

## The Supreme Court Grants Petition to Decide Constitutionality of CFPB Funding

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On February 27, 2023, the U.S. Supreme Court granted the Consumer Financial Protection Bureau's Petition for a Writ of Certiorari in the closely watched case of *CFPB v. Community Financial Services Association of America*,<sup>[1]</sup> and denied the cross-petition filed by Community Financial Services Association of America ("CFSA").<sup>[2]</sup> The CFPB's petition asked the Court to overturn the October 19, 2022 ruling by the United States Court of Appeals for the Fifth Circuit that the CFPB's funding structure is unconstitutional and, therefore, that the CFPB's Payday Lending Rule is invalid.<sup>[3]</sup> CFSA's cross-petition asked the Court to consider two alternative grounds for invalidating the Payday Lending Rule.<sup>[4]</sup> This case marks the second time in three years that the Supreme Court will consider the constitutionality of structural features of the CFPB.

In this latest judicial opinion holding that the CFPB's structure is unconstitutional, the Fifth Circuit held that the CFPB's funding structure violated the Appropriations Clause of Article I of the Constitution.<sup>[5]</sup> The Appropriations Clause states, in part, that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law."<sup>[6]</sup> The CFPB does not receive funds through annual appropriations from the Treasury, but is authorized to request a capped amount of funds from the Federal Reserve System.<sup>[7]</sup> The Fifth Circuit held that this arrangement violates the Appropriations Clause because it uniquely insulates the CFPB from the appropriations process.<sup>[8]</sup> According to the Fifth Circuit, funding the CFPB outside of the annual appropriations process means that the CFPB has powers of the "purse" and the enforcement "sword" in violation of the Constitution's separation-of-powers doctrine.<sup>[9]</sup> As a remedy, the Fifth Circuit vacated the CFPB's Payday Lending Rule because it was finalized while the CFPB was unlawfully funded.<sup>[10]</sup> The Fifth Circuit recognized that its ruling contradicted the decision of "every court to consider" the CFPB's funding structure.<sup>[11]</sup>

The CFPB's petition challenged the Fifth Circuit's constitutional and remedial rulings. The CFPB argued that Congress "appropriated" funds to the agency as the Appropriations Clause requires when it authorized the CFPB to request and receive funds from the Federal Reserve System.<sup>[12]</sup> The CFPB contended that the Fifth Circuit should not have invalidated the Payday Lending Rule because

it did not ask whether the funding provision was severable from other CFPB statutes, and misapplied precedent when considering the causal connection between the constitutional defect and the Payday Lending Rule.<sup>[13]</sup> The CFPB sought oral argument for the Court's April 2023 sitting,<sup>[14]</sup> but the timing of the grant means that a hearing is unlikely to occur before the Court's October 2023 term. A decision, therefore, could come as late as May or June 2024.

CFSAA's cross-petition urged the Court to deny the CFPB's petition, but asked the Court to consider two alternative grounds for vacating the Payday Lending Rule if it were to grant the CFPB's petition: (1) it was promulgated by the CFPB's director while he was unconstitutionally "shielded from removal by President Trump"; and (2) it exceeds the CFPB's authority.<sup>[15]</sup> The Supreme Court declined to consider the Fifth Circuit's ruling on those issues.

By granting the CFPB's petition, the Supreme Court will have the opportunity to address significant questions about the meaning of the Appropriations Clause, the appropriate remedy for the purported constitutional violation, and the viability of the CFPB and other federal financial regulators that are funded outside of annual appropriations. As the CFPB explained, the Fifth Circuit's decision has "enormous legal and practical consequences" for the CFPB, regulated entities, and consumers.<sup>[16]</sup> Indeed, the logic of the Fifth Circuit's decision threatens to unwind every action the CFPB ever has taken.<sup>[17]</sup> Attorneys General of twenty-one Democratic states and the District of Columbia submitted an amicus brief echoing this concern.<sup>[18]</sup> They argue that the potential loss of the "CFPB's critical enforcement, regulatory, and informational functions" threatens "substantial harm to the states."<sup>[19]</sup> In another amicus brief, sixteen Republican Attorneys General emphasized federalism concerns underlying this case.<sup>[20]</sup> They urged the Court to uphold the Fifth Circuit's decision in order to "provide the states certainty over their role in regulating our financial system" and "restore the CFPB's accountability to the states."<sup>[21]</sup> And despite the Fifth Circuit's effort to limit its opinion to the CFPB, its analysis could implicate other federal agencies that are not funded through a "normal" appropriations bill, such as the Federal Reserve System and the Federal Deposit Insurance Corporation. Thus, the Court's decision may have far-reaching consequences across the Federal Government.

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## FOOTNOTES

[1] *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448 (Feb. 27, 2023), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/22-448.html>.

[2] *Cmty. Fin. Servs. Ass'n of Am. v. CFPB*, No. 22-663 (Feb. 27, 2023), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/22-663.html>.

[3] Petition for a Writ of Certiorari, *CFPB v. Community Financial Services Association of America*, No. 22-448 (Nov. 14, 2022) ("CFPB Petition" hereinafter).

[4] Cross-Petition for a Writ of Certiorari, *Community Financial Services Association of America v. CFPB*, No. 22-663 (Jan. 13, 2023) ("CFSAA Petition" hereinafter).

[5] *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 644 (5th Cir. 2022) (subsequent history omitted); see also Rachel Rodman et al., *Fifth Circuit Ruling Chills Consumer Financial Protections*, Bloomberg Law (Oct. 25, 2022), <https://news.bloomberglaw.com/business-and-practice/fifth-circuit-ruling-chills-consumer-financial-protections?context=search&index=0> (discussing Fifth Circuit's opinion).

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[6] U.S. Const. art. I, § 7, cl. 7.

[7] See *Cmty. Fin. Servs. Ass'n of Am.*, 51 F.4th at 638 (discussing 12 U.S.C. § 5497(a)).

[8] *Id.* at 638–39.

[9] *Id.* at 640.

[10] *Id.* at 642–43.

[11] *Id.* at 641.

[12] CFPB Petition at 10 (“Congress enacted a statute explicitly authorizing the CFPB to use a specified amount of funds from a specified source for specified purposes. The Appropriations Clause requires nothing more.”).

[13] *Id.* at 23–27.

[14] *Id.* at 31.

[15] CFSAA Petition at i, 13, 22.

[16] CFPB Petition at 28–30.

[17] See *Cmty. Fin. Servs. Ass'n of Am.*, 51 F.4th at 643 (“Because the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency’s unconstitutional funding scheme, there is a linear nexus between the infirm provision (the Bureau’s funding mechanism) and the challenged action (promulgation of the rule).”).

[18] Brief for New York et al. as Amici Curiae in Support of Petitioners, *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448, at 17 (Dec. 14, 2022), available at [https://www.supremecourt.gov/DocketPDF/22/22-448/249998/20221214182326873\\_22-448\\_Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/22/22-448/249998/20221214182326873_22-448_Amicus%20Brief.pdf).

[19] *Id.* at 17.

[20] Brief for West Virginia et al. as Amici Curiae in Support of Granting the Petition, *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448 (Dec. 14, 2022), available at [https://www.supremecourt.gov/DocketPDF/22/22-448/249963/20221214151852678\\_CFPB%20Amicus%20ISO%20Petition.pdf](https://www.supremecourt.gov/DocketPDF/22/22-448/249963/20221214151852678_CFPB%20Amicus%20ISO%20Petition.pdf).

[21] *Id.* at at 4, 8–9.

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