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

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BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution, and individual rights. Landmark has a unique perspective on this case. It was one of the *amici curiae* who raised the implications of the CFPB's funding in *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). Brief for *Amicus Curiae* Landmark Legal Foundation at 16-19, *Seila Law, LLC v. Consumer Fin. Prot. Bureau* (No. 19-7).

Landmark urges this Court to uphold the ruling of the Court of Appeals for the Fifth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress violated the separation of powers through the unprecedented step of providing the Consumer Financial Protection Bureau (CFPB) with an insulated, perpetual, and regenerating source of funding. The constitutionality of the CFPB's structure first came before the Court in *Seila Law*. It did not come

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

deceptively, with hidden threats to the constitutional order, like a wolf in sheep's clothing. It came as a wolf. See *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). The CFPB arrived as an independent agency with broad legislative, executive, and judicial powers and with insulation from congressional oversight and presidential control. The CFPB was so far removed from external checks and balances that it was almost a government unto itself. "In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history." *Seila Law*, 140 S. Ct. at 2191. Its single director had removal protection, at issue in *Seila Law*, and it was even designed to run independently in the director's absence or unavailability. See 12 U.S.C. § 5491(b)(5). This Court held that the CFPB's removal restrictions violated Article II of the Constitution. *Seila Law*, 140 S. Ct. at 2205.

The CFPB returns now in slightly altered form under the direct control of the President. But it remains a wolf. It still has "vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy." Id. at 2191. It holds a broad mandate to protect consumers from elusive harms such as "unfair, deceptive, or abusive acts" and "discrimination." 12 U.S.C. § 5511(b)(2). Most troubling, it still has a perpetual source of funding from the most politically insulated creature of government, the Federal Reserve, which allows it to bypass the inter-branch checks and balances of the appropriations process. 12 U.S.C. § 5497(a). And it was given a pathway to true financial

independence from the Legislative Branch through the ability to invest unused funds at the Federal Reserve. 12 U.S.C. § 5497(b)(3).

The Constitution's Appropriations Clause was designed to ensure that the power of the purse remained exclusively in the hands of the Legislature. Congress has effectively delegated that power to the Executive Branch. Furthermore, the CFPB's funding mechanism does not comply with the requirements of the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7. In short, the structure of the CFPB and Congress's scheme to fund it violate the separation of powers.

ARGUMENT

I. Congress violated the Constitution's separation of powers by delegating the power of the purse to an agency of the Executive Branch.

The separation of powers is one of the chief virtues of the Constitution. As James Madison wrote, "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed., 1961). If the federal Constitution truly allowed "this accumulation of power or with a mixture of powers, having a dangerous tendency to such an accumulation," he continued, then it would deserve condemnation. Id. This separation of powers was a

"self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Madison considered it "essential to the preservation of liberty." The Federalist No. 51, p. 321 (C. Rossiter ed., 1961). He explained that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." Id. at 322. The purpose of divided government was to "[diffuse] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

There can be no question that the significant power to fund government, the power of the purse, resides with the Legislative Branch. Madison called the power of the purse a "powerful instrument" in the hands of the House of Representatives to reduce "all the overgrown prerogatives of the other branches of government." The Federalist No. 58, p. 359 (C. Rossiter ed., 1961). It is "the most complete and effectual weapon" in the hands of the people's "immediate representatives" in the House "for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." Id. In a discussion of the interplay of the core functions of the branches, Alexander Hamilton wrote, "The executive . . . holds the sword of the community. The legislature . . . commands the purse . . . The judiciary, on the contrary, has no influence over either the sword or the purse." The Federalist No. 78, p. 465 (C. Rossiter ed., 1961). Hamilton later

warned that combining the powers of both "the sword and the purse . . . would furnish one body with all the means of tyranny." 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution at 348-49 (J. Elliot 2d ed. 1891) (A. Hamilton). In this case, Congress ceded their power of the purse to the Executive Branch in an apparent attempt to create a regulatory body as insulated as possible from external checks. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 72-78 (Nov. 2010). But it is not within Congress's power to do so.

By granting perpetual funding and financial independence to the CFPB, Congress places the Bureau outside the Constitution's checks and balances. As Justice Kagan observed in *Seila Law*, the CFPB's "budgetary independence comes mostly at the expense of Congress's control over the agency." *Seila Law*, 140 S. Ct. at 2240 n.11 (Kagan, J., concurring). Not only does the CFPB evade Congress's budgetary check on the Executive, but it does so by usurping the power of the purse, raising important nondelegation issues. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Just as permitting the nation's chief prosecutor to write his own criminal code "is delegation running riot," *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (citing *Schechter Poultry*, 295 U.S. at 553)

(Cardozo, J., concurring), so is handing a massive regulatory agency a perpetual funding stream.

In fact, this Court's decision in *Seila Law* makes the nondelegation question in this case even more pressing. It is no longer the case that an independent CFPB Director uses his budget free from external interference, which was serious enough. As Markham S. Chenoweth and Michael P. DeGrandis observed, "Title X of Dodd-Frank unconstitutionally ceded Congress's exclusive funding authority to the CFPB. But *Seila Law* has now changed the law so that it cedes core appropriations power directly to the President . . . It would be difficult to construct a more direct violation of the nondelegation doctrine." Markham S. Chennoweth and Michael P. DeGrandis, *Out of the Separation-of-Powers Frying Pan and Into the Nondelegation Fire: How the Court's Decision in* Seila Law *Makes CFPB's Unlawful Structure Even Worse*, 87 U. Chi. L. Rev. Online 55, 59 (2020).

Indeed, the new arrangement raises a unique concern. If a future Congress wishes to take back or even slightly alter this direct stream of permanently appropriated funding for a direct appointee of the President, it will need the President's signature or a veto-overriding majority to do so. This puts the appropriation process backwards. Furthermore, why would the President sign a bill surrendering his control over a guaranteed stream of funds free from the checks of the appropriations process? It is not just the funds that have been placed under control of the President under *Seila Law*, but the broad legislative, executive, and

judicial powers it holds as well. As Chief Justice Roberts observed in *Seila Law,* "the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions." *Seila Law*, 140 S. Ct. at 2200-01.

Any argument that Congress has "plenary power" to devise appropriations in any manner it pleases cannot be true. See Pet. Br. 24. "[E]ven so-called plenary powers cannot override foundational constitutional constraints." *Haaland v. Brackeen*, No. 21-376, 2023 U.S. LEXIS 2545, at *167 (Jun. 15, 2023) (Alito, J., dissenting). Congressional funding must still be made within the confines of the rest of the Constitution, like the Establishment Clause or the foundational principle of the separation of powers. Professor Kate Stith argues that, although the power to appropriate rests "*exclusively* in Congress . . . it is *not* a *plenary* power – Congress' exclusive power of appropriation does not trump the rest of the Constitution." Edwin Meese III, William Barr, Louis Fisher, Geoffrey P. Miller, and Kate Stith, *Panel IV: The Appropriations Power and the Necessary and Proper Clause*, 68 Wash. U. L. Q. 623, 646 (1990).

The judiciary has regularly defined the scope and limitations of congressional powers when they approach their boundaries. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Commerce Clause); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (taxing power). A ruling on the validity of appropriations by Congress is not

an attempt to "control congressional spending," as some might suggest. See Professors of History and Constitutional Law Amicus Br. 4. The Court would merely be defining a valid appropriation and determining to what extent Congress can delegate this power to executive agencies. "Congress itself could not be . . . the final judge of its own power under the Constitution." *Balt. & O. R. Co. v. United States*, 298 U.S. 349, 364 (1936).

The notion that the Judicial Branch can rule on appropriations is further supported by the holding in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, the Court determined that provisos attached to the use of appropriated funds could not be designed to intrude on any duties that were the exclusive purview of the other branches. Id. at 146. Appropriations are thus subject to at least some structural restrictions, chiefly, that they cannot be used to further unconstitutional aims and cannot improperly distort the separation of powers. In *Klein*, the Court determined that Congress had usurped Executive powers by limiting the efficacy of the presidential pardon and had commandeered judicial powers by dictating rules of evidence and standards for the presumption of guilt. Id. at 148.

The delegation of the Appropriations power, as was done here, is also appropriate for judicial review. Professor Stith argued for certain "appropriations norms," namely, "that Congress provide a clear statement of object and that it limit the amount and duration of spending authority." Kate Stith, *Congress'*

Power of the Purse, 97 Yale L.J. 1343, 1393 (1988). Furthermore, she contended, "courts would appear to have both the capacity and the power" to enforce the scope of the appropriations power and these appropriations norms. Id. The primary importance of the Appropriations clause is its power of preclusion–i.e., what it takes away from Congress and the Executive. It strips from Congress "the option not to require legislative appropriations prior to expenditure. If the Constitution thus strictly forbids 'executive appropriation' of public funds, the exercise by Congress of its power of the purse is a structural imperative." Id. at 1349.

The structure and internal logic of the Constitution thus necessitates that Congress, and only Congress, retain the authority to appropriate funds. Yet the Petitioners suggested that if Congress is precluded from establishing agencies with independent funding mechanisms, then this would render unconstitutional a variety of agencies and services with long historical precedent, such as the United States Post Office, the Federal Deposit Insurance Corporation, the National Mint, and the Federal Reserve, among others. But, as C. Boyden Gray argued, delegating the power of the purse to other regulatory agencies who maintain "budgetary autonomy" is less constitutionally suspect because organizations like the U.S. Post Office possess no tyrannical potential. C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB*, 24 Geo. Mason L. Rev. 1213, 1228 (2017). The FDIC, the National Credit Union Administration, and the Federal Housing Finance

Agency, he wrote, "are narrowly-focused entities whose missions are, respectively, to insure bank deposits, to charter and insure non-profit federal credit unions, and to supervise government-sponsored enterprises that provide housing finance benefits. Those missions are hardly the stuff from which tyranny is made." Id. Unlike the U.S. Mint, the Post Office, and other agencies that operate with relative budgetary independence, the CFPB wields vast authority to write regulations, issue billions of dollars in fines, and act as judge, jury, and executioner.

The Bureau tries to downplay the abnormality of the CFPB's funding by providing examples of other Federal agencies designed in similar ways. However, in doing so, they illustrate more clearly just how unusual the CFPB is. When discussing standing appropriations, they mention a funding mechanism which exists for the upkeep of the Smithsonian Institution. Pet. Br. 20. When discussing federal entities funded by sources such as investments and fees, they mention the Post Office, the Mint, the Office of the Comptroller of the Currency (OCC), and the Federal Reserve. Pet. Br. 22-23. When discussing other agencies which can roll their funds over year to year, they raise the Farm Credit Administration and the OCC. Pet. Br. 32. They even state the CFPB is like the Federal Reserve Board in receiving its funding through assessments on banks in the Federal Reserve System. Pet. Br. 34. However, they are never able to find an agency that perfectly aligns with the CFPB's appropriation mechanism, as none exists. The CFPB's unique funding mechanism is

an amalgamation of features from various agencies, an amalgamation that serves to further isolate this supremely powerful agency from the direct control of Congress. The singularity of the CFPB perhaps explains why, as the Petitioners observe, no court other than the court below has ever held that an Act of Congress violated the Appropriations Clause.

The key distinguishing factor between the CFPB and agencies with similar, but by no means identical, funding is the CFPB's power to control a wide swath of the economy and exercise potentially tyrannical authority. As this Court observed in *West Virginia v. EPA*, "we 'typically greet' assertions of 'extravagant statutory power over the national economy' with 'skepticism.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). *West Virginia v. EPA* is relevant to this case not because of its proposed methodology for reading statutes with broad effects, though the CFPB's enabling legislation is vague; rather, this case serves as a reminder that this Court reserves greater scrutiny for those agencies which control large portions of the economy.

It should also be noted that, "It is difficult to conceive of an administrative agency with more power and more political independence than the Fed." Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 Wm. & Mary L. Rev. 503, 523 (2000). This adds another layer of insulation from Congress. This type of double protection was relevant in another case where

an agency's independence threatened the separation-of-powers, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 523 (2010). "The added layer of . . . protection makes a difference." Id. at 495.

The CFPB "remains doubly insulated from the appropriations process as it still determines its own budget and siphons funds from the appropriations-insulated Federal Reserve." *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 236 (2022) (Jones, J., concurring). This politically unaccountable funding mechanism, as we have elaborated above and as other federal courts have observed, is "an innovation with no foothold in history or tradition." Id. at 237 (citing *Seila Law*, 140 S. Ct. at 2202) (internal quotations removed). As the CFPB's endowment continues to grow, however, the Bureau may further achieve a third level of insulation, exacerbating an already perilous constitutional situation.

One of the most unusual features of the CFPB is its ability to decide not to spend all of the money it requests from the Federal Reserve. 12 U.S.C. § 5497(b). This unspent money may be invested into three-month Treasury bills. Consumer Fin. Prot. Bureau, *Financial report of the Consumer Financial Protection Bureau: Fiscal Year 2022* 78 (Nov. 15, 2022), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_financial-report_fy2022.pdf. During his short tenure as Acting Director of the CFPB, Mick Mulvaney decried this practice and attempted to reduce it as much as possible, noting that he saw "no practical reason to maintain such a large reserve, since [. . .] the Board has

never denied a Bureau request for funding." Consumer Fin. Prot. Bureau, *Funds Transfer Request, FY 2018 Quarter 2* (Jan. 17, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf. See 12 U.S.C. § 5497(a)(1). Nevertheless, in all but three of the annual Financial Reports of the CFPB, they have reported an increase in their investments as compared to the year before. Consumer Fin. Prot. Bureau, *Financial Reports* (Jul. 7, 2023), https://www.consumerfinance.gov/about-us/budget-strategy/financial-reports/. This war chest of investments was valued at $338.8 million at the end of FY 2022. Included in this number was $128 million in purely unobligated funds, cash that sits unused by an agency which determines its own budget. Id.

This strange arrangement raises alarm bells when one considers that the CFPB receives revenue from these funds in the form of interest. This is not the meager interest of a savings account at a local bank. As of July 5th, 2023, the CFPB earns more than 5% annualized returns on their three-month Treasury bills. Board of Governors of the Federal Reserve System, *3-Month Treasury Bill Secondary Market Rate, Discount Basis*, Economic Research: Federal Reserve Bank of St. Louis (July 5, 2023), https://fred.stlouisfed.org/series/DTB3. As a result of *Seila Law*, here is an agent of the President who exercises legislative, judicial, and executive power, overseeing a rolling investment account which allows him to stockpile funds. These funds can be used to spend more in a given year than the statutory limit on transfers from the Federal Reserve might

otherwise allow. Additionally, these funds, if allowed to continue to grow, would provide an alternative revenue stream for the CFPB even further outside of Congress's already tenuous grasp.

In years where the CFPB has decided to increase their investments compared to the year before, it has yielded an average growth in their investments of around $58 million. Consider the scenario where they continued to grow their holdings at this pace. In 20 years, assuming the current 5% annual interest persists (a figure approximating the average interest rate across the span of American history), Lawrence Lewitinn, *Here's 222 years of interest rate history in one chart*, CNBC (Sep. 23, 2013, 5:39PM), https://www.cnbc.com/2013/09/23/heres-222-years-of-interest-rate-history-on-one-chart.html, the CFPB would have more than $2 billion at their disposal, while generating roughly $100 million a year in interest income. Indeed, there have already been multiple years where interest income to the CFPB was in the millions. Consumer Fin. Prot. Bureau, *Financial Reports* (Jul. 7, 2023), https://www.consumerfinance.gov/about-us/budget-strategy/financial-reports/.

This scenario illustrates two long term threats to the separation of powers. The first is that the CFPB could strategically request the maximum funding each year without using it all, building up a theoretically limitless endowment fund. That would, of course, still remain within the funds authorized to them by Congress. However, the second threat materializes when one considers the interest generated on that

endowment. Were the CFPB to stockpile enough funds, the interest on their Treasury bills could cover a sizable portion of their operating budget. They could one day significantly outspend the transfer cap through this interest income alone. Thus, the CFPB would be triply-insulated, as: 1) The Federal Reserve Board acquires funds outside of the appropriations process; 2) the Federal Reserve Board has to transfer some of these funds to the CFPB all the way up to Congress's cap; and 3) the excess funds held by the CFPB generate a revenue stream separate from the quarterly transfers, a stream which the CFPB may try to increase over several years by adding cash to their interest-accruing reserve fund. What could be further from the Framers' vision for the separation of powers than an independently financed Executive Branch agency that wields legislative, executive, and judicial powers?

II. Congress's method of funding the CFPB violates the Appropriations Clause.

Even if the CFPB funding mechanism is not unconstitutional as a violation of separation of powers and the nondelegation doctrine, it fails to meet the requirements of a lawful appropriation. Article I, Section 9, Clause 7 states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Professor Stith argues that, as a matter of textual interpretation, money drawn from the treasury is synonymous with "all

public Money." Stith, at 1357. Furthermore, "[t]his principle implies that all monies received by the United States are in 'the Treasury.'" Id. at 1356.

The "Treasury," thus understood, encompasses even money generated through independent funding mechanisms like that of the Federal Reserve and the CFPB. The CFPB receives money from the Federal Reserve, which is self-funded, but this neither exempts the CFPB from the Appropriations Clause nor relieves Congress of its duty to allocate the funds pursuant to legislative appropriations. To the extent that the CFPB is using any public money "received from whatever source, however obtained," it is understood to be drawing from the Treasury and thus this funding must be authorized by an appropriation. Id.

An appropriation made by law, according to Stith, must "provide a clear statement of the activity or object being funded" and "impose effective limitations on the amount and the duration of the appropriation." Id. at 1386. As Alexander Hamilton understood it, "no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed." Chenoweth and DeGrandis, at 57 n. 2 (citing Alexander Hamilton, *Explanation* (Nov. 11, 1795) in *The Works of Alexander Hamilton*, Vol. VII, (John C. Hamilton ed., S.D.N.Y. Clerk 1851)). He further clarified his understanding by raising the example of acts of Congress "appropriating certain sums for the various branches of the public service, and indicating the funds from which the monies are to be drawn." Id. He wrote, "The *object*, the *sum* and the *fund* are *all* that

are to be found in these acts. . . . This I regard as constructive of the clause in the constitution. The appropriation laws are in execution of that provision and fulfil all its purposes." Id.

The statutes at issue here, including 12 U.S.C. § 5497, authorizing the CFPB's double-insulated (perhaps even triple-insulated) and open-ended funding mechanism, do not meet these criteria. By permitting the use of public monies without a valid appropriation, Congress has failed to meet what Professor Stith argues is "one of its principal constitutional responsibilities." Stith, at 1386. "Congress" says Stith, "may transgress the constitutional norm if it legislates permanent or other open-ended spending authority, particularly in areas where the executive branch has significant discretion in defining the objects of expenditure." Id. This is precisely what has occurred with the CFPB.

In 12 U.S.C. § 5497(c), there is no clear statement of the activity or object that is being funded with limitation and duration. Furthermore, the underlying primary purpose, objectives, and functions of the CFPB as set by Congress are broad. See 12 U.S.C. § 5511. One of the CFPB's stated objectives includes: Protect consumers from "unfair, deceptive, or abusive acts" and "discrimination." 12 U.S.C. § 5511(b). As noted in an FTC case. *E. I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984), "[t]he term 'unfair' is an elusive concept, often dependent upon the eye of the beholder." As Justice Gorsuch has noted, "[v]ague laws invite

arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring).

The CFPB has been empowered by Congress to take any action it sees fit in the realm of consumer financial law. This action is then insulated from the system of checks and balances. CFPB spending is not "subject to review by Committees on Appropriations," nor can Congress' power of the purse reach the CFPB budget without dismantling the funding mechanism of the Federal Reserve. 12 U.S.C. § 5497(a)(2)(C). The CFPB is granted a perpetual source of funding and given extraordinary discretion in defining the scope and objects of its own authority. This is an abdication of the duties imposed on Congress by the Appropriations Clause. They have granted the CFPB access to nearly $1 billion per year, they have waived their authority to review agency expenditures, and they have used only the slightest constraints to guard the American government and people against the tyranny of regulatory dictates.

CONCLUSION

The judgment of the circuit court of appeals should be upheld.

Respectfully submitted,

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