

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 BEFORE JUDGMENT TO THE
UNITED STATES COURTS OF APPEALS FOR THE FIFTH
CIRCUIT

**BRIEF OF *AMICUS CURIAE* THE FOUNDATION
FOR GOVERNMENT ACCOUNTABILITY IN
SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE**

The Foundation for Government Accountability (FGA) is a 501(c)(3) non-profit organization that helps millions achieve the American Dream by improving welfare, workforce, health care, and election policy at both the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from the trap of government dependence, restore dignity and self-sufficiency, and empower individuals to take control of their futures. FGA's policy reforms are grounded in the principles of government transparency, the free market, individual freedom, and limited constitutional government.

Since its founding, FGA has helped achieve more than 781 reforms impacting policies in 42 states as well as 27 federal reforms. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, equipping policy makers with the information they need to achieve meaningful reforms, and by appearing *amicus curiae* before state and federal courts including the U.S. Supreme Court in *Azar v. Gresham*, 141 S. Ct. 1043 (2021), and *Biden v. Nebraska*, 600 U.S. __ (2023).

The case at issue here centers on an improper abdication of power by Congress to an executive branch agency, the Consumer Financial Protection Bureau

* Per this Court's Rule 37.6, this brief was not authored in whole or in part by any party, and no one other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

(CFPB), in violation of the Constitution’s structural separation of powers and the Appropriations Clause. In handing over its appropriations power to an executive agency now headed by a single Director removable at the whim of the President, the separation of powers required to maintain a limited, constitutional government is undermined. Given the immense power CFPB wields over a wide range of industries and individual citizens, free market principles and individual liberty are also severely threatened. Accordingly, this case directly implicates FGA’s core mission of promoting limited, constitutional government, a free market, and individual liberty. For these reasons, FGA stands in support of Respondents.

INTRODUCTION & SUMMARY OF ARGUMENT

Under the U.S. Constitution, the legislative branch is given the exclusive “power over the purse,” as a means to check the power of the other two branches. *See* U.S. CONST. art. I, § 9, cl. 7; *see also* James Madison, *The Federalist Papers*, No. 58, (Feb. 20, 1788), The Avalon Project, Yale Law School, Lillian Goldman Law Library, bit.ly/43PJ2sY. As the Supreme Court recently noted, “[a]mong Congress’s most important authorities is its control of the purse.” *Biden v. Nebraska*, 600 U.S. __, __ (2023) (slip op., at 24). But here, Congress has established a structure for funding CFPB not through appropriations, but rather through funding received “directly from the Federal Reserve, which is itself outside the appropriations process.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2194 (2020). Moreover, the

amount of funding CFPB receives is unilaterally determined by the CFPB Director, so long as the amount does not exceed a prescribed percentage of the Federal Reserve's "total operating expenses." 12 U.S.C. § 5497(a)(1)-(2). In establishing this funding structure, Congress has ceded not only its exclusive power to appropriate funds, but also its power to review CFPB's funding. This it cannot do. As the Court has made clear, "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992).

Given the power and reach of CFPB which "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens," this impermissible abdication of power presents more than a constitutional conundrum; it presents a legitimate threat to liberty. *Seila Law*, 140 S. Ct. at 2202, n.8.

The problems presented by CFPB are part of a larger issue. Though Congress alone possesses the power to legislate, over time this power, in addition to the power to appropriate funds at issue here, has been delegated or siphoned away and transferred to executive branch-controlled agencies and independent agencies encompassing a "fourth branch" of government. As a result of this delegation, the administrative state has steadily grown in size, power, and reach.

This undermines the system of checks and balances established by the Constitution. Returning the appropriation power over CFPB to Congress would likely encourage Congress to reclaim other legislative power it has delegated or lost to other administrative agencies. As a result, this would check not only the power of CFPB, but also that of the administrative state at large.

Recognizing that CFPB's funding structure constitutes a clear violation of the Appropriations Clause, some proponents have attempted to divert attention away from the constitutional issues. They claim any attempt to restore a system of checks and balances over CFPB will lead to regulatory chaos, but this claim is untrue. Instead, it is CFPB that is creating regulatory chaos through its aggressive attempts to expand the scope of its power through the promulgation of new legislative rules through mere guidance issued outside of the rulemaking process required under the Administrative Procedure Act (APA), causing significant confusion and concern for businesses and consumers. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); 5 U.S.C. §§ 551-553.

Regardless, cutting off CFPB's unconstitutional funding and vacating the payday lending rule does not necessarily mean an end to all functions and oversight currently performed by CFPB, nor to CFPB itself. Instead, it would simply mean that Congress must either address the unconstitutional funding issue through new legislation that returns the power to appropriate funding for CFPB to Congress, or allow key

functions to transfer to other agencies funded by Congress in accordance with the Constitution.

For these reasons and more, this Court should uphold the lower court's holding that the statute providing funding to CFPB, 12 U.S.C. § 5497, violates the Appropriations Clause, and hold that the lower court did not err in vacating a regulation promulgated at a time when CFPB was receiving such funding.

ARGUMENT

I. CFPB's Funding Structure Violates the Appropriations Clause

Wary of the danger posed by concentrated power, the Framers created three distinct branches of government, each with separate powers and subject to a system of checks and balances. U.S. CONST. art. I, §1; II, §1, cl. 1 & III, §1. To the legislative branch was given the *exclusive* "power over the purse," a power Madison described as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people..." James Madison, *The Federalist Papers*, No. 58, (Feb. 20, 1788), The Avalon Project, Yale Law School, Lillian Goldman Law Library, bit.ly/43PJ2sY.

The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. This "straightforward and explicit command" makes clear that "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid

reservation of congressional control over funds in the Treasury.” *OPM v. Richmond*, 496 U.S. 414, 424-25 (1990). This limitation extends to executive branch agencies, including CFPB, and it cannot be delegated away by Congress. *See Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

However, CFPB is funded not through appropriations, but rather through funding received “directly from the Federal Reserve, which is itself outside the appropriations process,” and in an amount unilaterally determined by the CFPB Director, so long as the amount does not exceed a prescribed percentage of the Federal Reserve’s “total operating expenses.” *Seila Law*, 140 S. Ct. at 2194; 12 U.S.C. § 5497(a)(1)-(2). Thus, Congress has ceded not only its exclusive power to appropriate funds, but also its power to review CFPB’s funding. This it cannot do. As the Court has made clear, “[t]he Constitution’s division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.” *New York*, 505 U.S. at 182.

Given the power and reach of CFPB which “acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens,” this impermissible abdication of power presents more than a constitutional conundrum; it presents a legitimate threat to liberty. *Seila Law*, 140 S. Ct. at 2202, n.8.

The Framers understood that “the great security against a gradual concentration of the several powers in the same department, consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. ... Ambition must be made to counteract ambition.” James Madison, *The Federalist Papers*, No. 51, (Feb. 8, 1788), *The Avalon Project*, Yale Law School, Lillian Goldman Law Library, bit.ly/3NidIw1. The Constitution gives Congress the exclusive “power of the purse” to resist the encroachments of the other branches of government. By relinquishing that power to the executive branch, Congress has undermined the Constitution’s separation of powers and violated the Appropriations Clause. The Court should uphold the lower court’s holding that the statute providing funding to CFPB, 12 U.S.C. § 5497, violates the Appropriations Clause, and hold that the lower court did not err in vacating a regulation promulgated at a time when CFPB was receiving such funding.

II. Returning to Congress the “Power of the Purse” Over CFPB would Serve as an Important Check on the Ever-Expanding Administrative State

Though Congress alone possesses the power to legislate, in addition to the power to appropriate funds, over time this power has been delegated or siphoned away and transferred to executive branch-controlled agencies and independent agencies encompassing a “fourth branch” of government. As a result

of this delegation, the administrative state has steadily grown in size, power, and reach undermining the system of checks and balances established by the Constitution.

One way to appreciate this growth is to look at the steadily increasing number of federal executive agencies and employees over time. Just over a decade ago, there were approximately 405 federal administrative agencies. Lewis & Selin, *Sourcebook of United States Executive Agencies*, ACUS (Dec. 2012), bit.ly/3NH2Kl7. Today, there are approximately 514. *A-Z Index of U.S. Government Departments and Agencies*, USAgov (2023), bit.ly/3PgDYJx. Naturally, with the more than 25 percent increase in the number of agencies has come a significant increase in the number of federal executive branch employees as well. Between 2008 and 2017, the total number of executive branch employees increased by 196,737. *Sizing Up the Executive Branch*, OPM (Feb. 2018), bit.ly/3Nft83V. The White House currently claims a workforce of more than four million employees including those serving in the armed forces. *The Executive Branch*, The White House (2023), bit.ly/3p9OQOO. This figure does not include government contractors performing much of the work of the executive branch, which in 2020, amounted to an additional five million workers, bringing the total to more than nine million. Paul Light, *The True Size of Government is Nearing a Record High*, Brookings (Oct. 7, 2020), bit.ly/430KDee.

Another way to measure the growth in the administrative state is by examining the ever-increasing volume of new regulations being created every year.

These regulations carry the force and effect of law but are passed without the hassle of public debate and accountability which the legislative process entails. In fact, the sheer volume of regulations has soared by nearly 40 percent in the last two decades. Fick *et al*, *Congress Must Rein in President Biden's Regulatory Spending Spree to Tame Inflation*, FGA (Jul. 26, 2022), bit.ly/3j4AP1U. In 2021 alone, agencies published in the Federal Register nearly 75,000 pages of new proposed and final regulations, orders, and notices governing the conduct of American companies and citizens. *Id.* That's more than 20 times the average number of pages published in the Federal Register in the 1930s, and a roughly 50 percent increase from what was published on average in the 1980s. *Federal Register Pages Published Annually*, LLSDC (2020), bit.ly/3peYBew. Meanwhile, the Code of Federal Regulations, which codifies all current federal regulations, already spans more than 105 million words across nearly 190,000 pages encompassing more than 1.3 million regulatory mandates and restrictions. Fick *et al*, *Congress Must Rein in President Biden's Regulatory Spending Spree to Tame Inflation*, FGA (Jul. 26, 2022), bit.ly/3j4AP1U.

With all this growth has come increasing costs. For example, the cost to federal taxpayers to develop, administer, and enforce federal regulations has more than tripled since 2000, reaching nearly \$80 billion per year by 2021. *Id.* Worse yet, these costs only account for a subset of federal agencies that primarily regulate the private sector. They exclude several major agencies, such as the Department of Defense, In-

ternal Revenue Service, Social Security Administration, and the Centers for Medicare & Medicaid Services. *Id.* Every year, Americans spend more than 10 billion hours on regulatory compliance paperwork alone, generating an annual cost of more than \$140 billion. *Id.* When accounting for compliance costs, economic losses, and other costs, the price tag for federal regulations comes out to \$2 trillion every year. *Id.* Clearly, the administrative state is growing unchecked. Congress should step in and reclaim its power as a co-equal branch of government, and where constitutionally required, as it is here, the Court must step in and return to Congress its nondelegable powers.

As the Supreme Court recently noted, “[a]mong Congress’s most important authorities is its control of the purse.” *Biden v. Nebraska*, 600 U.S. __, __ (2023) (slip op., at 24). This power is particularly critical for Congress to exercise oversight of executive branch agencies. *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 *Harvard Law Review* 1822, 1831 (2012), bit.ly/3CyZXUH. “Congress uses the appropriations monopoly to exert control over agencies by altering total funding, targeting specific programs through earmarks and riders, and using signals and threats.” *Id.* at 1825. But with CFPB’s funding falling “outside the appropriations process,” as it comes directly from the Federal Reserve, which is, itself, outside the appropriations process, Congress has effectively handed over to the executive branch its

most powerful tool for oversight. 12 U.S.C. § 5497(a)(1)-(2).

Returning the appropriation power over CFPB to Congress would likely encourage Congress to reclaim other legislative power it has delegated or lost to other administrative agencies. As a result, not only would the power of CFPB be checked, but also that of the administrative state at large.

III. Cutting off CFPB's Funding and Vacating the Payday Lending Rule Won't Create the Regulatory Chaos Some Proponents Claim

Recognizing that CFPB's funding structure constitutes a clear violation of the Appropriations Clause, some proponents have attempted to divert attention away from the constitutional issues claiming any attempt to restore a system of checks and balances over CFPB will lead to regulatory chaos. But this claim is untrue.

Unmoored from the Constitution's system of checks and balances, CFPB has been drifting away from the boundaries Congress originally created when it established CFPB, extending its power and reach in myriad ways. For instance, CFPB recently issued a new interpretive rule expanding the authority of states to investigate and enforce federal consumer protection laws in unprecedented ways while simultaneously forming new alliances with state attorneys general politically aligned with the current administration. *Authority of States to Enforce the Consumer Financial Protection Act of 2010*, CFPB (May 19,

2022), bit.ly/432Ko2t; *Open Letter from the House Financial Services Committee to Rohit Chopra, Director, CFPB* (Jul. 28, 2022), bit.ly/3CASqod. In addition, CFPB also recently broadened its authority to sue financial services providers for supposed discrimination without any evidence of discriminatory intent. This dangerous new authority, never before claimed in Dodd-Frank’s 12 years of existence, will create significant uncertainty for regulated industries. *Toomey: Under Chopra, CFPB is More Out of Control Than Ever Before*, U.S. Senate committee on Banking, Housing, and Urban Affairs (Apr. 26, 2022), bit.ly/3NPoYx. Even worse, this new unilateral power grab was done without engaging in the rulemaking process, and was instead merely announced through a press release. *Id.* And in yet another example of blatant overreach, CFPB recently proposed drastic reductions in standard credit card fees which will invariably raise the costs of loans for all borrowers, including those who make timely payments. Caitlin Reilly, *Senators, CFPB’s Chopra spar over proposed credit card fee limit*, Roll Call (Jun. 13, 2023), bit.ly/3py3FuF. Late fees go down for some, while loan costs rise for everyone.

Clearly, CFPB’s unbridled efforts to expand the scope of its power outside of the rulemaking process required under the APA are causing significant confusion and concern for businesses and consumers alike; the very regulatory chaos its proponents claim will result if the “power of the purse” is returned to Congress. *See Perez*, 575 U.S. at 96; 5 U.S.C. §§ 551-553.

Regardless, cutting off CFPB's unconstitutional funding and vacating the payday lending rule does not necessarily mean an end to all functions and oversight currently performed by CFPB, nor to CFPB itself. Instead, it would simply mean that Congress must either address the unconstitutional funding issue through new legislation that returns the power to appropriate funding for CFPB to Congress, or allow key functions to transfer to other agencies funded by Congress in accordance with the Constitution.

Importantly, should Congress choose to address the CFPB funding issue through new legislation, it would also be afforded an opportunity to take a hard look at CFPB's utility and structure and consider putting in place better guardrails to keep CFPB from broadening the scope of its power in the way it has been seeking to do under the current administration. Not only would this serve as an important check on CFPB's "highly-politicized agenda unbounded by statutory limits," and its "arrogant regulatory ethos [to do] ...whatever it wants," it would also help restore a sense of order and predictability to the businesses CFPB seeks to regulate in ways never imagined by Congress. *Open Letter From the Senate Committee on Banking, Housing, and Urban Affairs to Director Chopra*, (Sep. 12, 2022), bit.ly/44bbEwF.

CONCLUSION

For these reasons and more, this Court should uphold the lower court's holding that the statute providing funding to CFPB, 12 U.S.C. § 5497, violates the Appropriations Clause, and hold that the lower

court did not err in vacating a regulation promulgated at a time when CFPB was receiving such funding.

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