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 FARM ACTION, HEAL FOOD ALLIANCE, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, RURAL COALITION, AND PARTNERS FOR RURAL TRANSFORMATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RACHEL L. FRIED
Counsel of Record
JEFFREY B. DUBNER
ORLANDO ECONOMOS
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 448-9090
rfried@democracyforward.org

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Materials

BRIEF OF FARM ACTION, HEAL FOOD ALLIANCE, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, RURAL COALITION, AND PARTNERS FOR RURAL TRANSFORMATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are groups representing the interests of farmers, ranchers, rural communities, food system workers, and anyone who eats.

Farm Action is a non-profit organization that serves as a network builder for farmers and ranchers, food chain workers, consumers, organizations, and policymakers up and down the food supply chain. Farm Action works to build a fair, inclusive, and competitive food and agriculture system that respects our land, natural resources, and neighbors around the world.

HEAL (Health, Environment, Agriculture, Labor) Food Alliance is a national multi-sector, multi-racial, member-led coalition of 45 organizations who represent over 2 million rural and urban farmers, ranchers, fishers, farm and food chain workers, indigenous groups, scientists, public health advocates, policy experts, community organizers, and activists. Together, these groups are organizing for food systems that nourish our families, are accessible and affordable for all communities, and are fair to the working people who grow, process, distribute, prepare, and serve our

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[1] Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *Amici*, their members, and their counsel contributed money to fund this brief.

food - while protecting the air, water, soil and biodiversity we all depend on. Many of the BIPOC growers represented by HEAL have been directly affected by discriminatory lending practices and continue to struggle to access sufficient credit and loans to enable land ownership, land tenure, and for their businesses to thrive.

Institute for Agriculture and Trade Policy is a non-profit advocacy organization that works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm, and trade systems. IATP analyzes policy and global trade developments, collaborates with coalitions of agricultural advocates, and works to ensure a strong regulatory framework that protects public health, the environment, workers and farmers. IATP is a member of the Credit Policy Committee of the National Sustainable Agriculture Coalition, which recently released its Farm Bill Platform 2023, including a Credit Title developed by our committee. IATP has submitted comments on the Farm Credit Administration's most recent Strategic Plan and on FCA's proposed rule to strengthen the structure of its bank liquidity reserve.

The Rural Coalition is an alliance of over 60 diverse, community-based member organizations that have worked for 45 years to advance the interests of the historically underserved producers, workers and rural communities they represent. Since 1978, the Rural Coalition has developed and secured passage of over 45 key federal policies to strengthen rural agriculture, with a critical focus on equitable access and building a new generation of diverse producers—producers whose very future in farming is inextricably linked to the outcome of this case. Our member organizations are deeply familiar with the barriers that small scale, limited-resource or socially disadvantaged producers face, including discrimination in lending. CFPB's Payday Lending Rule helps protect those farmers forced into payday loans as their only option to make it to harvest in the unpredictable conditions they face in an agricultural system that is both volatile and unfair.

The Partners for Rural Transformation is a collective of six Community Development Finance Institutions, all who live in and serve regions with higher concentration of persistent poverty counties. PRT is interested in this case because the CFPB protects and serves the most underbanked and unbanked populations, including our regions of rural persistent poverty America.

Amici have an acute interest in the preservation of the Farm Credit System (FCS, or System) and the institutions it comprises, including the Farm Credit Administration (FCA), which oversees and administers the FCS. The FCS is the single largest provider of credit to the agricultural sector, and it ensures farmers and ranchers can get the loans necessary to sustain America's food system. *Amici* also have an interest in the continued operations of the Consumer Financial Protection Bureau (CFPB or Bureau). The CFPB provides critical insight into the difficulties the agricultural sector faces in accessing credit, and it combats discrimination and a lack of transparency by regulating consumer financial products and collecting data regarding the availability of those products. The CFPB's activities are critical to the people *Amici* represent.

Like the CFPB, certain FCS institutions—most notably, the FCA—are not funded through annual appropriations legislation. *Amici* submit this brief to explain why both the FCA's and CFPB's funding structures are constitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the judgment of the Fifth Circuit because, as the Respondents explain in depth, Br. for Pet'rs 13–38, it conflicts with the text of the Constitution and disregards this Court's precedent. This brief focuses on an additional reason to reverse: the Fifth Circuit's opinion could undermine the funding structures of myriad federal agencies, including the FCA, in which *Amici* have a particular interest.

Both the FCS and the CFPB are critical to the health of the agricultural sector. The FCS provides crucial support to America's farmers, including by supplying much-needed loans. The FCA—the FCS's administrative arm—helps insulate our nation's food system from economic shocks through careful management of the FCS. For its part, the CFPB analyzes and addresses issues related to the financial products and credit markets on which agricultural producers rely. A threat to either agency, or to the financial stability indispensable to their respective missions, is a threat to American agriculture. By finding a constitutional violation in features of the CFPB's funding structure that are shared by that of the FCA, the Fifth Circuit's decision did just that.

The funding structure of the CFPB is constitutional. The Appropriations Clause provides that money may only "be drawn from the Treasury . . . in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Consistent with this text and this Court's precedent, the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). The CFPB's funding structure is "authorized by a statute," *OPM v. Richmond*, 496 U.S. 414, 424 (1990), namely the Consumer Financial Protection Act of 2010, 12 U.S.C. 5301 (CFPA or Act). Congress thus authorized the CFPB's funding structure by statute, and the CFPB's funding structure is constitutionally sound.

The Fifth Circuit imposed additional requirements onto the CFPB's funding structure that have no basis in the text of the Appropriations Clause. For example, the court identified Congress's decision to fund the CFPB in a manner other than through annual or time-limited appropriations legislation as problematic, even though nothing in the Constitution imposes a time limit on appropriations. Indeed, Congress has long found annual appropriations unnecessary and undesirable for certain federal agencies. Compounding the problem, the Fifth Circuit did not clarify which features, or combinations of features, of the CFPB's funding structure it considered dispositive to the constitutional question. Nor did that court indicate the weight it attributed to each feature in its analysis. The consequence is a novel, indeterminate test for whether a federal agency's funding structure violates the Appropriations Clause that threatens the existence of all agencies Congress has chosen to fund in ways other than through annual appropriations legislation.

The Fifth Circuit's erroneous decision casts a cloud over the FCA. Several of the features of the CFPB's funding structure that the Fifth Circuit identified as problematic are shared by the FCA. Similar to the CFPB, Congress decided to fund the FCA, as well as another System institution—the Farm Credit System Insurance Corporation (FCSIC)—not through annual appropriations legislation, but by authorizing them to levy assessments on institutions within the FCS. In addition to being funded outside the annual appropriations process, for example, the FCA's funds "shall not be construed to be Federal Government funds or appropriated moneys." 12 U.S.C. 2250(b)(2). The Fifth Circuit took issue with substantively identical language with respect to the CFPB's funds. *Comm. Fin. Servs. Assoc. of Am., Ltd. v. CFPB*, 51 F.4th 616, 639 (5th Cir. 2022). Yet the FCA's funding structure, too, is "authorized by a statute," *Richmond*, 496 U.S. at 424, so it satisfies the Appropriations Clause.

The Fifth Circuit's decision is unbounded by the text of the Appropriations Clause, by precedent, and by practical consideration of its potential ripple effects. If affirmed, that decision could threaten not only the existence of administrative agencies like the FCA, but also the sources of the food that feeds our nation. For those reasons, this Court should reverse the decision of the Fifth Circuit and reaffirm that the Appropriations Clause does not bind Congress to funding agencies only through annual appropriations legislation.

ARGUMENT

I. The FCS and CFPB both ensure and improve access to credit for agricultural businesses.

The FCS is vital to the health of the American agricultural sector. Any risk to the continuing operations of the FCS posed by the Fifth Circuit's decision threatens the stability of the System, to say nothing of the devastation that would be wrought were the funding structure of the FCA to be found unconstitutional. Even if this Court cabins the Fifth Circuit's opinion to the CFPB, the harm to the agricultural community would be severe because the CFPB is also vital to the vibrancy and stability of our agricultural sector.

A. The FCS is critical to the long-term health and stability of the agricultural sector.

The FCS is a complex farm loan regulatory system designed to protect our nation's farmers and food system. The FCS is an interlocking network of borrower-owned lending institutions, regulators, and insurers that includes the FCA, an independent federal agency that regulates and oversees the FCS; the FCSIC, which insures the debt obligations of System lending institutions; the lending institutions themselves, composed of four regional Farm/Agricultural Credit Banks (FCBs/ACBs, or System banks) and their subsidiary Agricultural Credit Associations (ACAs); and the Federal Farm Credit Banks Funding Corporation (Funding Corporation), which is owned by and issues debt securities on behalf of the FCBs and ACBs to generate revenue to fund the loans those banks make to farmers through their subsidiary ACAs. The System also includes the Federal Agricultural Mortgage Corporation, or Farmer Mac, which operates a secondary market for agricultural credit.

The FCS dates to the Federal Farm Loan Act of 1916, which established federal land banks, farm loan associations, and a farm loan board within the Treasury to ensure farmers had access to credit during a farming recession. Ch. 245, 39 Stat. 360. President

Roosevelt established the FCA—the regulatory arm of the FCS—in Depression-Era 1933. Exec. Order No. 6084 (Mar. 27, 1933), *reprinted in* 12 U.S.C. prec. 2241. That same year, Congress enacted sweeping reforms to the FCS, which included giving the FCA oversight powers. *See* Emergency Farm Mortgage Act of 1933, Pub. L. No. 73-10, 48 Stat. 41; Farm Credit Act of 1933, ch. 98, 48 Stat. 257 (June 16, 1933).

The FCS collectively holds the largest share of the nation's agricultural debt, amounting to $441 billion and representing 44.4% of total agricultural lending. FCA, *2021 Annual Report* (July 2022) https://www.fca.gov/template-fca/about/2021AnnualReport.pdf [hereinafter, *FCA 2021 Annual Report*]. The FCS plays a particularly important role in helping farmers secure long-term credit to buy the land necessary for agriculture. For most of its history, "the FCS has had the largest market share of farm business debt secured by real estate." *Id.* at 16.

The FCS also provides critical short-term financing to help farmers weather the time between sowing and selling their product. The Farm Credit Act of 1933 authorized the introduction of a new kind of credit cooperative, called a Production Credit Association (PCA), designed to provide short-term credit to help farmers get their product to market.[2] Pub. L. 73–75, 48 Stat. 257. The short-term credit PCAs provided fueled a measurable increase in corn

[2] PCAs have since been folded into the umbrella ACA institutions that provide credit at a broad range of maturities. FCA, *Description of FCS institution types*, https://www.fca.gov/bank-oversight/description-of-fcs-institution-types (last accessed May 5, 2023) ("All present-day PCAs are now subsidiaries of ACAs.").

yield, crop revenue, and tractor use in the years following their introduction.[3]

The FCA ensures the safety and soundness of System institutions by conducting oversight, enforcing liquidity and leverage requirements, and providing technical assistance. 12 U.S.C. 2252. It also oversees the FCSIC, which, as discussed above, insures FCS investors against the risk of default by borrowers. Thanks in large part to the FCA's oversight, the System's debt securities issued by the Funding Corporation have excellent credit ratings.[4] These credit ratings in turn make System institutions attractive investment opportunities and help increase the capital available for financing farm loans.

The FCS and FCA also play a critical role in ensuring the long-term health of our agricultural workforce by helping young, beginning, and small

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[3] Jared Hutchins, *The US farm credit system and agricultural development: Evidence from an early expansion, 1920–1940*, 105 Am. J. of Agr. Econ. 3 (Jan. 2023), https://onlinelibrary.wiley.com/doi/10.1111/ajae.12290 ("Counties within 30 km from their serving PCA had 9% higher corn yield and 7% to 14% higher crop value per acre," as well as "small but statistically different levels of tractor use," "as compared to counties 45–100 km away from their PCA.").

[4] *See* Farm Credit Funding Corporation, *What is the credit rating of the farm credit debt securities?*, https://www.farmcreditfunding.com/ffcb_live/faq.html.

Credit Rating Agency	**Long-Term Credit Rating**	**Short-Term Credit Rating**
Moody's	Aaa	P-1
Standard and Poor's	AA+	A-1+
Fitch	AAA	F1+

("YBS") farmers. The FCS is responsible for "furnishing sound and constructive credit and related services to young, beginning, and small farmers and ranchers." 12 U.S.C. 2207(a). The FCA pursues this mission by studying and reporting on the issues YBS farmers face.[5] The FCS and FCA are investing more money in more young, small startup farms year over year, ensuring the vibrancy, diversity, and stability of our agricultural workforce; in 2021, for example, System institutions increased lending to all three YBS categories both in terms of new lending and outstanding loans, on both a dollar-volume and loan-volume basis. *FCA 2021 Annual Report*, at 31.

The FCA also has "extensive enforcement powers." *Harper v. Fed. Land Bank of Spokane*, 878 F.2d 1172, 1176 (9th Cir. 1989); *see also* Farm Credit Act of 1971, Pub. L. 92-181, § 1.9, 85 Stat. 584, as amended. The FCA may issue cease and desist orders, enforceable in the courts, against any institutions or persons who violate the Farm Credit Act or regulations it has promulgated thereunder. 12 U.S.C. 2261(a), 2267. The FCA is further empowered to assess civil and criminal sanctions to enforce the statute. *Id.* 2268(a), 2269. As recently as 2018, Congress expanded the FCA's jurisdiction to institution-affiliated parties, *id.* 2267a, which include independent contractors of System institutions and any other person who participates in the conduct or affairs of System institutions, *id.* 2271.

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[5] The FCA partnered with universities to produce symposia on YBS farmers in 2022, *see FCA 2021 Annual Report*, at 29–30, and annually reports on the System's loans to YBS producers, as required by statute. 12 U.S.C. 2207(b); *FCA 2021 Annual Report*, at 30.

The fact that FCA funds are not annually appropriated is critical both to its mission and continued viability, and to the general health of the federal fisc.[6] This durable funding structure ensures the stability necessary to carry out the agency's mission: because the FCA's funds come from fee assessments and not annual appropriations bills, the agency can plan and implement long-term initiatives to support the viability of American agriculture without regard to whether Congress is able to annually budget federal dollars toward those activities. Without the ability to ensure multi-year budgetary stability, the FCA would be unable to plan regulatory programs on the long-term basis that financial systems need. *See* Marc G. Quintyn & Michael W. Taylor, *Regulatory and Supervisory Independence and Financial Stability*, International Monetary Fund, at 21 (Mar. 1, 2002), https://www.imf.org/external/pubs/ft/wp/2002/wp0246.pdf (explaining that short-term budgetary dependence may result in budgets being "cut at times of fiscal austerity" when "mounting problems" require "greater supervisory attention").

Consider the difference between the programs of the FCA and the Department of Agriculture (USDA). Both the FCA and the USDA oversee agricultural loans, through the FCS and the Farm Service Agency (FSA), respectively. As discussed above, the FCS loans are financed by the sale of debt securities. FSA loans, though, whether direct or government-guaranteed,

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[6] 92 Cong. Rec. 38532 (Nov. 1, 1971) (remarks of Rep. James Broyhill (R-NC)) ("Because the farm credit system is a farmer-owned and financially self-sustaining credit institution, it is estimated that there will be no cost incurred by the Federal Government as a result of the passage of this bill.").

are financed by the federal government through annual appropriations legislation. 7 U.S.C. 1988. The FCA's financial stability allows it to provide more loans, more consistently, than the USDA. Since 2016, the FSA loaned, on average, $6.2 billion per year.[7] But this figure is inconsistent, varying by up to $5 billion, and fluctuating annually by billions of dollars; for example, FSA loans dropped from $7.5 billion in 2020 to $5.8 billion in 2022, and then nearly doubled to $10.8 billion of available funds in 2023. *See* FSA Program Data, *supra* note 7; FSA, *Funding*, USDA https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/funding/index (last visited May 8, 2023). By contrast, in 2021 alone (the most recent year for which data is available), the FCS made $136.4 billion in new loans, *see FCA 2021 Annual Report*, at 30, and that figure has reliably risen year over year.[8] The same is true of the administrative budgets of each agency: while the FCA's budget—which has traditionally been capped by Congress but independently sourced—has increased every year over the period discussed, the FSA's budget—which derives from annual appropriations bills—has fluctuated from year to

[7] This was calculated using the Executive Summaries for Farm Loan Programs from 2017 through 2022, available through the USDA's website. FSA, *Program Data*, https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/program-data/index.

[8] In 2017, the FCA oversaw $76.8 billion in new loans made; in 2018, $85.7 billion; in 2019, $90.9 billion; in 2020, $119.7 billion. *See* FCA, *Reports and Publications–FCA Annual Reports*, https://www.fca.gov/about/reports-publications (data collected from FCA Annual Reports from 2017-2021).

year.[9] Congress thus maintains oversight and control of the administrative budgets of both the FCA and the FSA, but designates different sources for each based on whether it prioritizes long-term stability or short-term elasticity. As discussed below, under the Appropriations Clause, that choice is within the discretion of Congress.

The FCS, administered by the FCA, thus plays a crucial role in supporting agricultural businesses, particularly for the young, small, and new businesses that sustain our rural middle class. The FCA's budgetary stability is vital to that mission.

B. The CFPB protects farmers and rural communities by studying and addressing the problems they face.

Because farmers and rural Americans participate in the broader financial market, using many of the same financial products as other Americans, every action the CFPB takes to protect financial consumers protects farmers and rural citizens.[10] The CFPB

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[9] The FCA's budget has risen from $66.2 million in 2016 to $84.8 million in 2022. *See* FCA, *Reports and Publications–FCA Performance and Accountability Reports*, https://www.fca.gov/about/reports-publications (data collected from Performance and Accountability reports from the years 2016–2022). By contrast, the FSA's budget has fluctuated by more than $130 million within the same period, dropping from $1.51 billion in 2016 to $1.38 billion in 2019. *See* USDA, *Budget Summary*, https://www.usda.gov/obpa/budget-summary (data collected from archived USDA budget summaries from 2016–2023).

[10] Although rural and agricultural communities do not overlap completely, the legislative history of the Farm Credit Act of 1971 reveals that lawmakers recognized the deep connection between the two communities and the importance of both to the United

regulates financial products not otherwise regulated by the FCA, ensuring that farmers and rural Americans are protected whether their borrowing is regulated by the FCA or the CFPB.

In addition, the CFPB collects and publishes data on issues facing the agricultural sector and rural communities. *See, e.g.*, Shawn Sebastian, *New effort focused on financial issues facing rural communities,* CFPB (Mar. 10, 2022), https://www.consumerfinance.gov/about-us/blog/new-effort-focused-on-financial-issues-facing-rural-communities/ [hereinafter *New effort focused on financial issues facing rural communities*]. The CFPB recognizes that poverty levels are rising in many rural areas. *Id.* It has therefore invited testimony from rural and agricultural voices, and has gathered evidence regarding rural banking deserts and discriminatory and predatory agricultural credit practices. *Id.*[11] For example, in April 2022, the CFPB

States. 92 Cong. Rec. 42260 (Nov. 19, 1971) (remarks of Rep. John McMillan (D-SC)) (The FCA was intended to "provide for the farmer-owned cooperative system of making credit available to farmers and ranchers and their cooperatives, for rural residences, and to associations and other entities upon which farming operations are dependent, to provide for an adequate and flexible flow of money into rural areas, and to modernize and consolidate existing farm credit law to meet current and future rural credit needs."); 92 Cong. Rec. 38532 (Nov. 1, 1971) (remarks of Rep. Richard Ichord (D-MO)) ("[T]he future of this country is directly related to the development of rural America.").

[11] A "banking desert" is a census tract with no bank within ten miles of its center. Rural areas are ten times more likely than urban areas to be banking deserts. Drew Dahl & Michelle Franke, *Banking Deserts Become a Concern as Branches Dry Up*, Federal Reserve Bank of St. Louis (July 25, 2017), https://www.stlouisfed.org/publications/regional-

released a report presenting data on "Challenges in Rural Banking Access." CFPB, *Data Spotlight: Challenges in Rural Banking Access* (Apr. 2022), https://files.consumerfinance.gov/f/documents/cfpb_data-spotlight_challenges-in-rural-banking_2022-04.pdf.

The CFPB has also used its rulemaking authority to collect better lending data that can ultimately be used to improve rural credit access. The CFPB recently finalized a long-awaited rule mandated by Congress in section 1071 of the Dodd-Frank Act, 15 U.S.C 1691c-2, which will "create our nation's first consistent and comprehensive database regarding lending to small businesses, including small farms." Small Business Lending under the Equal Credit Opportunity Act (Regulation B), 12 C.F.R. Part 1002, RIN 3170-AA09 (Mar. 30, 2023), https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf (Section 1071 Rule). This will allow "enforcement agencies to assess potential areas for fair lending enforcement." *Id.* This rule is intended to "work in concert with the Community Reinvestment Act, which requires certain financial institutions to meet the needs of the communities they serve." CFPB, *CFPB Finalizes Rule to Create a New Data Set on Small Business Lending in America* (Mar. 30, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-create-a-new-data-set-on-small-business-lending-in-america/. This rulemaking reflects the CFPB's attention to agricultural credit and rural banking deserts, as the agency recognizes that "the loss of local banks means the loss of local knowledge of the rhythms of rural

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economist/second-quarter-2017/banking-deserts-become-a-concern-as-branches-dry-up.

communities, small businesses, and small farms—three groups that rely on in-person banking services." CFPB, *Statement of CFPB Director Rohit Chopra, FDIC Board Member, on the Notice of Proposed Rulemaking Regarding the Community Reinvestment Act*, (May 5, 2022), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-fdic-board-member-on-the-notice-of-proposed-rulemaking-regarding-the-community-reinvestment-act/.

Finally, the CFPB's efforts to combat discriminatory and predatory lending practices benefit rural and agricultural communities. Farmers sometimes rely on payday loans to help repay agricultural loans to avoid foreclosure of their farms. *See New effort focused on financial issues facing rural communities* ("Farmers described the downstream consumer finance impacts of trying to subsist and hold onto their families' homes and farms under these arrangements by cobbling together off-farm income, taking out credit card debt, personal loans, and other forms of credit just to make ends meet."). Those farmers would be directly benefited by the protections of the Payday Lending Rule at issue in this case.

Additionally, socially disadvantaged farmers and ranchers (SDFRs), who are agricultural workers who "have been subjected to racial, ethnic, or gender prejudice," 7 U.S.C. 2003(e), face barriers to inclusion in credit markets. *See* Economic Research Service, *Socially Disadvantaged, Beginning, Limited Resource, and Female Farmers and Ranchers*, U.S. Dep't of Agriculture, https://www.ers.usda.gov/topics/farm-economy/socially-disadvantaged-beginning-limited-resource-and-female-farmers-and-ranchers/ (last updated Mar. 22, 2023). SDFRs represent "17 percent of primary producers," but account for only "8 percent of outstanding total agricultural debt." GAO, *Agricultural Lending: Information on Credit and Outreach to Socially Disadvantaged Farmers and Ranchers Is Limited*, GAO-19-539 (July 11, 2019), https://www.gao.gov/products/gao-19-539 [hereinafter GAO Study on Agricultural Lending]. SDFRs "face a number of challenges that hamper their ability to obtain private agricultural credit" and "face actual or perceived unfair treatment in lending." *Id*. Black farmers in particular face discrimination and exclusion: the proportion of Black farmers dropped from 14% of all farmers in 1920 to less than 2% today. *New effort focused on financial issues facing rural communities*. "Black farmers have lost more than 12 million acres of farmland over the past century, mostly since the 1950s." *Id.*

At present, "comprehensive data on SDFRs' outstanding agricultural debt are not available because regulations generally prohibit lenders from collecting data on the personal characteristics of applicants for loans." GAO Study on Agricultural Lending. Congress charged the CFPB with filling that gap. The recently promulgated Section 1071 Rule, discussed above, will "require financial institutions to compile, maintain, and submit to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses." Section 1071 Rule. The rule will thus ameliorate the data deficit currently obscuring the discrimination SDFRs face and make the agricultural credit market more fair and free.

II. The Fifth Circuit's extratextual reading of the Appropriations Clause could threaten the FCA, which is funded pursuant to enabling legislation, not annual appropriations legislation.

The Appropriations Clause requires all money paid from the Treasury to be disbursed pursuant to an act of Congress. The funding structures of both the CFPB and the FCA were enacted by acts of Congress; they both therefore comport with the Appropriations Clause. But the Fifth Circuit concluded that the Appropriations Clause requires more than an act of Congress to approve an expenditure, even though the factors the court considered relevant do not appear in the Constitution. The Fifth Circuit's erroneous consideration of these extratextual factors calls into question the funding structures of agencies that had never before been in dispute, including the FCA.

A. The CFPB's funding structure comports with the Appropriations Clause.

The Constitution's Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. Const. art. I, § 9, cl. 7. The clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co.*, 301 U.S. at 321. Or, put conversely, "the payment of money from the Treasury must be authorized by a statute." *Richmond*, 496 U.S. at 424.

The Appropriations Clause mandates that Congress alone may determine how "all the taxes raised from the people, as well as revenues arising from other sources," should be spent. *Id.* (quoting 2

Commentaries on the Constitution of the United States § 1348 (3d ed. 1858)). It thereby protects the public from Executive overreach. It "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co.*, 301 U.S. at 321. Its underlying aim is to ensure that Congress, and not the Executive Branch, decides how the public's money should be spent. As Petitioners explain, the Appropriations Clause has never before been interpreted to restrict Congress's discretion in crafting the funding structures of Executive agencies. Br. for Pet'rs 24–25.

Congress authorized the funding of the CFPB when it passed the CFPA. The Act directs the Director of the CFPB to determine the amount of money "reasonably necessary" to carry out the CFPB's authorities and to obtain those funds from the Federal Reserve System, 12 U.S.C. 5497(a)(1), subject to a cap of 12% of the total operating expenses of the Federal Reserve System, adjusted for inflation, *id.* 5497(a)(2)(A)-(B). The Federal Reserve System, in turn, pursuant to another act of Congress, obtains its funds from fees it assesses against the financial institutions it regulates. *See id.* 243. The CFPB may seek additional funds from Congress if necessary by requesting an appropriation from the Committee on Appropriations of both Houses of Congress. *Id.* 5497(e)(1). Congress further provided for the CFPB's funds to be maintained in the Bureau Fund in the Federal Reserve System. *Id.* 5497(b)(1). The CFPB may invest portions of its funds not currently needed. Congress again directed what would happen to those funds: the interest and earnings on investments are credited to the Bureau Fund. *Id.* 5497(b)(3). Congress also specified that the Bureau Fund should be used "to pay the expenses of the Bureau in carrying out its duties and responsibilities," *id.* 5497(c)(1), which Congress outlined at 12 U.S.C. 5511. This congressional authorization satisfies the Appropriations Clause.

Consistent with the constitutional text, historical practice, and this Court's precedents, the vast majority of courts to have considered whether the CFPB's funding structure comports with the Appropriations Clause have properly concluded it does. The Second Circuit recently held that "[b]ecause the CFPB's funding structure was authorized by Congress and bound by specific statutory provisions, . . . [it] does not offend the Appropriations Clause." *CFPB v. L. Offs. Of Crystal Moroney, P.C.*, 63 F.4th 174, 181 (2d Cir. 2023). The D.C. Circuit has likewise rejected constitutional challenges to the CFPB's funding structure. *See PHH Corp. v. CFPB*, 881 F.3d 75, 95–96 (D.C. Cir. 2018), *abrogated on other grounds by Seila L. LLC v. CFPB*, 140 S. Ct. 2183 (2020). Indeed, the Fifth Circuit stands alone in its determination otherwise. *See Bureau of Consumer Fin. Prot. v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 57 (D.R.I. 2020) ("Over the past decade, both before and after *Seila Law*, litigants have argued that the CFPB's funding structure is unconstitutional. None has succeeded.") (footnote omitted). As all other courts correctly concluded, the CFPB's funding structure was authorized by an act of Congress and therefore comports with the Appropriations Clause.

B. Congress has chosen to fund the FCA outside the annual appropriations process.

Like the CFPB, Congress has chosen to fund the FCA—a key component of the FCS—from a source other than annual appropriations legislation.

Congress directed the FCA to determine how much money it will need each fiscal year, much like it instructed the CFPB. 12 U.S.C. 2250(a)(1). Similar to the Federal Reserve System, the FCA collects that amount through assessments from the institutions it regulates in the proportions it deems appropriate. *Id.* 2250(a)(2). These assessments are then deposited into the Farm Credit Administration Administrative Expense Account, which is maintained in the Treasury. *Id.* 2250(b)(1). Like the CFPB's funds, the funds in the FCA's expense account "shall not be construed to be Federal Government funds or appropriated moneys." *Id.* 2250(b)(2); *see also* 12 U.S.C. 5497(c)(2) ("Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.").

Congress may limit the administrative expenses of the FCA, *see* 12 U.S.C. 2249, which it "usually" does through annual appropriations legislation, FCA, *FY 2022 Performance and Accountability Report*, at 15 (Nov. 8, 2022), https://www.fca.gov/template-fca/about/FCAPerformanceAndAccountabilityReport FY2022.pdf [hereinafter *FCA FY 2022 Performance and Accountability Report*]; *see also* Congressional Research Service, *Farm Credit Administration and Its Board Members*, at 1 (Mar. 3, 2023), https://crsreports.congress.gov/product/pdf/IF/IF10767 ("Even though FCA is not funded by congressional appropriation, the annual Agriculture appropriations act places a limit on FCA's administrative expenses."). Congress capped the FCA's expenditures at $88.5 million for fiscal year 2023. Consolidated Appropriations Act, H.R. 2617–36, 117th Cong

(2023).[12] The FCA may direct the Secretary of the Treasury to invest and reinvest any unused amounts in the expense account; all income earned is deposited in the expense account. 12 U.S.C. 2250(3). Although Congress can and does cap the annual administrative expenses of the FCA, it has not limited the amount of money the FCA may accumulate in investments or in its expense account. In fiscal year 2022, the FCA's budgetary resources totaled $110,059,470, about $25 million more than its administrative budget. *See FCA FY 2022 Performance and Accountability Report*, at 15, 17. Congress requires the FCA to submit annual reports to it "on the condition of the System and its institutions," and "on the manner and extent to which the purposes and objectives of [the Farm Credit Administration Act] are being carried out." 12 U.S.C. 2252(a)(3).

The FCSIC, another System institution, is likewise not funded through annual appropriations bills. The Funding Corporation funds the loans of all System banks by issuing debt securities to investors. *See* 12 U.S.C. 2160(b), 2153.[13] The FCSIC insures the obligations of all System banks, thereby protecting the investment of those who bought the bonds issued by the Funding Corporation. *See* 12 U.S.C. 2277a-1. The FCSIC holds its funds in the Farm Credit Insurance Fund. *Id.* 2277a-9. The FCSIC replenishes

[12] The FCA may exceed this limit by up to 10 percent with notice to the Committees on Appropriations of both Houses of Congress. 12 U.S.C. 2249.

[13] *See also* Federal Farm Credit Banks Funding Corporation, *Farm Credit System*, https://www.farmcreditfunding.com/ffcb_live/aboutUs/farmCreditSystem.html (last accessed May 5, 2023); Farm Credit, *Our Structure*, https://farmcredit.com/our-structure (last accessed May 5, 2023).

its funds by assessing premiums from the insured System banks according to a statutory formula. *Id.* 2277a-4. Basically, the FCSIC charges premiums to the insured System banks in proportion to their exposure, *id.* 2277a-4(a), maintaining a minimum "secure base amount" that is itself a percentage of the aggregate exposure of the System banks, *id.* 2277a-4(c).

Finally, throughout the System's history, Congress has authorized government funding for, or has guaranteed the obligations of, System institutions through legislation other than annual appropriations bills and sometimes for time periods exceeding one year. For example, the Emergency Farm Mortgage Act of 1933 permitted the Federal Land Banks to issue up to $2 billion in bonds, over the course of two years, with interest guaranteed by the federal government. Pub. L. No. 73-10, 48 Stat. 41, at 41–42. During the 1980s, our nation faced a severe agricultural recession during which many farmers defaulted on loans and the FCS lost billions of dollars. Julie Anderson Hill, *Bailouts and Credit Cycles: Fannie, Freddie, and the Farm Credit System*, 2010 Wis. L. Rev. 1, 4–5 (2010). Congress responded by passing the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1568, which created the Farm Credit System Financial Assistance Corporation to provide necessary funds to the failing System institutions. Congress permitted the Financial Assistance Corporation to issue, over a multi-year period, up to $4 billion in fifteen-year bonds with principal and interest guaranteed by the Treasury. 101 Stat. at 1597. Congress's ability to tailor its spending to contemporaneous needs—including by authorizing spending for years into the future—has been and continues to be crucial to ensuring the vitality of the agricultural sector of our economy.

C. The extratextual reading of the Appropriations Clause advanced by the Fifth Circuit could threaten the Farm Credit Administration.

To *Amici*'s knowledge, nobody has previously suggested that the FCA's funding structure violates the Appropriations Clause. Before the decision below issued, there was no reason to doubt it; as discussed *supra* in Part II.A, the Appropriations Clause prohibits anyone but Congress from expending money from the Treasury—no more and no less. Like the CFPB, "the [FCA's] funding structure was authorized by Congress and bound by specific statutory provisions." *L. Offs. of Crystal Moroney*, 63 F.4th at 181 (considering the funding structure of the CFPB). Thus, "the [FCA's] funding structure does not offend the Appropriations Clause." *Id.*

Under the Fifth Circuit's reasoning, however, the FCA's 50-year-old funding structure would suddenly be subject to question. In holding the CFPB's funding structure to violate the Appropriations Clause, the Fifth Circuit introduced extratextual considerations that have no basis in the Constitution. None of the individual features that the Fifth Circuit decried should be significant from an Appropriations Clause perspective. But even assuming some could be relevant, the circuit court did not specify which features of the CFPB's funding structure it considered decisive and which it considered merely distasteful. Consequently, the reading of the Appropriations Clause advanced by the Fifth Circuit and Respondents could call into question other agencies' funding mechanisms, including the FCA's.

1. The Fifth Circuit's extratextual reading of the Appropriations Clause has no basis in the Constitution or precedent.

In holding the CFPB's funding structure to violate the Appropriations Clause, the Fifth Circuit incorrectly read additional requirements into the text of the clause.

First, the Fifth Circuit suggested the Appropriations Clause requires Congress to appropriate funds on an annual, or at least "time limited," basis. *See CFSA*, 51 F.4th 616, 638–39 (5th Cir. 2022) (*CFSA*) ("While the great majority of executive agencies rely on annual appropriations for funding, the Bureau does not. . . . Congress did not merely cede *direct* control over the Bureau's budget by insulating it from annual or other time limited appropriations.").

This purported requirement is inconsistent with the text of the Constitution and longstanding congressional practice. Contrary to Respondents' suggestion, *see* CFSA Cert. Opp. 15 ("Rather than both chambers of Congress and the President needing to agree to fund the CFPB *each year*, ..." (emphasis added)), nothing in the Appropriations Clause or elsewhere in the Constitution requires Congress to revisit and reauthorize agency funding on an annual (or any other) timeframe. Had the Framers intended to impose time limits on appropriations, they would have done so explicitly, as they did regarding funds appropriated for armies. U.S. Const. art. I, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"). Moreover, as the CFPB notes, history is replete with examples of so-called "standing" or "permanent" appropriations that last for multiple years or indefinitely, Social Security payments being one of them. Br. for Pet'rs 20–21 (citing 42 U.S.C. 301, 401(b)).

Second, the Fifth Circuit found fault with the fact that Congress directed the CFPB to obtain its funds from the Federal Reserve System, which in turn obtains its funds from fees it assesses against financial institutions. *See* 12 U.S.C. 243. The Fifth Circuit described this arrangement as "a double insulation from Congress's purse strings." *CFSA*, 51 F.4th at 639.

But neither the CFPB's nor the Federal Reserve System's source of funding is "insulat[ed]" from congressional control, let alone in a way that is proscribed by the Appropriations Clause. "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *PHH Corp.*, 881 F.3d at 95 (observing that "[t]he way the CFPB is funded fits within the tradition of independent financial regulators"). The Appropriations Clause thus does not foreclose Congress's decision to fund agencies through assessments or fees, as it has the Federal Reserve System, the FCA, and others. Nor does the clause preclude Congress from making one source of funds available to two different agencies. *See* Br. for Pet'rs 34 (noting the Federal Reserve Board has the "ministerial" role of "simply transfer[ring] the requested amount, subject to the cap set by Congress, to the CFPB).

Third, the Fifth Circuit faulted the Bureau Fund for being "[un]tethered to the Treasury." *CFSA*, 51 F.4th at 639. To be sure, the Bureau Fund is maintained at a Federal Reserve bank, *see* 12 U.S.C.

5497(b)(1), not in the Treasury, and the CFPB need not remit unused funds to the Treasury.

Neither of these features offends the Appropriations Clause. The Appropriations Clause does not mandate that all agencies maintain their funds in the Treasury; rather, it mandates that money may not *leave* the Treasury without congressional approval. Whether money, once appropriated to an agency, is located wholly within the agency, the Treasury, or elsewhere is irrelevant to Congress's appropriations authority. Nor does the Appropriations Clause require that unused amounts of authorized expenditures be transferred to the Treasury. Indeed, Congress has provided for agencies other than the CFPB—such as the FCA—to retain and invest unused amounts of approved expenditures rather than transfer them to the Treasury. *See* 12 U.S.C. 2250(3) (permitting FCA to invest and reinvest excess funds); *see also, e.g.*, *id.* 355 (authorizing Federal Reserve to buy and sell bonds and notes); *id.* 1823(a)(1) (providing for the investment of FDIC funds "not otherwise employed"); *id.* 4516(f)(6) (authorizing the Director of the FHFA to request investment of funds "not required to meet the current working needs of the Agency").

Fourth, the Fifth Circuit believed that "Congress relinquished its jurisdiction to review [CFPB] funding on the back end" by opting not to subject funds derived from the Federal Reserve System to review by the congressional Committees on Appropriations. *CFSA*, 51 F.4th at 639 (citing 12 U.S.C. 5497(a)(2)(C)).

As an initial matter, as Petitioners make clear, no appropriation of funds is truly indefinite because Congress can always repeal or amend the law that established the appropriation. *See* Br. for Pet'rs 20. It is moreover incorrect to conclude that Congress has "relinquished its jurisdiction to review" CFPB's expenditures. In the CFPA, Congress required the Bureau to submit regular reports to Congress that "justif[y] . . . the budget request of the previous year," 12 U.S.C. 5496(c)(2), and required annual audits of the CFPB's operations, budget, and finances, *id.* 5496a. The only supposed relinquishment is Congress's decision not to subject these funds to review by the congressional Committees on Appropriation. *See id.* 5497(a)(2)(C). This cannot bear the significance that the panel attributed to it. There is no conceivable constitutional requirement that funding be reviewed by a particular committee rather than the Congress as a whole. Nor did the Fifth Circuit suggest that other congressional committees would lack authority to engage in oversight of these transactions. Indeed, neither House of Congress even had a Committee on Appropriations for the first several decades after the Founding. *See* United States Senate, *Appropriations Committee Created*, https://www.senate.gov/about/origins-foundations/committee-system/appropriations-committee-created.htm (last accessed May 4, 2023); Appropriations, *About the Committee*, https://appropriations.house.gov/about (last accessed May 4, 2023).

Fifth, the Fifth Circuit apparently deemed the scope of the CFPB's regulatory portfolio relevant to the Appropriations Clause analysis. *See CFSA*, 51 F.4th at 638. It took issue with the fact that the CFPB "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy." *CFSA*, 51 F.4th at 638 (quoting *Seila Law*, 140 S. Ct. at 2191).

But the Appropriations Clause does not impose additional requirements on appropriations for enforcement purposes or to agencies with robust enforcement powers. Indeed, as Petitioners explain, "Congress has frequently chosen" to fund "financial regulatory agencies" through fees and assessments, rather than annual appropriations legislation. Br. for Pet'rs 22.

2. The Fifth Circuit's decision could threaten the FCA.

Because the Fifth Circuit's analysis is unmoored from any textual or historical grounding, it is not clear that any of the distinctions discussed in Part II.C.1 *supra* have constitutional significance. Beyond that, the Fifth Circuit failed to apply the extraconstitutional factors it identified in a jurisprudentially tenable or practically administrable way. The court did not articulate a line that would clarify which types of funding structures are constitutionally permissible and which are not. Nor did it establish a limiting principle that would anchor its reasoning in any alleged concerns animating the Appropriations Clause. The Fifth Circuit summarily concluded: "Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it." *CFSA*, 51 F.4th at 639. Yet, as discussed above, no feature of the CFPB's funding structure independently offends the Appropriations Clause, and it is unclear what combination of features is sufficient in that court's view to create a constitutional violation.

The Fifth Circuit's opinion thus opens the door for challenges to any agency that is funded in any way other than that court's preferred method of annual appropriations legislation—with no constitutional basis. *See, e.g.*, Br. of Plaintiffs-Appellants at 50–54, *Collins v. Dep't of the Treasury*, No. 22-20632 (5th Cir. Feb. 1,

2023) (relying on *CFSA* in arguing that the Federal Housing Finance Agency's "self-funding structure" violates the Appropriations Clause"). The features of the CFPB's funding structure that the Fifth Circuit considered problematic that are most relevant to the FCA's funding structure are discussed below.

With respect to the first feature discussed in Part II.C.1 above, the Fifth Circuit found CFPB's "self-actualizing, perpetual funding mechanism" to be the "[m]ost anomalous" feature of its funding structure, juxtaposing it with the "annual appropriations for funding" on which "the great majority of executive agencies rely." *CFSA*, 51 F.4th at 638.

But the Appropriations Clause places no restrictions on the form, source, or duration of an appropriation made by Congress, once made. *See* Br. for Pet'rs 14–18. The FCA and many other agencies are not funded by annual appropriations bills. Pursuant to valid legislation, the FCA requisitions its funds through assessments imposed on the System institutions it regulates, and its funds are maintained in a Treasury expense account or in investments whose earnings are deposited therein. The FCA's funding mechanism can thus also be said to be "perpetual," *CFSA*, 51 F. 4th at 638: the FCA requires no annual or other periodic appropriations by Congress because Congress designed it to obtain its funding through other means. Indeed, as the D.C. Circuit recognized, "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *PHH Corp.*, 881 F.3d at 95.

With respect to the fourth feature discussed in Part II.C.1 above, the Fifth Circuit highlighted language in the CFPA that, in its view, "underscore[s]" Congress's lack of oversight over the CFPB's funding: that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." *CFSA*, 51 F.4th at 639 (quoting 12 U.S.C. 5497(c)(2)). As discussed in Part II.B., *supra*, substantively identical language applies to the FCA's funds. *See* 12 U.S.C. 2250(b)(2). Far from "underscor[ing]" a "novel cession by Congress of its appropriations power," *CFSA*, 51 F.4th at 639, that language merely states that the CFPB's and FCA's funds should not be treated as appropriated money, and is "plainly concerned with insulating the [FCA] from statutory restrictions governing appropriations." *United States v. Wells Fargo & Co.*, 943 F.3d 588, 605 (2d Cir. 2019) (interpreting substantively similar language in 12 U.S.C. 244 applying to the Federal Reserve). Here again, the Fifth Circuit provides no dividing line between permissible uses of this unremarkable language and impermissible ones.

With respect to the fifth feature discussed in Part II.C.1 above, the FCA too wields "extensive enforcement powers" over FCS-related activities. *Harper*, 878 F.2d at 1176. The Fifth Circuit neglected to explain how it determined the point at which point an agency's enforcement powers, in its view, implicate the Appropriations Clause or why this is an appropriate judicial task. *See CFSA*, 51 F.4th at 641; Br. for Pet'rs 35. Whether the FCA's enforcement powers are of such scope as to trigger extra scrutiny under the Appropriations Clause is unclear under the Fifth Circuit's reasoning. On a proper reading of the Appropriations Clause, however, the relative scope of an agency's enforcement powers is constitutionally irrelevant. The Appropriations Clause does not discriminate between funds used for enforcement and funds used for other purposes, and it certainly does not impose additional requirements on the funding of executive agencies with enforcement powers.

If any of the factors the Fifth Circuit analyzed are considered dispositive to determining compliance with the Appropriations Clause, the Fifth Circuit's analysis thus throws into question the lending and enforcement structures that farmers have relied on for more than five decades, as well as every other agency that is funded outside the annual appropriations process.[14]

CONCLUSION

For the reasons explained above, the Court should reverse the judgment of the Fifth Circuit.

[14] Of course, to the extent *CFSA* is read to hold that an agency's funding structure is unconstitutional only where it includes all the features of the CFPB's, or where the agency's annual administrative expenditures are not capped by Congress, then the FCA is distinguishable.

Respectfully submitted.

RACHEL L. FRIED
Counsel of Record
JEFFREY B. DUBNER
ORLANDO ECONOMOS
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 383-0794
rfried@democracyforward.org

Counsel for *Amici Curiae*

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