

## In Two Camps, 37 States and D.C. Urge Supreme Court to Review CFPB Funding Case

December 15, 2022 | [Mark E. Rooney](#)

Two coalitions of state attorneys general are urging the Supreme Court to review the constitutionality of the CFPB's funding structure—albeit for vastly different reasons. The two amicus briefs were filed December 14 in support of the CFPB's request for review of a recent Fifth Circuit ruling holding the agency's funding structure unconstitutional and voiding its rule governing payday, vehicle-title, and certain installment loans (the Payday Rule). The filing of the briefs puts added pressure on the Supreme Court to agree to hear the case. Both groups predict "chaos" in consumer financial markets if the high court declines to review the case, a move that would effectively strip the CFPB of authority in the three states comprising the Fifth Circuit (Texas, Louisiana, and Mississippi) but nowhere else.

At issue is the Fifth Circuit's October 19 decision invalidating the Payday Rule on the theory that the agency's funding structure is unconstitutional. The CFPB, which is organized under the Federal Reserve System, is not subject to Congress's annual appropriations process. Instead, under the Consumer Financial Protection Act, the director of the agency requests operating funds from the Federal Reserve each year up to a statutory cap. The Federal Reserve System, in turn, is funded mainly through assessments on financial firms and certain interest income on investments; it too is not subject to regular Congressional appropriations. The Fifth Circuit castigated Congress for "abandoning" its responsibility under the Appropriations Clause by creating a funding framework that is "double-insulated" from Congress. *CFSA v. CFPB*, 51 F.4th 616, 639 (5th Cir. 2022).

Then, the Fifth Circuit concluded that the constitutional defect demanded vacatur of the Payday Rule. The court held that there was a "linear nexus" between the funding mechanism and the promulgation of the Payday Rule—"without its unconstitutional funding, the Bureau lacked any other means to promulgate the rule." *Id.* at 643.

The amicus briefs are unanimous in their desire to see the Supreme Court review the case, but not much else. In one camp, led by New York, twenty-one states and the District of Columbia argue that the Fifth Circuit's decision to vacate the Payday Rule was an unnecessary and excessive remedy. They view the CFPB as a "valued enforcement and regulatory partner to the States" and worry that allowing the decision below to stand "would deprive the States and their residents not only of the protections given by [the Payday Rule], but also of the CFPB's role more broadly as a federal regulator and enforcer of consumer financial laws." They argue that even if there is a constitutional defect in the funding approach, any remedy must address the funding issue narrowly and without undoing prior CFPB rules or other actions.

In the other camp, West Virginia and fifteen other states urge the Supreme Court to take the case so

that it can affirm the Fifth Circuit's decision and provide clarity to states and the marketplace. This group argues that the "CFPB's unprecedented funding scheme impermissibly shifts Congress's power of the purse to the Bureau." Leaning on a variety of law review articles, they argue that because Members of Congress represent state and local interests, the Congressional appropriations process is a critical means for states to influence federal agency behavior.

The West Virginia-led brief labels the case a "high-stakes matter." The CFPB would not disagree with that; it noted in its petition that the Fifth Circuit ruling "threatens to inflict immense legal and practical harms on the CFPB." Indeed, since the circuit decision, at least one CFPB enforcement action within the circuit has been stayed. A judge presiding over a separate CFPB enforcement action, pending in a federal district court in New York, last week entered a stay of that case over the CFPB's objection, citing the CFPB's petition. Other challenges to CFPB actions can be expected.

The CFPB is asking the Supreme Court to hear and decide the case this term. If the Supreme Court agrees, it would likely entail merits briefing in the early spring, followed by oral argument in spring, and a decision by early July. The two amicus briefs seeking such review on behalf of 37 states and the District of Columbia may well bolster the likelihood of Supreme Court review.

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