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 PROFESSORS OF HISTORY AND CONSTITUTIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading scholars with expertise in constitutional law and early American history. *Amici* are:

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Appropriations Clause is about one thing: legislative supremacy. By permitting Treasury payments only "in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, it gives the people's elected representatives exclusive control over federal spending and makes them politically accountable for their choices. The Founders' adoption of that safeguard

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

marked the culmination of struggles in England and America through which the legislature wrested control over government finances from the executive and his appointees.

While praising Congress's appropriations power, Respondents come to bury it. Like the Fifth Circuit, they would transform the Appropriations Clause from a legislative check on executive power into a judicial check on legislative power, replacing Congress's plenary discretion over spending with nebulous, judge-fashioned restraints. Those limits are absent from the Clause's text, unsupported by its history, and incompatible with legislation dating to the Founding. The decision below should be reversed.

The Clause's command is simple: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* "In other words," as Alexander Hamilton explained, "before money can legally issue from the Treasury for any purpose, there must be a law authorising an expenditure and designating the object and the fund." *Explanation* (Nov. 11, 1795), *Founders Online*, National Archives, https://founders.archives.gov/documents/Hamilton/01-19-02-0077.

The Consumer Financial Protection Bureau's funding provision does just that. It is a law authorizing an expenditure and designating its object and source. *See* 12 U.S.C. § 5497(a), (c)(1). It is thus an appropriation made by law. The Clause requires nothing more than that expenditures be "expressly authorized by act of Congress." *Knote v. United States*, 95 U.S. 149, 154 (1877).

The Fifth Circuit's contrary ruling rests on three false premises: that the Clause requires appropriations to be separate from "enabling legislation," Pet.

App. 38a, that it disfavors "perpetual" appropriations, *id.* at 36a, and that it "obligates" Congress to keep agencies on a tight enough leash to satisfy judges that "'the boundaries between the branches'" are being adequately policed, *id.* at 31a (quoting *CFPB v. All Am. Check Cashing*, 33 F.4th 218, 231 (5th Cir. 2022) (Jones, J., concurring)).

None of these newly fashioned demands appear in the Clause's text. And all would have surprised the First Congress. The very first agency it created, the Customs Service, wielded extensive authority over a vital component of the economy and was financed not with annual appropriations but with an indefinite revenue stream provided in the legislation creating it. *See* Act of July 31, 1789, ch. 5, §§ 29, 38, 1 Stat. 29, 44-45, 48. And Congress did not stop there. To enforce the nation's first internal tax, it established a cadre of revenue officers who also had an indefinite source of funding in their enabling statute, while leaving their exact budget to executive discretion within a statutory cap. *See* Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 199, 213. In subsequent years, Congress created other important agencies with perpetual self-funding, including the other largest component of the early civilian bureaucracy, the Post Office. *See infra* Part II.

From the Founding to the present, Congress has consistently given agencies self-sustaining funding or indefinite appropriations whenever Congress deemed it practical to do so. By the mid-1800s, indefinite appropriations (sometimes called "standing" or "permanent" appropriations) made up a significant portion of the national budget. A few decades later, well over a hundred statutes involved "permanent and indefinite appropriations." S. Rep. No. 334, 46th Cong., 2d Sess., at 4-8 (1880).

These choices are within Congress's discretion under the Appropriations Clause, which simply requires expenditures to be "authorized by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). At the Founding, as today, to "appropriate" money "by law" simply meant to designate a purpose for that money in legislation that has satisfied the requirements for a bill to "become a Law." U.S. Const art. I, § 7, cl. 2. The Clause imposes no other procedural restrictions or substantive limits. *See* Hamilton, *supra* ("The *object*, the *sum* and the *fund* are *all* that are to be found in these acts. They are commonly, if not universally, silent as to any thing further. This I regard as constructive of the clause in the constitution.").

Nor does the Clause obligate Congress to use its appropriations power in any particular way. The Clause is instead "a restriction upon the disbursing authority of the Executive," *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), giving Congress alone "[t]he power to control, and direct the appropriations," 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213 (1833). "The judiciary on the contrary has no influence over either the sword or the purse." *The Federalist No. 78*, at 523 (Jacob E. Cooke ed., 1961) (Hamilton).

By erecting a legislative barrier against unauthorized expenditures, the Clause empowers Congress to control executive spending. It does not empower the judiciary to control congressional spending. Its vital function is to arm the people's elected representatives with discretion over the government's finances—not shackle them to an unelected judiciary's vision of how that discretion should be exercised.

ARGUMENT

I. The Appropriations Clause Gives Congress Alone the Power to Decide How Agencies Are Funded.

A. The Text of the Clause Requires Only that Treasury Withdrawals Be Authorized by Law.

The text of the Appropriations Clause imposes a single requirement: "payments of money from the Federal Treasury are limited to those authorized by statute." *OPM v. Richmond*, 496 U.S. 414, 416 (1990). The Clause does not require federal agencies to be funded by payments from the Treasury. Nor does it require laws making appropriations to be temporary or separate from "enabling" legislation. The Clause does what it says. It simply demands that spending from the Treasury be authorized by the "single, finely wrought and exhaustively considered, procedure" for enacting legislation set forth in the Constitution. *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). As the text of the Clause makes clear, a "law alone" *does* "suffice." Pet. App. 38a.

1. The Clause's text is "straightforward and explicit." *Richmond*, 496 U.S. at 424. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. This "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap*, 301 U.S. at 321. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned." *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

As a threshold matter, the CFPB's funding is not "drawn from the Treasury." U.S. Const. art. I, § 9, cl. 7. It is paid from the earnings of the Federal Reserve System. *See* 12 U.S.C. § 5497(a)(1). This Court has never suggested that the Clause's reference to "the Treasury" should be construed more broadly than its literal meaning. To the contrary, precedent indicates that the Clause applies only to Treasury withdrawals, without otherwise affecting the lawful receipt or payment of funds by government officials.

For instance, this Court has long held that a criminal pardon may authorize the return of a convicted person's forfeited money, held in "one of the public depositories to the credit of the United States," so long as it has not yet been "paid into the treasury." *Knote*, 95 U.S. at 155 ("if the money had only gone into the hands of some officer of the government . . . it might be refunded"). But "if the money had actually passed into the treasury, it could not be refunded without an act of Congress." *Id.*; *see* 8 U.S. Op. Att'y Gen. 281, 285 (1857) (if money is "technically in the Treasury," then "a law will be requisite to draw it out").

Nor does the Appropriations Clause require federal activities to be funded solely by Treasury withdrawals. Other constitutional provisions impose that requirement, *see* U.S. Const. art. I, § 6, cl. 1 (compensation for Congressmembers must "be ascertained by Law, and paid out of the Treasury"), but the Appropriations Clause does not. And when the Framers chose the Clause's precise language, they knew that agencies could be funded through means other than Treasury withdrawals. *See* Ordinance for Regulating the Post Office, 23 *Journals of the Continental Congress* 670 (1782) (funding Post Office with "monies to arise from postage").

When laws direct agencies to obtain funds from sources other than the Treasury and spend them on designated purposes, those authorizations are inherently made by law. The additional work of the Appropriations Clause is to prevent the executive from raiding the government's general stockpile of revenue in the Treasury without the same type of legislative authorization. *See infra* Part I.B.

To affirm the decision below, this Court would have to hold that the Clause's reference to "the Treasury" means something other than the Treasury (and what it means). Resolving that question is unnecessary, however, because the text of the Clause is satisfied here regardless.

2. The Appropriations Clause requires only that expenditures be "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. This simply means that spending "must be authorized by a statute." *Richmond*, 496 U.S. at 424.

An "appropriation" is the "act of setting aside a sum of money for a public purpose." *Black's Law Dictionary* 110 (8th ed. 2004). That straightforward definition matches the word's meaning in non-legislative contexts. *See Oxford English Dictionary* (3d ed. 2014) ("[t]he assignment of anything to a special purpose . . . *esp.* a sum of money set apart for any purpose").

The word "appropriation" had the same meaning at the Founding: "The application of something to a particular purpose." Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). Its only specialized legal definition concerned a type of donation to religious institutions. *See id.*; Giles Jacob, *A New Law-Dictionary* (1739) ("the Annexing of a Benefice . . . to the proper and perpetual use of some religious House"). Otherwise, an "appropriation" was simply

"the appointing a thing to a particular use." Nathan Bailey, *Universal Etymological English Dictionary* (1737); *see* Noah Webster, *A Compendious Dictionary of the English Language* (1806) (an "appropriation" is "an application to some particular use or meaning, an alienation (benefice)," and to "appropriate" means "to set apart for a certain purpose, or for one's self").

This definition was deeply entrenched. The words "appropriation" and "to appropriate" derived from a Middle English predecessor, "appropre," which likewise meant "to set apart for a special purpose." *Oxford English Dictionary* (3d ed. 2014). Ultimately, these terms all trace to a Latin word combining "ad" (conveying the idea of "rendering") with "proprius" (conveying the idea of "own"). *See id.*

Thus, from its earliest roots to the present, to "appropriate" has always meant "to set apart for or assign to a particular purpose or use." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/appropriate. By requiring Treasury withdrawals to be "in Consequence of Appropriations made," U.S. Const. art. I, § 9, cl. 7, the Framers simply required that they have previously been "consign[ed] to some particular use," Johnson, *supra*.

The Clause also demands that such designations of purpose be "made by Law." U.S. Const. art. I, § 9, cl. 7. Those words can refer only to one thing: enacting legislation under Article I, Section 7. Many constitutional provisions permit specific actions to be authorized only "by Law." None requires anything more than the ordinary steps needed for a bill to "become a Law." U.S. Const. art. I, § 7, cl. 2; *see, e.g.*, *id.* § 2, cl. 3 (manner of enumerating census); *id.* § 4, cl. 1 (time, place, and manner of elections); *id.* § 4, cl. 2 (day for annual congressional assembly); *id.* § 6, cl. 1 (congressional salaries); *id.* art. II, § 1, cl. 6 (presidential succession);

id. § 2, cl. 2 (officers of the United States); *id.* (appointment of inferior officers); *id.* art. III, § 2, cl. 3 (place of trial for crimes not committed within any state).

Apart from satisfying the usual requirements for legislation—no small hurdle—the Clause imposes no special procedural rules on laws appropriating money. By contrast, the Constitution requires unique procedures for many other types of legislative action. Bills to raise revenue must "originate in the House." *Id.* art. I, § 7, cl. 1. So must impeachments. *Id.* § 2, cl. 5. Convictions must take place in the Senate, *id.* § 3, cl. 6, as must the approval of appointments and treaties, *id.* art. II, § 2, cl. 2. Supermajorities are needed to propose constitutional amendments, *id.* art. V, convict on impeachment, *id.* art. I, § 3, cl. 6, expel congressmembers, *id.* § 5, cl. 2, and approve treaties, *id.* art. II, § 2, cl. 2. Specially tailored procedures govern resolution of Electoral College run-offs. *Id.* art. II, § 1, cl. 3; *id.* amend. XII.

Unlike all of these measures, appropriations must simply be approved "by Law." *Id.* art. I, § 9, cl. 7. This was a conscious choice by the Framers, who deliberately decided against imposing any unique demands on appropriations legislation. Indeed, the only substantive change they made to the Appropriations Clause throughout the Constitutional Convention was to *eliminate* rules that would distinguish appropriations from other types of legislation. *See infra* Part I.B.3.

Without discussing any of this, the Fifth Circuit decided that "an *appropriation*" must be separate from "enabling legislation." Pet. App. 38a. But the very first federal agency, and many since, have departed from that approach, *see infra* Part II, and nothing in the Clause's text requires it.

Nor does the Clause impose any limits on the duration of appropriations legislation. The Constitution disallows "perpetual funding," Cert. Opp. 15, in only one context: "no Appropriation of Money . . . [t]o raise and support Armies . . . shall be for a longer Term than two Years." U.S. Const. art. I, § 8, cl. 12. That express limit would be superfluous if the Appropriations Clause already imposed a "temporal limitation," Cert. Opp. 15, on all appropriations. "It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

While the Fifth Circuit found it "anomalous" to depart from "annual appropriations," Pet. App. 33a, the Constitution says nothing about annual funding. It explicitly allows appropriations that fund armies—*the most restricted type of appropriation*—to last for "two Years." U.S. Const. art. I, § 8, cl. 12. For all other appropriations, the Constitution imposes no time limit. Making this unmistakably clear, the very next provision empowers Congress "[t]o provide and maintain a Navy," *id.* cl. 13, with no corresponding time limit.

Respondents concede that "the Constitution does not require that all appropriations be annual" but claim that they cannot last "in perpetuity." Cert. Opp. 20. How long may they last then? And where in the Constitution does one look for that answer? In reality, the "text of the Constitution allows for indefinite appropriations in all contexts other than the army." Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 58 (2017).

Ignoring the text, Respondents and the Fifth Circuit derive unwritten rules from the Appropriations Clause's "salutary aims." Pet. App. 38a. The CFPB's "perpetual funding," they claim, "reverses the baseline

for appropriations" by eliminating any need for "Congress and the President . . . to *agree* to fund the CFPB each year." Cert. Opp. 15 (quotation marks omitted). But where the Founders wished to limit Congress's appropriations power, they did so expressly. Apart from restricting the duration of army funding, they prohibited adjusting a president's salary, U.S. Const. art. II, § 1, cl. 7, and diminishing judges' salaries, *id.* art. III, § 1, during their terms of service. Otherwise, they left congressional discretion complete.

B. Judicial Second-Guessing of Congress's Funding Choices Is at Odds with the Clause's History.

1. The English Development of Legislative Supremacy over Appropriations

Legislative power over appropriations emerged in England as part of the centuries-long struggle for parliamentary supremacy. Traditionally, Parliament was "summoned and dismissed at the King's pleasure," more of "an occasional expedient" than an institution with a "regular place in the mechanism of government." David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, at 162, 38 (9th ed. 1966). Monarchs generally "used Parliament as a means of raising revenues, usually to finance their military adventures." Richard D. Rosen, *Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 31, 28 (1998).

Over time, however, Parliament "began to use [its] revenue-raising authority to exact legislative concessions from the Crown." *Id.* This culminated in "[t]he principle of appropriation," *i.e.*, that funds "granted by Parliament are only to be expended for particular

objects specified by itself." Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time* 620-21 (2d ed. 1880).

Historically, the British monarch was entitled to various sources of "ordinary" revenue, such as rents from crown lands and fines imposed in royal courts. 1 William Blackstone, *Commentaries on the Laws of England* 286, 289 (1791 ed.). Parliament had no say in how "the king's revenue" was spent, and there was no firm distinction "between the national revenue and the king's private pocket money." F. W. Maitland, *The Constitutional History of England* 309, 433 (1908). "[U]nconstrained by the need to consult the representatives of the people," Gerhard Casper, *Appropriations of Power*, 13 UALR L. J. 1, 4 (1990) (quotation marks omitted), English kings generally spent their money on whatever they pleased.

For many kings, that meant war with other European nations. But the crown's "ordinary" revenue often fell short when funding these endeavors. *See* Chafetz, *supra*, at 46. Hence, there developed a second stream of "*extraordinary* revenue," financed by taxes specially levied for the king's use. Blackstone, *supra*, at 306-07.

These grants of "extraordinary" tax revenue required Parliamentary authorization, Keir, *supra*, at 38, and, increasingly, Parliament also "claimed the power to appropriate the supplies granted to the king," "to say that they shall be spent in this or that manner," Maitland, *supra*, at 183-84. Parliament asserted that authority only sporadically until its struggle with the Stuart kings led to a reconfiguration of the British constitution around the principle of parliamentary supremacy.

By the seventeenth century, the king's "ordinary" revenues were insufficient even "to cover the normal costs of royal governance." Chafetz, *supra*, at 47. "In this dilemma, the Crown naturally sought to exploit every source of revenue to which any claim might be asserted," but Parliament objected to these new forms of "non-parliamentary taxation." Keir, *supra*, at 181-82. Increasingly, Parliament and the crown were at loggerheads over finances: The king pressed for legislation authorizing extraordinary revenues, particularly to fund various "foreign policy adventures," Chafetz, *supra*, at 47, but Parliament refused to write a blank check for these campaigns. In response, the king repeatedly dissolved Parliament and attempted to rule without it, Rosen, *supra*, at 34-35, relying on taxes levied "without parliamentary sanction," Maitland, *supra*, at 307. Under Charles I, this cycle "led to the Civil War and, ultimately, to Charles's beheading." Chafetz, s*upra*, at 47.

During the Interregnum, Parliament increasingly managed the national finances itself. Maitland, *supra*, at 309-10. But after the Restoration, the old financial conflicts between crown and Parliament resurfaced. This time, the result was a "profusion of specific appropriations provisions in revenue bills," Chafetz, *supra*, at 48, "appropriating the supplies to specific purposes," Taswell-Langmead, *supra*, at 619. Laws began instructing that "money raised by taxation was appropriated to this purpose and to that." Maitland, *supra*, at 310.[2] Parliament also capped the funds that could be spent on particular activities. *E.g.*, Taxation Act,

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[2] *E.g.*, Taxation Act, 17 Car. 2, c. 1, § 5 (1665); An Act for Raising Moneys, 18 & 19 Car. 2, c. 1, § 33 (1666); Taxation Act, 18 & 19 Car. 2, c. 13, § 6 (1667); Taxation Act, 19 & 20 Car. 2, c. 6, §§ 23-25 (1668).

18 & 19 Car. 2, c. 1, § 31 (1666) ("thirty thousand pounds and no more").

To ensure its instructions were obeyed, Parliament also developed a set of oversight mechanisms. It required the segregation of appropriated funds. Casper, *supra*, at 3 (citing Taxation Act, 18 & 19 Car. 2, c. 1, § 33 (1666)); *see also* Taxation Act, 17 Car. 2, c. 1, § 5 (1665). It penalized the diversion of appropriated money to other purposes. *E.g.*, Taxation Act, 18 & 19 Car. 2, c. 13, § 6 (1667). It imposed elaborate bookkeeping requirements, *e.g.*, Taxation Act, 17 Car. 2, c. 1, § 5 (1665), and it "insisted that the records be open for public inspection," Chafetz, *supra*, at 48; *e.g.*, Taxation Act, 17 Car. 2, c. 1, § 7 (1665); Taxation Act, 18 & 19 Car. 2, c. 1, § 34 (1666). Parliament also appointed independent auditors. *See* Chafetz, *supra*, at 49 (citing Accounts of Public Moneys Act, 19 & 20 Car. 2, c. 1 (1667)); Taswell-Langmead, *supra*, at 622.

Parliament's new assertion of budgetary authority met with continued royal intransigence. This was finally squelched by the Glorious Revolution, after which "[t]he whole basis for the monarchy had transformed." Rosen, *supra*, at 42. "In everything to do with finance the House of Commons was now supreme." George Macaulay Trevelyan, *The English Revolution, 1688–1689*, at 98 (1965 ed.). From that point, "in granting money to the crown," Parliament always "appropriated the supply to particular purposes more or less narrowly defined." Maitland, *supra*, at 433. Notably, the new system did not involve a division between "enabling" and subsequent "appropriations" legislation. Pet. App. 38a. A single law would provide a source of revenue and designate the purpose for which it could be spent.

Parliament also began limiting the duration of its revenue grants. But importantly, it retained total

discretion over whether and when to employ such limits. Some tax revenues were granted annually. *E.g.*, Taxation Act, 1 W. & M., c. 20 (1689). Others lasted several years. *E.g.*, Taxation Act, 2 W. & M., c. 4, § 1 (1690). A few were indefinite. *E.g.*, Taxation Act, 2 W. & M., c. 3 (1690). The choice rested with Parliament alone, specifically with the elected House of Commons. Even on the fraught issue of standing armies, "the British Constitution fixe[d] no limit whatever to the discretion of the legislature," which had "power to make appropriations to the army for an indefinite term." *Federalist No. 41*, *supra*, at 273 (Madison).

Significantly, too, the main reason Parliament often chose short-term funding was to force "the regular calling of parliaments." Chafetz, *supra*, at 51. Unlike the American Congress, which decides for itself when to convene, *see* U.S. Const. art. I, § 4, cl. 2; *id.* amend. XX, § 2, cl. 1 ("at least once in every year"), Parliament still gathered only when summoned by the crown. While the new Bill of Rights exhorted that "parliaments ought to be held frequently," 1 W. & M., sess. 2, c. 2, § 1, cl. 13 (1689), more was needed to ensure that the monarch could not rule without the people's representatives. Thus, "the Commons took good care that after the Revolution the Crown should be altogether unable to pay its way without an annual meeting of Parliament." Trevelyan, *supra*, at 96. Far from being an "obligation," Pet. App. 42a, however, temporary appropriations were a tool used only when Parliament saw fit.

2. The Entrenchment of Legislative Supremacy over Appropriations in Early America

In America, as in England, the appropriations power was regarded as an instrument of legislative

supremacy, giving the people's elected representatives complete discretion over government spending.

"The conflicts between Parliament and the Crown over the power of the purse . . . were replayed in the American colonies in struggles between the royal governors and provincial assemblies." Rosen, *supra*, at 44. The colonial assemblies had an advantage: they wielded the local taxing power, which funded the salaries of the royally appointed bureaucracy. Casper, *supra*, at 5. To control that bureaucracy, "the colonial legislatures self-consciously imitated the British House of Commons in asserting their power of the purse," Paul R. Q. Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 Yale L.J. 838, 841 (1987), "stipulating in tax bills the purposes for which the monies they granted would be used," *id.* at 842.

Exploiting their budgetary authority, legislatures held hostage the salaries of crown-appointed governors, military officers, and judges. *See* Chafetz, *supra*, at 54-55. In 1734, for instance, "the South Carolina House of Commons, angry that the royally appointed chief justice had sided with the royally appointed governor in a dispute with the legislature, provided no salary at all for the chief justice." *Id.* at 54.

By the American Revolution, control over appropriations was firmly established as "a legislative prerogative." Casper, *supra*, at 8. Reflecting the "unquestioned rule" of "legislative supremacy," *id.* at 6, the early state constitutions prevented governors from spending funds "without prior legislative authority," Rosen, *supra*, at 57.

Most accomplished this with an appropriations clause. None of these clauses required that appropriations be time-limited. None distinguished between "enabling" legislation and "appropriations" legislation.

Indeed, none restricted the legislature's discretion in any way. Like the federal provision they inspired, these state precursors required only that spending be authorized by law.

Indeed, the variations in phrasing by which different state provisions imposed the same rule underscores that being "appropriated by law" simply meant being authorized by legislation:

- The governor "shall have power to draw for and apply such sums of money *as shall be voted by the general assembly*." N.C. Const. of 1776, art. 19 (emphasis added).
- The chief magistrate "may draw for such sums of money *as shall be appropriated by the general assembly*." Del. Const. of 1776, art. 7 (emphasis added).
- "[N]o money [may] be drawn out of the public treasury *but by the legislative authority of the State*." S.C. Const. of 1778, art. 16 (emphasis added).
- "No moneys shall be issued out of the treasury . . . but by . . . the governor . . . *agreeably to the acts and resolves of the [legislature]*." Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. 11 (emphasis added).
- The governor "may draw upon the Treasurer for such sums *as may be appropriated by the House of Representatives*." Vt. Const. of 1786, ch. 2, § 11 (emphasis added).

These provisions all meant the same thing, and nothing more: withdrawing money from the treasury required authorization "by the legislative authority of the State." S.C. Const. of 1778, art. 16.

3. The Adoption of the Appropriations Clause

"By 1787, the power of the purse was uniformly recognized as legislative, not executive, in character," Rosen, *supra*, at 64, and the Appropriations Clause was "wholly uncontroversial at the Constitutional Convention," Chafetz, *supra*, at 56. The Clause was proposed in language closely resembling its final form. The Framers made only one fundamental change—ensuring that appropriations legislation would not be subject to any special procedures distinguishing it from other legislation.

Initially, the Appropriations Clause was linked with the Origination Clause, which required bills raising *or* appropriating money to originate in the House of Representatives, without Senate alteration: "all Bills for raising or appropriating money . . . shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second Branch—and . . . no money shall be drawn from the public Treasury but in pursuance of appropriations to be originated by the first Branch." 1 *The Records of the Federal Convention of 1787*, at 524 (Max Farrand ed., 1911); *see* 2 *id.* 14 (approval of this language); 2 *id.* 178 (slight modifications made by committee of detail).

Ultimately, however, the Framers decided not to give the House exclusive authority over appropriations. *See* 2 *id.* 280 (rejecting proposal). The Appropriations Clause was then severed from the Origination Clause, 2 *id.* 505-06, and its language modified accordingly, taking its final form: "All bills for raising revenue shall originate in the House of Representatives; and shall be subject to alterations and amendments by the Senate. No money shall be drawn from the Treasury but in consequence of appropriations made by law." 2 *id.* 552.

Thus, the only substantive change made to the Clause was to eliminate any special rules differentiating the approval of appropriations from other legislation. Treasury withdrawals would simply need to be authorized "by law." *Id.*

The debates surrounding the Constitution confirm that this was the original understanding of the Clause. Like its English and American predecessors, the Clause was meant to check executive power by giving the legislature complete control over payments from the Treasury. Its single command was that spending must be authorized by Congress. And it imposed no constraints on Congress's choices.

That is why, as Edmund Randolph explained, the new office of the president need not be feared: "He can handle no part of the public money except what is given him by law." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 201 (Jonathan Elliot ed., 1836). George Nicholas similarly emphasized that the people's legislative representatives would have total control over federal spending: "Any branch of government that depends on the will of another for supplies of money, must be in a state of subordinate dependence, let it have what other powers it may." 3 *id.* 17.

Advocates of the new Constitution consistently described the Appropriations Clause as protecting liberty by securing congressional supremacy over expenditures: "there can be no regulation more consistant with the Spirit of Economy and free Government [than] that it shall only be drawn forth under appropriation by Law." 3 *Farrand's Records* 149 (McHenry). As James Madison observed, "the legislative department alone has access to the pockets of the people," giving it "a prevailing influence" and fostering "dependence" on Congress in "the other departments."

Federalist No. 48, *supra*, at 334; *see* 3 *Elliot's Debates* 393 (Madison) ("The purse is in the hands of the representatives of the people. They have the appropriation of all moneys."). Charles Pinckney likewise stressed that "the appropriations of money, and consequently all the arrangements of government," would rest with the people's elected representatives: "With this powerful influence of the purse, they will be always able to restrain the usurpations of the other departments." 4 *Elliot's Debates* 330.

The Appropriations Clause, in short, would not restrain Congress—it would enable Congress to restrain the other branches. The Founders all agreed that "the purse-strings should be in the hands of the Representatives of the people." 2 *Farrand's Records* 274 (Mason). They differed only about whether to further confine that authority to "the *immediate* representatives of the people" in the House of Representatives. 2 *id.* 278 (Dickinson) (emphasis added).

The Founders certainly never suggested that courts would override Congress's choices about the scope or duration of appropriations. "The judiciary[,] on the contrary," was to have "no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society." *Federalist No. 78*, *supra*, at 523 (Hamilton). James Wilson explained that "the purse was to have two strings," not three, that "must concur in untying," one in the House and the other in the Senate. 2 *Farrand's Records* 275. More generally, Hamilton noted while discussing the power to authorize standing armies that "[t]he principles which had taught us to be jealous of the power of an hereditary monarch" should not "by an injudicious excess [be] extended to the representatives of the people in their popular assemblies." *Federalist No. 26*, *supra*, at 166-67.

Because the Appropriations Clause set forth a simple, uncontroversial command, it was invoked during the ratification debates mainly to emphasize its value as a bulwark against the possibility of "a tyrannical president." Chafetz, *supra*, at 57. Discussions about separating the "purse" from the "sword" focused overwhelmingly on that specific military concern. *E.g.*, 1 *Farrand's Records* 144 (Mason); 2 *Elliot's Debates* 349 (Hamilton); 2 *id.* 375 (Lansing); 4 *id.* 93 (Goudy); 4 *id.* 114 (Spaight); 4 *id.* 258 (Pinckney).

Echoing the Founders, early treatises described the Appropriations Clause as a legislative check on executive power—not a judicial check on legislative power. As St. George Tucker put it, the Clause was "a salutary check . . . upon the extravagance, and profusion, in which the executive department might otherwise indulge itself," preventing the executive from spending funds "as he thinks proper." *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States* 362 (1803). Joseph Story found the Clause's purpose "apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money." Story, *supra*, at 213. Because taxes are "raised from the people" to fund government endeavors, their representatives in Congress have "the power to decide, how and when any money should be applied for these purposes." *Id.*

What did Congress need to do to exercise this power? Simply designate the purpose of any Treasury withdrawals "by Law." U.S. Const. art. I, § 9, cl. 7. "In other words, before money can legally issue from the Treasury for any purpose, there must be a law authorising an expenditure and designating the object and the fund." Hamilton, *Explanation*, *supra*. "The public security is complete in this particular if no money can

be expended but for an object, to an extent, and out of a fund, which the laws have prescribed." *Id.*

II. Congress Has Authorized Self-Funding and Indefinite Appropriations Since the Founding.

The Fifth Circuit called it "novel" and "anomalous" to give a powerful agency "perpetual funding" in its enabling statute, to finance the agency "from a source that is itself outside the appropriations process," and to allow its leader to set the agency's budget within a statutory cap. Pet. App. 33a, 35a. These claims are belied by the nation's earliest laws, "contemporaneous and weighty evidence of the Constitution's meaning." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (quotation marks omitted).

A. The Customs Service

Foreign trade was vital to the Founding-era economy and offered the only plausible means of repaying the nation's post-war debts. When Congress first convened in 1789, therefore, its "first order of business" was "a comprehensive program of import and tonnage duties." Aaron T. Knapp, *From Empire to Law: Customs Collection in the American Founding*, 43 Law & Soc. Inquiry 554, 565 (2018). But the "unprecedented depth and scope" of this regime demanded "an enforcement program unlike anything eighteenth-century Americans had ever seen." *Id.* at 565. So before Congress even created the Treasury or War Departments, it established the Customs Service—a vast network of officials who enforced these new duties. *See* Act of July 31, 1789, ch. 5, 1 Stat. 29.

By 1792, the Customs Service "far surpassed any other civil establishment," with nearly 500 officials. Carl E. Prince & Mollie Keller, *The U.S. Customs Service: A Bicentennial History* 37 (1989). "The custom

house became the most visible icon of federal governance in American culture," and "customs revenue almost singlehandedly funded the federal government." Gautham Rao, *National Duties: Custom Houses and the Making of the American State* 6 (2016).

This regulatory behemoth had a permanent, self-funding revenue stream. For sixty years, "Congress made no annual appropriations for [its] expenses." Laurence F. Schmeckebier, *The Customs Service: Its History, Activities, and Organization* 17 (1924). Instead, customs collectors received fees for transactions like issuing permits, along with a percentage of the duties raised at their ports. Act of July 31, 1789, § 29, 1 Stat. at 44-45. After paying salaries and expenses, *see id.*, they deposited any balance into the Treasury, *id.* § 9, 1 Stat. at 38; *see* Schmeckebier, *supra*, at 17. Collectors also kept half of any "penalties, fines and forfeitures" they helped recover. *Id.* § 38, 1 Stat. at 48.

Congress left this funding system in place until 1849, when it substituted Treasury payments for retention of fees. *See* Act of Mar. 3, 1849, ch. 110, § 1, 9 Stat. 398, 398. Even then, Congress opted for permanent—not annual—appropriations. *Id.* § 4, 9 Stat. at 398-99. That persisted into the twentieth century. *See* Schmeckebier, *supra*, at 17-18; Act of Aug. 24, 1912, ch. 355, 37 Stat. 417, 434 (repealing the Service's "permanent appropriation").

Like the CFPB, therefore, the Customs Service was funded through "mere enabling legislation." Pet. App. 38a. That funding came "from a source that [was] itself outside the appropriations process," Pet. App. 35a, namely, duties, fees, and fines. And thanks to its "perpetual funding mechanism," Pet. App. 33a, customs officials did not need "to come 'cap in hand' to the

legislature at regular intervals," *All Am. Check Cashing*, 33 F.4th at 232 (Jones, J., concurring).[3]

The Customs Service also wielded immense authority, including "core executive powers." Cert. Opp. 1. Its officials seized vessels and goods, *see* Act of July 31, 1789, § 12, § 15, § 22, § 24, § 26, boarded ships to inspect their books and cargo, *id.* § 5, § 24, and opened packages on suspicion of fraud, *id.* § 23, all without warrants. They decided whether ships could unload or leave port. *Id.* § 12, § 14. They searched homes and commercial premises. *Id.* § 24. And they initiated prosecutions to recover penalties for legal violations. *Id.* § 20, § 36; *see* 1 Stat. at 36-43, 47-48. They also had wide discretion in how they implemented the laws. *See* Rao, *supra*, at 12-13. "On occasion, a collector might make ad hoc national policy from his customhouse." Prince & Keller, *supra*, at 38.

As Treasury Secretary, Alexander Hamilton supervised the Customs Service, chiding collectors for any "lack of vigilance." U.S. Customs Service, *A History of Enforcement in the United States Customs Service, 1789–1875*, at 15 (1988). Neither he nor the First Congress seems to have regarded an "expansive executive agency . . . exempt from budgetary review" and "headed by a single Director removable at the President's pleasure" as an "abomination." Pet. App. 37a (citing 2 *The Works of Alexander Hamilton* 61 (Henry Cabot Lodge ed., 1904)).

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[3] While the underlying import duties were originally set to expire in seven years, Act of July 4, 1789, ch. 2, § 6, 1 Stat. 24, 27, they never lapsed, and the underlying tonnage duties were indefinite from the start, Act of July 20, 1789, ch. 3, § 4, 1 Stat. 27, 28.

B. Revenue Officers

"Near the end of its term, the First Congress adopted a major new piece of tax legislation," which imposed excise duties "on spirits distilled within the United States." Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1296 (2018); *see* Act of Mar. 3, 1791, ch. 15, 1 Stat. 199. To enforce the nation's "first internal tax," Brenda Yelvington, *Excise Taxes in Historical Perspective*, in *Taxing Choice* 31, 32 (William F. Shughart ed., 1997), Congress created a new bureaucracy, to be led by revenue supervisors and as many inspectors as the president "shall judge necessary." Act of Mar. 3, 1791, § 4, 1 Stat. at 200.

Congress did not finance this regulatory apparatus through annual appropriations, but rather gave it an indefinite source of funding in the legislation that created it. And notably, Congress left it up to the president to decide how much funding the revenue officers should receive—authorizing him, "from time to time, to make such allowances to the [officers] for their respective services in the execution of this act, to be paid out of the product of the said duties, as he shall deem reasonable and proper." *Id.* § 58, 1 Stat. at 213.

Congress merely set an upper cap, specifying that such compensation could not exceed seven percent of the taxes raised, or $45,000 annually, "until the same shall be further ascertained by law." *Id.*; *see also id.* § 44, 1 Stat. 209 (additionally entitling officers to half of any penalties and forfeitures they helped recover). The excise tax, which was earmarked for repayment of the national debts, would "continue to be collected and paid" until those debts were "fully discharged." *Id.* §§ 61-62, 1 Stat. 213-14.

In short, the First Congress provided the revenue officers, in their enabling legislation, with an indefinite funding stream independent of Treasury withdrawals. The amount used was left to executive discretion, subject only to an upper cap. *Cf.* 12 U.S.C. § 5497(a), (e) (same structure for the CFPB).

No one seems to have objected to this funding mechanism. This was not because the legislation was uncontroversial—it "triggered apocalyptic protests" over the revenue officers' immensely broad search powers. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602–1791, at 743 (2009). One congressman declared that it would "let loose a swarm of harpies . . . prying into every man's house and affairs." 2 Annals of Cong. 1844 (1791). The tax itself was so hated that it ultimately led to the Whiskey Rebellion.

Despite that, Congress imposed excise taxes on additional goods throughout the 1790s. Charlotte Crane, *Pennington v. Coxe: A Glimpse at the Federal Government at the End of the Federalist Era*, 23 Va. Tax Rev. 417, 419-20 (2003). Although these taxes "were extremely unpopular," Yelvington, *supra*, at 35, no one blinked an eye at Congress's choice to enforce them through indefinitely self-funded officers, operating under a capped budget otherwise left to executive discretion.

C. The Post Office

In 1792, Congress established a new Post Office. Instead of relying on annually appropriated Treasury withdrawals, Congress empowered the Office to pay its expenses out of its revenue. *See* Act of Feb. 20, 1792, ch. 7, §§ 3, 8, 1 Stat. 232, 234-35. Among other things, the Postmaster General was authorized to pay

postmasters whatever commissions "he shall think adequate," within an upper cap. *Id.* § 23, 1 Stat. at 238.

To protect the new Post Office from "market forces," Cert. Opp. 22, Congress criminalized the establishment of competing services. *See* Act of Feb. 20, 1792, § 14, 1 Stat. at 236. Although this legislation was initially temporary, *see id.* § 30, 1 Stat. at 239, Congress made it permanent two years later. *See* Act of May 8, 1794, ch. 23, § 29, 1 Stat. 354, 366. Thus, yet another pillar of the early nation's executive bureaucracy had a perpetual, self-sustaining funding stream.

By Andrew Jackson's presidency, the Post Office employed three-quarters of the government's civilian workforce. Winifred Gallagher, *How the Post Office Created America: A History* 68 (2016). "Various attempts were made to put a check upon the Postmaster General by requiring him to pay over all receipts from postage to the Treasury" and rely exclusively on annual appropriations instead. Wesley Everett Rich, *The History of the United States Post Office to the Year 1829*, at 150 (1924). "This plan was rejected each time it was proposed, on the ground that it would hamper the Office too greatly." *Id.*

D. Other Legislation

In 1798, Congress again authorized what the Fifth Circuit found unthinkable: "a 'permanently available' endowment 'without any further act of Congress.'" Cert. Opp. 15 (quoting Pet. App. 35a). Under new legislation, American ship owners deducted and paid the government a portion of their employees' wages, which the president used for the "relief and maintenance of sick or disabled seamen." Act of July 16, 1798, ch. 77, §§ 1-3, 1 Stat. 605, 605-06. Any surplus funds could be "invested in the stock of the United States, under the direction of the President," and, "when, in his opinion,

a sufficient fund shall be accumulated," spent on hospital facilities. *Id.* § 4, 1 Stat. at 606; *see also* Act of May 3, 1802, ch. 51 § 1, 2 Stat. 192, 192 (providing that the surplus "shall constitute a general fund, which the President . . . shall use and employ as circumstances require"); *cf.* Pet. App. 35a-36a (castigating the CFPB's ability to "roll over" its funds "*ad infinitum*" into a "separate fund" under "the control of the Director").

In adopting such funding structures, Congress did not cede control: it later modified this arrangement, Act of June 29, 1870, ch. 169, § 1, 16 Stat. 169, 169, then replaced it with a different standing appropriation, Act of June 26, 1884, ch. 121, § 15, 23 Stat. 53, 57, and eventually switched to annual appropriations, Act of Mar. 3, 1905, ch. 1484, 33 Stat. 1214, 1217.

From the eighteenth century onward, laws providing self-funding or permanent appropriations continued to proliferate. *E.g.*, Act of Apr. 2, 1792, ch. 1, § 14, 1 Stat. 246, 249 (indefinitely funding national Mint primarily through fees); Act of June 26, 1812, ch. 107, § 17, 2 Stat. 759, 764 (permanent relief fund for widows, orphans, and disabled privateers); Act of July 4, 1836, ch. 357, § 9, 5 Stat. 117, 121 (indefinitely funding Patent Office through fees); Act of Aug. 10, 1846, ch. 178, § 5, 9 Stat. 102, 104 (permanent endowment from James Smithson bequest); Act of Feb. 9, 1847, ch. 7, 9 Stat. 123, 123 (permanent appropriation for interest on national debt); Act of Feb. 28, 1871, ch. 100, § 66, 16 Stat. 440, 458 (indefinitely funding Steamboat-Inspection Service through fees); Act of Feb. 19, 1875, ch. 89, 18 Stat. 329, 329-30 (indefinitely funding Office of the Comptroller of the Currency through bank assessments).

By the 1840s, "permanent and indefinite appropriations" already made up a significant chunk of the national budget ($2.5 million). Report from the Secretary

of the Treasury, on the State of the Finances, 28th Cong., 1st Sess. 5-6 (Dec. 6, 1843). By 1880, more than 130 active statutes involved "permanent and indefinite appropriations." S. Rep. No. 334, 46th Cong., 2d Sess., at 4-8 (1880) (listing statutes).

Congress has always been capable of rescinding such funding—and has often done so. In 1912, it withdrew the Customs Service's longstanding "permanent appropriation," Act of Aug. 24, 1912, 37 Stat. at 434, after determining that it would be better to require "a detailed statement of estimates each year," Hearings Before Subcomm. of House Comm. on Appropriations in Charge of Permanent Appropriations 11 (Mar. 5, 1910). But the very next year, Congress rejected that model for the Federal Reserve Board, allowing it twice annually to request from federal reserve banks "an assessment sufficient to pay its estimated expenses." Act of Dec. 6, 1913, ch. 6, § 10, 38 Stat. 251, 261.

These are political choices, entrusted to the discretion of the people's elected representatives. When Congress decides that an agency should have self-funding or indefinite appropriations, it is not ceding the power of the purse. It is exercising it.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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