

Dec. 13, 2022

TO: Reporters

FROM: Americans for Financial Reform

RE: CFPB Oversight Hearing and Fifth Circuit Ruling

CONTACT:

Key Takeaways

- The Fifth Circuit Court of Appeals recently declared that the funding structure of the Consumer Financial Protection Bureau is unconstitutional, and the Solicitor General is appealing. The decision is *wrong on the law* by any plausible reading of the Constitution and past jurisprudence, and *hurts consumers and honest businesses*.
- Political opponents of the CFPB and their allies in the financial services industry, have sought to destroy it since its creation in 2010, and are now using the right-wing courts for their agenda. If allowed to stand, this decision would be a crippling blow to an agency that is, according to [a new poll](#), extremely popular with voters across political orientations.
- The Solicitor General has [petitioned](#) the Supreme Court to hear the case early next year.

Background

- Congress created the CFPB in 2010 to remedy failures of consumer protection exposed by the financial crisis and Great Recession. It consolidated responsibility for consumer protection, previously scattered among various federal regulators, in one agency. Its tools include regulation, law enforcement, direct supervision, and public education.
- In slightly over a decade, it has [won](#) over \$13.5 billion in relief for about 175 million consumers in the form of restitution or canceled debts, and \$1.8 billion in civil penalties – money that can compensate victims even if the company that defrauded them cannot.
- Already, under CFPB Director Rohit Chopra, the agency's work has [saved consumers](#) \$1 billion each year from overdraft charges, and it is working to reduce the prevalence of "junk fees". The CFPB's work [protects](#) servicemembers and veterans from predatory lenders and punishes bad actors who discriminate against people of color.

The Fifth Circuit Decision: Wrong on the Law

- In its decision, the Fifth Circuit [declared](#) CFPB's funding mechanism unconstitutional in response to a lawsuit brought by the Community Financial Services of Association of America, a lobby organization for [payday lenders](#), a form of small-dollar, high-interest credit. It sought to overturn an anti-predatory lending rule CFPB approved in 2017.
- The Fifth Circuit complied, vacating the rule on the grounds that the CFPB used illegal funding to write it. Since the funding of that action is indistinguishable from any other the agency has taken since its inception, the Fifth Circuit created the legal conditions for saying that all actions of the agency since its inception in 2010 are unconstitutional.
- The Fifth Circuit contends that CFPB's funding mechanism violates the [Appropriations Clause](#) of the U.S. Constitution, which states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."
- Under the 2010 Dodd-Frank Act, the CFPB [draws funding](#) from the Federal Reserve. It receives a maximum of 12% of the Fed's 2009, inflation-adjusted operating budget. The Fed itself collects money from the regional reserve banks in the Fed system.

- This decision also threatens other agencies not funded through the annual appropriations process, notably the Federal Reserve, which uses the same funding mechanism as the CFPB, as a Fed vice-chair recently [told Congress](#). Notably, also the FDIC, the Office of the Comptroller of the Currency, and the National Credit Union Administration are all in the same boat. (The Fifth Circuit advanced [a bizarre “double-insulation” theory](#) to distinguish CFPB from other agencies.)
- Other non-financial federal agencies are funded outside this annual process as well: Bureau of Engraving and Printing, The Federal Housing Finance Agency, Medicare, Social Security, and Farm Credit Administration.
- No other court has found that the CFPB’s funding violates the Constitution, and in fact others have [rejected](#) the argument. Nevertheless, the Fifth Circuit contends that, because the CFPB is funded outside the annual appropriations process, it pays the bills in an unconstitutional fashion. It violates the separation of powers, the Fifth Circuit insists, because the executive branch has usurped the control of Congress – or rather, that lawmakers ceded their power – over the purse.
- The Fifth Circuit Court is known to be [very right-wing](#), as it is packed with Trump-appointed judges. Even today’s conservative Supreme Court felt the need to reverse six of seven decisions by the Fifth Circuit in the 2019-2020 term and five of seven decisions in the 2020-2021 term.

Dangerous for Honest Businesses

- The CFPB does more than simply punish bad actors through enforcement or regulation. It sets the rules of the road, most notably through a series of regulations strengthening the housing finance market after the mortgage-driven crisis of 2008. Without those rules, honest businesses can’t function, and fraudsters would flourish.
- The Mortgage Bankers Association has warned in strong terms against a court invalidating the CFPB’s funding mechanism. In a Supreme Court case on a separate issue, the group [wrote](#) that “a ruling abolishing the CFPB or undoing its past actions – or even just calling the legitimacy of its past actions into doubt – could destabilize critical segments of the national economy, in clear contravention of Congress’s purpose in enacting the statute at issue.” It wrote of “catastrophic” consequences for housing finance, which would “very likely all but grind to a halt as lenders would be unable to have any confidence that their transactions comply with law.”
- Private-sector lawyers agree. “The Fifth Circuit’s ruling potentially calls into question every single rule, guidance and order that the CFPB has issued –as they all trace their origins to the CFPB’s unconstitutional self-funding structure,” regulatory attorneys Anthony DiResta and Luis Garcia of Holland & Knight [wrote](#) in a note to clients.

Bad for Consumers

- The CFPB has functioned effectively most of its existence (except three years under Trump-appointed leadership) and will soldier on, but a court decision of this gravity will inevitably weigh on its work.
- CFPB staff must now constantly assess what they can and cannot do, based on an uncertain legal environment. That uncertainty has ripple effects for the consumers that Congress charged the agency with protecting.
- Bad actors are already seizing the moment. TransUnion, the credit bureau that has [repeatedly broken the law](#), is now [trying](#) to use the Fifth Circuit decision to block a CFPB lawsuit against it. MoneyGram, a provider of transfer services to millions of people, many

of them immigrants, is [alleging](#) the regulation governing its business is invalid. A New Jersey consulting firm is [disputing](#) CFPB's right to even investigate potential wrongdoing.