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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAISEY TRUST, by and through its trustee, Eddie Haddad; CAPE JASMINE CT. TRUST, by and through its trustee, Eddie Haddad; and SATICOY BAY LLC, SERIES 10007 LIBERTY VIEW,

Plaintiffs,

vs.

FEDERAL HOUSING FINANCE AGENCY; and SANDRA L. THOMPSON, in her official capacity as Director of the Federal Housing Finance Agency,

Defendants.

Case No.: 2:23-cv-00978-APG-EJY

DEFENDANTS' OPENING SUPPLEMENTAL BRIEF UNDER THE COURT'S JULY 8 ORDER

The Supreme Court's recent decision in *Consumer Financial Protection Bureau v. Community Financial Services Association*, 601 U.S. 416 (2024) ("*CFSA*"), resolves this case in its entirety, confirming that Plaintiffs' Appropriations Clause theory cannot stand. In light of the Supreme Court's definitive rejection of Plaintiffs' primary theory, and for all the reasons stated in Defendants' pending motion to dismiss and corresponding reply brief, the Court should dismiss this action with prejudice.

At the outset of this case, Plaintiffs made it abundantly clear that they had hitched their wagon to the Fifth Circuit's ruling that the Consumer Financial Protection Bureau's ("CFPB") funding mechanism violates the Appropriations Clause. And though they tried to downplay their reliance on that decision in the amended complaint they filed after the Supreme Court heard oral argument, Plaintiffs did not change their basic theory: Because FHFA sets its own assessment-funded budget, it supposedly "unilaterally spend[s] public money without an appropriation from Congress," thereby purportedly violating the Appropriations Clause. Am. Compl. ¶ 83.

CFSA rejects that theory directly, definitively, and dispositively. Specifically, the Supreme Court articulated a clear standard for determining whether a statutory funding mechanism comports with the Appropriations Clause—the statute "need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause." 601 U.S. at 426. Here, the statute establishing FHFA's assessment-based funding easily clears that bar, expressly identifying both the source (assessments on FHFA's regulated entities) and purpose (defraying FHFA's reasonable expenses in exercising its statutorily defined powers and duties). *See* 12 U.S.C. § 4516(a).

Indeed, the standard articulated in *CFSA* aligns perfectly with the arguments FHFA and Director Thompson presented in their pending motion to dismiss, and it eviscerates Plaintiffs' Appropriations Clause-based claims. And the *CFSA* decision does nothing to rehabilitate Plaintiffs' other meritless claims, which fail for the reasons Defendants already explain in their motion-to-dismiss briefing. As Plaintiffs plead no legally viable claim, the Court should dismiss this action with prejudice.

I. *CFSA* Establishes a Clear Source-and-Purpose Test for Appropriations Clause Cases

CFSA directly resolves the central question raised both in that case and by Plaintiffs' Appropriations Clause claim in this case: What constitutes a valid appropriation? In *CFSA*, the Supreme Court provided the answer. Two and only two characteristics define a valid appropriation: (1) a specified source and (2) a designated purpose. In the Supreme Court's words, "appropriations need *only* identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause." *Id.* at 426 (emphasis added). The decision articulates the same standard no fewer than *six* times. *See id.* at 424, 426, 427, 438, 439, 441. To resolve Plaintiffs' Appropriations Clause challenge to FHFA's funding structure, this Court must now apply *CFSA*'s two-part test.

FHFA's funding provision satisfies both elements. *First*, it specifies assessments on FHFA's regulated entities as the source of the Agency's funding. 12 U.S.C. § 4516(a) ("The Director shall establish and collect *from the regulated entities*….") (emphasis added). *Second*, it authorizes expenditure of that funding for a designated purpose—to cover the reasonable costs of FHFA. *Id.* ("to provide for reasonable costs (including administrative costs) and expenses of the Agency…"). Thus, FHFA's funding provision plainly satisfies the source-and-purpose test established by *CFSA*. As a result, FHFA's funding provision complies with the Appropriations Clause, and Plaintiffs' Appropriations Clause theory therefore cannot stand.

The challenge before the Court in *CFSA* mirrors the challenge Plaintiffs levy against FHFA. The plaintiffs in *CFSA* argued, among other things, that "by allowing [CFPB] to indefinitely choose its own level of annual funding, subject only to an illusory cap[,] … the Bureau's funding mechanism is too open-ended in duration and amount to satisfy" the Appropriations Clause. *Id.* at 426 (summarizing plaintiffs' position). Plaintiffs here allege that FHFA's funding structure violates the Appropriations Clause because the Agency "may establish and collect assessments, in an amount to be determined by the Director, directly from the entities that FHFA regulates." ECF No. 34 ¶ 29; *see also id.* ¶ 76 (FHFA is "funded through assessments from the entities that it regulates rather than from an appropriation passed by Congress and signed by the President.").

Further, the two funding provisions are substantially similar in the ways that are relevant

under *CFSA*. Congress authorized the CFPB to draw funds from the Federal Reserve System in an amount the CFPB's Director deems "reasonably necessary to carry out" the Bureau's duties. 12 U.S.C. § 5497(a)(1). And as discussed above, Congress authorized FHFA's Director to collect from its regulated entities an amount the Director deems "sufficient to provide for the reasonable costs … of the Agency." 12 U.S.C. § 4516(a). In both this case and in *CFSA*, the challengers argue self-funding structures that leave discretion in the hands of the agency director on how much funding to raise violate the Appropriations Clause. The Supreme Court validated this type of funding structure for the CFPB; a similar result must follow here.

The *CFSA* decision fully comports with Defendants' arguments in their motion to dismiss. For example, Defendants argued that "[s]ince the earliest days of the Republic, Congress has empowered Executive Branch agencies to fund their activities by levying parties the agency affects." ECF No. 36 at 18. The Supreme Court's extensive analysis of pre- and post-founding history confirms Defendants' argument. *See CFSA*, 601 U.S. at 426-434.

In that vein, Defendants and the Supreme Court both placed great weight on the funding structure of the Post Office immediately following the Constitution's ratification. *Compare* ECF No. 36 at 18-19; ECF No. 42 at 19-21 *with CFSA*, 601 U.S. at 434-35. That structure did not rely on annual appropriations drawn from the Treasury, and it vested significant discretion in the Postmaster General to determine how to "'defray the expense'" of running the Post Office. *See* ECF No. 36 at 18 (quoting Post Office Act of 1792, 1 Stat. 232-34). As explained in FHFA's motion to dismiss, the very same "Congress that enacted the Post Office Act included many of the same people who had drafted and executed the Constitution, confirming beyond doubt that assessment-based funding … falls well within the Framers' understanding of what the Appropriations Clause allows." *Id.* at 18-19. The Supreme Court reached the same conclusion, stating that the practice of Congress immediately following ratification "'provides contemporaneous and weighty evidence of the Constitution's meaning.'" *CFSA*, 601 U.S. at 432 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)). The Supreme Court relied on the Post Office example to uphold the CFPB's funding structure; this Court should similarly rely on it to uphold FHFA's structure.

The Post Office is just one iteration of the many "flexible approaches to appropriations"

Congress has taken since the Founding. *Id.* at 433. Early Congresses established other flexible funding mechanisms outside of annual disbursements from the Treasury, including the National Mint, *see* Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 249 (establishing funding in the part through collection of fees), and the Patent Office, *see* Act of July 4, 1836, ch. 357, § 9, 5 Stat. 121 (same). And as Justice Kagan notes in her concurrence in *CSFA*, flexibility has "been particularly common in the sphere of financial regulation." *Id.* at 444 (Kagan, J., concurring). For example, nearly 150 years ago, Congress authorized the Office of the Comptroller of the Currency to levy assessments on the banks it regulates as "necessary or appropriate to carry out [its] responsibilities." 12 U.S.C. § 16; *see also* Act of Feb. 19, 1875, ch. 89, 18 Stat. 329. These varied examples undermine Plaintiffs' suggestion that funding can only be properly considered "appropriations" if it takes the form of "periodic payments disbursed from the Treasury." ECF No. 39 at 30. The Supreme Court in *CFSA* rejected Plaintiffs' rigid conception of appropriations, stating that "[u]nder the Appropriations Clause, an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes." *CFSA*, 601 U.S. at 424.

II. Nothing Beyond Source and Purpose Is Required

Plaintiffs' filings since *CFSA*'s release hint at an argument that would improperly add a third requirement to the two-part source-and-purpose test, despite the clarity of the Supreme Court's language on this point. Specifically, Plaintiffs seize on one particular distinction between CFPB's funding structure and FHFA's: a statutory fixed-dollar cap. *See, e.g.*, ECF No. 49 at 3 ("Unlike other federal agencies like the Consumer Financial Protection Bureau, there is no cap or limit to the amount of money that the FHFA can extract and spend."). Plaintiffs thus appear poised to argue that because the Court discussed the CFPB's cap, the presence of a statutory fixed-dollar cap is a necessary component of the Court's holding.

No basis exists for such an argument. While the Court mentioned the CFPB's funding cap, it was neither central to the Court's analysis nor determinative of the outcome. That is because it is not a part of the source-and-purpose test that the Court clearly and repeatedly articulated throughout its opinion. As discussed above, the Court's central holding is that "appropriations need *only* identify a source of public funds and authorize the expenditure of those funds for designated

purposes to satisfy the Appropriations Clause." *CFSA*, 601 U.S. at 426 (emphasis added). Plaintiffs' attempt to add a third requirement—a statutory cap—ignores the Court's holding that "only" a source and designated purpose are required. *Id.* at 426.

Indeed, the *CFSA* dissent unambiguously confirms that the majority opinion *does not* depend upon a statutory fixed-dollar cap: "Nor does the Court's interpretation require Congress to set an upper limit on the amount of money that the Executive may take." *Id.* at 448 (Alito, J., dissenting). Had Justice Alito's summary been inaccurate or incomplete, either the majority opinion or Justice Kagan's concurrence surely would have addressed it—as they did on other, less-central points. *See id.* at 438 ("the dissent never offers a complete understanding of what the word 'Appropriations' means"); *id.* at 439 ("[t]he dissent's treatment of early American history does not advance its point"); *id.* at 440 ("[the dissent's] attempt to distinguish the Customs Service and the Post Office from the Bureau is not convincing"). But they did not. In the end, no member of the Court ever suggests in *CFSA* that the Appropriations Clause requires Congress to impose a fixed-dollar cap, and the examples of the Post Office, the Customs Service, and other assessment-funded financial regulators confirm it does not. *See id.* at 434 (discussing Post Office); *id.* at 444 (Kagan, J., concurring) (discussing Post Office); *id.* at 465 (Alito, J., dissenting) (discussing Post Office); *see also id.* at 444 (Kagan, J., concurring) (discussing OCC and the Federal Reserve).

The Court's analysis of the Appropriation Clause's text and history also confirms that a statutory fixed-dollar cap is not a requirement for a valid appropriation. With regard to the Constitution's text, because it "requires an 'Appropriatio[n] made by Law,'" the Court's concern in *CFSA* was "principally with the meaning of the word 'appropriation.'" *Id.* at 426 (quoting Art. I, § 9, cl. 7). To determine the plain meaning of the Appropriation Clause's text, the Court relied on dictionary definitions of the word "appropriation" at the time the Constitution was ratified. *See id.* at 427. None of those definitions indicated that the definition of "appropriation" inherently requires a limitation such as a cap. Indeed, the various Founding-era dictionaries defined the term as:

- "The act of sequestering, or assigning to particular use or person, in exclusion of all others." 1 N. Webster, An American Dictionary of the English Language (1828);

- "The application of something to a particular use," 1 J. Ash, The New and

Complete Dictionary of the English Language (2d ed. 1795);

- "The application of something to a particular purpose," 1 S. Johnson, A Dictionary of the English Language (6th ed. 1785); and

- "[T]he appointing a thing to a particular use," T. Dyche & W. Pardon, A New General English Dictionary (14th ed. 1771).

See CFSA, 601 U.S. at 427. Relying on these definitions, the Court concluded that "appropriations were understood as a legislative means of authorizing expenditure from a source of public funds for designated purposes." *Id.* Nothing about these definitions or the Framers' contemporary understanding of the term suggests a cap is necessary for there to be an "appropriation."

With regard to the relevant history, nothing in the Court's thorough analysis of the history of appropriations suggests that a statutory fixed-dollar cap is required. In fact, the opposite is true. The history of appropriations confirms that Congress enjoys substantial discretion to craft appropriate funding mechanisms. The fact that some agencies have statutory fixed-dollar caps and others do not only illustrates this discretion. After surveying the pre-founding history of appropriations—from Parliament to the early Colonies—the Court concludes that "early legislative bodies exercised a wide range of discretion" in choosing funding mechanisms. *Id.* at 431. And while these pre-founding examples displayed many variations on the precise form of funding, the common theme among them was that appropriations "designate[d] particular revenues for identified purposes." *Id.* Thus, as the Court succinctly states, "[p]re-founding history supports the conclusion that an identified source and purpose are *all that is required* for a valid appropriation." *Id.* at 427 (emphasis added). Nothing in the relevant history suggests that a statutory cap was required.

To the contrary, "[t]he practice of the First Congress also illustrates the source-and-purpose understanding of appropriations." *Id.* at 432. As discussed above, the Supreme Court arrives at its conclusion by examining—and endorsing—two particular examples of funding structures that are relevant here: the Customs Service and the Post Office. *See id.* at 434. For both entities, Congress established "open-ended funding scheme[s]" based on commissions and fees, rather than annual tax-and-spend appropriations. *Id.* And in neither case did Congress impose a statutory fixed-dollar cap on the amount these entities could collect.

Indeed, if the lack of a statutory fixed-dollar cap were constitutionally deficient, the Court's extensive discussion of these early-Republic examples of entities that lacked such a cap would have taken a different tone. Yet instead of treating the Customs Service and Post Office as constitutionally suspect, the Court expressly relied on them as examples of a valid appropriation. To the Court, these examples showed that "[e]arly appropriations displayed significant variety in their structure. Each, however, adhered to the minimum requirements of an identifiable source of public funds and purpose." *Id.* These "minimum requirements" plainly did not—and do not—include a statutory fixed-dollar cap.

Beyond the plain terms of the Court's holding, the Court's analysis of the funding cap also demonstrates that it is not a requirement for a constitutional appropriation. If, as Plaintiffs suggest, the validity of the CFPB's funding structure actually depended on the presence of a statutory cap, then the Court would have analyzed whether the CFPB's cap was "illusory." *Id.* Indeed, the challengers in *CFSA* argued that the CFPB is "subject only to an illusory cap set so high that the agency has never come close to hitting it." Resp't's Br. at 9. In other words, the challengers' argument was that, for all intents and purposes, CFPB's funding was uncapped. But in arriving at its decision, the Supreme Court undertook no analysis to determine whether the challengers' characterization of the cap was accurate. *See generally id*. Had the presence of a fixed-doller cap been a necessary, outcome-determinative element, the Court would have addressed whether the CFPB's cap was in fact illusory and if so, whether that mattered. That the Court did not do so underscores that the presence or absence of a cap does not drive or control the Appropriations Clause analysis.

Finally, Congress's choice to allow FHFA to determine and assess a level of funding "sufficient to provide for reasonable costs … and expenses of the Agency," 12 U.S.C. § 4516(a), is not unique or uncommon, especially among agencies with similar responsibilities. As noted above, Congress frequently constructs flexible funding mechanisms for financial regulatory agencies. "Indeed, not a single federal bank regulator is currently, or has been for a long while, funded by standard congressional appropriations." *Id.* at 444 (Kagan, J. concurring). And as with FHFA, Congress chose not to impose a statutory fixed-dollar cap on many of these agencies. Similar

uncapped funding mechanisms include:

- The Federal Reserve (12 U.S.C. § 243): "The Board of Governors of the Federal Reserve System shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated expenses and the salaries of its members and employees";

- The Office of the Comptroller of the Currency (12 U.S.C. § 16): "The Comptroller of the Currency may collect an assessment, fee, or other charge from any entity described in section 1813(q)(1) of this title, as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office of the Comptroller of the Currency";

- The National Credit Union Administration (12 U.S.C. § 1755(b)): "The fee assessed under this section shall be determined according to a schedule, or schedules, or other method determined by the Board to be appropriate, which gives due consideration to the expenses of the Administration in carrying out its responsibilities under this chapter and to the ability of Federal credit unions to pay the fee"; and

- The Federal Deposit Insurance Corporation (12 U.S.C. § 1817(b)(2)(A)): "The Board of Directors shall set assessments for insured depository institutions in such amounts as the Board of Directors may determine to be necessary or appropriate."

Despite Plaintiffs' attempts to distort the Supreme Court's ruling by engrafting an additional component to the Court's two-part test for evaluating Appropriations Clause claims, *CFSA*'s holding is crystal clear: A valid appropriation requires (1) a specified source and (2) a designated purpose. FHFA satisfies those two requirements. As a result, Plaintiffs' claim that FHFA's funding mechanism violates the Appropriations Clause fails under *CFSA*.

For the foregoing reasons, as well as those explained in Defendants' motion-to-dismiss briefing, the Court should dismiss Plaintiffs' Amended Complaint with prejudice.

DATED: July 31, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of July, 2024, I caused the foregoing to be electronically filed using this Court's ECF system, which will then send a notification of such filing by electronic email to the following counsel:

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