

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
America's Future, U.S. Constitutional Rights
Legal Defense Fund, and Conservative Legal
Defense and Education Fund
in Support of Respondents**

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July 10, 2023

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INTEREST OF THE *AMICI CURIAE*¹

America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code section 501(c)(3). These organizations were established, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

These *amici* are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise.

STATEMENT OF THE CASE

The Consumer Financial Protection Bureau (“CFPB”) was created by the Consumer Financial Protection Act (“CFPA”) in response to the 2008 financial crisis. CFPB was housed within the Federal Reserve System and charged with “implement[ing]” and “enforce[ing]” consumer protection laws to “ensur[e] that all consumers have access to markets for consumer financial products and services” that “are

¹ It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

fair, transparent, and competitive.” 12 U.S.C. § 5511(a). Congress transferred to CFPB “administrative and enforcement authority over 18 federal statutes which prior to the Act were overseen by seven different agencies.” *Cnty. Fin. Servs. Ass’n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 623 (5th Cir. 2022). Thus, as with many other federal agencies, Congress vested CFPB with executive, legislative, and quasi-judicial powers.

However, CFPB is unique within the federal government in that it “is not funded with periodic congressional appropriations. ‘Instead, the [Bureau] receives funding directly from the Federal Reserve.’” *Id.* at 624. Each year, CFPB simply requests an amount “determined by the Director to be reasonably necessary to carry out” the agency’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.’” *Cnty. Fin. Servs.*, 51 F.4th at 624.

In November 2017, CFPB finalized a payday lending rule limiting collection practices by lenders which was challenged by two organizational plaintiffs. *Id.* at 625. The district court granted summary judgment for CFPB on all counts. *See Cnty. Fin. Servs. Ass’n of Am. v. Consumer Fin. Prot. Bureau*, 558 F. Supp. 3d 350, 368 (W.D. Tex. 2021).

On appeal, the Fifth Circuit reversed on one count, finding that the Act violates the Appropriations Clause of the Constitution by creating a “self-actualizing, perpetual funding mechanism” that allows the Bureau

to continue functioning in perpetuity without needing to seek appropriations from Congress. *Cnty. Fin. Servs.*, 51 F.4th at 638.

The Fifth Circuit explained that the CFPB created in CFPB a “double insulation” from the Congressional appropriations process, in that neither the Federal Reserve nor CFPB is funded under that process. *Id.* at 638-639. The Court noted that “the Act explicitly states that ‘[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.’ [*Id.* § 5497(c)(2)] [and] ‘funds derived from the Federal Reserve System ... shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.’” *Id.* at 639 (some internal quotations omitted). The Court concluded that “[t]he Bureau’s perpetual insulation from Congress’s appropriations power ... renders the Bureau no longer dependent and, as a result, no longer accountable to Congress and, ultimately, to the people.” *Id.* (internal quotation omitted).

SUMMARY OF ARGUMENT

How this Court resolves the Appropriations Clause and Separation of Powers issues in this case will determine whether the People will continue to be subjected to CFPB bureaucrats’ wielding of a tyrannical mix of legislative, executive, and judicial powers without any meaningful check on their actions by Congress. Congress established an unconstitutional funding process for CFPB by circumventing Congressional appropriations, and

compounded the problem by having those funds come from the Federal Reserve which also is not funded by appropriations.

Placing CFPB structurally under the Federal Reserve makes it almost impossible for Congress to influence its operations. CFPB and the Federal Reserve were designed on the premise that independence from politics was a value of the highest order — but that really means that they would be operated by specialized economic and banking technocrats who could ignore those actually vested with sovereignty in America — the People. The Federal Reserve’s demonstrated failure to achieve its Congressionally designated objectives demonstrates that whatever the flaws of an agency being subject to “political” influence, that independence from such influences is worse.

The Great Recession of 2008-09, which led to the creation of CFPB, demonstrated the abject failure of the Federal Reserve, banking regulators, and housing regulators to spot and stop ongoing fraud. With the Department of Justice having no appetite to proceed criminally against the powerful banks and bankers, it became necessary to do something in order to give the public the impression that the problem would now be fixed — by creating CFPB. By insulating CFPB from the appropriations process and congressional oversight, it ensured that this highly political agency would be protected from congressional meddling unless the House, Senate, and President were in the same party’s control, and acted together to stop the flow of funding. Demonstrating the danger of creating a truly

independent, self-funding agency, CFPB has treated both Congress and the Trump Administration with contempt, seemingly daring the political branches to try to control its actions.

The abuses emanating from CFPB should be enough for this Court to strike down the Dodd-Frank funding model, but the threat that it could be replicated in other CFPB-type agencies is also real. Agencies insulated from political **accountability to Congress** achieve the central objective of bureaucrats who distrust the People — **avoidance of any and all accountability**, as they operate in “the public interest” as they see it, which generally means in their own interest and the interest of those they regulate.

ARGUMENT

I. DODD-FRANK’S SCHEME FOR CFPB TO CIRCUMVENT THE APPROPRIATIONS PROCESS BY USING UNAPPROPRIATED FEDERAL RESERVE FUNDS COMPOUNDS THE CONSTITUTIONAL VIOLATION.

When the U.S. Court of Appeals for the D.C. Circuit addressed the constitutionality of a single director heading the Consumer Financial Protection Bureau (“CFPB”), then-Judge Kavanaugh began both his opinion for the panel in 2016 and his *en banc* dissent in 2018 by asserting:

This is a case about executive power and individual liberty.²

For the reasons set out *infra*, those words correctly describe the current challenge to CFPB's funding mechanism. To be sure, the issue here involves the Appropriations Clause and Separation of Powers, but how this Court resolves those issues will determine whether the People will continue to be subjected to CFPB bureaucrats' wielding of a tyrannical mix of legislative, executive, and judicial powers without any meaningful check on their actions by Congress. It will also determine whether Congress will be empowered to establish other politically insulated entities according to the CFPB model.

A. CFPB Is Funded with Unappropriated Assets Held by the Federal Reserve System.

This Court has before it two stellar opinions from the Fifth Circuit explaining why “the CFPB’s funding structure violates the separation of powers principle enshrined in the Appropriations Clause”³: Judge Edith Jones’ concurrence in *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 220-43 (5th

² *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 5 (D.C. Cir. 2016) vacated by *reh’g en banc* 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017), reinstated in part and remanded by 881 F.3d 75 (D.C. Cir. Jan. 31, 2018); and *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

³ *All American*, 33 F.4th at 221 (Jones, J., concurring).

Cir. 2022) (hereinafter “*All American*”) (Jones, J., concurring); and Judge Cory Wilson’s opinion for the Court in *Cnty. Fin. Sers. Ass’n of Am. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022) (hereinafter “*Consumer Financial*”).

Judge Jones explained that “even with a Director removable by the President,”⁴ the CFPB “remains doubly insulated from the appropriations process as it still determines its own budget and siphons funds from the appropriations-insulated Federal Reserve.” *All American* at 236 (Jones, J., concurring). Specifically:

Congress does not even retain indirect control over the agency’s funding because the **Federal Reserve’s budget** is based on semiannual levies on banks within the Federal Reserve System, 12 U.S.C. § 243; and the Director’s collection and use of funds is **not subject to review** by congressional appropriations committees, 12 U.S.C. § 5497(d). [*Id.* at 223 (emphasis added).]

The CFPB defended its funding mechanism by stating that “Congress’s choice to fund the CFPB outside the appropriations process is hardly unprecedented because other agencies, like the Federal Reserve, also enjoy some level of budgetary independence.” *Id.* at 225. It is curious indeed for CFPB to have used the Federal Reserve System

⁴ In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020), this Court concluded that the CFPB’s single-director structure violated the separation of powers.

(hereinafter “The Fed”) as a precedent for budgetary independence, as that argument only reinforces the impropriety of the mechanism designed by Dodd-Frank to immunize CFPB’s funding from congressional control. As Judge Jones explained:

By granting the CFPB a substantial entitlement to perpetual funding outside the appropriations process, Congress utterly relinquished its constitutional fiscal role. The default is **compounded**: Congress forfeited indirect control over the CFPB’s budget because the **Federal Reserve’s annual budget consists of non-appropriated funds** levied from banks within the Federal Reserve system. 12 U.S.C. § 243. Congress even renounced its own power to review the CFPB’s budget. 12 U.S.C. § 5497(a)(2)(C). Congressional oversight is meaningless without the leverage normally provided by Congress’s appropriations power to back it up. Thus, between presidential elections, the people retain virtually no control over an agency that “dictate[s] and enforce[s] policy for a vital segment of the economy affecting millions of Americans.” *Seila Law*, 140 S. Ct. at 2204. [*Id.* at 233 (emphasis added).]

Judge Jones concludes her concurring opinion: “The CFPB’s **double insulation** from Article I appropriations oversight mocks the Constitution’s separation of powers by enabling an executive agency to live on its own in a kingly fashion.” *Id.* at 242 (emphasis added).

The problem associated with CFPB obtaining its funding from the Federal Reserve System was reinforced in Judge Wilson’s opinion, which highlighted yet another significant problem with that scheme: “The funds siphoned by the Bureau, in effect, 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 12 U.S.C. § 289(a)(3)(B).” *Consumer Financial* at 638; see also 624, 638-39. Thus, CFPB is not expending funds that somehow “belong” to the Fed, for whenever CFPB draws down what it desires (albeit up to a cap) from The Fed, it diminishes surplus funds which otherwise would be transferred to the Treasury.

The government’s brief does its argument no favors with the way in which it addresses the “double-insulation” arguments raised by Judge Jones and Judge Wilson:

But that **double-insulation** theory is incorrect because the Federal Reserve Board—the supposed intermediary between Congress and the CFPB—exercises no power over how much money the CFPB receives. Rather, it simply transfers the requested amount up to the cap defined by Congress.... That ministerial role in no way insulates the CFPB from congressional control. Congress is free to modify the Bureau’s funding at any time by simply passing a statute....” [Brief for the Petitioners at 34 (emphasis added).]

Surely, the government must understand that the constitutional issue is not whether **The Fed** exercises control over funds handed over to the CFPB, but rather whether **Congress** exercises control through the appropriations process. And the government's argument that The Fed's "ministerial role in no way insulates the CFPB from congressional control" because Congress could pass a new law is just as irrelevant. Certainly, Congress can always pass a new law, but the fact that legislation would require cooperation among the House, Senate, and President to stop the funding stream flowing to the CFPB in no way remedies Dodd-Frank's violation of the Appropriations Clause.

The CFPB's funding scheme turns the Constitution on its head. The Appropriations Clause (Article I, sec. 9, cl. 7) requires that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." However, CFPB is funded every year without a "Law" being "passed" by both houses of Congress and signed by the President (or veto override). Article I, sec. 7, cl. 2 and 3. Under its "insulated" self-funding scheme, enactment of a "Law" is required to stop the CFPB from being funded.

B. The Federal Reserve System Shares Many of the Same Unconstitutional Attributes as CFPB.

The Fed is in many ways the perfect place for Congress to have housed an agency which it wanted to immunize from any meaningful congressional oversight and control, as The Fed itself was structured

to achieve these same purposes. Created by the Federal Reserve Act of 1913, The Fed is administered by a seven-member Board of Governors appointed by the President subject to Senate confirmation for a 14-year (staggered) term, with a Chair and Vice Chair serving four-year terms. Although The Fed was designed to give the impression that it is a government agency, it is a public-private partnership which operates outside of any congressional, presidential, or judicial controls. In large part because it receives no congressional appropriations, it views itself to be independent from the President and the Congress:

though the Congress sets the goals for monetary policy, **decisions of the Board** — **and** the Fed’s monetary policy-setting body, the **Federal Open Market Committee** — about how to reach those goals **do not require approval** by the President or anyone else in the executive or legislative branches of government. [Who owns the Federal Reserve? FederalReserve.gov (emphasis added).]

President Biden has pledged not to intrude on the independence of The Fed, confirming that while the nation’s central bank is tasked with achieving certain congressionally established objectives, it operates without direct or indirect governmental control:

U.S. President Joe Biden said the Federal Reserve has a primary responsibility to control inflation and **vowed not to seek “to influence its decisions inappropriately”** ahead of a meeting with the central bank chief

on Tuesday. [Biden highlights Fed inflation role ahead of Powell meeting on Tuesday,” *Reuters* (May 31, 2022) (emphasis added).]

In fact, The Fed believes that its independence from “politics” improves the nation’s economy:

Congress has determined the Federal Reserve can best achieve its mission ... **without taking politics into consideration.**

Experience around the world has also shown that countries with **independent central banks that are able to make decisions free from political influence have better economic outcomes** for their citizens....

The Federal Reserve is **accountable** to the Congress and the American people and Federal Reserve leaders regularly **testify and report** to the Congress on how the Federal Reserve is managing monetary policy. [Why is it important to separate Federal Reserve monetary policy decisions from political influence?” FederalReserve.gov (emphasis added).]

The rationale for both The Fed and the CFPB — that agencies operate better when they are administered by bureaucrats independent from political influence — may sound “progressive,” but turning over major functions of government to technocrats is profoundly hostile to the notion of accountability to the sovereign People. “[W]hile sovereign powers are delegated to the agencies of

government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The notion that simply having The Fed submit a written report, and having its Chair testify before Congress, provides accountability defies both logic and history. Fed Governors testifying before Congress feel completely free not to answer questions. “A top contender to be the next chair of the Federal Reserve [Lael Brainard] refused three times to answer whether or not she was a capitalist or a socialist in 2019.” A. Miller, “Biden’s potential Fed chair pick refuses to say if she’s a capitalist or a socialist,” *FoxBusiness* (Nov. 19, 2021); *see also* R. Aro, “The Fed Finally Gets Some Tough Questions. And Fails to Answer Them,” *Mises Institute* (May 4, 2021).

The Fed publishes an online booklet entitled “The Fed Explained: What the Central Bank Does,” which states:

The Federal Reserve System is the central bank of the United States. It performs five general functions to promote the effective operation of the U.S. economy and, more generally, the public interest. The Federal Reserve

- conducts the nation’s monetary policy to promote **maximum employment** and **stable prices** in the U.S. economy;
- promotes the **stability of the financial system** and seeks to minimize and contain

systemic risks through active monitoring and engagement...

- promotes the **safety and soundness of individual financial institutions...**
- promotes **consumer protection....**

Does the nation enjoy stable prices? Since The Fed was created in 1913, the value of a dollar has been reduced to below 3 cents due to inflation. *See* A. de la Motte, "How US States Could Pave the Way for Currency Competition," *Mises Institute* (June 29, 2023). *See also* Ron Paul, End the Fed at 25 (Grand Central Publishing: 2009). How many recessions and bank failures have occurred while The Fed was entrusted with minding the store? By serving as lender of last resort, The Fed has allowed its member banks to privatize profits earned with reckless behavior, but then socialize losses with infusions of capital when losses are incurred. *Id.* at 25-28. No doubt, The Fed's ability to avoid accountability to the People for its failures is in large part due to its not being funded by Congress, and that mistake should not be repeated. Certainly, The Fed should not be the place where Congress tucks away agencies that it wants to shelter from "political influence" — a phrase used by bureaucrats as an epithet, but which actually describes the voice of the People, which needs to be heard and listened to in a government that ostensibly "deriv[es] [its] just powers from the consent of the governed...." Declaration of Independence.

II. CFPB'S FUNDING STRUCTURE WAS MARKETED TO ACHIEVE INDEPENDENCE FROM POLITICAL INFLUENCE, BUT WAS DESIGNED TO ENSURE UNCONSTITUTIONAL BUREAUCRATIC INDEPENDENCE.

A. Dodd-Frank Helped the Federal Government Deflect Accountability for the 2008 Crash.

Dodd-Frank was signed into law by President Barack Obama on July 21, 2010.⁵ The nation was still in the throes of the 2008-09 economic crisis which began with Wall Street bank and rating agency greed, fraud and mismanagement, in creating, rating, and selling mortgage backed securities and collateralized debt obligations. Often called The Great Recession, this was “the worst economic downturn since the Great Depression.”⁶ Politicians of all stripes blamed bank executives. Sen. Bernie Sanders (I-VT) called out “the crooks on Wall Street,” accusing them of “illegal and reckless behavior.”⁷ Sen. John McCain (R-AZ) — himself a prominent figure in the 1990s-era “Keating Five” savings and loan scandal — blamed “Wall Street

⁵ See H.R. 4173 (111th Cong.): Dodd-Frank Wall Street Reform and Consumer Protection Act.

⁶ See B. Duignan, “Financial crisis of 2007–08,” Britannica.com.

⁷ See S. Miller, “Bernie Sanders wants Wall Street execs jailed for 2008 financial crisis,” *Washington Times* (Oct. 6, 2015).

greed.”⁸ Despite these strong words, only one bank official was jailed, while taxpayers and bank shareholders footed the bill for bank losses.

49 financial institutions have paid various government entities and private plaintiffs nearly \$190 billion in fines and settlements ... but the money has come from shareholders, not individual bankers. (Settlements were levied on corporations, not specific employees, and paid out as corporate expenses — in some cases, tax-deductible ones.) In early 2014, just weeks after Jamie Dimon, the CEO of JPMorgan Chase, settled out of court with the Justice Department, the bank’s board of directors gave him a 74 percent raise, bringing his salary to \$20 million. [W. Cohan, “How Wall Street’s Bankers Stayed Out of Jail,” *The Atlantic* (Sept. 2015).]

According to one study, there were 5,199 discrete crimes within the 2019 U.S. Code, many of which deal with banking and fraud. See G. Canaparo, “Count the Code: Quantifying Federalization of Criminal Statutes,” *The Heritage Foundation* 10 (Jan. 7, 2022). But while the Department of Justice chose not to enforce these multitudes of federal criminal laws against culpable bankers, Congress had to show voters that it was doing something — so it created a new federal agency to ensure this degree of corruption

⁸ See C. Good, “McCain Blames Wall Street Greed in Latest Ad,” *The Hill* (Sept. 17, 2008).

could never happen again. The CFPB was that “shiny new object.”

Many believe that the Department of Justice did not want to hold anyone accountable, in part due to the Holder Doctrine:

a June 1999 memorandum written by the then-deputy attorney general [Eric Holder] warning of **the dangers of prosecuting big banks** — a variant of the “too big to fail” argument that has since become so familiar. Holder’s memo asserted that “collateral consequences” from prosecutions — including corporate instability or collapse — should be taken into account when deciding whether to prosecute a big financial institution. [W. Cohan (emphasis added).]

Under the Holder doctrine, banks and bank executives are allowed to profit by plundering with impunity, for they are “too big to prosecute.” Multiple Attorneys General allowed the statute of limitations for criminal fraud to pass, and then the 10-year statute of limitations for bank fraud (18 U.S.C. § 1344) expired as well. *Id.*

Thus, Dodd-Frank’s CFPB served the important political objective of providing the public with the illusion of a strong governmental response to Wall Street fraud to cover for the reality of federal regulatory failure and a dearth of criminal prosecutions.

B. CFPB Should Not Be Allowed to Serve as a Model for a Party in Power to Insulate a Favored Agency from Congress.

Judge Wilson’s opinion below correctly described Congress’s scheme to fund CFPB perpetually to be an “abdicat[ion of] its appropriations power” (*Consumer Financial* at 623). These *amici* are concerned that the Dodd-Frank funding mechanism could be repeated for another agency — unless stopped by this Court. Washington could again operate to destroy the constitutional balance, particularly when one party is in control of the White House and both houses of Congress. That ruling party could give permanent funding to another favored agency so it could do its work insulated from a future Congress under the control of the opposing party, which would need to capture the presidency and both houses of Congress in order to stop the flow of money.⁹

1. The Democratic Party Unilaterally Created the CFPB in Its Own Image.

When CFPB was created in 2010, Democrats controlled both houses of Congress and the Presidency. In September 2010, President Obama named Elizabeth Warren to set up the agency. See “President Obama Names Elizabeth Warren Assistant to the President and Special Advisor to the Secretary of the Treasury

⁹ Creating an enforcement scheme removed from congressional control also benefits individual Senators and Representatives politically, so that if fraud continues, they could deflect blame to that independent agency, saying — “it’s not my fault.”

on the Consumer Financial Protection Bureau,” *White House* (Sept. 17, 2010). As a law professor, Warren had argued for creating a consumer protection agency “independent from politicians beholden to the financial industry.” R. Rubin, “The Tragic Downfall of the Consumer Financial Protection Bureau,” *National Review* (Dec. 21, 2016). But by 2010, majority “Democrats had a better idea: They would make her agency independent from Republicans.” *Id.*

Republicans took the House in the 2010 elections, but Democrats maintained control of the Presidency and the Senate. But the CFPB could not begin to create regulations until a director was appointed. On May 2, 2011, 44 Senate Republicans sent a letter to Obama demanding structural reforms to the CFPB before they would agree to vote on any director. *See* M. McConnell, “Letter to President Barack Obama” (May 2, 2011). “[T]he Dodd-Frank Act grants the director unfettered authority to set the budget of the CFPB. No agency or institution, including Congress, can review the CFPB budget,” the Senators wrote. *Id.* at 1. “The present structure of the [CFPB] ... violates basic principles of accountability and our democratic values.” *Id.* at 2. The Senators demanded that “[t]o ensure that the CFPB does not engage in wasteful or inappropriate spending and has effective oversight, **the CFPB should be subject to the Congressional appropriations process.**” *Id.* (emphasis added).

In July 2011, President Obama nominated Richard Cordray, a former Democrat Ohio attorney general, to head the agency. Senator Richard Shelby (R-AL) pledged to filibuster Cordray’s nomination until the

CFPB was restructured. See R. Epstein, “Richard Shelby: Cordray is DOA,” *Politico* (Jul. 21, 2011). On January 4, 2012, President Obama used the recess appointment power to put Cordray into his position. See K. Hetherington, “Using recess power, Obama putting Cordray in job,” *Daily Caller* (Jan. 4, 2012).

2. The CFPB Demonstrates Its Partisan Agenda.

In December 2016, former CFPB enforcement attorney Ronald Rubin published a whistleblower expose of the efforts of Warren and Cordray to cement the CFPB as an openly partisan agency. “Warren ... led the one-year agency-building process. She chose loyal Democrats to be her senior deputies; they hired like-minded middle managers, who in turn screened lower-level job seekers,” Rubin wrote. “[M]istakes were possible. I was one of them.” See R. Rubin, “The Tragic Downfall of the Consumer Financial Protection Bureau.” Later, “[a]s screening techniques improved, Republicans were more easily identified and rejected.” *Id.*

Clear verbal and non-verbal signals quickly emerged. The most common, “I don’t think he believes in the mission” was code for “he might not be a Democrat.” At one meeting, Kent Markus, a former Clinton-administration lawyer who had joined the bureau as Cordray’s deputy, remarked that an applicant under consideration “sounds like a good liberal to me.” After a few seconds of nervous laughter and eye contact around the room, Markus

recognized his slip. “I didn’t say that,” he awkwardly joked. [*Id.*]

Rubin charged that the CFPB used its funds from The Fed to benefit Democratic causes. “[M]illions of dollars were diverted from the CFPB to Democratic allies. From 2014 to 2017, the bureau paid \$11 million a year to rent office space in an Obama fundraiser’s building.” See R. Rubin, “Richard Cordray Delivers the Consumer Financial Protection Bureau Punchline,” *National Review* (Nov. 27, 2017). To help with marketing its agenda, “the bureau paid over \$43 million to GMMB, the liberal advocacy group that created ads for the Obama and Hillary Clinton presidential campaigns” (*id.*), as well as Bill Clinton’s and Joe Biden’s campaigns. See GMMB.com, “What Do Presidents Joe Biden, Barack Obama and Bill Clinton Have in Common?”

“From 2011 to 2016, Republicans regularly passed legislation to restructure the CFPB as a bipartisan commission and bring its funding under the congressional appropriations process. Democrats labeled and rejected all changes as attempts to weaken consumer protection.” See R. Rubin, “The Tragic Downfall,” *supra*.

But with no fear of congressional appropriators, the CFPB routinely ignored congressional oversight attempts. “The unwritten policy of its supervising attorneys ... was ‘never give [Congress] what they ask for.’” *Id.* “When a member of Congress asked Richard Cordray ... about an extravagant \$216 million renovation of the agency’s rented building in

Washington, D.C., Cordray infuriated Republicans in Congress with the retort, ‘Why does that matter to you?’”¹⁰ C. Gray and S. Kazman, “Supreme Court should do what Congress won’t: Rein in the Bureau of Consumer Financial Protection,” *The Hill* (Dec. 20, 2018). An August 4, 2017 majority staff report from the House Committee on Financial Services detailed Cordray’s repeated pattern of refusal to answer congressional subpoenas, and recommended holding him in contempt.¹¹

Named by President Trump as interim director in 2017, former Rep. Mick Mulvaney (R-SC), a critic of the CFPB’s lack of accountability during his stint in the House, exposed that tactic before the House Financial Services Committee:

I do not have to answer a single one of your questions. I will ... But I don’t have to. The statute says that I shall appear before Congress.... Doesn’t say a word about answering your questions. Doesn’t say a word about testifying.... It would be my statutory right to simply sit here and twiddle my thumbs for the next four hours while y’all ask questions. I think that’s wrong.... I use that

¹⁰ See <https://www.youtube.com/watch?v=5IxSfJ638cs>.

¹¹ See House Financial Services Committee, “Majority Staff Report on Director Cordray’s Failure to Comply with His Legal Obligations under the Committee’s Subpoena Duces Tecum Dated April 4, 2017, Issued in Part to Further the Committee’s Ongoing Investigation Into the CFPB’s Arbitration Rulemaking” (Aug. 4, 2017).

as just one of many examples of what's broken in the way this statute is written.¹²

When Sen. Warren submitted a list of 105 questions to Mulvaney, he refused to answer, explaining his reason.

I encourage you to consider the possibility that the frustration you are experiencing now, and that which I had a few years back, are both inevitable consequences of the fact that **the Dodd-Frank ... Act insulates the Bureau from virtually any accountability** to the American people through their elected representatives. [J. Lawler, "Mick Mulvaney says it's Elizabeth Warren's own fault he doesn't have to answer her questions," *Washington Examiner* (Apr. 5, 2018) (emphasis added).]

3. The CFPB Fails to Protect Financial Consumers.

In terms of doing its job to protect consumers from financial fraud, the CFPB's "misplaced priorities kept it from protecting consumers during the most widespread fraud in recent history," the 2016 Wells Fargo customer data breach. See R. Rubin, "The Tragic Downfall," *supra*.

¹² See <https://www.c-span.org/video/?c4724239/user-clip-tweedle-tumbs> at :35 mark.

Congressional hearings revealed that two years of examinations, thousands of bank-employee firings, and numerous complaints had failed to get the bureau's attention before the *Los Angeles Times* published a detailed exposé late in 2013. Worse yet, from 2013 to 2016, the CFPB took no action while the bank continued the incentive program that drove the unauthorized account openings [at Wells Fargo]. [*Id.*]

While in Congress, Rep. Mulvaney, a member of the Financial Services Committee, stated that the CFPB had become “a wonderful example of how a bureaucracy will function if it has no accountability to anybody. It turns up being a joke, and that’s what the CFPB really has been in a sick, sad kind of way.” See *Credit Union Times*, “Interview with Mick Mulvaney.”

4. CFPB Worked against President Trump’s Agenda.

The party that created the CFPB had no intention of giving up control just because the voters elected President Trump in 2016. “Cordray spent the first half of 2017 quietly promoting and entrenching faithful Democratic employees to obstruct his Republican successor.” See R. Rubin, “Richard Cordray Delivers.” In late 2017, he prepared to resign to run for governor in Ohio. But Cordray feared that President Trump would in fact appoint Mulvaney as acting director:

Cordray feared that Mulvaney would discover evidence the CFPB has been hiding for years, including the bureau's failure to investigate the Wells Fargo fraud; data manipulation in its failed attempt to regulate car dealers by guessing buyers' races and alleging discriminatory lending; inspector-general admonishments to stop obstructing congressional oversight; and some particularly explosive sexual-harassment claims against CFPB senior managers. [*Id.*]

As he stepped down on Friday, November 24, “[c]iting language in the Dodd-Frank Act ... Cordray announced that [Leandra] English would become acting director upon his resignation that day.” *Id.* As the *New York Times* reported, “[t]he move was seen as an effort to delay Mr. Trump from appointing his own director, whose confirmation could take months.” T. Bernard, “Dueling Appointments Lead to Clash at Consumer Protection Bureau,” *New York Times* (Nov. 24, 2017).¹³

“Trump can’t override that,” Warren said. “[Trump] can nominate the next ... Director — but until that nominee is confirmed by the Senate, Leandra English is the Acting Director under the Dodd-Frank Act.” See S. Lane, “Dems blast Trump for overriding consumer bureau with temporary pick,” *The Hill* (Nov. 25, 2017). As the *Times* noted, Cordray’s move threatened to leave the CFPB under the dead-

¹³ Story available at: <https://dailygazette.com/2017/11/25/dueling-appointments-lead-to-clash-at-consumer-protection-bureau/>.

hand control of Obama/Cordray appointees, even with “Trump in the White House and Republicans in control of both houses of Congress.” *See* T. Bernard.

English filed for an emergency injunction against Trump that Sunday night, in an effort to prevent Trump from seating Mulvaney on Monday morning. *See The Hill*, “Read CFPB deputy director’s suit saying Trump can’t fill consumer agency post,” (Nov. 27, 2017). Twenty Democrat representatives, along with former Sen. Dodd and former Rep. Frank, filed an *amicus* brief in support of English’s suit.¹⁴ The brief demonstrates that the real “independence” the CFPB’s creators sought was independence from political opponents and the will of the voters. The Dodd/Frank brief argued that allowing the President, instead of the outgoing director, to choose an interim director would “mean that the bureau could be headed — potentially for many months — by an acting director handpicked by the president without the check of Senate confirmation, thus depriving the Bureau of **the independence that was central to Congress’s plan in establishing it.**” *See* E. Hannon, “Federal Judge Rules Trump Appointee Can Take Charge of Independent Consumer Protection Agency,” *Slate* (Nov. 28, 2017) (emphasis added). Yet Obama’s action in bypassing a Republican Senate filibuster with the recess appointment of Cordray evidently raised no “independence” concerns with CFPB’s creators.

¹⁴ *See English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), for a listing of the representatives filing the *amicus* brief.

After two months of litigation, the district court ruled that the President did in fact have the right to fill the vacancy. *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018). English continued the court fight on appeal for six more months, finally abandoning it and resigning from the Bureau in July 2018, when Trump nominated Kathy Kraninger for Senate confirmation as a permanent CFPB director. See D. McCue, “English to Exit Consumer Bureau, End Legal Challenge,” *Courthouse News* (July 6, 2018). In November 2020, however, President-elect Biden appointed English to another position — to lead his CFPB transition team. See C. Lehman, “Leandra English, Who Pretended to Run CFPB, Leads Biden CFPB Transition,” *The Washington Free Beacon* (Nov. 11, 2020).

CFPB’s operations demonstrate that walling off an agency from congressional appropriations and accountability leads to abuses and is destructive of liberty regardless of which party may employ that unconstitutional tactic.

CONCLUSION

For the foregoing reasons and for the reasons set out in the briefs for respondents, the lower court injunctions should be affirmed.

Respectfully submitted,

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July 10, 2023