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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

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Respect for the separation of powers is fundamental to the limited and responsible form of government that the Constitution embodies and ALF long has advocated as an *amicus curiae* in numerous cases before this Court, most recently in *Biden v. Nebraska*, No. 22-506.

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae,* its counsel, and its supporters made a monetary contribution intended to fund preparation or submission of this brief.

The question presented here—whether Congress abandoned its duties under the Appropriations Clause, U.S. Const., art. I, § 9, cl. 7, by enacting a self-funding mechanism for the Consumer Financial Protection Bureau (CFPB)—necessarily implicates the separation of powers.

"Among Congress's most important authorities is its control of the purse." *Biden v. Nebraska*, No. 22-506, slip op., at 24 (U.S. June 30, 2023). The Clause's "straightforward and explicit command . . . 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Delegating Congress's "power of the purse" to the CFPB not only breaches the separation of powers embodied by the Appropriations Clause, but also significantly curtails that financial regulatory agency's accountability to Congress, the President, the businesses that it regulates, and the consumers that it purports to protect.

Unfortunately, Congress's deliberate attempt to insulate the CFPB from the annual appropriations process is emblematic of both political branches' chronic disrespect for the Appropriations Clause. Examples of the many ways in which Congress and the Executive Branch, often in concert, repeatedly have violated the Appropriations Clause range from enactment of statutes that vest the Federal Reserve and several other financial entities with "complete, uncapped budgetary autonomy," *PHH Corp. v. CFPB*,

881 F.3d 75, 81 (D.C. Cir. 2018) (en banc); to many federal agencies' extensive use of "revolving funds" and other forms of "backdoor spending" that replace or supplement annual appropriations, *see* U.S. Gov't Accountability Off., GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process 3, 16, 88 (2005);[2] to the Biden Administration's now-invalidated, unilateral and unappropriated attempt to cancel, *i.e.*, withdraw or expunge, a half-trillion dollars in student loan debt assets held by the Treasury. *See* Br. of Atl. Legal Found. as *Amicus Curiae*, *Biden v. Nebraska* & *Department of Education v. Brown*, Nos. 22-506 & 22-535 (Jan. 12, 2023).

The present case focuses on the CFPB, an egregious example of how Congress knowingly and unabashedly has breached its duties under the Appropriations Clause. *See* Pet. App. 27a-42a; *PHH Corp.*, 881 F.3d 75 at 198 n.19 (Kavanaugh, J., dissenting); *CFPB v. All Am. Check Cashing, Inc.* ("*All Am. Check*"), 33 F.4th 218, 220-242 (5th Cir. 2022) (en banc) (Jones, J., concurring); *id.* at 242 (Oldham, J., concurring in the judgment); *see also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part and dissenting in part); *id.* at 2240 n.11 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

ALF, as *amicus curiae*, has the benefit of a broad perspective on the nature, scope, and extent of the political branches' historic and ongoing violations of the Appropriations Clause. Although this litigation

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[2] Available at https://www.gao.gov/assets/gao-05-734sp.pdf.

focuses on the CFPB, ALF believes that the nondelegation doctrine, discussed at length in this brief, also renders unconstitutional the congressionally enacted, self-funding mechanisms of other federal entities, including the Federal Reserve, from which the CFPB, on demand, replenishes its coffers. A holding here that the CFPB's self-funding mechanism, 12 U.S.C. § 5497(a), violates the Appropriations Clause would encourage Congress to give serious consideration to statutory amendments that would bring the Federal Reserve and other self-funding entities into conformity with the Appropriations Clause.

Through this case, therefore, the Court should send a long overdue wakeup call to both Congress and the Executive Branch that the Appropriations Clause—the Article I portal through which all expenditures of federal funds must pass—means what it says. Indeed, this case may represent the last clear chance to restore the Appropriations Clause to its original purpose and full effect.

SUMMARY OF ARGUMENT

The Court's opinion in *Seila Law* (holding that the CFPB Director's for-cause-only removal protection violated the separation of powers) repeatedly refers to the CFPB's self-funding mechanism as an additional way that Congress has attempted to insulate the CFPB from accountability for its "vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy." 140 S. Ct. at 2191.

The Court explained that "[u]nlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments." *Id.* at 2193-94; *see* 12 U.S.C. § 5497(a) (Transfer of funds from [Federal Reserve] Board Of Governors); *id.* § 243 (Assessments upon Federal reserve banks to pay expenses). Pointing to this "financial freedom" twice-removed from the congressional appropriations process, the Court observed in *Seila Law* that "[t]he CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control." 140 S. Ct. at 2204. The Court indicated that the CFPB's double-insulated self-funding authority made "the Director's removal protection even more problematic." *Id.*

In a separate opinion, Justice Kagan noted in *Seila Law* that "budgetary independence comes mostly at the expense of *Congress's* control over the agency, not the President's." *Id.* at 2240 n.11 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (emphasis added).

Similarly, in a pre-*Seila Law* D.C. Circuit case which had held that the CFPB Director's removal protection was constitutional, then-Judge Kavanaugh, dissenting from the en banc majority, explained as follows:

> Congress's ability to check the CFPB is less than its ability to check traditional independent agencies. The CFPB is not

> subject to the ordinary annual appropriations process. . . . As those who have labored in Washington well understand, the regular appropriations process brings at least some measure of oversight by Congress. The CFPB is exempt from that check. . . . [T]he CFPB's current exemption from the ordinary appropriations process arguably enhances the concern in this case about the massive power lodged in a single, unaccountable Director.

PHH Corp., 881 F.3d 75 at n.19 (Kavanaugh, J., dissenting).

"[J]ust as the CFPB Director's removal protections unconstitutionally insulated the agency from executive control, so, too, does its budgetary independence unconstitutionally eliminate legislative control over the CFPB." *All Am. Check*, 33 F.4th at 225 (Jones, J., concurring). The CFPB's budgetary independence is an "affront to the separation of powers"; it "makes [CFPB] unaccountable to Congress and the people [and] is inimical to the Constitution's structural checks and balances." *Id.* at 225, 232; *see also Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part) ("Congress has increasingly shifted executive power to a *de facto* fourth branch of Government—independent agencies [which] wield substantial power with no accountability to either the President or the people.")

Having held in *Seila Law* that "the structure of the CFPB violates the separation of powers," 140 S. Ct. at

2192, the Court now has the opportunity to further redress Congress's unconstitutional endeavor, no matter how well intended, to create yet another federal financial entity that is so independent of congressional control, it breaches the separation of powers, in this case by bestowing upon CFPB perpetual, double-insulated, self-appropriation authority. Congress cannot delegate, either to the CFPB or any other Executive Branch agency or entity, its exclusive, constitutionally assigned, "power of the purse." The Court should hold, therefore, as did the Fifth Circuit, that the CFPB's self-funding mechanism violates the separation of powers. *See* Pet. App. 45a-46a ("Congress's cession of its power of the purse to the Bureau violates the Appropriations Clause and the Constitution's underlying structural separation of powers.").

"Preserving the separation of powers is one of this Court's most weighty responsibilities. . . . [T]he values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole." *Wellness Int'l Network, Ltd. v. Sharif*, 577 U.S. 665, 696 (2015) (Roberts, C.J., dissenting). "The framers knew . . . that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress. . . . enforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone." *Gundy v. United*

States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

The Appropriations Clause is a pillar of the separation of powers, which the Court can and should enforce here through application of the nondelegation doctrine. That doctrine has particular force where, as in this case, Congress has not merely attempted to delegate some aspect of its general legislative power to a federal department or agency, but instead, has expressly delegated a specific, fundamental, all-encompassing constitutional *duty* that the Framers, for good reason, deliberately assigned to Congress alone. *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988) ("[A] primary significance of the appropriations clause in section 9 lies in what it takes away from Congress: the option *not* to require legislative appropriations prior to expenditure.").

The "intelligible principle" standard that the Court typically applies in nondelegation cases is inapposite here. Those cases involve statutory delegations of rulemaking or enforcement discretion arising from Congress's exercise of its general legislative power under Article I, § 1. In contrast, this case involves Congress' attempt to delegate its exclusive, constitutionally assigned duty under the Appropriations Clause. There is no intelligible principle by which Congress can delegate that duty to an Executive Branch agency. Even if the intelligible principle test were applicable, the self-funding provision at issue, 12 U.S.C. § 5497, contains no criteria for the CFPB to follow (other than an illusory

funding cap) in requisitioning from the Federal Reserve every year more than $ 700 million in non-appropriated funds.

ARGUMENT

The CFPB's Self-Funding Mechanism Is Unconstitutional Because It Violates The Nondelegation Doctrine

A. The nondelegation doctrine is critical to maintaining the separation of powers

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "[T]he separation of powers is designed to preserve the liberty of all the people." *Collins v. Yellen*, 141 S. Ct. 1761, 1781 (2021).

> Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.
>
> Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.

Clinton v. New York, 524 U.S. 417, 450 (1988) (Kennedy, J., concurring).

In particular,

> the Constitution's rule vesting federal legislative power in Congress is vital to the integrity and maintenance of the system of government ordained by the Constitution.

> It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable "ministers."
>
> * * *
>
> Permitting Congress to divest its legislative power to the Executive Branch would dash [this] whole scheme.

West Virginia v. EPA, 142 S. Ct. 2587, 2617-18 (2022) (Gorsuch, J., concurring).

As the Court explained in *Touby v. United States*, 500 U.S. 160, 164-65 (1991),

> [t]he Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. From this language, the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another Branch of government.

The nondelegation doctrine is "designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 668-69 (2022) (Gorsuch, J., concurring). More specifically,

> [t]he nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. . . . If Congress could hand off all its legislative powers to unelected agency officials, it would dash the whole scheme of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.

Id. at 660 (internal quotation marks omitted); *see also Gundy*, 139 S. Ct. at 2134-35 (Gorsuch, J., dissenting) ("If Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" (quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("Justice GORSUCH's scholarly analysis of the Constitution's nondelegation doctrine in *Gundy* may warrant further consideration in future cases.").

"In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The text of Article I, § 1 of the Constitution, which vests "[a]ll legislative Powers" in Congress, "permits no delegation of those powers." *Id.* Congress nonetheless "may confer substantial discretion on executive

agencies to implement and enforce the laws." *Gundy*, 139 S. Ct. at 2123. The Court has explained that the rationale for such Executive Branch discretion is that "'in our increasingly complex society, replete with ever changing and more technical problems,' this Court has understood that 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" *Id.* (quoting *Mistretta*, 488 U.S. at 372).

In cases where Congress has exercised its general legislative power, "the constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides." *Id.*

The Court's "intelligible principle" test, however, does not apply to this case. There is no delegation of Congress's general legislative power at issue here.

> Unlike the Constitution's general grant of a lawmaking power to Congress, the Appropriations Clause grants a particular government function to Congress exclusively: disbursements from the Treasury must go through bicameralism and presentment. In order to make the assignment of the appropriation function to Congress both clear and exclusive, the Appropriations Clause constrains *any* governmental actor that intends to draw money from the Treasury. The Clause then provides that no matter the

> governmental actor, the appropriation must be "made by Law"—that is, each authorization must be made by Congress.

Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 Tex. L. Rev. 89, 116-17 (2022).

The question here is whether Congress can delegate, to an Executive Branch regulatory agency, its duty under the Appropriations Clause to exercise control over all expenditures of federal funds. The answer is "no," especially since the CFPB's funding source, the Federal Reserve, *is itself* insulated from the congressional appropriations process. *See PHH Corp.*, 881 F.3d 75 at n.19 (Kavanaugh, J., dissenting).

B. The nondelegation doctrine applies with particular force to the Appropriations Clause

"As Chief Justice Marshall explained, Congress may not 'delegate . . . powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825)). The plenary power and duty that the Appropriations Clause assigns exclusively to Congress in connection with all expenditures of federal funds fits squarely and inflexibly within this strictly nondelegable category of legislative authority.

The Appropriations Clause commands: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. This "straightforward and explicit

command" has a "fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and *not according to the individual favor of government agents*." *Off. of Pers. Mgmt.*, 496 U.S. at 427-28 (emphasis added).

As Professor Stith explained in her classic and frequently cited article about the Appropriations Clause, "[t]his empowerment of the legislature is at the foundation of our constitutional order." Stith, *supra* at 1344.

> The Appropriations Clause is thus a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213–14 (1833).

U.S. Dept. of Navy v. Fed. Lab. Rels. Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.); *see also All Am. Check*, 33 F.4th at 221 (Jones, J., concurring) ("The Appropriations Clause embodies a fundamental separation of powers principle—subjugating the executive branch to the legislature's power of the purse."); Pet. App. 31a-32a (collecting cases discussing

the critical role played by the Appropriations Clause in the separation of powers); U.S. Gov't Accountability Off., GAO-16-463SP, Principles of Federal Appropriations Law ("GAO Redbook"), ch. 1, § A at 1-6 (4th ed., 2016 rev.) ("As James Madison and subsequent constitutional scholars have recognized, the congressional power of the purse is a key element of the constitutional framework of checks and balances.").[3]

"The Constitution arms Congress with and *mandates that it use* potent fiscal powers designed to maintain the boundaries between the branches and preserve individual liberty from the encroachments of executive power. Indeed, by most accounts, Congress's fiscal powers are its most formidable tool." *All Am. Check*, 33 F.4th at 231-32 (Jones, J., concurring) (emphasis added).

C. No intelligible principle governs, or could govern, the self-funding mechanism that Congress devised for the CFPB

1. "Congress has not only the power but also the duty to exercise legislative control over federal expenditures." Stith, *supra* at 1345; *see also* GAO Redbook, *supra* ("[T]he Constitution vests in Congress the power and duty to affirmatively *authorize* all expenditures."). "By granting the CFPB a substantial entitlement to perpetual funding outside the appropriations process, Congress utterly relinquished

[3] Available at https://www.gao.gov/assets/2019-11/675699.pdf.

its constitutional fiscal role." *All Am. Check*, 33 F.4th at 233 (Jones, J., concurring).

Under 12 U.S.C. § 5497(a)(1), the Board of Governors of the Federal Reserve System "[e]ach year (or quarter of such year) . . . shall transfer to the [Consumer Financial Protection] Bureau . . . the amount determined by the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau." The fact that CFPB's annual self-appropriation is subject to a generous inflation-adjusted "funding cap," *id.* § 5497(a)(2), does not alter the agency's total sequestration from the congressional appropriations process. Indeed, § 5497(a)(2)(C) states that "the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." *See All Am. Check*, 33 F.4th at 233 (Jones, J., concurring) ("Congress even renounced its own power to review the CFPB's budget. . . . Congressional oversight is meaningless without the leverage normally provided by Congress's appropriations power to back it up.").

2. CFPB's most recent "Funds Transfer Request" illustrates how completely Congress has "severed any line of accountability between it and the CFPB by giving the CFPB a perpetual source of funding outside the appropriations process." *Id.* The CFPB Director's two-paragraph letter to the Federal Reserve's Chair merely states: "I have determined that $59,800,000 is the amount necessary to carry out the authorities of the Bureau for FY 2023 Q3, and I request that the

Board transfer this amount to the CFPB. . . . Please deposit the funds in the Bureau of Consumer Financial Protection Fund established at the Federal Reserve Bank of New York ('Bureau Fund') as soon as practicable following receipt of this letter." Letter from Rohit Chopra to Jerome Powell (Apr. 6, 2023).[4]

Under the intra-Executive Branch procedure that Congress has devised, CFPB merely sends this type of perfunctory letter to the Chair of the Federal Reserve's Board of Directors in order to appropriate to itself almost a billion dollars every fiscal year. *See All Am. Check*, 33 F.4th at 223 n.7. "The Director of the CFPB requests transfers from the Board in amounts that [the Director has] determined are reasonably necessary to carry out the CFPB's mission within the limits set forth in the Dodd-Frank Act. Transfers from the Board were capped at $734.0 million in FY 2022 and are capped at $750.9 million in FY 2023 and $785.4 million in FY 2024." CFPB, Annual Performance Plan and Report, and Budget Overview 8 (Feb. 2023).[5]

As a result of this authority to fund itself by requisitioning the non-appropriated funds of another Executive Branch entity—the Federal Reserve—the CFPB is "exempt from" the "measure of oversight by Congress" that "the regular appropriations process brings." *PHH Corp.*, 881 F.3d at 198 n.19 (Kavanaugh, J., dissenting). As Judge Jones

[4] Available at https://tinyurl.com/4vcs4cw4.

[5] Available at https://tinyurl.com/h38xbnnn.

observed, "[t]he CFPB's double insulation from Article I appropriations oversight mocks the Constitution's separation of powers by enabling an executive agency to live on its own in a kingly fashion." *All Am. Check*, 33 F.4th at 242. "A Nation cannot plunder its own treasury without putting its Constitution and its survival in peril." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

3. The Fifth Circuit explained that although the Federal Reserve is the immediate source of the CFPB's funds, the agency's "perpetual self-directed, double-insulated funding structure," Pet. App. 40a, should be viewed as an unappropriated withdrawal of money from the Treasury in violation of the Appropriations Clause. This is because

> [t]he funds siphoned by the Bureau, in effect, reduce amounts that would otherwise flow to the general fund of the Treasury, as the Federal Reserve is required to remit surplus funds in excess of a limit set by Congress. . . . [W]here the Federal Reserve at least remains tethered to the Treasury by the requirement that it remit funds above a statutory limit, Congress cut that tether for the Bureau, such that the Treasury will never regain one red cent of the funds unilaterally drawn by the Bureau.

Pet. App. 34a-35a (citing 12 U.S.C. § 289(a)(3)(B)). Thus, the CFPB bypasses the Appropriations Clause

portal and effectively withdraws unappropriated money from the Treasury.

4. There is a "distinction between authorizing legislation and appropriating legislation." *U.S. House of Rep. v. Burwell*, 185 F. Supp. 3d 165, 168-69 (D.D.C. 2016). "A law alone does not suffice—an *appropriation* is required. . . . [S]pending only 'in Consequence of Appropriations made by law' is additive to mere enabling legislation; appropriations are required to meet the Framers' salutary aims of separating and checking powers and preserving accountability to the people." Pet. App. 38a.

The Dodd-Frank Act is merely "authorizing legislation," *i.e.*, "[s]ubstantive legislation, proposed by a committee of jurisdiction other than the House or Senate Appropriations Committees, that establishes and continues the operation of a federal program or agency either indefinitely or for a specific period or that sanctions a particular type of obligation or expenditure within a program." Glossary of Terms Used in the Federal Budget Process, *supra* at 15. In contrast to the Dodd-Frank Act, an "appropriation act" is a "statute, under the jurisdiction of the House and Senate Committees on Appropriations, that generally provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." *Id.* at 13; *see also Burwell*, 185 F. Supp. 3d at 169 ("Appropriations legislation has 'the limited and specific purpose of providing funds for authorized programs.'" (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979)).

The self-appropriation procedure established by 12 U.S.C. § 5497(a) violates the Appropriations Clause by bypassing the requirement for appropriations legislation.

5. The nondelegation doctrine in its purest form renders § 5497(a) unconstitutional. There is no "intelligible principle" that would enable Congress to delegate its express, specifically assigned, and exclusive duty under the Appropriations Clause to control the government's purse strings. Delegation by Congress of a duty that the Constitution assigns exclusively to Congress is a contradiction in terms.

Even if the Constitution somehow permitted Congress to delegate its appropriations responsibility to the CFPB, Congress has not provided any intelligible principle to guide the CFPB Director's unilateral quarterly and annual withdrawals of Federal Reserve funds. Section 5497(a) merely directs the Federal Reserve to "transfer" to CFPB "the amount determined by the Director to be reasonably necessary," albeit up to an extravagant "funding cap." That bare provision offers no "procedural," "purposive," or "substantive" self-funding criterion that could be viewed as an "intelligible principle." *Clinton v. New York*, 524 U.S. at 484-85 (Breyer, J., dissenting).

As a practical matter, even the funding cap set forth in § 5497(a)(2) is illusory: Although the CFPB Director is supposed to take into account the funds obtained from the Federal Reserve during the preceding year, all funds received by the CFPB "shall remain available until expended." 12 U.S.C.

§ 5497(c)(1). In other words, the CFPB "may 'roll over' the self-determined funds it draws *ad infinitum*." Pet. App. 35a-36a.

6. The situation here is readily distinguishable from cases where the Court has upheld "even very broad delegations . . . to various agencies to regulate in the 'public interest,'" *Gundy*, 139 S. Ct. at 2129. Those cases involve exercise of Congress's general legislative power, *not its appropriations duty*. *See e.g.*, *id.* at 2123 (collecting cases); *Mistretta*, 488 U.S. at 372 (same).

The Second Circuit in *CFPB v. Moroney*, No. 20-3471 (2d Cir. Mar. 23, 2023) glossed over this crucial distinction. It concluded that "the CFPB's funding structure is proper under the nondelegation doctrine" because the Dodd-Frank Act identifies the CFPB's purpose, objectives, and functions. According to *Moroney*, those provisions offer "an intelligible principle to guide the CFPB in setting and spending its budget." Slip op., at 21.

To the contrary, the Dodd-Frank Act's general provisions say nothing about the almost unlimited discretion that § 5497 affords the CFPB's Director in determining how deeply to tap into the Federal Reserve, quarter after quarter, year after year. And of course, the Act is merely an "authorizing statute," *not* an appropriations bill. More fundamentally, the Second Circuit's assertion that an intelligible principle "directing the agency's legislative authority is all that is required to satisfy separation of powers concerns," *id.* at 21-22 n.2, ignores the nature of the Appropriations Clause which, by design, assigns to

Congress *alone* the duty to appropriate funds needed to carry out an Executive Branch agency's purpose, objectives, and functions.

7. "[W]hen the separation of powers is at stake . . . abdication is not part of the constitutional design." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) (internal quotation marks omitted). But abdication of its Appropriations Clause duties is exactly what Congress has done in the case of the CFPB (among other self-funded entities, beginning with the Federal Reserve).

Allowing the CFPB to continue funding itself by withdrawing hundreds of millions of dollars every quarter from the Federal Reserve "would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties." *Id.*

CONCLUSION

The Court should affirm the Fifth Circuit's holding that the CFPB's self-funding mechanism, set forth in 12 U.S.C. § 5497(a), violates the Appropriations Clause.

Respectfully submitted,

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