

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

**BRIEF OF *AMICI CURIAE* LAWYERS'
COMMITTEE FOR CIVIL RIGHTS UNDER
LAW, HOUSING CLINIC OF JEROME N.
FRANK LEGAL SERVICES ORGANIZATION
AT YALE LAW SCHOOL, LEADERSHIP
CONFERENCE ON CIVIL AND HUMAN
RIGHTS, NATIONAL FAIR HOUSING
ALLIANCE, UNIDOSUS, ET AL.
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

The *amici curiae* joining this brief are civil rights and racial justice organizations and a law school clinic committed to protecting low- and moderate-income people of color from discrimination and predatory financial practices. They therefore have an interest in this Court's decision on the constitutionality of the Consumer Financial Protection Bureau's (CFPB) steady and reliable funding structure, which is integral to its enforcement of federal consumer protection laws. The civil rights community relies upon the CFPB, particularly through its enforcement of the Equal Credit Opportunity Act (ECOA), as a key partner in the ongoing work of securing financial opportunity and shared economic progress, including for communities of color.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee)² is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to secure equal justice for all through the rule of law, targeting in particular the inequities confronting Black Americans and other

¹ Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

² The Lawyers' Committee includes the following independent affiliates: The Washington Lawyers' Committee for Civil Rights and Urban Affairs; Lawyers' Committee of Civil Rights Under Law of the Boston Bar Association; The Chicago Lawyers' Committee for Civil Rights Under Law, Inc.; Colorado Lawyers' Committee; Mississippi Center for Justice; Public Counsel, Los Angeles, California; Public Interest Law Center of Philadelphia; and Lawyers' Committee for Civil Rights of the San Francisco Bay Area.

people of color. The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee has for decades sought to protect consumers from financial frauds and scams, including in partnership with the CFPB and other financial regulatory agencies that joined the Lawyers' Committee-led Loan Modification Scam Prevention Network in the wake of the 2008 foreclosure crisis. The CFPB's work and partnership is crucial to the Lawyers' Committee's goal of preventing discrimination in the housing market and other credit markets that affect access to educational and economic opportunity.

The Housing Clinic of the Jerome N. Frank Legal Services Organization at Yale Law School is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to people who cannot afford private counsel. Many of the Clinic's clients face unfair and deceptive practices from actors subject to CFPB activity. The CFPB has assisted the Clinic's clients by preventing these practices and providing both redress and avenues for redress for violations of consumer protection law.³

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of over 230 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and

³ Amicus briefs filed by a legal clinic affiliated with Yale Law School do not represent any institutional views of Yale Law School or Yale University.

human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the National Association for the Advancement of Colored People; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. One of the missions of The Leadership Conference is to promote effective civil rights legislation and policy. The Leadership Conference was in the vanguard of the movement to secure passage of the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965 and its subsequent reauthorizations, and the Fair Housing Act of 1968.

The National Fair Housing Alliance (NFHA) is a nonprofit corporation that represents a consortium of 227 private, nonprofit fair housing organizations, state and local civil rights agencies, and individuals. NFHA is dedicated to ending housing segregation and ensuring equal housing opportunities for all people. NFHA and its members engage in efforts to end segregation and ensure equal housing opportunities through leadership, education and outreach, membership services, public policy initiatives, advocacy, community development, and enforcement. On the front line in the fight against housing discrimination, NFHA and its members regularly rely on the CFPB to protect individuals from discrimination and predatory behavior by lenders and other financial institutions. NFHA was one of the key leaders that worked to create the CFPB after the housing crisis of 2008 impacted communities of color and triggered the Great Recession, resulting in a loss of wealth for Blacks and Latinos. Because of the impact of the crisis, NFHA played a leading role in developing the CFPB's Office of Fair Lending and Equal Opportunity.

UnidosUS (formerly National Council of La Raza) is a nonprofit, nonpartisan organization that serves as the nation's largest Latino civil rights and advocacy organization. Since 1968, Unidos has identified and challenged the social, economic, and political barriers that affect Latinos through expert research, advocacy, programs, and an Affiliate Network of nearly three hundred community-based organizations. Unidos supported the creation of the CFPB to address the needs of Latino consumers for trustworthy financial services and products, including the decision of Congress to establish the Bureau with a durable and stable funding mechanism.

These five groups are joined by additional civil rights and racial justice organizations identified in Appendix A.

SUMMARY OF ARGUMENT

Congress created the CFPB at the height of, and in response to, a foreclosure crisis that devastated Black and Latino communities across the country. The CFPB is the federal government's most meaningful attempt in generations to protect these consumers, and all low- and moderate-income people, from financial wrongdoing. Congress chose an appropriate funding mechanism for the CFPB that would enable the agency to address the aftermath of the financial crisis and to prevent similar such crises in the future. The stable means of funding Congress set out in law was, and is, a constitutionally valid choice grounded in Congress's knowledge of events contributing to the crisis, the long track record of similarly funded regulators, and the plain text of the Constitution's Appropriations Clause. Because the CFPB plays an important role in supporting consumer-related advocacy, a holding that the CFPB's funding mechanism is

unconstitutional would harm consumers, including lower-income consumers and consumers of color, who are disproportionately at risk from unreliable, unsafe, or discriminatory financial products.

When it was formed in 2011, the CFPB inherited many of its powers from financial regulators that had previously been tasked with a range of responsibilities, including prohibiting discriminatory practices in access to credit, providing for transparency in financial instruments, and requiring data collection on home mortgages. Congress first became engaged in efforts to address the health and safety of our economy and promote trust in financial instruments in the early twentieth century, providing steady funding for many of these agencies to ensure stable oversight of the financial sector, including consistent and predictable compliance burdens. Following the height of the Civil Rights movement in the 1960s, Congress created additional legislative authorities to ensure that consumers, including consumers of color, would be able to trust financial transactions and have access to fair and nondiscriminatory financial services and products.

The subprime mortgage foreclosure crisis of the mid-to-late 2000s showed Congress that a lack of cohesion across these responsibilities could threaten the global economy and endanger consumer trust, giving rise to the Bureau as a dedicated consumer protection agency for the financial marketplace. To undergird these authorities, Congress maintained the underlying budgetary model that had characterized its predecessor financial regulatory agencies for nearly a century.

The Bureau's mission remains vital. Throughout U.S. history, consumers of color have been subjected to racial discrimination in home mortgages and in systems of consumer credit across automobile lending,

student loans, and more. Such practices have harmfully diminished access within communities of color to favorable credit terms and exposed them to predatory credit products. The racial discrimination—much of it state-sanctioned—that inspired the statutes the CFPB now oversees remains pervasive today. Whether those laws prohibit discrimination or predatory practices, without their protections enforced by the CFPB, people of color would be disproportionately harmed by a weakened regulatory regime.

The CFPB is integral to the federal government’s efforts to counteract discriminatory practices and thereby ensure a fairer marketplace for all people. Its important work rests upon its ability to advance its mission in a steady and consistent manner, as Congress correctly decided. A decision to invalidate the CFPB’s funding structure on constitutional grounds would be harmful to all consumers, including millions of low- and moderate-income consumers of color who are disproportionately impacted by unfair and discriminatory financial practices. Accordingly, *amici* urge reversal of the decision below.

ARGUMENT

I. The CFPB’s funding structure is consistent with the Appropriations Clause, and the Bureau’s mission and funding structure demonstrate continuity with prior agencies and their funding structures.

Over the past century, Congress has enacted many bills that formed a complex framework of civil rights and consumer protection legislation, tasking a host of regulatory agencies with enforcing these statutes. Many of these agencies were, and still are, funded with a “permanent” appropriations mechanism, albeit one that can always be altered by an act of Congress and

that may be, as the CFPB's is, subject to a spending cap. In creating the CFPB, Congress centralized some of this previously dispersed authority over consumer protection laws to more effectively enable regulation of the safety and fairness of financial products. In clear recognition of that structure's importance for the creation and maintenance of complex, long-term financial rules, Congress also maintained the traditional budgetary structure of the Bureau's predecessor agencies. This permanent funding mechanism is crucial to the CFPB's continued ability to promote financial stability and to address discrimination in the financial marketplace. The Bureau's funding structure, like that of its predecessors, is consistent with the text of the Appropriations Clause, which merely requires that Congress specify the funding mechanism and identify its purpose.

A. Congress has the power to create permanently funded financial regulators, consistent with the Appropriations Clause.

In the decision below, the U.S. Court of Appeals for the Fifth Circuit erred in concluding that the Appropriations Clause bars Congress from structuring the CFPB's funding in its chosen manner. *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 638-42 (5th Cir. 2023). That decision failed to grapple with the basic text of the Appropriations Clause, which states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The CFPB's funds are unambiguously distributed to the Bureau "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7; see *Cincinnati Soap Co. v. United States*, 301 U.S. 308,

321 (1937) (affirming that appropriations must be made by an “act of Congress,” but not requiring any special procedure for the passage of that act); *see also Ring v. Maxwell*, 58 U.S. 147, 148 (1854).

Specifically, in the context of the Appropriations Clause, the Constitution does not require use of one specific process—the annual appropriations process—as the only means for Congressionally authorized spending. Indeed, the Framers could not possibly have intended to constitutionalize that process, given that Congress did not create it until the years following the U.S. Civil War. Instead, the plain meaning of the phrase “Appropriations made by Law” is simply that expenditures must be authorized by Congress through an act of the legislature, constraining the Executive Branch from accessing monies to act on its own initiative in the absence of such authorization from Congress. Under our Constitution, any legislative act that authorizes the expenditure of funds is an appropriation.

This Court’s long-established precedent supports this common-sense interpretation. In *Cincinnati Soap Co.*, the Court determined that Congress’s passage of a statute authorizing the disbursement of funds generated by an import tax, even absent specific instruction on how to distribute the funds, did not disqualify the act from operating as a Congressional appropriation allowed under the Appropriations Clause. 301 U.S. at 321. While the clause was intended to act as a “restriction upon the disbursing authority of the Executive Department,” this restriction required only that it be effectuated by “*an act of Congress*,” and a Congressional authorization made outside the annual appropriations process meets such a requirement. *Id.* at 321 (emphasis added).

The Fifth Circuit’s decision overlooks both this longstanding precedent and the plain meaning of the Appropriations Clause. Under the analysis in *Cincinnati Soap* and related precedent, Congressional enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), suffices as authorization for the funding mechanism of the CFPB.

B. Prior to the passage of civil rights laws, lenders colluded with state actors to discriminate against people of color.

The history of Congressional efforts to prevent predatory practices provides critical context to understand the importance of the CFPB in promoting equity and consumer trust in financial products and services, particularly for consumers of color. Prior to passage of many fundamental civil rights laws, lenders frequently colluded with state actors to discriminate against people of color, including in the housing market.

In the decades prior to the passage of civil rights and fair lending laws in the 1960s and 1970s, public and private-sector discrimination in the housing market drove down the value of homes for people of color while bolstering property values in white communities. As homeownership is a key driver for wealth, the result was a widening racial wealth gap over time. Richard Rothstein, *The Color of Law: A Forgotten History of How our Government Segregated America* 75, 154 (2017) (summarizing the consistent pattern of “[g]overnment[] commitment to separating residential areas by race,” and policies that resulted in “smaller disposable incomes and fewer savings for black families, denying them the opportunity to accumulate wealth”).

Among other practices, this discrimination took the form of “redlining”: a formalized federal policy not to underwrite mortgages or provide other loans for housing production in certain residential areas, in part based explicitly on the racial makeup of those areas. Rothstein, *supra*, at 75 (describing federal government policies of (1) dividing maps of metropolitan areas “into zones of foreclosure risk based in part on the race of their occupants,” and then insuring mortgages for white homeowners who “lived in all-white neighborhoods into which there was little danger of African Americans moving,” and (2) guaranteeing bank loans to developers willing to create all-white suburbs).

Then, in the 1950s and 1960s, while many white families were buying suburban homes through low-cost mortgages subsidized by the Federal Housing Administration (FHA) and the G.I. Bill, predatory contract sellers preyed upon Black families with few other options—many of whom had just migrated to northern cities after World War II. Beryl Satter, *Family Properties: Race, Real Estate, and the Exploitation of Black Urban America* 38-39 (2009). Contract sales, an alternative to traditional mortgage lending, provided the main avenue for Black residents to secure homeownership. These transactions, which are similar to rent-to-own contracts in which buyers pay high monthly installments but lose their entire investment with one missed payment, further exacerbated the inequitable financial terms for entering the homeownership market. Satter, *supra*, at 4-5 (“These sales stripped black migrants of their savings during the very years when whites of similar class background were getting an immense economic boost through FHA-backed mortgages . . .”).

Congress passed the Fair Housing Act in 1968, 42 U.S.C. § 3601 *et seq.*, following President Kennedy's earlier executive order barring housing discrimination in federally funded housing agencies or federally backed mortgages, Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963). Although the CFPB does not enforce the Fair Housing Act, the Act's passage provided a template for the passage of ECOA, which the CFPB does enforce.

These laws curbed, but did not end, discrimination in the housing and mortgage markets. In lieu of traditional redlining, predatory actors devised a new form of discrimination in the late 1960s. Banks began targeting low-income prospective home buyers for risky, subprime mortgage loans, a practice commonly called "reverse redlining." Speculative, unregulated mortgage lenders specifically targeted Black communities: "the captured segregated housing market incentivized market actors to speculate that the poverty and desperation of Black urban residents, especially Black women, would drive them toward the low-income homeownership market." Keeanga-Yamahtta Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* 18 (2019).

Bad actors that target communities of color have never limited their predatory practices to the housing market, and the United States has also long had a dual credit market for many other types of financial products, from automobile loans to credit cards. A vast array of New Deal financial programs expanded access to credit for white Americans, but the politics of the time—with President Roosevelt still beholden to segregationist members of Congress from the South—ensured that Black Americans were almost entirely excluded. Mehrsa Baradaran, *The Color of Money:*

Black Banks and the Racial Wealth Gap 101 (2017). This precipitated the growth of a segregated credit economy, as the era’s “combination of progressive banking reform and regressive racial hierarchy meant that postwar American prosperity was propelled through a mortgage and consumer credit apparatus that was exclusionary.” *Id.* at 103.

As a result, an alternative or “fringe” market for predatory financial products emerged that too often provided the only credit option for many low-income people of color. These products were, and still are, predatory and expensive, destabilizing families and communities through huge financial burdens and rates of default. Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today’s Society*, 51 S.C. L. Rev. 589, 605-10 (2000).

Companies that trade in these and other inferior financial products market them to Black and Latino borrowers at much higher rates than white borrowers. Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 Emory L.J. 483, 494 nn.51-52 (2013). All too often, low-income Black and Latino consumers have had little choice but to use these products to make ends meet due to other obstacles fueled by structural inequality, including inadequate wages and a lack of affordable housing. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 Stan. L. Rev. 1093, 1107 (2019) (“[H]igh-risk, low-income (and often minority) borrowers disproportionately use payday loans to fill in the gaps left by the difference between their cost of living and income . . .”).

As a response to inequities caused by unfair and sometimes discriminatory consumer financial practices,

securing consistent and reliable consumer financial regulation has long been understood to be a racial justice imperative: “Before the press and the nation focused on Martin Luther King’s Civil Rights coalition, activists and community groups were protesting against exploitative credit and exclusionary lending transactions.” Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. Irvine L. Rev. 887, 901 (2019). Thus, the past and present impact of predatory practices provides critical understanding for the CFPB’s importance to consumers of color.

C. Congress relied upon federal agencies that it had created to address the safety and fairness of a host of financial products, including through several laws that the CFPB now enforces. The CFPB’s funding structure originates from a decision by Congress to continue long-standing funding practices that enabled its predecessor federal agencies to address the safety and fairness of financial products.

Starting in the late 1960s, Congress enacted a host of consumer financial protection laws to remedy unfairness and lack of transparency in consumer products and, in some instances, to combat discrimination. These laws include many that the CFPB now enforces, and the federal agencies that Congress tasked with enforcing these laws have funding structures that are analogous to that of the CFPB. Like the CFPB, Congress chose to fund these agencies through sources that are permanent (but nonetheless always subject to change by Congress).

Congress’s choice of funding mechanism was built on longstanding foundations, beginning with the

Progressive Era’s interventions in the private financial market through the creation of the Federal Reserve in 1913, and continuing into the New Deal era’s protections for small depositors through the Federal Deposit Insurance Corporation in 1933. *See* Cong. Rsch. Serv., R44918, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework* 14-15 (2020). Congress was also spurred to action by efforts to protect opportunities for marginalized borrowers. *See* Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 Ga. St. U. L. Rev. 1147, 1151 (2010).

For example, Congress enacted ECOA, Pub. L. No. 93-495, Tit. V, 88 Stat. 1521 (1974), as a cornerstone for the federal government’s efforts to end discrimination in lending. As amended in 1976, ECOA—which is both a civil rights and a consumer protection law—prohibits discrimination with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public benefits, or exercise of rights under the consumer laws. *See* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, sec. 2, § 701(a), 90 Stat. 251. ECOA built on the Fair Housing Act’s foundation by creating an “additional tool” to “proscribe racial redlining” in housing, as well as new protections for people of color in contexts outside housing. *Equal Credit Opportunity Act Amendments and Consumer Leasing Act—1975: Hearings on S. 483, S. 1900, S. 1927, S. 1961 and H.R. 6516 before the Subcomm. on Consumer Affs. of the Senate Comm. on Banking, Hous. & Urb. Affs.*, 94th Cong. 317-19 (1975) (statement of J. Stanley Pottinger, Assistant Att’y Gen., Civil Rights Division, Department of Justice).

A year after ECOA's passage, Congress enacted and President Ford signed into law the Home Mortgage Disclosure Act of 1975 (HMDA), Pub. L. No. 94-200, Tit. III, 89 Stat. 1125, which created recordkeeping, reporting, and public disclosure requirements for mortgage lenders. HMDA was inspired by efforts to expose ongoing "reverse redlining" and redlining practices in communities of color through increased access to home mortgage lending data. See Rebecca K. Marchiel, *After Redlining: The Urban Reinvestment Movement in the Era of Financial Deregulation* 5 (2020). Its passage gave the federal government a powerful new means of unearthing patterns of discrimination and developing the factual basis of lawsuits under the FHA and ECOA. Over time, Congress expanded the Act's mandate to more explicitly collect race and ethnicity data that has "expose[d] profound mortgage lending disparities in this country by race, locale, and income." Patricia A. McCoy, *The Home Mortgage Disclosure Act: A Synopsis and Recent Legislative History*, 29 J. Real Est. Rsch. 381, 392 (2007).

Since the very beginning, agencies funded through "permanent" appropriations outside the annual appropriations process were instrumental to engendering stable expectations for both businesses and consumers through their enforcement of ECOA, HMDA, and other similar consumer protection laws. While the CFPB implements and enforces this portfolio of laws today, this responsibility was originally divided among several different federal agencies.

When ECOA was originally enacted, for example, Congress assigned sole rulemaking authority to the Federal Reserve and split enforcement authority over specific types of institutional creditors among the Federal Reserve and other financial regulators based

on their preexisting jurisdiction.⁴ Equal Credit Opportunity Act §§ 703-04, 88 Stat. 1522-23. Although Congress gave the Federal Trade Commission (FTC) residual authority over all other unenumerated types of creditors, *id.* § 704(c), this division of labor still meant that ECOA's directives would be enforced against a significant portion of the U.S. credit market by the Federal Reserve and other agencies funded outside of the annual appropriations process. *See* Henry Hogue *et al.*, Cong. Rsch. Serv., R43391, *Independence of Federal Financial Regulators: Structure Funding, and Other Issues* 25-27 (2017) (describing these agencies' permanent funding structures). Under HMDA as originally enacted, Congress similarly assigned responsibility for promulgating its implementing regulations to the Federal Reserve and divided up enforcement duties among the same group of financial regulators. Home Mortgage Disclosure Act § 305, 89 Stat. 1124.

Many other consumer statutes enacted during this era followed this same model, beginning with the Truth in Lending Act of 1968 (TILA), which also provides substantive protections that are of particular importance for communities of color often targeted by bad actors that mislead their customers about the cost of credit. *See* Pub. L. No. 90-321, Tit. I, §§ 105, 108, 82 Stat. 148, 148-50 (1968) (allocating rulemaking authority to the Federal Reserve, specific enforcement authority

⁴ These included the Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), and National Credit Union Administration (NCUA). Likewise, the CFPB and the Department of Justice would later enter into a joint memorandum agreeing to share responsibilities in enforcing these laws. *See* Consumer Fin. Prot. Bureau & U.S. Dep't of Just., *Memorandum of Understanding Regarding Fair Lending Coordination* (Dec. 6, 2012).

among the financial regulators, and general enforcement authority to the FTC).

Over and over again, Congress made a considered judgment to assign significant responsibility over its new consumer laws to agencies that were funded through permanent appropriations. *See, e.g.*, Fair Credit Reporting Act, Pub. L. No. 91-508, Tit. VI, § 621, 84 Stat. 1127, 1134-35 (1970); Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 814, 91 Stat. 874, 881-82 (1977); Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, Tit. I, Subtit. B, § 155, 108 Stat. 2190, 2197.

As this history shows, Congress has long relied upon agencies funded in a steady manner outside of the annual appropriations process to play significant roles in the administration of federal consumer financial protection laws. While the legislature can change this any time it likes, as it now stands, the CFPB's use of a permanently authorized funding structure to enforce the laws discussed in this Section is a point of continuity within this lineage and reflects the will of the people's representatives.

D. The CFPB's funding structure is well within the scope of established practice in light of this long tradition of agency powers.

The CFPB is an enforcement agency with the statutory authority and stability to oversee the safety and transparency of the financial products marketplace. Congress recognized that to achieve these goals, it was essential that the federal government "provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace." *About Us: The Bureau*, Consumer Fin. Prot. Bureau, <https://www.consumerfinance.gov/>

about-us/the-bureau (last visited May 11, 2023). Moreover, Congress decided, uncontroversially, that the CFPB's funding mechanism would reflect historical norms for such functions and provide a measure of stability, subject to any ongoing Congressional oversight and amendments. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 44 (2010).

When Congress established the CFPB as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, it sought to protect consumers from unfair, deceptive, and abusive practices. 12 U.S.C. § 5511(b)(2). The housing bubble and ensuing financial crisis forced Congress to confront these problems when widespread predatory practices in the mortgage market caused foreclosures to spike, thereby exposing holders of mortgage-backed securities to significant losses. S. Rep. No. 111-176, at 2 (2010) (attesting to the fact that the Dodd-Frank Act was a “direct and comprehensive response to the financial crisis” that devastated the U.S. economy). Financial experts testified that inadequate government oversight and a splintered regulatory framework contributed to the unraveling of the American financial system and allowed for the crisis to unfold as it did. *Id.* at 2-3. Congress noted that “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 . . . led to what has become known as the Great Recession.” *Id.* at 9. Notably, due to predatory marketing and their exclusion from prime markets, households of color were far more likely to borrow money using these unsafe and abusive credit instruments. *Id.* at 14-15. When the financial crisis began, these households were among the hardest hit.

In response, Congress centralized authority for the enforcement of many consumer protection laws in the CFPB, eliminating the “conflicting regulatory missions, fragmentation, and regulatory arbitrage” that plagued the prior system and hastened the destabilization of the American financial system. *Id.* at 10. This decision was aimed both at ensuring overall financial stability and improving the fairness and transparency of financial products. *Id.* at 23-25.

Congress also ensured that the CFPB retained the budgetary structure that had been an important aspect of previous enforcement regimes. Financial regulators like the Federal Reserve, OCC, and the Public Corporation Accounting Oversight Board all had permanent funding mechanisms that engendered steadiness and predictability (though all remained subject to subsequent amendments by Congress to their authorities or funding). Barkow, *supra*, at 44. As Congress recognized when it designed the CFPB, budgetary stability helps ensure sufficient funding for enforcement of complex and long-term regulatory initiatives. *Building the CFPB: A Progress Report*, Consumer Fin. Prot. Bureau 26 (2011), https://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf.

II. The CFPB plays an essential role in combating predatory and discriminatory practices.

The Fifth Circuit’s decision in this case calls into question the CFPB’s authority to take *any* future action. A nonexistent or less-effective CFPB would not only threaten economic stability, as the Bureau plays a key role in protecting the long-term health of the financial sector, but also undermine the CFPB’s work that advances equal participation in the financial system by people of color.

The CFPB is one of the key federal actors tasked with protecting the rights of individuals to be free from racial discrimination and predatory behavior at the hands of lenders and other financial institutions throughout the economy. Its steadfast efforts to curb racially discriminatory lending and other unlawful consumer practices help, as Congress intended, to advance important civil rights goals, as well as the interest of consumers in being free from unfair and deceptive practices, and the stability of the economy writ large.

A. The CFPB’s enforcement of ECOA and FCRA protects homeowners and renters of color from discrimination.

More than fifty years after the passage of the Fair Housing Act, discrimination is still rampant in the housing market. Biased mortgage lending permeates the industry and disproportionately harms Black and Latino homeowners and applicants. A 2021 Brookings Institute report identified substantial differences in mortgage lending approval rates by race: based on data collected under HMDA, “mortgage lending applications of Black American borrowers are two to three times more likely to be denied.” Kristen Broady, Mac McComas & Amine Ouazad, *Report: An Analysis of Financial Institutions in Black-Majority Communities: Black Borrowers and Depositors Face Considerable Challenges in Accessing Banking Services*, Brookings Inst. (Nov. 2, 2021), <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services>.

The CFPB addresses unlawful racial discrimination in mortgage lending both through enforcement and

rulemaking. For example, in 2016, the CFPB and the U.S. Department of Justice (DOJ) sued a Memphis-area mortgage lender called BancorpSouth for racially discriminatory redlining, charging that the company had avoided supplying mortgages to residents of majority-Black neighborhoods. Complaint at 2, *United States v. BancorpSouth Bank*, No. 16CV00118 (N.D. Miss. June 29, 2016). BancorpSouth agreed to pay over \$10 million after the CFPB and DOJ’s investigation revealed that—in addition to siting branches and targeting marketing activity outside of Black neighborhoods—the company had (1) unlawfully denied certain mortgage loans to Black customers, (2) overcharged some of its Black customers, and (3) when presented with undercover testers inquiring about obtaining a mortgage, consistently treated Black testers worse than white testers with comparable credit qualifications. *Id.* at 2-3; Consent Order at 2, 15, 24, 26, 28-29, *BancorpSouth Bank*, No. 16CV00118 (N.D. Miss. July 25, 2016).

In 2021, Trustmark National Bank agreed to pay nearly \$9 million after the CFPB and DOJ brought an enforcement action against the bank for redlining discrimination against Black and Latino families in the Memphis area. Consent Order at 10, 15, *United States v. Trustmark Nat’l Bank*, No. 21CV02664 (W.D. Tenn. Oct. 27, 2021). The CFPB and DOJ alleged that Trustmark’s discrimination “was intentional and willful and was implemented with reckless disregard for the rights of individuals based on their race, color, and national origin,” Complaint at 14, *Trustmark Nat’l Bank*, No. 21CV02664 (W.D. Tenn. Oct. 22, 2021), and their investigation revealed that the bank had avoided siting branches in Black and Latino communities, avoided assigning loan officers to those

communities, and discouraged loan applications from those neighborhoods, *id.*

In 2022, the CFPB and DOJ reached a settlement with Trident Mortgage, a Philadelphia-area mortgage lender alleged to have engaged in intentional racial discrimination. The CFPB and DOJ took enforcement action against Trident as a result of the company's apparent redlining of "majority-minority" neighborhoods and discouraging of loan applications from those areas. Complaint at 2, *Consumer Fin. Prot. Bureau v. Trident Mortg. Co.*, No. 22CV02936 (E.D. Pa. July 27, 2022). Over the course of the Trident investigation, regulators found numerous acts of overt racism on the part of the company, including (1) sharing racist language and messages about people of color, such as emails that contained racial slurs; (2) avoiding sending loan officers to neighborhoods predominantly comprised of people of color; and (3) developing marketing campaigns and advertising materials that discouraged loan applications from residents of those neighborhoods while instead targeting white neighborhoods. *Id.* at 8-13. As part of the settlement order, Trident agreed to pay over \$24 million. *See* Consent Order at 4, 9-10, 13, 16, *Trident Mortg. Co.*, No. 22CV02936 (E.D. Pa. Sept. 14, 2022).

As these examples show, there are still too many instances of home mortgage lenders discriminatorily and unlawfully preventing people of color from realizing the dream of homeownership. Enforcement actions by the CFPB have been critical to address the harms of racial discrimination in this industry and deter unlawful discrimination.

The CFPB also uses its rulemaking powers to monitor and address racially discriminatory mortgage lending practices. The Bureau's Regulation C, issued pursuant

to HMDA, requires many financial institutions to maintain, report, and publicly disclose information about mortgage loans. *See* 12 U.S.C. § 2803(h); 12 C.F.R. §§ 1003.1-6. Public officials can use this data to gauge whether a given community's needs, including the needs of low-income Black and Latino neighborhoods, are being met by mortgage lenders, and in turn, to promote economic stability across communities. HMDA data can also help regulators and private attorneys general identify potentially discriminatory lending patterns. *See Data & Research: Mortgage Data (HMDA)*, Consumer Fin. Prot. Bureau, <https://www.consumerfinance.gov/data-research/hmda> (last visited May 11, 2023).

Additionally, the CFPB plays a vital role in protecting renters from unfair practices. This has significant implications for Black and Latino households, as 56% of Black households and 49% of Latino households rent their homes, compared to just 27% of white households. *American Community Survey 2021 1-Year Estimates, Table B25003B, Tenure (Black or African American Householder Alone)*, U.S. Census Bureau, <https://data.census.gov/table?q=b25003b&tid=ACSDT1Y2021.B25003B> (last visited May 11, 2023); *American Community Survey 2021 1-Year Estimates, Table B25003H, Tenure (White Alone, Not Hispanic or Latino Householder)*, U.S. Census Bureau, <https://data.census.gov/table?q=b25003h&tid=ACSDT1Y2021.B25003H> (last visited May 11, 2023); *American Community Survey 2021 1-Year Estimates, Table B25003I, Tenure (Hispanic or Latino Householder Alone)*, U.S. Census Bureau, <https://data.census.gov/table?q=b25003i&tid=ACSDT1Y2021.B25003I> (last visited May 11, 2023).

The Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*, which Congress charged the CFPB with

enforcing, 12 U.S.C. §§ 5481(12)(F), (14), 5492(a)(10), is among the Bureau's most powerful tools for protecting tenants. In light of racial disparities in credit scoring, eviction filings, and the criminal legal system, restrictive tenant screening often poses a significant barrier to housing for Black and Latino tenants, often consigning these families to poorer-quality housing in more segregated neighborhoods and sometimes even driving them into homelessness. See Abby Boshart, *How Tenant Screening Services Disproportionately Exclude Renters of Color from Housing*, Urb. Inst. (Dec. 21, 2022), <https://housingmatters.urban.org/articles/how-tenant-screening-services-disproportionately-exclude-renters-color-housing>.

Yet landlords increasingly rely on third-party screening companies to assist with their review of applicants. *Tenant Background Checks Market*, Consumer Fin. Prot. Bureau (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf. Those companies are subject to the CFPB's oversight. Unfortunately, tenant screening reports frequently include troubling inaccuracies. When screening companies fail to follow reasonable procedures for ensuring accuracy or do not exclude information that is required to be excluded from consumer reports, that conduct can violate the FCRA. 15 U.S.C. §§ 1681c, 1681e.

FCRA violations involving inaccurate reports are particularly likely to harm communities of color where the underlying reason for the inaccuracy was a false match on the basis of a shared name. CFPB Advisory Opinion, *Fair Credit Reporting: Name-Only Matching Procedures*, 86 Fed. Reg. 62,468, 62,470 (Nov. 10, 2021). In the most recent analysis published in 2020, the CFPB recorded over 191,100 company responses to complaints about inaccurate reporting and acknowledged

that reports using name-only matching is a of particular concern in this context. *Id.* at 62,469.

For Latino consumers, this issue is especially problematic. Latino individuals have disproportionate contact with the criminal legal system compared to white individuals. U.S. Dep't of Just., NCJ 304953, *Federal Prisoner Statistics Collected under the First Step Act, 2022* (Dec. 2022). Further, there are also certain names and surnames that Latinos are disproportionately likely to have. Joshua Comenetz, U.S. Census Bureau, *Frequently Occurring Surnames in the 2010 Census 3-7* (Oct. 2016). If someone with such a name has a criminal conviction record, screening companies with unlawful procedures put other Latinos who may be applying for rental housing at risk of utterly unjustified exclusion. *See generally* CFPB Advisory Opinion, Fair Credit Reporting: Name-Only Matching Procedures, 86 Fed. Reg. 62,468 (Nov. 10, 2021). The inclusion of information that must be excluded from consumer reports under the FCRA, *see* 15 U.S.C. § 1681c(a), can also disproportionately harm tenants of color in the rental screening context, *see Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real-Estate Related Transactions*, U.S. Dep't of Hous. & Urb. Dev. (Apr. 4, 2016), [https://www.hud.gov/sites/documents/ HUD_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF).

To address these problems, the CFPB issued guidance on how screening companies can comply with the law and implement reasonable procedures. *Tenant Background Checks Market*, Consumer Fin. Prot. Bureau (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf; *Consumer Financial Protection*

Circular 2022-07: Reasonable Investigation of Consumer Reporting Disputes, Consumer Fin. Prot. Bureau (Nov. 10, 2022), https://files.consumerfinance.gov/f/documents/cfpb_reasonable-investigation-of-consumer-reporting-disputes_circular-2022-07.pdf. It also published research assessing the state of the market for rental screening services. *Id.* Both steps, in concert with the work of HUD, DOJ, and private attorneys general to enforce the Fair Housing Act with respect to tenant screening, have the potential to make the rental market fairer and more inclusive for Black and Latino households as well as to reduce homelessness.

B. The CFPB also fights discrimination and exploitation through its regulation of automobile loans, student debt, and other financial products.

Beyond housing, the CFPB also protects the public from unfair, deceptive, or abusive consumer practices that disproportionately target consumers of color in financial markets. These include automobile lending, student debt, credit cards, and more. Accordingly, the CFPB's work is crucial to racial justice across a wide range of contexts, even when the Bureau is not directly enforcing antidiscrimination statutes. Maintaining the Bureau's authority to regulate these markets is therefore important to advancing economic equity and wealth-building for communities of color.

1. Automobile Lending

For most Americans, car ownership is essential for access to employment, fresh food, education, and social connection. This is especially true for low-income communities and people of color, who are less likely to live in neighborhoods with high economic opportunity and easily accessible grocery stores. Jonathan Lanning,

Evidence of Racial Discrimination in the \$1.4 Trillion Auto Loan Market, Fed. Rsv. Bank of Chi. (Jan. 2023), <https://www.chicagofed.org/publications/profitwise-news-and-views/2023/discrimination-auto-loan-market>.

These same communities experience well-documented discrimination in the automobile loan market. Controlling for creditworthiness, Black and Latino automobile loan applicants have lower approval rates and pay higher interest rates than white applicants. *Id.* At the same time, all else equal, applicants of color are significantly less likely to default on their loans than white applicants, suggesting that racial bias rather than unobserved differences between applicants by race accounts for these disparities. Alexander W. Butler, Erik J. Mayer & James P. Weston, *Racial Discrimination in the Auto Loan Market*, 36 Rev. Fin. Stud. 1, 4 (2022). This discrimination in the prime automobile loan market is compounded by predatory practices in the subprime market, in which lenders disproportionately target borrowers of color. These lenders can charge usurious interest rates of over 20%, and a large amount of variation in rates for similarly situated borrowers within the subprime market suggests that borrowers in these markets are unable to shop around and find the best rates. Jasper Clarkberg, Jack Gardner & David Low, *Data Point: Subprime Auto Loan Outcomes by Lender Type*, Consumer Fin. Prot. Bureau (Sept. 2021), https://files.consumerfinance.gov/f/documents/cfpb_subprime-auto_data-point_2021-09.pdf. Many subprime automobile lenders have also been accused of charging higher rates to Black and Latino borrowers. Emily Hirtle, *Structural Racism Flourishes in the Auto Lending Market*, Ams. for Fin. Reform (May 10, 2022) <https://ourfinancialsecurity.org/2022/05/blog-structural-racism-flourishes-in-the-auto-lending-market>.

The CFPB has responded to discrimination in the automobile loan industry in a number of valuable ways. For example, the CFPB has partnered with the FTC and the Federal Reserve to foster competition among subprime lenders in order to improve the bargaining ability of low-income borrowers—disproportionately borrowers of color—who are unable to access the prime loan market. Ryan Kelly, Chris Kukla & Ashwin Vasani, *Rising Car Prices Means More Auto Loan Debt*, Consumer Fin. Prot. Bureau (Feb. 24, 2022), <https://www.consumerfinance.gov/about-us/blog/rising-car-prices-means-more-auto-loan-debt>. The CFPB also initiated a lawsuit against Credit Acceptance, an automobile loan firm that is alleged to have hidden interest rate charges in New York State—listed in its contracts at around 23%, below the state’s 25% cap—in order to charge a median annual percentage rate (APR) of over 34%. Complaint, *Consumer Fin. Prot. Bureau v. Credit Acceptance Corp.*, No. 1:23-CV-00038 (S.D.N.Y. Jan. 4, 2023).

2. Student Debt

Borrowers of color also experience disproportionate harm in the student loan market. Although Black students graduate with around \$7,000 more in debt than white graduates on average, this disparity grows to around \$25,000 four years after graduation. The large growth in debt for Black borrowers is largely driven by the fact that white graduates are more likely to receive financial help from their parents, whereas Black graduates are more likely to transfer their own income to other family members. Andre M. Perry, Marshall Steinbaum & Carl Romer, *Student Loans, the Racial Wealth Divide, and Why We Need Full Debt Cancellation*, Brookings Inst. (June 23, 2021), <https://www.brookings.edu/research/student-loans-the-racial->

wealth-divide-and-why-we-need-full-student-debt-cancellation. By implication, the CFPB's regulation of predatory practices targeting student loan borrowers helps further broader efforts to remedy the racial wealth gap.

The CFPB is active in protecting individuals with student loan debt in a variety of ways. Most recently, for example, the agency released a bulletin in March 2023 describing loan servicers' obligations to avoid illegal collection on loans discharged in bankruptcy, explaining that servicers must "proactively identify student loans that are discharged . . . and permanently cease collections . . ." CFPB Bulletin 2023-01: Unfair Billing and Collection Practices After Bankruptcy Discharges of Certain Student Loan Debts, 88 Fed. Reg. 17,366, 17,368 (Mar. 23, 2023). The CFPB has also engaged in enforcement actions against exploitative debt-relief services that demanded advance fees in violation of the Telemarketing Sales Rule. *See* Complaint, *Consumer Fin. Prot. Bureau v. GST Factoring*, No. 8:20-CV-01239 (C.D. Cal. Jul. 13, 2020). Policies and enforcement actions like these protect the most vulnerable student loan borrowers from financial exploitation.

3. *Other Financial Products*

The CFPB is crucial to combating exploitation throughout the country's financial system, enforcing against unfair and misleading practices in contexts including credit cards, prison financial services, and immigration bond services. For example, the CFPB brought a \$225 million action against GE Capital in 2014 for deceptive and discriminatory credit card practices, including a refusal to extend balance repayment promotions to customers who spoke Spanish or had Puerto Rican mailing addresses in violation of

ECOA. Consent Order at 10, Synchrony Bank, CFPB No. 2014-CFPB-0007 (June 19, 2014). Black and Latino credit card borrowers pay higher interest rates on average than white borrowers and are also more likely to pay for basic living expenses with credit card debt. Jose Garcia, *The Color of Debt: Credit Card Debt by Race and Ethnicity*, Demos, https://www.demos.org/sites/default/files/publications/FACTSHEET_TheColorofDebt_Demos.pdf (last visited May 11, 2023). Accordingly, the CFPB's enforcement of ECOA in this space brings borrowers of color closer to a level playing field.

In 2021, the CFPB also entered into a consent order with JPay, a Department of Corrections contractor that required incarcerated and formerly incarcerated individuals to establish a high-fee account with the company in order to access the money they had earned while incarcerated in violation of the Electronic Fund Transfer Act, a practice likely to disproportionately harm Black and Latino individuals and their families in light of well-documented disparities in the prison system. Consent Order at 1-2, JPay, LLC, CFPB No. 2021-CFPB-0006 (Oct. 19, 2021). As a final example, the CFPB filed a lawsuit in 2021 against Libre by Nexus, an immigration bond company accused of concealing or misrepresenting the high fees of its services in violation of the Consumer Financial Protection Act. Complaint at 1-2, *Consumer Fin. Prot. Bureau v. Nexus Servs., Inc.*, No. 5:21-CV-00016 (W.D. Va. Feb. 22, 2021).

These examples demonstrate the extent to which deceptively marketed fringe financial products target populations, such as detained immigrants or justice-involved individuals, that disproportionately consist of people of color. Without the CFPB's oversight, low-income communities of color throughout the country would thus be more vulnerable to predatory, coercive,

and harmful schemes in many areas of our financial system.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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List of Additional Amici Curiae

Better Markets, Inc. (Better Markets)
California Reinvestment Coalition (CRC)
Credit Builders Alliance (CBA)
Disability Rights Advocates (DRA)
National Community Reinvestment Coalition (NCRC)
National Urban League
National Women's Law Center
Poverty & Race Research Action Council (PRRAC)
Prosperity Now
Public Justice