

The War on the Consumer Financial Protection Bureau: Community Financial Services of America v. CFPB

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In February 2023, the Supreme Court agreed to hear a case brought by payday lending trade groups who claim that their primary regulator, the Consumer Financial Protection Bureau (CFPB), is unconstitutional due to its independent funding structure. This case is the latest in an escalating series of industry and right-wing attacks to hobble or kill the CFPB. It is also part of a broader, concerted effort by powerful corporate actors – and their congressional allies – aimed at dismantling the federal regulators whose job it is to enforce the law and ensure that markets and industries are competitive, open, and fair. If the Supreme Court decides to side with Community Financial Services of America (CFS), the business lobby representing payday lenders, the consequences could sabotage not just the CFPB but also numerous critical federal agencies and programs that are funded outside of congressional appropriations. As a result, the knock-on effects of an adverse decision upholding the Fifth Circuit’s rogue ruling could throw the economy into chaos.

NOT THE FIRST CFPB CHALLENGE

In July 2020, the CFPB announced a rule aimed at protecting borrowers from the unfair and abusive practices of payday lenders, a predatory industry that issues small loans

with extremely high interest rates, usually for low-income Americans to pay their bills before receiving their next paycheck.¹ The rule, which prevented lenders from accessing Americans' bank accounts without their consent, was protested by the industry and eventually challenged in court by CFSA. CFSA argued that the rule was not legal and, separately, that the CFPB was unconstitutional, arguing that because the CFPB is funded through the Federal Reserve and not through the annual congressional appropriations process, its funding violates the Constitution's Appropriations Clause. CFSA lost in the federal trial court. On appeal to the Fifth Circuit Court of Appeals, CFSA again lost on its claims that the rule was illegal, but it won on its argument that the CFPB's funding structure violates the Constitution. The CFPB has appealed that decision to the Supreme Court, represented by the U.S. Solicitor General, who has already filed a brief in support.²

The CFPB has long been the target of the financial industry it regulates, and this is not the first time a case about its constitutionality has made it to the Supreme Court. In a 2020 decision in *Seila Law v. CFPB*, the Supreme Court held that the president has the power to remove the CFPB director from office but did not otherwise affect how the CFPB operates.³ The CFSA's lawsuit is an attack based on a new constitutional theory. Opponents of the agency, largely from the industries the CFPB regulates, and their allies in Congress have worked from the CFPB's founding to bring down the agency. Since its creation, more than 70 bills have been proposed in Congress to reduce the CFPB's authority.

THE APPROPRIATIONS CLAUSE, SATISFIED

The U.S. Constitution's Appropriations Clause states that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁴ The Constitution imposes two constraints on the process that Congress may use to enact appropriations. First, appropriations must be passed by both branches of Congress and signed by the president, just like other statutes. Second, appropriations to “raise and support Armies” may not exceed a two-year term. *The Constitution does not prescribe anything else about the process for funding the federal government.* The Founders knew to limit the appropriations power of Congress, and did in only this one specific way, which is not relevant to the CFPB.

¹ Payday, Vehicle Title, and Certain High-Cost Installment Loans—Revocation Rule, Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/rules-policy/final-rules/payday-vehicle-title-and-certain-high-cost-installment-loans-revocation-rule/>.

² Brief of Petitioners, *C.F.P.B. v. Cmty. Fin. Serv. Ass'n of Am., Ltd., et al.*, No. 22-448 (U.S. May 2023).

³ *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020).

⁴ U.S. Const. Art. I, § 9, Cl. 7.

No court has ever concluded that the Appropriations Clause puts a constitutional limit on how Congress can fund an agency it creates, nor has Congress or the executive branch ever understood the Appropriations Clause to limit how agencies can be created and funded. The decision by the Fifth Circuit is a radical and dangerous exception, claiming that any agency funded outside the annual appropriations process is by definition unconstitutional.

Furthermore, two other Circuit Courts have already reviewed this argument and rejected it. In 2017, an en banc panel of the District of Columbia Court of Appeals quickly dismissed arguments about the CFPB's independent funding as “bureaucratic minutiae” that were “outside the ambit of the separation-of-powers inquiry.” “The CFPB thus fits comfortably within the precedent and tradition supporting the independence of the financial regulators that safeguard the economy.”⁵ In March 2023, issuing an opinion while the Fifth Circuit's decision was pending before the Supreme Court, the Second Circuit Court of Appeals declined to follow its sister circuit, finding no support for its decision in Supreme Court precedent, the Fifth Circuit's reasoning, or the history of the Appropriations Clause.⁶

There are times when it may be appropriate for courts to rethink how the Constitution applies to current issues. The Civil Rights movement sparked a long overdue change in how the legal system addressed race. Emerging technologies can present new questions on the application of the Fourth Amendment's protections against unreasonable search and seizures. This is not one of those moments.

CONGRESS SPECIFICALLY DESIGNED THE CFPB TO HAVE AN INDEPENDENT FUNDING STRUCTURE

There are many ways Congress can and has funded government agencies. One way is through annual appropriations bills, sometimes called spending bills. These bills only provide funding one fiscal year at a time. If the fiscal year ends without a new spending bill passed by Congress, that part of the government must stop operating. That's why government employees are furloughed, national parks close, and certain other federal government programs stop operating when Congress can't pass appropriations bills.

⁵ *PHH Corp. v. CFPB*, 881 F.3d 75, 96 (D.C. Cir. 2017).

⁶ *CFPB v. Law Offices of Crystal Moroney*, 63 F.4th 174, 181-83 (2d Cir. 2023).

Another way Congress can fund a program or agency is through a direct spending bill. Sometimes this is referred to as mandatory spending because it is not contingent on Congress passing spending bills from year to year. Congress has funded programs or agencies for some number of years, or even indefinitely. Once Congress passes a direct spending bill, that program continues to operate under the terms of that bill. That's why Social Security and Medicare payments don't require annual appropriations bills. That's why independent agencies like the Federal Reserve can continue operating during a shutdown. The same is true for the CFPB.

The CFPB is not the only agency funded outside the annual appropriations process. The Federal Reserve, for example, is funded primarily from the interest earned on the securities it owns. Bank regulators like the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) are funded by fees paid by banks. The U.S. Postal Service and the U.S. Mint are also not funded by annual congressional appropriations. Simply put, there is nothing radical, new, or different about the CFPB's funding.

Additionally, the CFPB remains accountable to Congress, just like any other regulator or agency. It is required to appear before Congress for oversight hearings. Its budget is audited annually by the comptroller general. The comptroller general and the CFPB director submit annual budget reports to congressional authorizing committees. Any regulation it passes is subject to the Congressional Review Act, just like regulations from agencies funded in annual appropriations bills. And if Congress wants to reduce the CFPB's funding, or even eliminate the agency altogether, it can take the same steps it would take for any other agency: pass a law, subject to filibuster in the Senate, and override a veto if the president vetoes the bill.

THE CRITICAL IMPORTANCE OF THE INDEPENDENTLY FUNDED CFPB

In the aftermath of the financial meltdown of 2008, Congress sought to prevent the recurrence of another economy-crushing financial crisis. These efforts led Congress to create the CFPB, a regulatory agency that would enforce a variety of financial protection laws, many of which were already on the books. Concluding that funding the CFPB outside the annual appropriations process “is absolutely essential to the independent operations of any financial regulator,” Congress designed the CFPB to draw a limited budget from the

Federal Reserve.⁷ Congress has for decades sought to promote stability in the financial markets by insulating regulators from annual appropriations debates in Congress and changes in administrations. By authorizing the CFPB's independent funding structure, it kept with that longstanding practice.

Since its creation, the CFPB has used that independence to police corporate wrongdoing in the financial services industry and worked to promote fair and competitive markets to benefit the public. The CFPB has returned over \$17.5 billion of Americans' money to their pockets, benefitting over 192 million people nationwide.⁸

Under Director Rohit Chopra, appointed in 2021, the CFPB has ramped up its enforcement efforts, becoming a champion for everyday Americans against the wrongdoing of powerful corporate actors. For example, the agency wiped out more than 70% of Americans' medical debt from their credit reports, which one in three Americans said prevents them from buying a house or saving for retirement.⁹ The CFPB's fight against junk fees has required banks to cut overdraft and non-sufficient fund fees, saving Americans more than \$5 billion annually and particularly benefitting Black, Hispanic, and low-income customers, whom these fees disproportionately target.¹⁰ The CFPB eliminated more than \$10 billion in student debt in 2022 alone by taking action against fraudulent student loan servicers, and it has taken action to defend military servicemembers and veterans from predatory lending.¹¹

The agency has also become Americans' last line of defense from corporate wrongdoing in the banking sector, cracking down on huge financial firms that might otherwise get away with breaking the law. The CFPB won a nearly \$4 billion settlement with Wells Fargo, ordering the bank to pay restitution for its illegal conduct to Americans who lost their homes and cars as a result and requiring the bank to refund countless more whose bank accounts were drained by the bank's illegal fees.¹² The CFPB fined Bank of America more than \$250 million for denying Americans unemployment benefits, illegally freezing

7 Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376.

8 "Enforcement by the numbers," Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/enforcement/enforcement-by-the-numbers/>.

9 "CFPB Publishes Analysis of Potential Impacts of Medical Debt Credit Reporting Changes," Consumer Financial Protection Bureau, July 27, 2022, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-publishes-analysis-of-potential-impacts-of-medical-debt-credit-reporting-changes/>.

10 "Overdraft/NSF revenue down nearly 50% versus pre-pandemic levels," CFPB, May 24, 2023, <https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/>.

11 "Loan Cancellation for Student Loan Borrowers Who Attended Corinthian Colleges," CFPB, June 2, 2022, <https://www.consumerfinance.gov/about-us/blog/loan-cancellation-for-student-loan-borrowers-who-attended-corinthian-colleges/>; "Serving servicemembers, veterans, and military families," CFPB, <https://www.consumerfinance.gov/consumer-tools/educator-tools/servicemembers/>.

12 Katy O'Donnell, "Wells Fargo slammed with \$3.7B penalty, in record CFPB settlement," Politico, Dec. 20, 2022, <https://www.politico.com/news/2022/12/20/wells-fargo-cfpb-settlement-00074740>.

their bank accounts using flawed fraud detection programs, and unlawfully garnishing the wages of thousands of Americans.¹³

WHAT'S AT STAKE?

It is hard to predict what the Supreme Court will say, or whether it will adopt the Fifth Circuit's decision in whole, in part, or at all. It is also hard to predict what remedy might be required if the Supreme Court concludes the Appropriations Clause prohibits the CFPB from being funded the way Congress intended. However, based on the current ideological leaning of the Supreme Court, there is a real risk that the CFPB could fall victim to the Court's steady deregulatory march – see for example the Court's decision in *West Virginia v. EPA*, which crippled the agency's broader regulatory powers and was trumpeted as a victory in “the long war” against government regulation.¹⁴

The payday lending industry's argument, that the CFPB's funding structure is unconstitutional, could pose an existential threat. While the CFPB's payday lending rule is at issue in this case, if the Supreme Court finds the agency's funding structure unconstitutional, litigants might be encouraged to seek to undo past actions of the CFPB, from rules to enforcement actions. Any past rule or enforcement action it undertook could be at risk, and the agency itself could be hobbled.

Consumers would lose the federal regulator protecting them from wrongdoing in the financial services industry. Businesses, too, would suffer. Mortgage lenders, for example, rely on standard-setting rules enacted by the CFPB to freely offer home loans, meaning the decision's effects on the U.S. housing sector would be devastating for homebuyers and lenders alike.¹⁵ In fact, housing industry groups filed an amicus brief in the case warning of “chaos” in mortgage markets should the Supreme Court declare the CFPB's funding unconstitutional and not preserve the agency's existing mortgage-related rulemakings.¹⁶

13 Stacy Cowley, “Bank of America is fined \$225 million for mishandling pandemic unemployment benefits,” *The New York Times*, July 14, 2022, <https://www.nytimes.com/2022/07/14/business/bank-of-america-fined-unemployment.html>.

14 *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022); John Yoo and Robert Delahunty, “The Major-questions Doctrine and the Administrative State,” *National Affairs*, Fall 2022, <https://www.nationalaffairs.com/publications/detail/the-major-questions-doctrine-and-the-administrative-state>.

15 Stephanie Dhue, “A court just ruled that CFPB's funding is unconstitutional, and that could be ‘catastrophic’ for mortgage markets,” *CNBC*, Oct. 28, 2022, <https://www.cNBC.com/2022/10/28/court-ruling-on-payday-lending-could-impact-mortgage-markets.html>. 13 Stacy Cowley, “Bank of America is fined \$225 million for mishandling pandemic unemployment benefits,” *The New York Times*, July 14, 2022, <https://www.nytimes.com/2022/07/14/business/bank-of-america-fined-unemployment.html>.

16 Evan Weinberger, “Housing Industry Warns of ‘Chaos’ in Broad CFPB Funding Ruling,” *Bloomberg Law*, May 18, 2023, <https://news.bloomberglaw.com/daily-labor-report/housing-industry-warns-of-chaos-in-broad-cfpb-funding-ruling>.

The uncertainty caused by these possibilities could be profoundly disruptive to the financial industry and consumers.

Beyond just the CFPB, a possible adverse decision carries grave implications for critical financial regulators, and for the economy as a whole. Adoption of this new Appropriations Clause theory to the funding of federal agencies and programs could undermine any agency or program not funded in annual appropriations bills. Litigation against other agencies like the Federal Reserve, OCC, FDIC, NCUA, and other financial regulatory bodies could threaten core pillars of our economic and financial regulatory system, especially after a series of bank collapses created turmoil this year in financial markets.

Also endangered would be critical, longstanding programs like Medicare, Medicaid, Social Security, unemployment benefits, child nutrition assistance, and others – relied on by hundreds of millions of working Americans across the country. All told, if the Supreme Court were to uphold the Fifth Circuit’s ruling, it could make nearly two-thirds of federal spending illegal, inviting further legal challenges with the potential to gut the American state as we know it.

Additional Materials & Sources:

- [Solicitor General’s Amicus Brief](#)
- [Center for Responsible Lending and Americans for Financial Reform Poll on Support for the CFPB \(Dec. 2022\)](#)
- [Fifth Circuit: CFPB’s Funding Authority Is Unconstitutional Report by the Congressional Research Service](#)
- [Constitutional Accountability Center LTE in The Washington Post](#)
- [Americans for Financial Reform Blog: CFPB Supreme Court Case Draws Greater Attention as Threat to Federal Reserve](#)

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