). And while the FDIC, OCC, and NCUA supervise a smaller group of entities, those agencies regulate both consumer financing and, more broadly, "safety and soundness." See, *e.g.*, 12 U.S.C. 93(b), 1786, 1818.

Finally, even if it were relevant to the Appropriations Clause analysis, other federal bank regulators are not "inherently constrained by market forces" in a way that the CFPB is not. Br. in Opp. 22–23 (citations and quotation marks omitted). Only the OCC depends on the controversial practice of "charter shopping." Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 Yale J. Reg. 143, 156–58, 160 (2009). And only the OCC is funded by bank-chartering fees. 12 U.S.C. 16;

12 C.F.R. 8.2. The FDIC and NCUA are funded by premiums from deposit- or share-insurance policies, which are formally or practically required for every entity they regulate, and FDIC and NCUA insurance products have no serious private competitors. See Hogue, Independence of Federal Financial Regulators 27. As for the Farm Credit Administration and the Federal Housing Finance Agency: Both are funded by direct assessments on the federally chartered private entities they regulate. 12 U.S.C. 2250(a), 4516.

There are no material differences in the funding mechanisms of the CFPB and the other federal bank regulators. The CFPB and its peers—and the consumers and lenders who depend on them—rise and fall together.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

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