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 *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that structural provisions of the Constitution must be upheld in order to protect individual liberty. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Loper Bright Enterprises v. Raimondo*, No. 22-451; *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Department of Transportation v. Ass'n of American Railroads*, 575 U.S. 43 (2015), *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Christopher v. SmithKline Beecham, Corp.*, 567 U.S. 2156 (2012); to name a few.

## SUMMARY OF ARGUMENT

The Bureau argues for a textual approach that atomizes the Constitution – requiring that parts of the Constitution be read in isolation from the Constitution as a whole. Thus, the Bureau argues since the Constitution only contains one express limitation on the length of an appropriation (the two-year limit on appropriations for the army in Article I, §8, clause 12), then Congress must have the power to enact forever appropriations in all other cases.

But the forever appropriation to the Consumer Financial Protection Bureau is not an appropriation to

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

pay benefits from a special fund. Instead, it is an license for a law-making and enforcing body to act without Congressional approval and oversight in the form of regular appropriations. Indeed, Congress had drafted the law to make the Bureau free from Presidential control as well, making it effectively its own branch of the federal government. But this Court struck down that provision in *Seila Law, LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (2020), as a violation of the "carefully calibrated structure" of the Constitution. *Id*. at 2203.

The case before the Court now asks whether Congress can give a forever appropriation to a law-making and enforcing executive agency, completely freeing it from Congress's normal power over executive agencies exercised through the power of the purse and freeing it from the President's control during the budget process. *Id*. at 2204 (a problem noted but left unanswered in *Seila Law*). It is not enough to argue that some future Congress can enact a new law repealing the forever appropriation. Such a negative power (repealing an authority) is not at all the same as requiring Congress's affirmative consent for the agency's spending priorities.

The Constitution makes it purposefully difficult to enact new legislation. The Framers and Ratifiers recognized that the power of legislation was the biggest threat to individual liberty, and so they incorporated procedural hurdles to slow down the process of lawmaking. Congress is granted *all* legislative power authorized under the Constitution, but that power is constrained by bicameralism and presentment requirements. The Framers and Ratifiers did not include a "complexity" exception to these checks and

balances. Thus, an agency must come before Congress to win approval for its actions through the appropriations process. This requires the agency to carry "the burden of persuasion" regarding its continued existence. No matter that Congress frequently lumps together items of appropriations. It has shown that it will exercise its authority to separate out the budgets of specific agencies in order to exercise its own oversight on the power it has delegated.

The difficult process of enacting legislation, however, shows that it is a quite different question for the agency to have authority unless Congress "vetoes" that authority with new legislation. The agency no longer has any burden to satisfy Congress that the money is well spent or that the agency is operating strictly within the boundaries authorized by Congress.

In this case, Congress has "delegated" its power to appropriate funds to the Federal Reserve Board. The Board is directed to give the Bureau whatever amount of money the Bureau demands, up to a statutory maximum. This is money that would otherwise be deposited into the Treasury. The only guideline attached to this delegation is that the Federal Reserve may not appropriate an amount equal to more than 12 percent of its own budget. 12 USC § 5497(a)(1). Otherwise, it is bound to hand over however much money to the Bureau for any purpose the Bureau wishes to use that money. In any event, the appropriation of money by the Federal Reserve Board is not an appropriation "by law" from Congress.

Congress cannot delegate its constitutionally assigned powers to any other agency or entity. The power to legislate and the power to appropriate are

vested solely in Congress. Whether viewed as a forever appropriation to the Bureau or a delegation of Congress's exclusive power of appropriation to the Federal Reserve Board for the benefit of the Bureau, the action violates the Constitution's finely tuned structure of separation of powers.

## ARGUMENT

### I. Individual Provisions of the Constitution Cannot Be Interpreted in Isolation of the Overall Constitutional Design of Separated Powers.

The government argues that the initial law gave it a forever appropriation when that law directed the Federal Reserve Board to deliver funds to the Bureau each year in the amount demanded by the Bureau up to the statutory maximum. But Article I, § 9 requires appropriations to be "by law," plainly incorporating the requirements of bicameralism and presentment. A direction to the Federal Reserve Board to "appropriate" some of its revenue to the Bureau evades this "by law" requirement. The amount sent to the Bureau can change each year without Congress ever reviewing the Bureau's budget. But even if the original statute is seen as "appropriating" funds of unknown amount forever into the future, the law still contravenes the Constitution.

The Bureau seeks to preserve its forever appropriation by isolating one provision of the Constitution imposing a limit of Congress's power to appropriate. It argues that the provision of Article I, § 8 limiting Congress's power to make ongoing appropriations for the army to two years means that there is no limit on Congress's power to make forever appropriations for any

other purpose. Such an argument, however, divorces sections 8 and 9 of the Constitution from the overall constitutional structure.

There may not be a "Separation of Powers Clause" in the Constitution, but separation of powers is the core structural principle of the Constitution. *Seila Law*, 140 S.Ct. at 2205; *Boumediene v. Bush*, 553 U.S. 723, 797 (2008); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *Mistretta v. United States*, 488 U.S. 361, 380 (1989). It is this separation of powers that protects individual liberties. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more branches seek to transgress the separation of powers.").

This is not a modern judicial invention. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. *Ass'n of Am. Railroads*, 575 U.S. at 75 (Thomas, J., concurring). In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Reardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in

the design of the federal government. See FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter, ed., 1961); FEDERALIST NO. 47, *supra*, at 301-02 (James Madison); FEDERALIST NO. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. FEDERALIST NO. 48, *supra* at 308 (James Madison). Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.*

This Court has relied on this fundamental structural principle to decide constitutional challenges. In *Seila Law*, the Court noted that there was no "removal clause" in the Constitution yet had no trouble in concluding that Congress's attempt to insulate the Director of the Bureau from the President's removal power violated separation of powers. *Seila Law*, 140 S.Ct. at 2204, 2207. A decade earlier, the Court reached the same conclusion regarding the structure of the Public Company Accounting Oversight Board. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477,

498 (2010). Similarly, separation of powers was the basis for ruling that Congress could not give the President line-item veto power. *Clinton*, 424 U.S. at 440. That same separation of powers structure prohibits Congress from exercising a "one-house veto" of executive action. *Chadha*, 462 U.S. at 946.

Separation of powers is the design of the Constitution, not simply an abstract idea. *Id*. It protects individual liberty more surely than the Bill of Rights. *See e.g.*, *Ass'n of American Railroads*, 575 U.S. at 61 (Alito, J. concurring); *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Bond v. United States*, 564 U.S. 211, 222 (2011); *see also Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting)); *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring)).

The fact that the Constitution limits the power of Congress to make appropriations lasting more than two years for the army does not establish that Congress can make forever appropriations, essentially abdicating its power of appropriation until some future Congress repeals the statute. Nor can Congress delegate its exclusive power of the purse to another agency. The Constitution must be read as a whole. The appropriations clause is part of the scheme of separated powers and cannot be read out of the Constitution.

## II. The Appropriations Clause Is Part of the Structural Scheme of Separated Powers

There can be no doubt that the Appropriations Clause is an essential part of the scheme of separated powers. It was clearly intended as a check on the power of the executive department. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). As the

Court in *Reeside v. Walker*, 52 U.S. 272 (1850) noted, the amount of money in the Treasury is irrelevant. Without an appropriation, the executive department has no authority to spend that money. *Id*. at 291.

The Appropriations Clause ensures that elected representatives are answerable for how the People's money is spent. Joseph Story, Commentaries on the Constitution 3:§ 1342 (1883), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 378. In this, it is an important check against "an unbounded power of the executive over the public purse of the nation." *Id*.; St. George Tucker, Blackstone's Commentaries 1:App. 362-64 (1803), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 378. The power of the purse is a critical component of the structure of separated powers.

The Constitution vests the power of appropriation *only* in Congress. Because this power is part of the finely tuned structure of separated powers embedded in the Constitution, Congress has no authority to delegate this authority to the Executive Branch.

Powers assigned to Congress may not be delegated to another branch. *Gundy*, 139 S.Ct. at 2123 (plurality op.); *Field v. Clark*, 143 U.S. 649, 692 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). Delegation of the appropriation power to the executive negates the very purpose of placing that power solely with Congress.

Once the exclusive power of appropriation is delegated away, the people's representative no longer exercises oversight on how the money is being spent – what laws the agency is making, how it is enforcing those laws, what types and how many officials the agency employs. One of the objections listed in the

Declaration of Independence is that the King, without approval of elected representatives had "sent hither swarms of Officers to harrass our people, and eat out their substance." 1 Stat. 1. Yet the Bureau, free from control by our elected representatives via Congress's exclusive power of appropriations oversight and armed with its own law-making power, is subject to the same complaint. The Bureau takes action – creating and enforcing laws, determining its own budget – all without any oversight by Congress (and very limited oversight by the President). Congress has not simply delegated its power of appropriations – it has completely surrendered that power (subject only to a maximum amount) to the Federal Reserve Board.

"Money is the instrument of policy and policy affects the lives of citizens." *Clinton*, 524 U.S. at 451 (Kennedy, concurring). That is why the Constitution vests the appropriation power in Congress and Congress alone. Abdicating its power over appropriations is not an option under the Constitution. *Id*. at 452 (Kennedy, concurring).

It makes no difference that Congress authorized the creation of this fourth branch of government. The Constitution gives no authority to Congress to delegate its exclusive constitutional powers. *See id*. (Kennedy, J., concurring) ("The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.").

While Congress is vested with the sole power to make law and control appropriations, it can only do so through "a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. Be-

cause of that procedure, a law making an appropriation is fundamentally different from a law cancelling a forever appropriation made by a prior Congress.

## III. Because the Constitution Intentionally Makes it Difficult for Congress to Enact Legislation, the Possibility of Future Repeal of a Forever Appropriation Does Not Render the Action Constitutional.

This Court in *United States v. MacCollom*, 426 U.S. 317 (1976) noted: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *Id*. at 321. Yet that is what Congress attempted to do with this forever appropriation. It has attempted to convert the requirement of positive approval of Congress as a means of checking executive action, to merely an option of congressional veto of spending authority by a future Congress. The two are not the same.

First, Congress does not appropriate by silence. The failure of Congress to enact a law or make an appropriation cannot be interpreted as an authorization to spend money. Nothing in the Constitution grants the executive powers that are vested solely in Congress simply by Congress's failure to act. *United States v. Midwest Oil Co.*, 236 U.S. 459, 488-92 (1915). To begin with, there are many reasons why Congress may not act in a particular instance. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 160 (2001). Congressional failure to act is not an authorization. It is, at best, a "failure to express any opinion." *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality op.). Whatever the

meaning of congressional silence, that silence or inaction is not an exercise of the power vested in Congress by the Constitution. *See Clinton*, 524 U.S. at 440; *Chadha*, 462 U.S. at 951.

As this Court noted in *Chadha*, Congress may only exercise its power under the Constitution in accordance with "a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. That procedure is intentionally difficult. The founding generation was not interested in making it easy or efficient to pass new laws. They were more interested in protecting individual liberty.

Justice Alito noted, "[p]assing legislation is no easy task." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 472 (2015) (Alito, J. dissenting). This was intentional on the part of the Framers and Ratifiers of the Constitution. The founding generation was acutely aware that the "supreme power" of government was in making the laws. James Kent, Commentaries 1:207-10 (1826), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 39. Thus, it was important that significant checks be placed on that power in order to preserve liberty. The solution they came up with was to slow the legislative process – to make it difficult to enact legislation too quickly. *Id.*

They accomplished this by splitting Congress into two houses, both of which must concur before a legislative proposal can be adopted, and requiring that that the legislatively approved measure be presented to the President for approval. One house serves as a check on the other. William R. Davie, North Carolina Ratifying Convention (1788) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 36; Federal Farmer No. 11 (1788) *reprinted in* 1 THE FOUNDERS' CONSTITUTION

350. Requiring consent of two different bodies was thought more likely to produce consensus in line with the will of the citizenry, something well worth the increased time and effort involved. *See* Benjamin Rush, Observations on the Government of Pennsylvania (1777) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 364; James Wilson, Of Government, The Legislative Department, Lectures on Law (1791) *reprinted in* 1 THE FOUNDERS' CONSTITUTION 377.

The chief benefit of requiring two different bodies to approve proposed legislation is that it slows the process down and inhibits "rash" and "hasty" decisions. Joseph Story, Commentaries on the Constitution 2:§ 550 (1833), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 379; The Essex Result (1778) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 365. Justice Gorsuch noted these same points in his dissent in *Gundy*. He wrote that the "framers went to great lengths to make lawmaking difficult." *Gundy*, 139 S.Ct. at 2134 (Gorsuch, J., dissenting). To those who argue that the bicameralism and presentment requirements of Article I make the enactment of federal law arduous and slow the Framers and Ratifiers would have responded that that was the point. It is in that slow process that liberty is best protected. *Id.*

In the normal course of legislating, an appropriation would go through this process. Since an appropriation is a type of legislation, it must be enacted through this "single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. Normally, to win an appropriation the President (*See Seila Law*, 140 S.Ct. at 2204)) must present a case to Congress justifying the expenditure. Each house of Congress then decides whether to give approval for

the proposal and enact a law providing the appropriation. The measure is then presented to the President for his approval. As intended by the Framers and Ratifiers of the Constitution, this is an arduous process.

The Bureau argues that its forever appropriation meets the same requirements because a future Congress is always free to repeal the appropriation. But looking at the process for enacting legislation we can see that it is not the same at all. Rather than the Bureau bearing the burden of persuading both the House of Representatives and the Senate (not to mention the President) of the wisdom of a particular appropriation for the current year, it simply proceeds on an ongoing presumption. Not until a contrary piece of legislation, enacted through the "single, finely wrought and exhaustively considered, procedure" (*Chadha*, 462 U.S. at 951), would the forever appropriation cease to provide the ongoing spending authority for the Bureau to make and enforce laws. Congress's decision to free the Bureau from the requirement to win an appropriation though the constitutionally prescribed "arduous" process is an abdication of the appropriations powers vested in Congress by Article I. The separation of powers structure forbids Congress from such an abdication.

## CONCLUSION

The Consumer Financial Protection Bureau was established by Congress in the wake of a financial crisis that shook the nation. But emergencies or complex situations do not amend the Constitution. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring); *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) ("the fact

that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." (*quoting Chadha*, 462 U.S. at 944)).

The wisdom of establishing a law-making agency free from control by either Congress or the President – essentially creating a fourth branch of government – is not the question before the Court. The only issue is whether Congress had the power under the Constitution to do so. That question must be answered in the negative. No matter the emergency of the moment, Congress can only act within the boundaries of its authority under the Constitution. That authority is circumscribed first and foremost by the structure of separated powers. The Court should affirm the judgment of the court below.

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