Why Judge Jackson Is Wrong: The CFPB Cannot Be Lawfully Funded When the Federal Reserve Has No Profits

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I. THE CONSTITUTIONAL DEFECT CREATED BY JUDGE JACKSON'S INTERPRETATION

A. The Appropriations Clause Requires That CFPB Funds Be Otherwise Remittable to Treasury

The 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. As the Supreme Court reaffirmed in CFPB v. Community Financial Services Association of America, Ltd., 601 U.S. 416 (2024), Congress may satisfy the Clause by authorizing an agency to draw funds from a specified source, but that authorization must still reflect congressional control over federal funds.

The key constitutional feature that saved CFPB funding in the CFSA case was that the statute limited CFPB funding to money that would otherwise flow to the Treasury. *See id*. at 435–36 (emphasizing that the CFPB draws from the Federal Reserve's "earnings," which Congress has directed to the Treasury).

Judge Jackson's interpretation breaks that constitutional link. She doesn't even acknowledge that there is a serious constitutional issue, let alone address that issue.

When the Federal Reserve operates at a loss, there are no excess funds to remit to the Treasury. Instead, each Reserve Bank records a deferred asset on its balance sheet—essentially an IOU to itself—that must be offset by future profits before remittances to the Treasury may resume. See Bd. of Governors of the Fed. Reserve Sys., Financial Accounting Manual for Federal Reserve Banks (May 2025).

In those circumstances:

- No funds are remitted to the Treasury
- No funds are "available" to the Treasury
- No funds exist that Congress has authorized to be spent elsewhere

Allowing the CFPB to be funded anyway means the Bureau is being financed with money that would not—and legally could not—otherwise reach the Treasury. That violates the Appropriations Clause's core requirement that Congress control the disposition of federal funds. *See Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990).

Judge Jackson's reading thus transforms § 5497 (i.e., the CFPB funding language of Dodd-Frank) into a standing appropriation untethered to Treasury remittances, precisely what the Constitution forbids.

B. Congress Avoided This Constitutional Problem

First, in enacting Dodd-Frank, Congress rejected a previous iteration of the CFPB's funding provision from the version of the legislation originally introduced in the House that would have drawn funds from the Federal Reserve's "total system expenses" as opposed to "combined earnings." *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 4109(a) (as introduced in House, Dec. 2, 2009). This alternative draft, if constitutional, would have allowed the Federal Reserve to transfer funds to the CFPB without any regard to whether the Fed had "earnings. "But Congress consciously jettisoned the initial draft in favor of limiting the Bureau's source of funding to "the combined earnings of the Federal Reserve System" in an amendment to Dodd-Frank on May 20, 2010, and this language was carried forth into the version enacted by Congress and signed by the President. *Compare id.* ("shall transfer funds in an amount equaling 10 percent of the Federal Reserve System's total system expenses"), *with* H.R. 4173, 111th Cong. § 1017(a)(1) (as passed by Senate, May 20, 2010) ("shall transfer to the Bureau from the combined earnings of the Federal Reserve System the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau"), *and* 12 U.S.C. § 5497(a)(1) (same). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (emphasis in original); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 422-23 (1999) (Breyer, J., concurring in part and dissenting in part) (noting Congress discarded language that would have given FCC power it sought to exercise). Thus, an early version of what became Dodd-Frank would have required the Fed to have funded the CFPB without regard to earnings. Congress rejected that approach. Instead, it conditioned CFPB funding on a specific source: "combined earnings of the Federal Reserve System."

An unconditional funding mandate would have raised precisely the Appropriations Clause concerns Judge Jackson's opinion now creates. Courts must presume Congress legislates to avoid constitutional infirmities. *Edward J. DeBartolo Corp. v. Fla Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568, 575.

Second, Dodd-Frank uses the term "revenue" several times without referring to earnings in any capacity. *See, e.g.*, 12 U.S.C. §§ 5381(b) ("if the consolidated revenues of such company from such activities constitute less than 85 percent of the total consolidated revenues of such company"), 5311(a)(6)(A) ("the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature"), 5367(b)(2) ("as long as not less than 2/3 of the assets or 2/3 of the revenues generated from the activity are from or attributable to such company or affiliate"). It is a "cardinal rule that a statute is to be read as a whole, in order not to render portions of it inconsistent or devoid of meaning." *In re Glenn*, 900 F.3d 187, 190 (5th Cir. 2018). "We usually 'presume differences in language like this convey differences in meaning.'" *Wis. Cent. Ltd.*, 585 U.S. at 279 (quoting *Henson*, 582 U.S. at 86). So the usage of "earnings" rather than "revenue" in the CFPB's funding provision indicates that Congress intended these terms to hold different meanings.

And third, funding provisions for the other two federal agencies created under Dodd-Frank — the Financial Stability Oversight Counsel and Office of Financial Research — further validate that the CFPB's funding from "combined earnings" should not be conflated with "revenues." Under Dodd-Frank, "[a]ny expenses of the [Federal Stability Oversight] Counsel" were to "be treated as expenses of, and paid by, the Office of Financial Research," 12 U.S.C. § 5328, which in turn was to be funded for the first two years by "the Board of Governors" of the Federal Reserve System in "an[y] amount sufficient to cover the expenses of the Office," *id.*§ 5345(c) (emphasis added). The Office of Financial Research then would be granted "Permanent self-funding" from "assessments equal to the total expenses of the Office" collected from certain bank holding companies and nonbank financial companies supervised by the Board of Governors. *Id.* § 5345(d). The 111th Congress could have granted CFPB a similar open-ended appropriation, whether from an unspecified source paid by the Federal Reserve Board (like the Office of Financial Research and Federal Stability Oversight Counsel's interim funding, *cf. id.* §§ 5328, 5345(c)) or through assessments levied on regulated entities (like the Office and Counsel's permanent self-funding, *cf. id.* §§ 5328, 5345(d)). But it did not. Instead, the Bureau's appropriation is limited to a statutorily capped transfer drawn "from the combined earnings of the Federal Reserve System." *Id.* § 5497(a)(1), (2). The Court should not read that provision expansively to encompass any income, revenue, or other source of funding at the Federal Reserve System when Congress did not appropriate such funds for the Bureau.

II. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES "EARNINGS" TO MEAN PROFITS

Where a statute is ambiguous, courts must adopt the interpretation that avoids serious constitutional doubts. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979).

At a minimum, the term "earnings" is ambiguous. It can mean:

- Gross receipts or revenue, or
- Net earnings or profits

Judge Jackson chose the constitutionally problematic meaning without acknowledging the avoidance canon or explaining why it does not apply.

Reading "earnings" as profits resolves the constitutional issue cleanly:

- When the Fed has profits, it remits funds to Treasury
- Those funds are constitutionally available for Congress to reallocate
- CFPB funding remains tied to Treasury-remittable funds

That reading not only avoids constitutional doubt—it aligns with the structure of federal fiscal law.

III. "EARNINGS" MEANS PROFITS, NOT REVENUES

A. Dictionary Definitions Support a Net-Income Meaning

While "earnings" can have multiple meanings, authoritative dictionaries recognize its primary financial meaning as net income or profit.

- Black's Law Dictionary: "Earnings" are "revenue remaining after deducting costs and expenses."
- Merriam-Webster: "The balance of revenue after deduction of costs and expenses."

Judge Jackson selectively relied on secondary definitions while disregarding the ordinary financial meaning of the term—particularly inappropriate in a statute governing central-bank finance. Whereas for an individual person, we can speak of "earnings" as income, of course for corporations, like the Federal Reserve Banks, "earnings" always and unambiguously means profits.

B. Accounting Principles Confirm the Profit-Based Meaning

In accounting, "earnings" are not synonymous with gross receipts. Corporations, financial institutions, and regulators uniformly treat "earnings" as net income. The Federal Reserve itself distinguishes between:

- Gross income
- Operating expenses
- Net earnings

See 12 U.S.C. § 289(a) (Federal Reserve Act), which repeatedly refers to "net earnings" after expenses are paid.

Judge Jackson, without any support, makes much out of the fact that the Federal Reserve Act does not use the word "earnings" without the word "net" in front of it. Again, without any support whatsoever, she concludes that "earnings" appearing by itself means revenues while "net earnings "means profits. Judge Jackson's assertion that "combined earnings" means "everything the Fed earns" is inconsistent with how Congress uses the term throughout federal banking law.

C. The Fed's Own Financial Statements Make It Clear That Earnings Means The Same As "Net Earnings" — Revenues Minus Interest And Other Operating Expenses And Dividends To Members. "Earnings" Does Not Mean Revenues.

Judge Jackson's conclusion that "earnings" means gross revenue is irreconcilable with how the Federal Reserve itself defines and reports earnings in its financial statements. In the Federal Reserve Banks' Combined Statements of Operations, the term "earnings" is not used to describe gross inflows such as interest income; those inflows are reported separately as "Interest

income on securities" and "Interest income on loans." See Combined Statements of Operations of the Federal Reserve Banks (2024), at 4. Only after deducting "Interest expense on reserve balances," "Operating expenses," and statutory "Dividends paid to member banks" does the Federal Reserve calculate a bottom-line figure labeled "Net earnings"—the sole measure of earnings recognized for legal and accounting purposes. *Id*.; see also Factors Affecting Reserve Balances (H.4.1), Statistical Release, Table 1 (reflecting that when expenses exceed income, the Federal Reserve does not report positive earnings or make remittances to Treasury, but instead records a "deferred asset" that must be offset by future profits before any remittances can resume—confirming that, in Federal Reserve accounting, negative net income means no earnings at all). This reporting structure mirrors the Federal Reserve Act, which provides that only after "all necessary expenses" and dividends are paid do Reserve Banks have "net earnings" available for surplus or remittance. 12 U.S.C. § 289(a). Critically, the Federal Reserve does not maintain or report any category of "earnings" equivalent to gross revenue; treating revenues as "earnings," as Judge Jackson does, collapses the very accounting distinctions the Federal Reserve's own financial statements are designed to preserve and contradicts the central bank's settled understanding that earnings exist only when income exceeds expenses.

D. Statutory Context Confirms the Profit-Based Interpretation

Congress knows how to refer to gross revenue when it wishes to do so. It did not do so here.

Elsewhere in Dodd-Frank, Congress expressly uses:

- "Net earnings"
- "Operating expenses"
- "Amounts received"

See, e.g., 12 U.S.C. §§ 289(a), 5390(n)(2).

The omission of "net" in § 5497 does not mean Congress intended "earnings" to mean "revenue"; it reflects the ordinary understanding that earnings are already net of expenses unless otherwise specified. In other words, there is no difference between the meaning of "earnings" and "net earnings." They both refer to profits.

E. Judge Jackson's construction of "combined earnings" as "combined revenues" renders critical statutory language surplusage.

If "combined earnings of the Federal Reserve System" simply means gross revenues, then the phrase "from the combined earnings of the Federal Reserve System" in 12 U.S.C. § 5497(a)(1) does no work at all, because the Federal Reserve will always have some level of revenue. Under that reading, Congress could just as easily have directed that the CFPB be funded "by the Federal Reserve System," without specifying any source. But courts are required to give effect, if possible, to every word Congress uses and to avoid interpretations that reduce statutory language to mere surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute."); *TRW Inc. v. Andrews*, 534 U.S.

19, 31 (2001) (rejecting a construction that would render statutory language "superfluous"); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). Reading "earnings" to mean profits—as opposed to ever-present revenues—gives operative meaning to Congress's deliberate choice to condition CFPB funding on a specific source and avoids collapsing that limitation into a nullity.

IV. JUDGE JACKSON'S RELIANCE ON AGENCY PRACTICE IS LEGALLY IRRELEVANT

A. Past Agency Practice Cannot Override Statutory Limits

Judge Jackson supports her position in part by asserting that since September 2022 when the Federal Reserve System started to lose money on a combined basis until the end of CFPB Director Chopra's term, the CFPB requested funding from the Fed and the Fed honored those requests without equivocation. The CFPB, during that same time period, opposed motions to dismiss filed by defendants in enforcement litigation who argued that the lawsuits must be dismissed because they were financed with funds obtained unlawfully by the CFPB from the Fed. In the CFPB's opposition briefs, they argued that "earnings" means revenues and not profits and, therefore, that the funds were lawfully obtained from the Fed.

That reasoning is untenable.

An agency's change in position following a change in administration is not a basis for courts to "discount" or ignore the new view; to the contrary, it is a routine and legally permissible feature of administrative law so long as the agency acknowledges the change and offers a reasoned explanation. The Supreme Court has made clear that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one," but must simply show that the new policy is permissible under the statute and that the agency is aware it is changing course and has given a rational explanation for doing so. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515–16 (2009). Indeed, policy shifts reflecting different presidential priorities are inherent in executive-branch administration and do not render an agency's interpretation suspect or entitled to less weight. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865–66 (1984) (recognizing that statutory ambiguity may reflect an implicit delegation to the agency to make policy choices); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981–82 (2005) (agency may adopt a different reasonable interpretation over time). Accordingly, the CFPB's departure from its prior position under different leadership is not a flaw to be penalized, but a lawful exercise of delegated authority that should be evaluated on the merits of its reasoning, not discounted because it differs from the agency's past views.

The Supreme Court has repeatedly held that longstanding agency practice cannot make unlawful conduct lawful. *INS v. Chadha*, 462 U.S. 919, 944 (1983). If two agencies have been violating the law for three years, that does not amend the statute.

B. No Deference Is Permitted After Loper Bright

Any reliance on agency interpretation is foreclosed by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. ___ (2024), which eliminated Chevron deference.

Courts must now exercise independent judgment in interpreting statutes. Id. Judge Jackson's repeated reliance on how the CFPB and Federal Reserve have historically behaved is incompatible with *Loper Bright*.

C. Chairman Powell's Testimony Is Entitled to No Deference

Judge Jackson also relied on congressional testimony by Federal Reserve Chair Jerome Powell in which he stated, without any supportive reasoning, that the Fed has been lawfully funding the CFPB despite the Fed losses beginning in September 2022. Legislative testimony by an agency head is not law, not regulation, and not entitled to deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

D. Reliance On An Amicus Brief Submitted By Several Former Officials At The CFPB Is Not Persuasive.

The District Court erred by giving much too much weight to an amicus brief submitted by several former officials at the Fed. Courts routinely give little or no weight to amicus briefs that merely offer post-hoc opinions untethered to the statute's text or to any special expertise relevant to its interpretation. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1067 (7th Cir. 1997) (amicus briefs are helpful only when they "assist the court" rather than advance unsupported advocacy); *Nat'l Org. for Marriage v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013) (discounting amicus arguments lacking legal grounding). That principle applies with particular force where, as here, the amici are former officials who neither participated in drafting or interpreting the statutory provision at issue nor possess specialized expertise bearing on its meaning, and instead offer post-enactment views that "cannot substitute for the enacted text." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987).

V. BASED ON THE PRIOR HISTORICAL PERFORMANCE OF THE FED BEFORE DODD-FRANK WAS ENACTED, THERE IS NO EVIDENCE THAT CONGRESS CONTEMPLATED THAT THE FED WOULD LOSE MONEY IN THE FORESEEABLE FUTURE

From the time the Federal Reserve System became operational in late 1914/early 1915 up through the enactment of the Dodd-Frank Act on July 21, 2010, the Federal Reserve did not sustain an annual financial loss. Historical records indicate that the Federal Reserve consistently reported net positive earnings on an annual basis for that entire period (Federal Reserve System: The Surplus Account, GAO-02-939, U.S. Government Accountability Office (Oct. 2002), at 12–13).

- According to a U.S. Government Accountability Office (GAO) report, the Federal Reserve System did not have an annual operating loss from the time it began operations in 1915 through at least the early 2000s (and there is no evidence of a sustained annual loss through 2010).
- That GAO report notes the Reserve Banks occasionally experienced weekly losses — particularly due to foreign currency revaluation — but these were absorbed by surplus funds and did not result in an annual operating loss.

- That assessment still applies to the period when Jimmy Carter was President (1977-1981). Even though interest rates — including the prime rate and the federal funds rate — did rise sharply during Carter's term and into the early Volcker Fed era, the Federal Reserve did not record an annual financial loss in those years.
- Under Presidents Carter's administration (1977-1981), the U.S. experienced very high inflation and unusually high interest rates (including prime rates well into the double digits).
- High interest rates do not automatically translate into a Fed loss. The Fed earns interest income on its large holdings of Treasury and other securities. Even when market rates rise, this interest income generally increased faster than expenses. As a result, total annual net income remained positive.
- There is no record of an annual operating loss for the Fed during those years, nor for any year up through 2010. On the contrary, in years of rising rates, the Fed still generated profits that were remitted to the Treasury under the statutory regime governing its finances.
- The Fed is not a typical profit-maximizing firm, but a central bank whose income mainly comes from:
    - Interest on securities it holds (especially U.S. Treasuries), and
    - Other central banking operations.
- Expenses include operating costs, dividends to member banks, and interest paid on reserves. In typical economic environments (even with high rates like in the late 1970s), interest income outweighed these costs, so annual net income stayed positive.

Thus, there is absolutely no reason why Congress, at the time of passing or enactment of the Dodd-Frank Bill/Act would have focused any attention on whether the Fed would start losing money at any time in the future.

VI. EVEN IF CONGRESS TODAY, WITH 20-20 HINDSIGHT, WOULD NOT WANT THE CFPB'S CONTINUED OPERATIONS TO BE SUBJECT TO THE FEDERAL RESERVE SYSTEM REMAINING PROFITABLE, THAT IS NOT A RELEVANT INDICATOR OF CONGRESSIONAL INTENT AT THE TIME OF ENACTMENT OF DODD-FRANK

It is well-established law that the intent of a future Congress after the enactment of a statute by an earlier Congress is irrelevant in ascertaining the Congressional intent of such earlier Congress. Supreme Court precedent holds that the desires or statements of a later Congress — including post-enactment legislative history — are irrelevant to determining the intent of an earlier Congress in enacting a statute. The leading articulation of this principle is in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) where the Court rejected the relevance of post-enactment statements to legislative intent.

VII. EVEN IF CONGRESS AS A GENERAL MATTER CLEARLY DESIRED TO INSULATE THE CFPB FROM POLITICAL PRESSURE AND PROBABLY WOULD NOT HAVE WANTED TO SUBJECT THE CFPB'S OPERATIONS TO THE UNCERTAINTY OF THE FED HAVING PROFITS, THAT DESIRE HAS NO BEARING ON THE MEANING OF SPECIFIC LANGUAGE CONGRESS USED IN IDENTIFYING THE SOURCE OF THE CFPB'S FUNDING

Even if Congress never contemplated the possibility that the Fed might one day have no earnings and deprive the Bureau its default source of funding, "it is never [the judiciary's] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson*, 582 U.S. at 89. Instead, "Congress's decision to require" the Bureau to be funded from the combined earnings of the Federal Reserve System, or to seek additional funding from Congress, if necessary, "must be given practical effect rather than swept aside in the face of admittedly difficult circumstances." *New Process Steel*, 560 U.S. at 688 ("Section 3(b) [of the National Labor Relations Act], as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."). The Bureau's "desire to keep its doors open" does not override the commands of Congress. *Id.* Nor does it excuse violations of the separation of powers. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 205 (2020).

VIII. CONCLUSION

Judge Jackson's December 30, 2025 opinion rests on a fundamental legal error: equating "earnings" with "revenue" rather than profits. That error creates grave constitutional problems under the Appropriations Clause, disregards statutory text and structure, misapplies canons of construction, and improperly relies on agency practice and testimony that are legally irrelevant after *Loper Bright*.

Congress could have required the Federal Reserve to fund the CFPB unconditionally. It did not. Instead, it tied CFPB funding to a specific, constitutionally significant source: the Federal Reserve's earnings—meaning profits remittable to Treasury.

Courts are not free to rewrite that choice.

If Judge Jackson's interpretation were correct, the CFPB would enjoy a level of fiscal independence that no federal agency has ever possessed—and that the Constitution does not permit.

That is why her opinion is wrong.