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 TEN CONSUMER ADVOCACY ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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May 2023

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INTEREST OF AMICI CURIAE[1]

Amici curiae are ten organizations devoted to advocacy on behalf of consumers of financial services whose interests are protected by the Consumer Financial Protection Bureau (CFPB). Amici support the regulatory and enforcement initiatives that the CFPB has undertaken since its creation, including the payday lending rule at issue in this case. Amici, and the consumers whose interests they represent, would be adversely affected if this Court were to affirm the Fifth Circuit's holding that all of the CFPB's actions, from its inception, have been tainted by a statutory funding provision that, in the Fifth Circuit's view, violates the Constitution's Appropriations Clause. Amici submit this brief to assist the Court in understanding that the court of appeals' radical ruling has no grounding in a proper understanding of the Appropriations Clause, which commands only that federal expenditures be authorized by law—a command with which the CFPB's funding statute fully complies.

The amici joining this brief are Public Citizen, Americans for Financial Reform Education Fund, Consumer Action, Consumer Federation of America, Consumer Reports, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumer Law Center, Student Borrower Protection Center, and U.S. Public Interest Research Group. The appendix to this brief provides a brief description of each amicus.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Constitution's Appropriations Clause states: "No Money shall be draw from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. The Clause permits federal funds to be spent only with the authorization of a statute specifying a source of funds and the object for which they may be expended. The CFPB's funding statute, 12 U.S.C. § 5497, satisfies those requirements: It specifies the source from which the CFPB may draw funds, the amount it may draw, and the objects for which the funds may be spent.

That the statute provides funding with no durational limit does not take it outside Congress's power under the Appropriations Clause, which has long been understood to allow appropriations for an indefinite time. Indeed, significantly less than half of federal spending involves time-limited annual appropriations, and the operations of other financial services regulatory agencies, such as the Federal Reserve Board, have long been funded by appropriations with no time limit. That the funds come from a source other than general federal revenues also does not take them outside the realm of appropriations under the Constitution: Congress has long appropriated to agencies funds derived from fees, assessments, and other revenues attributable to agency activities rather than taxation or government borrowing.

The Fifth Circuit's suggestion that the CFPB is different because section 5497(c)(2) provides that its funds are not to be "construed" as "Government funds or appropriated monies" is fundamentally misguided. Whether the statute is an "appropriation" within the meaning of the Constitution depends on whether the

statute appropriates funding, not on whether Congress embraced that label. Moreover, the phrase used in section 5497(c)(2)—which has applied to the Federal Reserve Board's funding since 1933—is a congressional directive regarding statutory construction, setting forth Congress's command that laws that would otherwise apply to appropriated funds and government moneys are inapplicable to the CFPB's funds.

The court of appeals' view that the CFPB is distinguishable from other agencies funded outside the annual appropriations process because it is "double insulated" from congressional control is also wrong. The CFPB is no more or less insulated from congressional authority than any other agency that receives an appropriation under the terms of a statute that Congress can repeal or modify at any time. Section 5497(c)(2) creates no "double insulation" as this Court has used that concept in its separation of powers jurisprudence. To the contrary, there is not even a single layer of insulation between the CFPB and Congress's exercise of its appropriations powers: The CFPB receives exactly the appropriations that Congress has commanded, and Congress can alter the agency's appropriations whenever it wants. The Appropriations Clause requires nothing more.

ARGUMENT

I. The CFPB funding statute complies with the Appropriations Clause's fundamental command that expenditures of public money be authorized by law.

The statute at issue in this case, 12 U.S.C. § 5497, says exactly how much of the federal government's money the CFPB is entitled to draw each year, from what source that money is to be drawn, and what the

CFPB can spend the money on. The statute provides that the amount the CFPB can withdraw and spend is the *lesser* of (1) the amount determined by the Director of the CFPB to be reasonably necessary for the agency's activities, or (2) a precisely defined funding cap. *See id*. §§ 5497(a)(1) & (2). The law also provides that the source of those funds is the earnings of the Federal Reserve System and that the funds shall be immediately available to pay the agency's expenses in carrying out its statutory duties. *See id*. §§ 5497(a)(1) & (c). By defining the source and amount of funds and the uses to which they may be put, the statute complies fully with the command of the Appropriations Clause that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7.

The Appropriations Clause neither defines the term "appropriations" nor distinguishes "appropriations" laws from other laws, except in one respect not applicable here—the proviso in Article I, section 8 that appropriations to raise and support armies are limited to two years. The natural reading of the text is that "appropriations" is shorthand for directives that money be drawn from the Treasury, and that the Clause requires that such directives be set forth in laws enacted by Congress. As Alexander Hamilton stated in 1795, the Clause means that "before money can legally issue from the Treasury for any purpose, there must be a law authorizing an expenditure, and designating the object and the fund." Alexander Hamilton, *Explanation* (Nov. 11, 1795), 8 *The Works of Alexander Hamilton* 122, 128 (Fed. Ed. 1904).

This Court has read the Clause in exactly that way on the relatively few occasions when it has addressed it: "Our cases underscore the straightforward and

explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). "[I]n other words, the payment of money from the Treasury must be authorized by a statute." *Id*. Accordingly, "the established rule is that the expenditure of public funds is proper only when authorized by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality).

Beyond that straightforward rule, the Appropriations Clause leaves to Congress the authority to determine how to exercise its authority to enact laws appropriating money, subject to the generally applicable requirements of bicameralism and presentment to the President imposed by Article I, section 7. "The [Appropriations] [C]lause is not self-defining and Congress has plenary power to give meaning to the provision." *Harrington v. Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977), *quoted in U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.).

Exercising that plenary authority, Congress has crafted appropriations laws in a variety of ways that differ from the annual appropriations model that the Fifth Circuit's opinion suggests is the norm. The Government Accountability Office (GAO), which is responsible for issuing legal opinions concerning use of and accountability for public funds, recognizes multiple forms that an appropriation may take other than an annual appropriation of a defined amount of funds for a single fiscal year, including:

- "*Multiple year appropriation*: An appropriation that is available for obligation for a definite period of time in excess of one fiscal year."
- "*No-year appropriation*: An appropriation that is available for obligation for an indefinite period. A no-year appropriation is usually identified by appropriation language such as 'to remain available until expended.' "
- "*Indefinite appropriation*: An appropriation of an unspecified amount of money. An indefinite appropriation may appropriate all or part of the receipts from certain sources, the specific amount of which is determinable only at some future date, or it may appropriate 'such sums as may be necessary' for a given purpose."
- "*Permanent appropriation*: A 'standing' appropriation which, once made, is always available for specified purposes and does not require repeated action by Congress to authorize its use. Legislation authorizing an agency to retain and use receipts tends to be permanent; if so, it is a form of permanent appropriation."

GAO, *Principles of Federal Appropriations Law* 2-9–2-10 (4th ed. 2016) (*GAO Redbook*).[2]

Each of these different forms of law, GAO explains, is an "appropriation" because it is "authority" given to a federal agency "to incur obligations and to make payments from the Treasury for specified purposes." *Id.* at 2-6. "If [a] statute contains a specific direction to

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[2] Available chapters of the *GAO Redbook*'s fourth edition, as well as the entire third edition, are accessible at https://www.gao.gov/legal/appropriations-law/red-book. Unless otherwise indicated, citations to the *GAO Redbook* are to the fourth edition.

pay and a designation of the funds to be used, … then this amounts to an appropriation." *Id.* at 2-23. Thus, "[w]henever 'the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation.' " *Id.* at 1-7 (quoting *In re St. Lawrence Seaway Dev. Corp.*, B-193573, 1979 WL 11668 (Comp. Gen. Dec. 19, 1979)).

While the Fifth Circuit was correct in stating that the majority of federal *agencies* receive at least some of their funding through annual appropriations, Pet. App. 33a, the great majority of federal *spending* is not the result of annual appropriations laws. "Permanent" appropriations—those that are not time limited—take a variety of forms.[3] One of the most familiar is the appropriation for the judgment fund, 31 U.S.C. § 1304, which appropriates without any durational limit whatever funds are necessary to pay certain judgments against the United States when payment is not otherwise provided for. This Court has recognized that section 1304 is a valid exercise of Congress's Appropriations Clause powers. *See Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 95–96 (1992) (opinion of Rehnquist, C.J., for the Court).

Of greater financial consequence are the "Miscellaneous permanent appropriations" listed in 31 U.S.C. § 1305, which include appropriation of the "necessary amounts" to "pay interest on the public debt." *Id.*

[3] "Permanent" is of course a misnomer because Congress may change such an appropriation at any time, but this brief uses the term because it has consistently been applied to these types of appropriations by Congress, GAO, and the Executive Branch.

§ 1305(2). That appropriation, dating back to 1847,[4] accounts for 8 percent of projected federal spending for fiscal year 2023.[5] And that permanent appropriation is dwarfed by permanent appropriations for Social Security payments, *see* 42 U.S.C. § 401, and other entitlement programs. Spending based on these permanent appropriations—often referred to as "mandatory" spending—is estimated to account for approximately two-thirds of total federal spending in fiscal year 2023.[6]

Permanent appropriations often take the form of laws authorizing an agency to collect and expend user fees, assessments on regulated entities, revenues from market transactions, and funds derived from agency activities—rather than from general government revenues from taxes or borrowing. *See*, *e.g.*, 16 U.S.C. § 6906 (authorizing federal land management agencies to collect recreation fees and expend them without further appropriation); 7 U.S.C. § 511d (fees for tobacco inspections). While reflecting policy choices by Congress to make certain government activities self-sustaining, such laws satisfy Appropriations Clause requirements by providing the required statutory authorization for agencies to draw upon and expend public moneys for specified purposes. As the *GAO Redbook* explains, "a statute makes an appropriation if it (1) authorizes the collection of fees, and (2) makes the fees available for expenditure for a specified purpose. Such statutes constitute continuing or

[4] Act of Feb. 9, 1847, ch. 7, 9 Stat. 123.

[5] *See* Dep't of Treasury, *FiscalData*, https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/.

[6] *See* Dep't of Treasury, *FiscalData*, https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/.

permanent appropriations; that is, the money is available for obligation or expenditure without further action by Congress." *GAO Redbook* 2–24.

In some instances, statutes create "revolving funds," which agencies that may otherwise receive annual appropriations use to fund a broad range of self-sustaining, revenue-generating activities, such as loan programs or other "business-like" operations. *GAO Redbook* 12-86 (3d ed. 2004); *see, e.g.*, 44 U.S.C. § 309 (Government Publishing Office revolving fund); 54 U.S.C. § 101935 (revolving fund for National Park visitor services facilities); 7 U.S.C. § 1627b (National Sheep Industry Improvement Center revolving fund); 25 U.S.C. § 1497 (Indian Loan Guaranty and Insurance Fund). Because legislation establishing a revolving fund specifies a source of funds and makes it available to an agency for a specified purpose, "a revolving fund is a permanent appropriation." *GAO Redbook* at 12-88 (3d ed. 2004). Permanent appropriations of revolving funds are used to fund a broad range of activities by a large number of agencies. *See id.* at 12-86–12-140.

Although many permanent appropriations provide for self-financing of specific activities to supplement the funding of agencies that also receive annual appropriations, other permanent appropriations promote financing of a majority or even all of an agency's activities through means other than annual appropriations. For example, as the Fifth Circuit acknowledged, "the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, that National Credit Union Administration, and the Federal Housing Finance Agency" are all funded principally or entirely by legislation

appropriating for their use, without a time limit, revenues generated through their activities. *See* Pet. App. 40a.

Those examples are not exhaustive. Other agencies that receive the entirety of their funding through permanent statutory authority to expend amounts generated by their ongoing activities include the Farm Credit Administration and Farm Credit System Insurance Corporation, *see* 12 U.S.C. §§ 2250, 2277a-9; the Bureau of Engraving and Printing, *see* 31 U.S.C. § 5142; Federal Prison Industries (now known as UNICOR), *see* 18 U.S.C. § 4126; the Public Company Accounting Oversight Board, *see* 15 U.S.C. § 7219; and the Tennessee Valley Authority, *see* 16 U.S.C. § 831y. In addition, United States Citizenship and Immigration Services receives the great bulk of its funding for processing immigration and naturalization benefits through an indefinite appropriation of the fees it charges for those services. *See* 8 U.S.C. § 1356. Likewise, the Postal Service has long had a permanent appropriation of all revenues it receives, *see* 39 U.S.C. § 2401(a), as well as a permanent revolving fund available without fiscal-year limitation to fund its actions, *see id*. § 2003.

In other statutes, rather than using a permanent appropriation, Congress requires agencies to self-finance all or major portions of their activities through assessment of fees or penalties, but chooses to appropriate those assessments to the agencies annually. *See* 42 U.S.C. § 7178 (Federal Energy Regulatory Commission); 21 U.S.C. § 379h(g) (Food and Drug Administration). In yet other laws, Congress has provided permanent appropriations of some of the fees collected by an agency, while requiring annual appropriations to allow the agency to expend additional fees. *See* 15

U.S.C. §§ 78d(i), 78ee(a) (Securities and Exchange Commission).

These varied types of appropriations, and others like them, do not reflect congressional abdication of constitutional appropriations authority. Rather, they illustrate Congress's pursuit of the objective of making financing of government services "self-sustaining to the extent possible." 31 U.S.C. § 9701. The Constitution's mandate that Congress appropriate funds by law allows Congress to choose among a range of approaches for pursuing that policy. All of these choices are permissible under the Appropriations Clause because they comply with its fundamental command that expenditure of public funds be authorized by a law enacted by Congress.

The CFPB's funding statute complies with that command in exactly the same way as the examples discussed above: It tells the agency where it can get its funds, in what amount, and what it can spend them on. If this Court were to affirm the Fifth Circuit's ruling and hold for the first time in this country's history that a law meeting these requirements is not a constitutionally valid appropriation, it would call into question all the numerous spending measures that do not conform to the annual appropriations model. It would empower and invite courts to second-guess Congress's judgments about how best to fund agencies and government programs, and to supplant those congressional judgments with ad hoc judicial determinations about whether Congress had gone too far in "ceding" control over agency funding. Nothing in the Appropriations Clause authorizes such judicial overreach.

II. The Fifth Circuit erred in reading section 5497(c)(2) as a concession that Congress was not exercising its constitutional power to appropriate funds to the CFPB.

In explaining its conclusion that the law authorizing the CFPB to obtain specified sums from the Federal Reserve and expend them to carry out its duties is not an "Appropriation[ ] made by Law" within the meaning of Article I, the Fifth Circuit relied heavily on the provision in the funding statute stating that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." Pet. App. 36a (quoting 12 U.S.C. § 5497(c)(2)). The court of appeals said it was merely "tak[ing] Congress at its word," *id.* at 38a, in holding that the statutory authorization to draw and spend government funds was not, as a constitutional matter, an appropriation. The Fifth Circuit's reliance on section 5497(c)(2) is flawed in two principal respects.

A. To begin with, when the issue is the proper categorization of a law under the Constitution, courts are not supposed to "take Congress at its word." "[C]onstitutional question[s] [are] not controlled by Congress's choice of label." *Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519, 564 (2012). Such labels may be "dispositive … for purposes of matters that are within Congress's control," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995), such as how the terms of two laws "relate to each other," *Sebelius*, 567 U.S. at 544. But the labels do not determine how a law relates to the constitutional constraints on the government. "The Constitution constrains governmental action … under whatever congressional label" it is taken. *Lebron*, 513 U.S. at 392–93. Application of

those constraints depends on what a law "actually is" or does, not on how Congress characterizes it. *Id.* at 393 (quoting *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946)); *see also Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 51 (2015) ("Congressional pronouncements, though instructive as to matters within Congress's authority to address, … are not dispositive … for purposes of separation of powers analysis under the Constitution.").

In *Sebelius*, for example, this Court held that whether a law reflects an exercise of Congress's Article I taxing power, U.S. Const., art. I, § 8, cl. 1, does not depend on whether Congress labels the law a tax. *See* 567 U.S. 564–65. Rather, the Court held that Congress's decision to label the individual health-insurance mandate at issue in *Sebelius* a "penalty" rather than a "tax" was controlling only for statutory purposes—specifically, for determining application of the Anti-Injunction Act, which bars injunctions against collection of "taxes" but not "penalties." *See id.* at 543–46. Such labels matter for statutory purposes because statutes "are creatures of Congress's own creation," and "[h]ow they relate to each other is up to Congress," as determined by "the statutory text." *Id.* at 544. Congress's label "does not, however, control whether an exaction is within Congress's constitutional power to tax." *Id.* at 565. That issue does not turn on "[m]agic words or labels." *Id.* at 565 (citation omitted). Rather, it depends on a "functional" consideration of the "practical operation" of the law aimed at determining its "essential character." *Id.* (citations omitted).

Similarly, in *Association of American Railroads* and *Lebron*, the Court held that legislation stating that Amtrak "is not a department, agency, or instrumentality of the United States Government,"

49 U.S.C. § 24301(a)(3), does not control its status for constitutional purposes, and that Amtrak is in fact "a governmental entity … for purposes of determining … constitutional issues." *Ass'n of Am. R.Rs.*, 575 U.S. at 55; *see also Lebron*, 513 U.S. at 394 ("[A]mtrak is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution."). As in *Sebelius*, the Court reasoned that the statutory characterization of Amtrak could be controlling for purposes of excusing Amtrak from compliance with other statutes imposing requirements on departments, agencies, or instrumentalities, *see Lebron*, 513 U.S. at 392, but that Congress could not "make the final determination of Amtrak's status" for purposes of determining whether it is subject to constitutional constraints, *id.*

Application of these principles indicates that whether the funds at issue in this case are in "the Treasury" and whether the statutory authorization for the CFPB to draw those funds and expend them constitutes an "Appropriation[ ] made by Law" within the meaning of the Appropriations Clause are matters for this Court to determine based on the substance of what the statute does, not based on any labels that Congress may have applied. And all agree that what the statute unambiguously *does* is provide authority to the CFPB to draw funds from the Federal Reserve and expend them for the purposes specified in the law.

Assuming, as the parties here do, that the Federal Reserve's funds are part of the "Treasury" for Article I purposes, a law authorizing an agency to draw and expend such funds qualifies as an "Appropriation[ ] made by Law" under the longstanding definition of that term: It is a "payment of money … authorized by a statute." *Richmond*, 496 U.S. at 424; *see supra* at 4–

5. Whether Congress applied or disclaimed the label "appropriation" does not matter. "Under prevailing practice, the use of the word 'appropriation' is not necessary, as long as it is clear Congress intends to permit or prescribe expenditure." Kate Stith, *Congress's Power of the Purse*, 97 Yale L.J. 1343, 1378 (1988).[7]

B. In addition to treating what it believed to be Congress's characterization of the funding provision as determinative of whether the statute is an "appropriation," the Fifth Circuit made an equally fundamental error in reading the statutory provision to embody such a characterization to begin with. Section 5497(c)(2), in context, cannot reasonably be read as a disavowal by Congress that it was exercising power under the Appropriations Clause when it specified the amounts that the CFPB may draw from the Federal Reserve and expend for designated purposes. Rather, section 5497(c)(2), like the statutes at issue in *Sebelius*, *Lebron*, and *Association of American Railroads*, is an exercise of Congress's authority to control how the CFPB funding mechanism relates to the terms of other statutes—in this case, statutes that apply to "appropriated monies" or "Government funds."

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[7] Moreover, if the statute in fact meant what the court appears to have thought it means—that Congress was asserting that the Federal Reserve funds were not in the "Treasury" and thus could be allocated to the CFPB without an "appropriation"—then the Fifth Circuit was not really "taking Congress at its word." Rather, the court was contesting the first part of the statement it ascribed to Congress (that the funds are not part of the "Treasury") and accepting only what it saw as Congress's assertion that the law did not appropriate the funds to the agency. The court offered no explanation for "taking Congress at its word" for purposes of one half of the constitutional analysis but not the other.

Notably, section 5497(c)(2) does *not* say what the Fifth Circuit read it to say: that section 5497 is not an "Appropriation[ ] made by Law" of money to be drawn from the Treasury. Instead, it uses different words, not found in the Appropriations Clause—"appropriated monies" and "Government funds." Those terms have an obvious reference, not to the Constitution, but to the many *statutory* provisions that otherwise regulate uses of "appropriated" money and "Government funds" or synonymous phrases.[8] *See*, *e.g.*, *GAO Redbook* 2-18–2-20 (3d ed. 2004) (listing examples of issues involving application of statutory restrictions on "appropriated funds"); 12 U.S.C. § 392 (limiting banks that may serve as depositaries of "Government funds"); 31 U.S.C. § 3302(c)(1) (requiring all public money to be deposited without delay in the Treasury). The effect of the statutory provision is similar to that of other statutes providing that agencies may make use of funds available to them without regard to provisions otherwise applicable to expenditures of appropriated amounts or "Government funds." *E.g.*, 50 U.S.C. § 3510(b).

Section 5497(c)(2)'s use of the phrase "shall not be construed to be" is a strong indication that it is an exercise of Congress's authority to control how laws "relate to each other," *Sebelius*, 567 U.S. at 544, not an attempt to characterize what the law *is* for constitutional purposes. The most natural meaning of section 5497(c)(2)'s limitation on how CFPB funds drawn from the Federal Reserve may be *construed* is that it is a rule of statutory construction, aimed at ensuring

[8] Among the latter is the term "public money," which this Court has long equated with "Government funds." *See*, *e.g.*, *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940).

that statutes restricting uses of appropriated monies and government funds are not interpreted to apply to funds appropriated to the CFPB.

Faced with a statute that used similar language in providing that "self-determination contracts" between the United States and Indian tribes "shall not be construed to be procurement contracts," this Court held that, in context, "that statement seems designed to relieve tribes and the Government of the technical burdens that often accompany procurement, not to weaken a contract's binding nature." *Cherokee Nation of Okla. v. Leavitt*, 543 U.S 631, 640 (2005). So, too, here: Section 5497(c)(2) establishes a rule of construction to relieve the CFPB from technical statutory requirements applicable to appropriated monies and government funds. It is not an assertion that the law does not in fact appropriate money to the agency.

The statutory context confirms this reading. Section 5497(c)(2) is not, as the Fifth Circuit's reading suggests, a novel provision devised to create a unique, extra-constitutional status for CFPB funds. Rather, exactly the same formulation has long been used to describe funds of the Federal Reserve Board, *see* 12 U.S.C. § 244, as well as other financial regulatory agencies that receive funding through assessments on financial institutions, including the Office of the Comptroller of the Currency, *see* 12 U.S.C. § 481, the former Office of Thrift Supervision, *see* 12 U.S.C. § 1467(i)(2) (2009),[9] and the Farm Credit Adminis-

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[9] The Dodd-Frank Act amended section 1467(i)(2) to reflect the transfer of the Office of Thrift Supervision's examination functions and the associated monetary assessments to the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

tration, *see* 12 U.S.C. § 2250. The Dodd-Frank Act adopted this long-established usage in the CFPB funding provision—and in a handful other provisions expanding assessment-based funding of the Office of the Comptroller of the Currency, *see* 12 U.S.C. § 16, establishing and funding an Office of Financial Research within the Treasury Department, *see* 12 U.S.C. § 5345(b)(2), and providing that the Securities and Exchange Commission will be funded in part through assessment of registration fees, *see* 15 U.S.C. § 78d(i)(4). Notably, the caption of the latter provision makes clear that it is a "rule of construction." *Id*.

The statutory phrase repeated in these various provisions has its origins in the Banking Act of 1933, which amended 12 U.S.C. § 244 to provide that assessments imposed on Federal Reserve banks to fund the Federal Reserve Board "shall not be construed to be Government funds or appropriated moneys." Pub. L. No. 73-66, § 6(b), 48 Stat. 162, 167 (1933). Since its creation, the Federal Reserve had been funded through assessments on Federal Reserve banks, which the Board was authorized to use to defray its expenses. As originally enacted, however, the Federal Reserve Act contained no language excluding the Federal Reserve Board's funds from the operation of federal statutes regulating government funds and appropriated moneys. Accordingly, the Attorney General had issued a formal opinion in 1914 stating that the Federal Reserve Board was subject to a statute providing that all receipts and expenditures of "public moneys" by federal agencies were subject to audit by the Treasury Department. 30 Op. Atty. Gen. 308 (Nov. 16, 1914). The Federal Reserve Board's funds, the Attorney General concluded, were "moneys belonging to the

United States, and therefore public moneys" subject to the statutory audit requirement. *Id.* at 310.

Similarly, the Comptroller General determined in 1923 that Federal Reserve Board expenditures were subject to statutes limiting amounts agencies could pay for premiums on bonds and requiring agencies to contract for supplies through the Treasury Department. *See In re Fed. Reserve Bd.*, 3 Comp. Gen. 190 (1923). Responding to the Federal Reserve's contention that the statutes were applicable only to appropriated funds, the Comptroller General concluded that the legislation authorizing the Federal Reserve Board to expend funds derived from its assessments on Federal Reserve banks was an "appropriation" and hence those funds were subject to statutory limits on uses of appropriated funds: "The application of public moneys to a public purpose, no matter how obtained, or whether held in the general fund or segregated as a special fund, is the function of Congress, and its exercise of that function in authorizing the use of public funds is an appropriation of the funds designated to be employed." *Id.* at 193. The Comptroller General concluded that "in the absence of specific exception" applicable to Federal Reserve funds, those funds were subject to general statutes governing expenditures of appropriated public moneys. *Id.*

Viewed in this historical context, the meaning of the language added to 12 U.S.C. § 244 by the Banking Act of 1933 is plain. That legislation did not alter the Federal Reserve Board's authorization to impose assessments on Federal Reserve banks and expend the resulting funds for the purposes specified in section 244. For *constitutional* purposes, the statute still functioned as an appropriation of money permitting the Federal Reserve Board to draw and expend

specified funds. The change effected by the Banking Act was to provide the "specific exception" from statutes otherwise applicable to government funds and appropriated moneys that the Comptroller General and Attorney General had found lacking for Federal Reserve Board funds. The Act did so by creating a rule of *construction* prohibiting those funds from being deemed "Government funds" or "appropriated moneys" for such statutory purposes.

As the Senate Report on the legislation confirms, the new language did not change the constitutional status of the Federal Reserve's funding, but "[left] to the Board the determination of its own internal management policies" regarding its funds. S. Rep. No. 73-77, at 14 (1933). The Federal Reserve Bank of New York elaborated that the legislation "makes clear the right of the Federal Reserve Board to leave its funds on deposit with the Federal reserve banks and clarifies the Board's powers with respect to the funds derived from the assessments levied on the Federal Reserve banks for the purpose of defraying its expenses." Fed. Reserve Bank of NY, *Summary of Banking Act of 1933* at 4 (1933).[10]

The use of this language in other statutes involving similar funding mechanisms for financial regulators, including the CFPB, reflects repetition of a long-established principle of statutory construction.[11] Its use

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[10] Available at https://fraser.stlouisfed.org/title/federal-reserve-bank-new-york-circulars-466/1248-banking-act-1933-15952.

[11] Two Comptroller General opinions illustrate the effect of the language. In *In re Farm Credit Administration*, 72 Comp. Gen. 146, B-248967 (1993), the Comptroller General ruled that the Farm Credit Administration, which imposes assessments on

(*Footnote continued*)

with respect to the CFPB is particularly understandable given that the funds that section 5497 appropriates to the CFPB come from the same sources as the Federal Reserve Board funds already subject to the same rule of construction under 12 U.S.C. § 244.

In light of the statutory pedigree, the Fifth Circuit's reliance on section 5497(c)(2) as a basis for concluding that section 5497 is not, as a constitutional matter, an appropriation of funds to the CFPB may reflect the cursory briefing on the funding issue in the court of appeals. Regardless of the reason, though, the court's understanding of section 5497(c)(2) was fundamentally wrong.

III. Section 5497 does not insulate the CFPB from Congress's appropriations power.

If section 5497(c)(2) had the constitutional significance that the court below ascribed to it, the Federal Reserve Board's funding would likewise be called into question. And under the Fifth Circuit's view of the consequences of its constitutional theory, every action taken by the Federal Reserve Board could be

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farm credit institutions to fund its operations, was not subject to statutory prohibitions on the use of appropriated funds to pay expenses of non-governmental employees to attend meetings, because the statute governing its funding included language saying its funds "shall not be construed to be federal government funds or appropriated moneys." 12 U.S.C. § 2250(b)(2). By contrast, in *In re Callahan*, B-210657, 1984 WL 44274 (Comp. Gen. 1984), the Comptroller General ruled that the National Credit Union Administration *was* subject to a statute prohibiting use of appropriated funds to pay relocation expenses of employees because the statute giving it a standing appropriation of funds assessed against credit unions, 12 U.S.C. § 1755, does *not* include the government funds/appropriated moneys rule of construction. *See id.* at *4.

challenged as having been "*effected*" through an "unconstitutional funding structure." Pet. App. 44a–45a. Unwilling to embrace this radical consequence, the Fifth Circuit posited that the CFPB's funding is different from that of the Federal Reserve Board and other agencies that have indefinite appropriations of funds derived from assessments or fees because, in its view, the CFPB is "unique" in that it is "double insulated" from congressional control of its funding. Pet. App. 2a. According to the Fifth Circuit, the statute authorizing the CFPB to draw funds from the Federal Reserve both "insulat[es]" the agency "from annual or other time limited appropriations" and gives it "double insulation" by "providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process." Pet. App. 35a. That theory is unsupported by precedent, facts, or logic.

The Fifth Circuit's reference to "double insulation" appears to be an attempt to evoke the reasoning of this Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). In that case, this Court held that Congress was not permitted to provide two layers of "insulation" from presidential removal authority to members of the Public Company Accounting Oversight Board. *Free Enterprise Fund*, however, provides no support to the result below. A comparison of the agency structure at issue in *Free Enterprise Fund* with the funding structure at issue here demonstrates that the CFPB is not "double insulated" in the way that the Oversight Board was—indeed, it is not even "single" insulated.

Double insulation accurately described the tenure provision at issue in *Free Enterprise Fund*. In contrast to the single layer of insulation from unfettered

presidential removal authority created by the conventional structure of an independent multimember commission whose members can be removed for good cause by the President, *see Free Enterprise Fund*, 561 U.S. at 495, members of the Oversight Board had two layers of tenure protection between themselves and the President: The President could not remove them at all; rather, they could be removed only for cause by members of a superior agency, the SEC, whose members in turn could be removed by the President only for good cause. *See id*. at 495–96. Although the parties disagreed about whether that extra layer of protection should have constitutional consequences—as did the majority and the dissenters of this Court—there was no disagreement that the statute prevented the President from exercising direct removal authority over the members of the Oversight Board by interposing an independent agency between the President and the Board. *See id*. at 525–26 (Breyer, J., dissenting).

The CFPB funding mechanism has no similar features or effects. Congress's decision to appropriate specifically defined amounts of funds from the Federal Reserve to the CFPB does not place independent authority with respect to the amount of the CFPB's funding in the hands of another decisionmaker that stands between Congress and the CFPB. Congress has exercised *direct* control over the CFPB's funding by specifying the source and amount of funds appropriated to the agency. That the funding is "drawn from a source that is itself outside the [annual] appropriations process," Pet. App. 35a, does not differentiate the CFPB from the Federal Reserve Board or any other agency that has a standing statutory appropriation of funds derived from fees or assessments. Those funds are no more or less beyond congressional control when

expended by the agency that collects them than when Congress directs them to another agency.

Indeed, Congress has exerted greater control over the CFPB's funding than over that of the Federal Reserve Board or the Federal Reserve System itself. Congress imposed a precise cap on the amount available to the CFPB each year. *See* 12 U.S.C. § 5497(a)(2). Yet it has imposed no comparable annual limit on the amounts of Federal Reserve Board expenses that can be paid for with assessments on Federal Reserve banks, *see* 12 U.S.C. § 244, and no limit on the overall expenses of the Federal Reserve System that can be paid out of its earnings before its net income is transferred to the Treasury, *see* 12 U.S.C. § 289(a).[12]

In any event, with respect to neither the CFPB nor the Federal Reserve—nor any other agency that has received an appropriation not subject to a time limit—is there *any* layer of insulation between congressional exercise of its appropriations power and the agencies. Congress itself has determined how to fund both the CFPB and the Federal Reserve, and has by law authorized them to draw and expend specified moneys. And nothing can stop Congress, in the exercise of the same authority, from at any time specifying a

[12] The Fifth Circuit's assertion that the Federal Reserve System is required to "remit [to the Treasury] funds above a statutory limit," Pet. App. 35a, is correct only to the extent that the System may retain no more than $6.825 billion in accumulated surplus funds. 12 U.S.C. § 289(a)(3)(A). However, the statute does not limit the amount of expenses that Federal Reserve Banks may incur and deduct from earnings before transferring net earnings to surplus and thence to the Treasury. *See id.* § 289(a)(2).

different appropriation of funds or even denying funding altogether.

The Fifth Circuit's suggestion that Congress has insulated the CFPB from such an exercise of authority by "relinquish[ing] its jurisdiction to review agency funding on the back end," Pet. App. 36a, is unfounded. The statute provides only that the CFPB's draws of funds from the Federal Reserve are not subject to review by the House and Senate "Committees on Appropriations." 12 U.S.C. § 5497(a)(2)(C). But nothing in the Constitution provides a privileged role for any particular committee of either House of Congress—the Constitution does not even *mention* congressional committees.

Further, the statute provides for auditing of the CFPB by Congress's agent, the Comptroller General, and requires those audits to be reported to Congress. *See* 12 U.S.C. § 5497(a)(5). And it requires the CFPB's Director to provide annual financial reports to the House and Senate Committees on Appropriations. *See id.* § 5497(e)(4). Moreover, nothing in the statute hints at any limit on oversight of the CFPB's spending by committees other than the Appropriations Committees. And, of course, the statute does not limit, or even purport to limit, the ability of any future Congress to alter the CFPB's appropriations. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified."). In short, the "back end" relinquishment of jurisdiction the Fifth Circuit posited does not exist.

To be sure, section 5497 prevents Congress from zeroing out the agency's funding through *inaction*—that is, by not including funding for the agency in an annual appropriations act. That consequence does not, however, follow from any of the features the Fifth Circuit identified as "insulating" the CFPB from congressional control. Rather, the same consequence attaches whenever Congress enacts an appropriation law that does not have a time limit, including all the examples whose constitutionality the Fifth Circuit expressly stated that it did not question. *See* Pet. App. 40a, 41a n.16. There is nothing constitutionally anomalous about that consequence. Rather, it follows directly from the Constitution's command that Congress appropriate funds "by Law." Art. I, § 9, cl. 7. Whenever Congress enacts a *law*, changing or repealing that law, whether expressly or by implication, requires a further, affirmative legislative act of Congress. *See Fletcher v. Peck*, 10 U.S. 87, 135 (1810) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass."). The CFPB's funding provision is no more "insulated" from such action than any other law.

Finally, the Fifth Circuit's reference to what it characterized as the "unique" extent of the CFPB's "autonomy" and "authority," Pet. App. 40a, lends no support to its conclusion that the funding provision violates the Appropriations Clause. Leaving aside the doubtfulness of the court of appeals' view that the CFPB wields more power or has more independence than the Federal Reserve Board, the application of the Appropriations Clause does not turn on the significance of the activity being funded. The Clause applies to money drawn from the Treasury for any purpose, great or small, and imposes only one requirement:

that the withdrawal of funds be authorized by an "Appropriation by Law." Nothing in the text suggests that what constitutes an "appropriation" depends on a court's view of how significant the consequences of the expenditure may be.

Indeed, the Constitution identifies one and only one instance in which the requirements of a valid appropriations law turn on the subject matter of the expenditure: "no Appropriation of Money" to "raise and support Armies" may "be for a longer Term than two Years." Art. I, § 8, cl. 12. Except for that limitation, the Constitution leaves it to Congress to determine which activities should receive annual, biennial, multi-year, or indefinite appropriations. Congress made that choice here when it made a standing appropriation of funds from the Federal Reserve System to the CFPB, subject to an annual cap. The Appropriations Clause does not authorize the courts to disturb that choice.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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May 2023

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Descriptions of Amici Curiae

Public Citizen is a nonprofit consumer-advocacy organization with members in every state. It appears before Congress, administrative agencies, and courts to advocate strong consumer financial protections and government accountability. Public Citizen has participated as an amicus in many cases in this Court and the courts of appeals concerning the Constitution's structural and procedural requirements.

Americans for Financial Reform Education Fund (AFREF) is an independent, nonprofit coalition of more than 200 consumer, investor, labor, civil-rights, business, faith-based, and community groups working to lay the foundation for a strong, stable, and ethical financial system. Through policy analysis, education, and outreach, AFREF advocates stronger consumer financial protections. AFREF supported the CFPB's creation and strongly supports its mission to protect consumers.

Consumer Action, a non-profit 501(c)(3) organization founded in 1971, focuses on consumer education that empowers low-to-moderate-income and limited-English-speaking consumers to prosper financially. Consumer Action advocated for the creation of an independent CFPB and has engaged with the CFPB since its creation, sharing consumer perspectives and advocating for reasonable rules and actions related to credit cards, credit reporting, mortgages, student loans, debt collection, language access, and the agency's public complaint database.

Consumer Federation of America (CFA) is an association of 250 national, state, and local consumer groups that was founded in 1968 to advance the consumer interest through research, advocacy, and

education. For over 50 years, CFA has been at the forefront of ensuring that our marketplace is fair and safe through advancing the consumer interest across a broad portfolio of issues including financial services, banking, credit, investor protections, privacy, housing, insurance, and saving. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts.

Consumer Reports (CR), founded in 1936, is an independent, non-profit and non-partisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today's consumers, and provides ad-free content and tools to 6 million members across the U.S.

Electronic Privacy Information Center (EPIC) is a public interest organization in Washington, D.C.3 , established in 1994 to secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation. EPIC has long advocated for the financial privacy rights of consumers, including before the CFPB.

National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose

primary practice or area of study involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing struggle to curb unfair and oppressive business practices.

National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. NCLC staff engage with the CFPB on a broad range of issues, and an NCLC staff member formerly served on the CFPB's Consumer Advisory Board.

Student Borrower Protection Center (SBPC), a fiscally sponsored project of the Shared Ascent Fund, is a nonprofit organization focused on alleviating the burden of student debt for millions of Americans. The SBPC engages in advocacy, research, and litigation to rein in industry abuses, protect borrowers' rights, and advance racial and economic justice.

U.S. Public Interest Research Group (U.S. PIRG) serves as the national office for the state Public Interest Research Groups (PIRGs), which are independent, non-partisan, non-profit organizations working for consumers and the public interest. U.S. PIRG and the state PIRGs supported the CFPB's creation, arguing for a robust, independent federal agency whose sole mission is to protect consumers from harmful financial products and services.