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 OF COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS AND CREDIT UNIONS INCLUDING SELF-HELP CREDIT UNION, THE CENTER FOR RESPONSIBLE LENDING, AND NATIONAL ASSOCIATION OF LATINO COMMUNITY ASSET BUILDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are community development credit unions, community development financial institutions ("CDFIs"), and related industry associations whose memberships include institutions that are regulated by the Consumer Financial Protection Bureau ("CFPB" or "Bureau"). *Amici*, their members, and affiliates have a strong interest in ensuring that the CFPB continues to benefit consumers by enforcing U.S. consumer protection laws and regulations ensuring regulatory oversight remains appropriately tailored to the circumstances of the affected institutions. The CFPB's funding structure is constitutional and critical to ensuring that it can carry out its consumer protection mission free from undue industry influence. For this reason and the reasons set forth below, *Amici* request that the Court find the Bureau's funding mechanism constitutional.

Amici serve an important role in the economy. For example, Self-Help is one of the nation's largest community development financial institutions. For forty years, Self-Help has focused on creating asset building opportunities for low-income, rural, women-headed families and businesses, and families of color,

[1] No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *Amici curiae* or their counsel make a monetary contribution to the brief's preparation or submission.

primarily through financing safe, affordable home loans and small business loans. In total, Self-Help has provided $11 billion in financing to 159,000 homebuyers, small businesses, and nonprofit organizations and serves more than 193,000 mostly low-income families through more than 75 retail credit union branches in California, Florida, Illinois, North Carolina, South Carolina, Virginia, Washington, and Wisconsin.

Amicus curiae The Center for Responsible Lending ("CRL"), an affiliate of Self-Help, is a non-partisan, nonprofit research and policy advocacy organization working to promote financial fairness and economic opportunity for all, end predatory lending, and close the racial wealth gap. CRL's expertise gives it trusted insight to evaluate the impact of financial products and policies on the wealth and economic stability of Asian, Black, Latino, rural, military, low-wage, low-wealth, and early-career workers and communities.

Amicus curiae National Association for Latino Community Asset Builders ("NALCAB") is a community development financial institution, grant-maker, and hub of a national network of more than two hundred mission-driven organizations including real estate developers, business lenders, and community development credit unions that are anchor institutions in geographically and ethnically diverse Latino communities in 40 states, Washington, D.C., and Puerto Rico. NALCAB strengthens and coordinates the capacity of the NALCAB Network to deploy capital and influences investors and policy makers with research, advocacy, and technical advice. NALCAB operationalizes this work in three areas: organizational capacity building for nonprofits and government agencies; policy advocacy and field building; and impact investing through lending and asset management.

Since 2007, NALCAB has provided its Network members with over $20 million in grants and a wide range of technical assistance. NALCAB has also trained more than 1,000 practitioners and graduated 137 next generation Latino leaders from the Pete Garcia Community Development Fellowship. With NALCAB's support, member organizations have secured more than $400 million for affordable housing, small business, and financial capability programs. NALCAB has also influenced how local and federal government agencies are deploying hundreds of millions of dollars for community development and disaster recovery.

A full list of *Amici* can be found at the end of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The CFPB plays an integral role in the nation's financial system. The Bureau's work ensures that the system functions in a manner that is responsive to the interests of all market participants—consumers, large financial entities, and smaller institutions like *Amici*. Congress's chosen method of funding the Bureau underpins the Bureau's ability to do this important work, free from the outsized influence of any one market segment.

Petitioners' brief convincingly demonstrates that nothing in the text or history of the Constitution—or any decisions of this Court—supports the Fifth Circuit's unprecedented holding that the Bureau's funding mechanism (and that of many other regulators including key financial regulators like the Board of Governors of the Federal Reserve System) is unconstitutional. *Amici* do not believe that more needs to be said on that score.

Amici submit this brief, instead, to provide a real-world picture of what is at stake in this case beyond the pure question as to the meaning of the Appropriations Clause. The Bureau's role in the financial regulatory system is best understood in the context of the myriad changes that Congress made to the nation's financial regulatory scheme in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), changes carefully calibrated to address shortcomings in that system revealed by the 2008 financial crisis and Great Recession. In the twelve years since its inception, the Bureau has carried out its responsibilities under Dodd-Frank to achieve Congress's purposes. This is illustrated, in part, by the work the Bureau has done to be responsive to the unique needs of smaller financial institutions, including credit unions and CDFIs like the *Amici*, allowing these institutions to compete more effectively for consumers' business against larger institutions.

Understanding the judgments Congress made, and the role that the Bureau plays within the regulatory system, further demonstrates why this Court should not overturn Congress's decision with respect to the appropriate method of funding the CFPB's operations. Indeed, a decision striking down that funding mechanism would cause significant disruption to the regulatory system, to the severe detriment of financial institutions like *Amici* and the consumers they serve.

ARGUMENT

I. THE BUREAU PLAYS AN INTEGRAL ROLE IN REGULATING THE FINANCIAL SECTOR—PROTECTING AGAINST THE RISK OF ANOTHER SYSTEMIC FAILURE.

The relevance of the Bureau and its funding mechanism cannot be divorced from the events that prompted Congress to create the Bureau: the 2008 financial crisis and concerns regarding the role regulatory arbitrage played in allowing that crisis to occur. Those events revealed the dysfunction of the fragmented regulatory system that existed prior to the financial crisis, and the conflicting interests that can arise when regulators are simultaneously responsible for the safety and soundness of financial institutions and for protecting consumers from abuses by such institutions. Congress thus determined there was a need to consolidate regulatory authority in a single agency with the sole mission of "implement[ing] and, where applicable, enforce[ing] Federal consumer financial law consistently." 12 U.S.C. § 5511(a).

To protect the Bureau's independence and prevent potential regulatory capture, Congress saw fit to fund the Bureau in the same manner as most of the agencies whose authority was being consolidated into the Bureau: through a standing appropriation. Using this time-tested method for protecting the ability of financial regulatory agencies to exercise their authority unhesitatingly and without fear of the power of large financial institutions, Congress protected the Bureau's ability to oversee the consumer financial marketplace and promote financial stability.

A. Congress Created the Bureau to Replace the Patchwork Regulatory Regime that Allowed the 2008 Financial Crisis to Occur.

The 2008 financial crisis devastated the economy: Americans lost approximately 7 million homes to foreclosure; 8 million jobs; and $13 trillion in household wealth, including retirement, college, and other savings. S. REP. NO. 111-176, at 228 (2010). As recognized by the Senate Committee on Banking, Housing and Urban Affairs ("Committee"), the crisis illustrated "the failure of the federal banking and other regulators to address significant consumer protection issues detrimental to both consumers and the safety and soundness of the banking system." *Id.* at 9.

In response, Congress enacted Dodd-Frank with the "primary purpose" being to "promote the financial stability of the United States." *Id.* at 2. As part of its effort to replace the then-existing bank regulatory scheme that too often emphasized "the short-term profitability of the banks at the expense of consumer protection," Congress created the Bureau to "establish a basic, minimum federal level playing field for all banks and, for the first time, non-depository financial companies that sell consumer financial products and services to American families." *Id.* at 10-11.

In the forty years preceding the enactment of Dodd-Frank, beginning with the Truth in Lending Act in 1968, Congress had enacted roughly twenty separate laws (and innumerable amendments) aimed toward protecting consumers in the financial marketplace. These laws spanned numerous markets, touching on housing finance,[2] education finance,[3] credit cards,[4]

[2] *See*, *e.g.*, the Home Owners Protection Act of 1998 (12 U.S.C. §§ 4901 *et seq.*); the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. §§ 3801 *et seq.*); the Home Mortgage Disclosure Act of 1975 (12 U.S.C. §§ 2801 *et seq.*) (Prior to the law's transfer to the CFPB, regulatory authority was vested in the Federal Reserve Board and enforcement authority in multiple agencies.); the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. § 1601); and the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. §§ 5101 *et seq.*).

[3] *See*, *e.g.*, Higher Education Opportunity Act (15 U.S.C. § 1650).

[4] *See*, *e.g.*, Credit Card Accountability, Responsibility and Disclosure Act, Pub. L. No. 111-24, 123 Stat. 1734 (2009); Fair Credit Billing Act (15 U.S.C. §§ 1661 *et seq.*).

checking and savings accounts,[5] debt collection,[6] auto leases,[7] and many others. They included disclosure requirements, substantive regulations, and prohibitions on unfair or deceptive practices[8] and discrimination with respect to credit.[9]

These statutes contained a myriad of different approaches to implementation and enforcement, and created confusion and inconsistency regarding both. For example, although most of these statutes vested rulemaking authority in the Federal Reserve Board (*see*, *e.g.*, the Home Mortgage Disclosure Act of 1975, *supra* note 2, and the TILA *supra* note 7), some vested authority in other agencies such as the Federal Trade Commission ("FTC") (*see*, *e.g.*, the Gramm-Leach Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338) and the U.S. Department of Housing and Urban Development ("HUD") (see, *e.g.*, the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724). And still others vested more than one agency with

[5] *See*, *e.g.*, Truth in Savings Act (12 U.S.C. §§ 4301 *et seq.*); Electronic Fund Transfer Act (15 U.S.C. §§ 1693 *et seq.*).

[6] *See*, *e.g.*, The Fair Debt Collection Practices Act ("FDCPA"), Pub. L. No. 95-109, 91 Stat. 874 (1977); 15 U.S.C. §§ 1692 *et seq*.

[7] *See*, *e.g.*, the Truth in Lending Act ("TILA"), Pub. L. No. 90-321, 82 Stat. 146; 15 U.S.C. § 1604(a). Rulemaking authority under TILA was initially vested in the Federal Reserve Board.

[8] FTC Act § 5 (15 U.S.C. § 45).

[9] Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691 *et seq.* Authority over ECOA was initially vested in both the Federal Reserve Board and the FTC.

authority. *See*, *e.g.*, the FTC Act, *supra* note 8; ECOA, *supra* note 9.

Similarly, the authority to monitor regulatory compliance and remedy violations was split across multiple agencies. With regard to depository institutions, for example, the Federal Deposit Insurance Corporation ("FDIC") was responsible for state-chartered banks, the Office of the Comptroller of Currency ("OCC") for national banks, the Office of Thrift Supervision ("OTS") for federally chartered savings associations, the National Credit Union Administration ("NCUA") for credit unions,[10] and the Federal Reserve System for bank holding companies.[11] Responsibility for non-depository institutions was vested in the FTC, but the agency lacked the ability to conduct examinations, which greatly limited its effectiveness. *See generally* Chapter 311 of the 63rd Congress, 38 Stat. 717, September 26, 1914 (establishing the FTC). HUD, meanwhile, had overlapping jurisdiction over both depository and non-depository financial institutions under certain statutes relating to mortgage originations and servicing.

This patchwork approach to financial regulation both opened the door to regulatory arbitrage and created regulatory vacuums, which together contributed

[10] Act of Mar. 10, 1970, Pub. L. No. 91-206, 84 Stat. 49, Sec. 6 (transferring all functions of the Bureau of Federal Credit Unions to the NCUA).

[11] Levitin, *supra* p. 8 at note 116.

to the events that led to the financial crisis. As the Committee found:

> This fragmentation led to regulatory arbitrage between federal regulators and the states, while the lack of any effective supervision on nondepositories led to a "race to the bottom" in which the institutions with the least effective consumer regulation and enforcement attracted more business, putting pressure on regulated institutions to lower standards to compete effectively, "and on their regulators to let them."

S. REP. NO. 111-176, at 10 (quoting Testimony of Michael Barr, Assistant Secretary of the Treasury for Financial Institutions, to the Senate Committee on Banking, Housing, and Urban Affairs, July 14, 2009). Scholars have likewise noted that the piecemeal approach to regulation that existed in 2008 created competition for the most-lax regulation, with regulated institutions shopping for charters among agencies. *See* Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2042 (2014).

The Bureau was created explicitly to avoid a repetition of these systemic failures:

> The CFPB will stop regulatory arbitrage. It will write rules and enforce those rules consistently, without regard to whether a mortgage, credit card, auto loan, or any other consumer financial product or service is sold by a bank, a credit union, a mortgage broker,

> an auto dealer, or any other non-depository financial company.

S. Rep No. 111-176, at 11.

To effectuate that goal, Dodd-Frank enumerated eighteen separate consumer financial protection laws, 12 U.S.C. § 5481(12), and granted the Bureau extensive authority to, among other things, "supervise[ ] covered persons for compliance with" such laws, "tak[e] appropriate enforcement action to address violations" thereof, and "issu[e] rules, orders, and guidance implementing" these laws, 12 U.S.C. § 5511(c)(4), (5). In doing so, Congress amended each of the enumerated federal consumer financial protection laws to substitute the Bureau for one of the other agencies that had exercised authority under that statute.[12] Additionally, Congress expressly transferred from each of the regulators "[a]ll consumer financial protection functions"—defined to mean "all authority to prescribe rules or

[12] Pub. L. No. 111-203, 124 Stat. 1376 §§ 1083 (Alternative Mortgage Transaction Parity Act); 1084 (Electronic Fund Transfer Act); 1085 (Equal Credit Opportunity Act); 1086 (Expedited Funds Availability Act); 1087 (Fair Credit Billing Act); 1088 (Fair Credit Reporting Act and Fair and Accurate Credit Transactions Act); 1089 (Fair Debt Collection Practices Act); 1093 (Gramm-Leach Bliley Act); 1094 (Home Mortgage Disclosure Act); 1095 (Homeowners Protection Act of 1998); 1096 (Home Ownership and Equity Protection Act of 1994); 1097 (Omnibus Appropriations Act, 2009); 1098 (Real Estate Settlement Procedures Act of 1974); 1099 (Right to Financial Privacy Act of 197); 1100 (Secure and Fair Enforcement for Mortgage Licensing Act of 2008); 1100A (Truth in Lending Act); 1100B (Truth in Savings Act); 1100C (Telemarketing and Consumer Fraud and Abuse Prevention Act); 1100E (Adjustments for Inflation in the Truth in Lending Act (2010)).

issue orders or guidelines pursuant to any Federal consumer financial law" and the authority to "conduct examinations for compliance with Federal consumer financial laws." 12 U.S.C. § 5581(a)(1), (c)(1). Congress carved out of the transfer of examination authority depository institutions with $10 billion or less in assets, meaning that such institutions are subject to rules promulgated by the CFPB but their compliance with such rules is monitored by their prudential regulator.[13] Congress further amended the Federal Deposit Insurance Act to require the banking regulators to "make a referral" to the CFPB when one of the agencies "has a reasonable belief that a violation of an enumerated consumer financial law . . . has been committed by any . . . party within the jurisdiction of that . . . agency."[14]

At the same time that Congress consolidated all of these authorities in a single—and single-purpose—agency, Congress also created, for the first time, federal supervisory authority over non-depository institutions to "provide a level playing field" where both depository and non-depository institutions would be subject to "uniform rules and consistent enforcement for the benefit of consumers." S. Rep. No. 111-176, at 229. This, too, was a response to the financial crisis in which "non-depository financial companies were among the

[13] *Id.* § 1061, 12 U.S.C. § 5581. Congress also enacted special provisions governing the transfer of personnel from the preexisting banking regulators to the CFPB. Pub. L. No. 111-203 § 1064 (2010), 12 U.S.C. § 5584.

[14] Pub. L. No. 111-203 § 1090, 12 U.S.C. § 1818(t)(6).

largest sellers of subprime and exotic mortgages." S. Rep. No. 111-176 at 14.

In summary, in the aftermath of the 2008 financial crisis, Congress consolidated responsibility for protecting consumers in the financial marketplace in a single agency—the CFPB—and empowered that agency to regulate even the largest financial institutions in an independent and impartial manner. It is against this backdrop that one must consider the role of the Bureau's funding mechanism in facilitating the Bureau's purpose.

B. The Bureau's Funding Mechanism—Modeled After Other Financial Regulators—Creates Stability and Predictability.

Congress's chosen method for funding the Bureau—modeled on the funding methods of similar financial regulators—is integral to effectuating Dodd-Frank's central purpose: financial oversight free from regulatory capture. As the Committee explained, "the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator." S. Rep. No. 111-176, at 163. This concept is not novel, nor is the Bureau's funding mechanism out of the ordinary for a federal agency, particularly for a federal financial regulator.

Indeed, all of the banking regulators from which authority was transferred to the CFPB, many of which have budgets much larger than that of the CFPB,[15] are funded via a standing appropriation, including the Federal Reserve Board,[16] the OCC,[17] the FDIC,[18] and the NCUA.[19] As the GAO has explained, the federal banking agencies "are supported almost entirely through examination or assessment fees on their members, deposit insurance premiums, or interest on asset holdings, and are not included in the annual congressional appropriations process." U.S. GEN. ACCT. OFF., SEC OPERATIONS: IMPLICATIONS OF ALTERNATIVE FUNDING STRUCTURES 12 (2002). The same is true of the Federal Housing Finance Agency ("FHFA"), which oversees the "government sponsored entities" Fannie Mae and Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. § 4516. And, although the Securities and Exchange Commission ("SEC") does receive some funding through annual appropriations, most of its budget comes from fees collected by the agency, making it a narrow exception at best. SEC OPERATIONS, *supra*, at 7 (Fig. 1).

The Fifth Circuit's emphasis on the Bureau's supposedly unique "double insulation" is misplaced. *Cmty. Fin. Servs. Assoc. of Am. v. Consumer Fin. Prot. Bureau*, No. 21-50826, at 30 (5th Cir. 2022). As Petitioners have noted, the Federal Reserve Board's role in the Bureau's funding is entirely ministerial—that is, it exercises "no

[15] S. REP. NO. 111-176 at 164.

[16] 12 U.S.C. §§ 243, 244.

[17] 12 U.S.C. §§ 16, 481, 482.

[18] 12 U.S.C. §§ 1815(d), 1820(e).

[19] 12 U.S.C. §§ 1755(a) and (b).

power over how much money the CFPB receives" and "thus in no way insulates the CFPB from congressional control" as "Congress is free to modify the Bureau's funding at any time." Pet'rs' Br. at 34. Indeed, Congress can change the Bureau's funding by legislating with respect to the Federal Reserve Board's funding, as well as through legislation directly involving the Bureau's funding or operations, as Congress has indeed done on more than one occasion.[20] And as noted by other briefs filed in support of Petitioners, the court of appeals' characterization ignores the many controls and guardrails Congress maintains over the agency's budget.[21]

The CFPB's budgetary mechanism creates stability and predictability and enables the Bureau to discharge its functions in an independent and impartial manner. This benefits CDFIs, credit unions, and their customers who typically have less access to the political decisionmakers than large financial institutions. *See* Levitin, *supra* p. 8 at 2044 (noting that the

[20] *See* Consolidated Appropriations Act 2016, Pub. L. No. 114-113, 129 Stat. 2242 div. O § 704 (2015), *codified at* 12 U.S.C. § 5493(h); Department of Defense and Full Year Appropriations Act 2011, Pub. L. No. 112-10, 125 Stat. 38 div B.

[21] For instance, Congress capped the CFPB's budget to twelve percent of the Federal Reserve Board's operating expenses as of fiscal year 2013, subject to an annual inflation adjustment pursuant to a formula Congress enacted; the Director must seek permission from the President and both chambers of Congress to appropriate any amounts above this statutory limit. 12 U.S.C. 5497(a)(2)(A)(iii), (a)(2)(B), (e)(1). Meanwhile, Congress imposed no cap on other financial regulators, including the OCC and the FRB. 12 U.S.C. § 16; 12 U.S.C. § 243.

financial services industry exercises "considerable political clout, in large part through massive political campaign donations and lobbying"). This is especially important as *Amici* serve underserved communities who are vulnerable to financial exploitation and often better served by small institutions able to meet their unique needs.

II. THE BUREAU HAS DEVELOPED AN EXTENSIVE BODY OF RULES, POLICIES, AND PRACTICES ON WHICH CONSUMERS AND SMALL FINANCIAL INSTITUTIONS LIKE *AMICI* RELY.

In its twelve-year history, the Bureau has exercised its authority—through rulemaking, guidance, enforcement, and consumer complaint handling—to establish a regulatory scheme on which consumers and financial institutions of all sizes rely. The Bureau's funding mechanism has played an important role in the construction of this regulatory framework, as illustrated by the Bureau's responsiveness to the unique circumstances of different market segments such as smaller financial institutions like *Amici* and the Bureau's demonstrated ability to hold all financial institutions, including large financial institutions, accountable for their actions.

A. The Bureau Has Used Its Authority to Issue Rules, Orders, and Guidance to Facilitate Compliance with the Federal Consumer Financial Laws by Smaller Financial Institutions and to Protect Consumers.

Since its inception, the Bureau been vital to facilitating compliance with federal consumer financial laws, especially by smaller institutions like *Amici* that serve underserved consumers. The Bureau has used its authority, as described in the preceding section, to issue rules and provide other guidance that has not only protected consumers, but also allowed financial institutions to operate effectively. Of particular relevance is the CFPB's work to implement the Mortgage Reform and Anti-Predatory Lending Act, which Congress enacted as Title XIV of Dodd-Frank, effectively amending several laws. In the weeks before these amendments went into effect,[22] the CFPB—following notice-and-comment rulemaking—issued six rules that, together, provided clarification and gave financial institutions additional time to develop policies and procedures to comply with their new obligations.[23] Those rules have

[22] Congress established a January 2013 effective date for those amendments but authorized the CFPB to postpone that date for up to a year if it issued implementing regulations beforehand. Pub. L. No. 111-203, § 1400(c).

[23] *See* 78 Fed. Reg. 4725 (issued on Jan. 10, 2013) ("Escrow Requirements under the Truth in Lending Act"); 78 Fed. Reg. 6855 (issued on Jan. 10, 2013) ("High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X)"); 78

been widely recognized as bringing stability to the mortgage market after a period of extreme distress.[24]

Of particular relevance to *Amici*, several of the CFPB's mortgage rules created exemptions for smaller financial institutions—exemptions that were entirely in-line with Congress's express recognition that rules appropriate for large lenders serving hundreds of thousands or millions of consumers are not necessarily appropriate for community organizations serving a much smaller, local population.[25] Likewise, the CFPB

Fed. Reg. 10695 (issued on Jan. 17, 2013) ("Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act"); 78 Fed. Reg. 7215 (issued on Jan. 18, 2013) ("Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act"); 78 Fed. Reg. 10367 (issued on Jan. 18, 2013) ("Appraisals for Higher-Priced Mortgage Loans"); 78 Fed. Reg. 11279 (issued on Jan. 20, 2013) ("Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z)").

[24] *See, e.g.*, Br. of the Mortgage Bankers Association in *Seila Law v. CFPB*, No. 19-7 at 10 (explaining a decision calling into question the validity of the CFPB's mortgage rules "could be catastrophic for the real estate finance industry" and "mortgage markets would very likely all but grind to a halt").

[25] For example, Section 1481 of the Dodd-Frank Act amended the Truth in Lending Act to require that lenders establish an escrow account for the payment of taxes and property insurance for certain mortgage transactions. 15 U.S.C. § 1639d. But Congress authorized the CFPB to exempt creditors operating "predominantly in rural or underserved areas" if the creditors' total mortgage originations and asset size were below thresholds set by the CFPB. The CFPB issued a regulation defining those thresholds, 78 Fed. Reg. 4726, and it subsequently loosened the criteria in response to Congressional action amending the authorizing statute and based upon the Bureau's own experience. 80 Fed. Reg. 59944. The CFPB has similarly tailored other mortgage rules to

promulgated rules tailoring certain requirements to accommodate the business needs of smaller institutions.[26]

After finalizing these mortgage rules, the CFPB proceeded to issue a set of "Small Entity Compliance Guides" to translate the regulations into terms that business and compliance officials could more readily understand and use to develop compliance programs.[27] The CFPB developed a regulatory implementation program, through which it engaged with financial

accommodate small financial institutions. *See*, *e.g.*, 12 C.F.R. § 1026.43(b) (exemption from ability-to-pay requirement for Community Development Financial Institutions, Community Housing Development Organizations, and tax-exempt entities meeting certain conditions); 12 C.F.R. §§ 1026.41(e)(4), 1030(b) (exemption from servicing requirement for entities meeting definition of small servicer).

[26] For instance, Section 1411 of the Dodd-Frank Act amended the Truth in Lending Act to make it unlawful to make a mortgage loan unless the creditor makes a reasonable and good faith determination that that the consumer has the ability to repay the loan. 15 U.S.C. § 1639c(a). Section 1412, in turn, created a presumption of compliance with this requirement with respect to loans that are "qualified mortgages" as defined in that section and in regulations to be issued by the CFPB. *Id.* § 1639c(b). In defining the term qualified mortgage, Congress excluded loans that result in a balloon payment but authorized the CFPB to include balloon-payment loans as qualified mortgages so long as they meet the criteria for the authorized exemption to the escrow requirement. *See supra* note 25*;* 15 U.S.C. § 1639c(b)(2)(E). The CFPB elected to allow such loans to be treated as qualified mortgages, recognizing that small lenders are not able to make 30-year fixed rate mortgages. 12 C.F.R. § 1026.43(f).

[27] *See* Compliance Resources, CFPB, *available at* https://www.consumerfinance.gov/compliance-resources/ (last visited May 11, 2023).

institutions—including organizations like *Amici*—to answer questions, provide guidance, and assist with implementation.[28] And where the CFPB has concluded that further clarity or adjustments were needed, it has amended its rules to address such issues.[29]

This same story can be told with respect to regulations the CFPB has issued to implement other provisions of the Dodd-Frank Act, including its rules governing international remittances,[30] mortgage reporting,[31] and small business lending reporting.[32] In each case, the Bureau's implementing regulations created exemptions for smaller financial institutions as envisioned by Congress.[33]

Moreover, the CFPB has continued to play a vital role in facilitating compliance with consumer financial

[28] *See* Remarks of Richard Cordray to the American Bankers Association, April 3, 2014, *available at* https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-american-bar-association/.

[29] *See*, *e.g.*, 78 Fed. Reg. 35430 (June 12, 2013) (amending ability-to-pay rule); 78 Fed. Reg. 44686 (July 24, 2013) (amending mortgage servicing rule); 78 Fed. Reg. 60382 (Oct. 1, 2013) (amending multiple rules).

[30] *See generally* Section 1073 of the Dodd-Frank Act, 15 U.S.C. § 1693o-1.

[31] *See generally* Section 1094 of the Dodd-Frank Act, 12 U.S.C. § 2802.

[32] *See generally* Section 1071 of the Dodd-Frank Act, 15 U.S.C. § 1691o-2.

[33] *See* 12 C.F.R. § 1005.30(f) (remittance exemption); 12 C.F.R. § 1003.3(d) (mortgage disclosure exemption); 12 C.F.R. § 1002.105(b) (small business reporting exemption).

protection laws by providing necessary clarifications and reconciliations. In doing so, the CFPB has taken into consideration the specific needs of various entities including small financial institutions like *Amici*. For example, in 2018, Congress enacted the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, which, among other things, relieved certain financial institutions of some reporting requirements for home mortgages.[34] Within a few months, the CFPB issued an interpretive rule clarifying the specific types of data these financial institutions were no longer required to report. 83 Fed. Reg. 45325. Similarly, just last month, after Congress enacted the Adjustable Interest Rate ("LIBOR") Act,[35] the CFPB issued an interim final rule to conform regulations implementing the Truth in Lending Act with the LIBOR Act.[36]

The CFPB's funding mechanism ensures that consumer interests are taken into account alongside those of large and small financial institutions. That was true,

[34] The CFPB had provided a complete exemption from reporting for financial institutions that originated 25 or fewer closed-end loans or 100 or fewer open-end lines of credit. 80 Fed. Reg. 66128 (Oct. 28, 2015). Congress added to this an exemption from reporting certain data elements for institutions originating 500 or fewer loans or lines of credit. Pub. L. No. 115-174, 132 Stat. 1296 § 104.

[35] Pub. L. No. 117-103, 136 Stat. 49 div. U.

[36] The CFPB rule has not yet been published in the Federal Register but can be viewed at https://files.consumerfinance.gov/f/documents/cfpb_facilitating-libor-transition-libor-act-regulation-z_2023-04.pdf.

for example, of the mortgage rules and the remittance rule previously discussed. And that continues to be true today. For example, just last year, Congress passed the Debt Bondage Repair Act, which prohibits credit reporting companies from issuing reports for the victims of trafficking that include negative information caused by the trafficking.[37] Six months later, the CFPB issued an interim final rule clarifying for survivors the process required to exercise their rights under the law and clarifying for credit reporting agencies their obligations. 87 Fed. Reg. 37700. And just over two weeks ago, after conducting a study of property assessed clean energy ("PACE") loans which found that these loans increase property tax bills by 88% and lead to a 35% increase in mortgage delinquencies,[38] the CFPB issued a proposed rule to require PACE lenders to assess consumers' ability to repay before making these loans.[39]

In sum, the CFPB has played—and continues to play—precisely the role that Congress envisioned: by listening and being responsive to all participants within the financial system, the CFPB has protected the stability of the system as a whole. The CFPB's

[37] This was part of the National Defense Authorization Act. Pub. L. No. 117-81 § 6102.

[38] McAlister and Sandler, CFPB Data Point: Property Assessed Clean Energy (PACE) Financing and Consumer Financial Outcomes.

[39] 88 Fed. Reg. 30388 Residential Property Assessed Clean Energy Financing (Regulation Z) (proposed May 1, 2023) (to be codified at 12 C.F.R. § 1026).

funding mechanism has played a key role in this success.

B. The Bureau's Funding Mechanism Has Enabled the Bureau to Hold All Entities Within Its Jurisdiction—Including Large Financial Institutions—Accountable.

The CFPB has two tools for ensuring compliance with federal consumer financial laws: supervisory examinations (which are confidential) and enforcement actions (which are public).[40] As of 2017, roughly 60% of examinations were resolved through confidential supervisory action while the other approximately 40% led to an enforcement investigation.[41] The CFPB's enforcement record illustrates the propriety of Congress's decision to fund the CFPB in the same manner it funds other banking regulators: with a standing appropriation.

A series of actions involving Wells Fargo, the nation's third largest bank with almost $1.9 trillion in assets, provides a compelling case in point. Three CFPB Directors have brought enforcement cases against, and entered into consent orders with, Wells Fargo. In the first, brought by Director Cordray in 2016, the company agreed to pay a $100 million fine for opening deposit and credit card accounts without the

[40] *See* 12 U.S.C. §§ 1024, 1025 (supervision), 1051-1057 (enforcement).

[41] *Supervisory Highlights* Summer 2017, *available at* https://files.consumerfinance.gov/f/documents/201709_cfpb_Supervisory-Highlights_Issue-16.pdf.

authorization of the consumers in whose name the accounts were opened.[42] In the second, brought by Acting Director Mulvaney in 2018, the company agreed to pay a $1 billion fine based on findings that it had overcharged consumers on mortgages and auto loans.[43] And in the third, brought by Director Chopra in 2022, the company agreed to pay over $2 billion in consumer redress and a $1.7 billion fine based upon findings of violations across multiple product lines.[44]

But the actions involving Wells Fargo are just one example. The CFPB has shown a continued willingness to take action when it has uncovered legal violations following a supervisory examination or investigation, as demonstrated by enforcement actions against many of the nation's largest banks including JP Morgan Chase, Bank of America, and Citibank.[45]

[42] *In re Wells Fargo Bank N.A.*, 2016-CFPB-0015, https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf

[43] *In re Wells Fargo Bank N.A.*, 2019-BCFP-0001, https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-bank-na_consent-order_2018-04.pdf

[44] *In re Wells Fargo Bank N.A.*, 2022-CFPB-0011, https://files.consumerfinance.gov/f/documents/cfpb_wells-fargo-na-2022_consent-order_2022-12.pdf

[45] *See, e.g.*, *In re JP Morgan Chase Bank N.A.*, 2013-CFPB-0007; *In re JP Morgan Chase Bank N.A.*, 2017-CFPB-0015; *In re Chase Bank USA N.A.*, 2015-CFPB-0013; *In re Bank of America N.A.*, 2022-CFPB-0004; *In re Bank of America N.A.*, 2022-CFPB-0002; *In re Bank of America N.A.*, 2014-CFPB-0004; *In re Citibank N.A.*, 2018-BCFP-0003; *In re Citibank N.A.*, 2016-CFPB-0003; *In re Citibank N.A.*, 2015-CFPB-0015; *In re Citibank N.A.*, 2017-CFPB-0021; *In re CitiMortgage Inc.*, 2017-CFPB-0005.

Similarly, the CFPB has demonstrated its willingness to hold large, non-depository financial institutions accountable. Dodd-Frank authorized the CFPB to supervise non-depositories that are "larger participants" in a consumer finance market. The Bureau has adopted at least five "larger participant rules,"[46] enabling the Bureau to supervise large debt collection agencies, consumer report agencies, auto finance companies, student loan servicers, and international money transmitters. 12 C.F.R. §§ 1090.104-108.

The CFPB has taken its responsibility for overseeing large, non-depository financial institutions seriously, both via supervisory actions, as demonstrated in the CFPB's *Supervisory Highlights*,[47] and enforcement actions. For example, the CFPB has filed suit against, and entered into consent orders with, two of the largest

[46] *See* 77 Fed. Reg. 42873 (July 20, 2012) (defining "Larger Participants of the Consumer Reporting Market"); 77 Fed. Reg. 65775 (Oct. 31, 2012) (defining "Larger Participants of the Consumer Debt Collection Market"); 78 Fed. Reg. 73383 (Dec. 6, 2013) (defining "Larger Participants of the Student Loan Servicing Market"); 79 Fed. Reg. 56631 (Sept. 23, 2014) (defining "Larger Participants of the International Money Transfer Market"); 80 Fed. Reg. 37495 (June 30, 2015) (defining "Larger Participants of the Automobile Financing Market").

[47] *See, e.g.*, *Supervisory Highlights Student Loan Servicing Special Edition* (2022), *available at* https://files.consumerfinance.gov/f/documents/cfpb_student-loan-servicing-supervisory-highlights-special-edition_report_2022-09.pdf; *Supervisory Highlights Consumer Reporting Special Edition* (2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-20_122019.pdf.

debt collectors[48] and each of the three national consumer reporting agencies.[49] Similarly, the CFPB currently is engaged in litigation against what was one of the largest student loan servicers,[50] one of the largest money transmitters,[51] and the largest subprime auto lender.[52]

As these examples make clear, with a standing appropriation, the CFPB has functioned precisely as the Congress envisioned—as an independent and effective regulator.

[48] *CFPB v. Portfolio Recovery Associates*, 2-23-civ-00110 (E.D. Va.) (stipulated final judgment and order); *In re Portfolio Recovery Associates*, 2015-CFPB-0023; *Bureau of Consumer Financial Protection v. Encore Capital Group*, No. 20-civ-01750 (S.D. Cal. Oct. 15, 2020) (stipulated final judgment and order); *In re Encore Capital Group*, 2015-CFPB-0022.

[49] *In re Experian Holdings Inc.*, 2017-CFPB-0012; *Bureau of Consumer Financial Protection v. Equifax Inc.*, No. 1:19-cv-03300-TWT (N.D. Ga. July 22, 2019) (stipulated final judgment and order); *In re Equifax Inc.*, 2017-CFPB-0001; *In re TransUnion Inc.*, 2017-CFPB-0002.

[50] *CFPB v. Navient Corp.*, No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017).

[51] *CFPB v. MoneyGram International*, No. 1-22-civ-0325 (filed Apr. 21. 2022, S.D.N.Y.).

[52] *CFPB v. Credit Acceptance Corp*., No. 1:23-civ-0038 (filed Jan. 4, 2023 S.D.N.Y.).

III. A RULING THAT INTERRUPTS THE CFPB'S OPERATIONS WOULD CAUSE MASSIVE DISRUPTION TO THE REGULATORY SYSTEM TO THE DETRIMENT OF FINANCIAL INSTITUTIONS LIKE *AMICI* AND THE CONSUMERS THEY SERVE.

As discussed herein, the CFPB's role in regulating the consumer financial system—worth trillions of dollars—is significant. An adverse ruling suspending the CFPB's operations would create chaos for market participants, threatening to upend the entire system.

Of course, if the Court were to find a constitutional defect in the CFPB's funding mechanism, it could sever specific provisions, permitting the CFPB to continue to function with funding through the Federal Reserve. Petitioners' brief identifies three such provisions whose severance would seem to satisfy the Fifth Circuit's concerns. Pet'rs' Br. at 41. But any ruling that interrupts the CFPB's operations would have dire consequences.

We do not go so far as to consider the market implications of an adverse ruling in this case on other financial regulators. As previously explained, we agree with Petitioners that there is no principled basis for distinguishing the CFPB's funding from that of the Board of Governors of the Federal Reserve System, the FDIC, the OCC, or the NCUA. But even if the decision here could somehow be cabined to the CFPB, the impact would be significant.

First and foremost, such a ruling would create a regulatory vacuum for large banks which, due to their size, pose the greatest threat to financial stability. Not only would this pose a tremendous risk to consumers, it would create a troubling mismatch in which the largest banks (those with more than $10 billion in assets) had no oversight (Dodd-Frank vested the Bureau with exclusive authority for their oversight), while leaving smaller institutions like *Amici* subject to banking regulators' oversight.[53] Such a wildly distorted playing field would significantly undermine the ability of smaller institutions to function in the marketplace.

Additionally, a ruling that interfered with the CFPB's functioning would bring the non-bank supervision program to an immediate halt. One of the key lessons of the financial crisis was the significant risk that non-depository financial institutions can pose, and thus one of the core goals of the Dodd-Frank Act was to "ensur[e] that . . . Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution." 12 U.S.C. § 5511(b)(4). The CFPB has exclusive authority to conduct supervisory examinations of non-depositories; if

[53] The one exception is that the Dodd-Frank Act left undisturbed the authority of the banking regulators to enforce § 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices." Even there, large banks would be at an advantage since the Dodd-Frank Act prohibits unfair, deceptive or abusive acts or practices, 12 U.S.C. § 5531, and that broader prohibition would be enforceable only against smaller institutions. Moreover, there are 18 other consumer financial protection laws which only the CFPB can enforce against larger banks.

the CFPB were unable to function, there would be no federal oversight of these institutions.

Moreover, a ruling that suspends the CFPB's operations would necessarily suspend the CFPB's ability to assist financial institutions in understanding their legal obligations and complying with the law. Institutions that regularly use the CFPB's Regulation Inquiries function[54] to obtain answers to questions about the Bureau's rules and the statutes they implement—a function particularly useful for smaller institutions that cannot afford large compliance staffs—would no longer be able to do so. Nor would financial institutions have the benefit of the CFPB's periodic updates to its Small Entity Compliance Guides, *Supervisory Highlights*, Circulars,[55] or other forms of guidance. Likewise, an adverse ruling would stop in their tracks the CFPB's robust research and consumer education programs. Both programs were mandated by Congress in Dodd-Frank,[56] and the Bureau has become the recognized leader in each of these fields.

Disrupting the CFPB's operations would also mean disrupting the CFPB's ability to continue with rulemakings it has commenced pursuant to express Congressional directives,[57] as well as its ability to

[54] Compliance Resources, *supra* note 27.

[55] Consumer Financial Protection Circulars, CFPB, *available at* https://www.consumerfinance.gov/compliance/circulars/ (last visited May 11, 2023).

[56] 12 U.S.C. §§ 1013(b)(1), (d), 5511(c)(1), (3), 5512(c)(3)(A).

[57] The PACE rulemaking previously discussed is one such example; it was mandated by § 307 of the Economic Growth,

respond to new and emerging problems through the rulemaking process. The rules that the CFPB has written would effectively be frozen in place while the world around it undergoes rapid change. Similarly, the CFPB would be disabled from acting on any of the approximately 20 petitions for rulemaking it has received in the past twelve months from trade associations and consumer advocates alike,[58] or from acting in response to what it learns from Requests for Information it has issued, including the most recent one seeking information regarding the collection and sale of consumer information, 88 Fed. Reg. 16951. Indeed, the CFPB would not even be able to issue the annual inflation adjustments provided for by statute that determine, for example, the size of permissible fees under the Fair Credit Reporting Act,[59] or the scope of an exemption from the Home Mortgage Disclosure Act.[60]

Finally, any ruling that interrupts the CFPB's operations would mean suspending the CFPB's

Regulatory Relief and Consumer Protection Act, Pub. L. No. 115-174, 15 U.S.C. § 1639c(b)(3). The Bureau also has initiated a rulemaking to implement § 1033 of the Dodd-Frank Act, 12 U.S.C. § 5533, which provides that "Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person."

[58] The rulemaking petitions can be accessed at https://www.consumerfinance.gov/rules-policy/petitions-rulemaking/.

[59] 15 U.S.C. § 1681j(f)(2).

[60] 12 U.S.C. § 2808(b).

consumer complaint function, also mandated by Congress.[61] In 2022, the CFPB received almost 900,000 complete, bona fide complaints from individual consumers or their representatives. Consumers obtained responses to almost 800,000 of those complaints, many resulting in monetary or non-monetary relief.[62] None of this could continue if the CFPB's operations were suspended.

In sum, a ruling that prevents the CFPB from continuing to function would have far-reaching effects. Anyone who uses a consumer financial product or service—anyone with a bank account, a credit card, a mortgage, auto loan, or personal loans—would be at risk. The risk extends beyond consumers, however. Providers of financial products and services, especially small institutions like *Amici*, would struggle to function in a marketplace where the largest players had free reign and none of the players had a steady source of guidance. Such a result can and should be avoided at all costs.

[61] 12 U.S.C. §§ 1013(b)(3), 5534.

[62] CFPB, *Consumer Response Annual Report 2022*, *available at* https://files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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