

May 16, 2024

# U.S. Supreme Court Upholds CFPB Funding Mechanism as Constitutional

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## Court Reverses Fifth Circuit’s 2022 Ruling and Holds That Allowing CFPB to Draw Funds from Federal Reserve Does Not Violate the Constitution’s Appropriations Clause

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### SUMMARY

The U.S. Supreme Court ruled today in *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.* that the CFPB’s funding mechanism—by which it draws funds directly from the Federal Reserve outside the annual congressional appropriations process—does not violate the Constitution’s Appropriations Clause. In a 7-2 decision authored by Justice Thomas, the Court reversed the Fifth Circuit’s 2022 decision that invalidated the CFPB’s Payday Lending Rule on constitutional grounds.

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### BACKGROUND

In response to the 2008 financial crisis and its aftermath, Congress created the Consumer Financial Protection Bureau,<sup>1</sup> and charged the new agency with implementing and enforcing a host of pre-existing financial consumer protection laws. In addition, Congress authorized the CFPB to prohibit—through enforcement and binding rulemaking—the commission of “any unfair, deceptive, or abusive act or practice” in the consumer finance sector under its authority.<sup>2</sup>

Congress designed a funding mechanism for the CFPB that (as with existing independent financial regulators) does not rely on annual Congressional appropriations. Instead, each year, the CFPB’s Director requests from the Federal Reserve an amount “reasonably necessary to carry out” the CFPB’s duties, subject to an inflation-adjusted statutory cap.<sup>3</sup> In 2022, for example, the transfer cap was \$734 million.<sup>4</sup> The Federal Reserve exercises no oversight over the CFPB’s use of its funding. Congress also

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expressly exempted the CFPB's funding from "review by the Committees on Appropriations of the House of Representatives and the Senate."<sup>5</sup>

In 2017, the CFPB promulgated the Payday Lending Rule, which regulates certain high-interest consumer loans.<sup>6</sup> In 2018, the Community Financial Services Association of America and Consumer Service Alliance of Texas—two trade associations representing companies offering small-dollar, short-term payday loans—challenged the CFPB's Payday Lending Rule in federal district court, alleging (among other things) that the CFPB "takes federal government money" without congressionally authorized annual appropriations, in violation of the Appropriations Clause.<sup>7</sup> After the district court granted summary judgment to the CFPB, the Fifth Circuit reversed, holding that the Appropriations Clause "affirmatively obligates Congress" to use its appropriations authority to directly fund government agencies.<sup>8</sup> The Fifth Circuit held that, even though "Congress enacted the law authorizing the Bureau's funding," "a 'law alone does not suffice—an *appropriation* is required.'"<sup>9</sup> The Supreme Court then granted certiorari to decide whether the CFPB's funding mechanism violates the Appropriations Clause.<sup>10</sup>

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### THE SUPREME COURT'S DECISION

Writing for the Court and joined by six other Justices, Justice Thomas wrote that "the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification" demonstrate that "appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause."<sup>11</sup> The word "appropriation," the Court reasoned, would have been understood at the founding to mean simply the authorization of expenditures.<sup>12</sup> That more flexible understanding was further confirmed by pre-founding history in England and the colonies, as well as early legislation in Congress.<sup>13</sup>

Applying this text and history to the CFPB's funding mechanism, the Court held that it "contains the requisite features of a congressional appropriation" and "fits comfortably within the First Congress' appropriations practice," because it "authorizes the Bureau to draw funds from a particular source" and "in an amount not exceeding an inflation-adjusted cap."<sup>14</sup> The Court concluded that neither the CFPB's ability to request an amount of funds to be drawn (subject to a cap) nor the fact that the CFPB's appropriation is not time-limited was material to the funding mechanism's constitutionality.<sup>15</sup> The Court therefore reversed the Fifth Circuit's judgment and remanded for further proceedings.<sup>16</sup>

Justice Alito dissented in an opinion joined by Justice Gorsuch, opining that the Appropriations Clause "imposes on Congress an important duty that it cannot sign away" lest it upset the separation of powers, and criticizing the majority for turning the Clause "into a minor vestige."<sup>17</sup>

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### IMPLICATIONS

By reversing the Fifth Circuit's decision, the Court removes one significant constitutional objection that parties have raised to challenge CFPB rule-making, and which could have rendered every CFPB action

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unconstitutional. The ruling may have an immediate procedural effect in at least two other pending cases against the CFPB—involving new rules on credit card late fees and small business lending data reporting—in which district courts had stayed rules in reliance on the Fifth Circuit’s now-reversed holding.<sup>18</sup> Those plaintiffs may, however, still seek to enjoin the rules based on other grounds.

Although the question unsurprisingly does not often arise, the Court has set a high bar going forward for Appropriations Clause-based challenges to federal agency action. A challenge to an agency’s authority to spend funds under the Appropriations Clause will have to show that Congress has not “identif[ied] a source of public funds and authorize[d] the expenditure of those funds for designated purposes.”<sup>19</sup>

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ENDNOTES

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- 1 12 U.S.C. § 5491(a).
- 2 *Id.* §§ 5536(a)(1)(B), 5531(b).
- 3 *Consumer Fin. Prot. Bureau v. Community Fin. Servs. Ass’n of Am., Ltd.*, No. 22-448, 2024 WL 2193873, at \*3.
- 4 *Id.* at \*4.
- 5 12 U.S.C. § 5497(a)(2)(C).
- 6 *Id.* at \*4.
- 7 *Id.*
- 8 *Id.* (quoting *Community Fin. Servs. Ass’n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 637 (5th Cir. 2022)).
- 9 *Id.* (quoting *CFSA v. CFPB*, 51 F.4th at 640).
- 10 *Id.*
- 11 *Id.* at \*5.
- 12 *Id.* at \*6.
- 13 *Id.* at \*6-9.
- 14 *Id.* at \*9.
- 15 *Id.* at \*9-10.
- 16 *Id.* at \*12.
- 17 *Id.* at \*14-15.
- 18 *Chamber of Com. of the U.S. v. Consumer Fin. Prot. Bureau*, No. 4:24-cv-00213, Opinion & Order at 5-6 (N.D. Tex. May 10, 2024); *Texas Bankers Ass’n v. Consumer Fin. Prot. Bureau*, 685 F.Supp.3d 445 (N.D. Tex. 2023).
- 19 *CFPB v. CFSA*, 2024 WL 2193873, at \*5.

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