Major CFPB Constitutionality Litigation Update

*By Jason W. McElroy**

INTRODUCTION[1]

In *PHH Corp. v. CFPB*,[2] the D.C. Circuit found that the structure of the Consumer Financial Protection Bureau ("CFPB") was unconstitutional. While the en banc D.C. Circuit overruled this decision on constitutionality grounds,[3] its impact has lived on in litigation throughout the country, where parties continue to make various constitutional arguments against the CFPB's structure. For example, in *Seila Law LLC v. CFPB*,[4] the Supreme Court found that the CFPB director's for-cause removal restriction was unconstitutional.[5] Following its decision in *Seila Law*, the Supreme Court made a similar ruling in *Collins v. Yellen*[6] with respect to the removal restriction on the director of the Federal Housing Finance Agency. Subsequent rulings from the Fifth Circuit raised multiple additional constitutional issues that directly challenged the CFPB's structure, or directly challenged analogous provisions of other agencies' authorities that may affect similar CFPB authorities. These included the Court's rulings in *Community Financial Services Ass'n v. CFPB* ("*CFSA*")[7] and *Jarkesy v. SEC*.[8]

The *CFSA* case addressed multiple constitutional challenges to the CFPB's structure and enforcement authority, dismissing all but the persistent argument related to the CFPB's funding structure, ultimately finding a fatal flaw in Congress's failure to subject the Bureau to the congressional appropriations process.[9] The *Jarkesy* case dealt with the administrative enforcement scheme put in place for the Securities and Exchange Commission ("SEC"), finding that the failure to

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1. This survey is one in a series of works covering recent updates in various areas of consumer financial services law. For an overview of the other surveys in this issue of *The Business Lawyer*, see John L. Ropiequet, Eric J. Mogilnicki, Sabrina A. Neff & Christopher K. Odinet, *Introduction to the 2025 Annual Survey of Consumer Financial Services Law*, 80 BUS. LAW. 531 (2025) (in this *Annual Survey*).

2. 839 F.3d 1 (D.C. Cir. 2016).

3. PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018). Notably, the en banc panel reinstated the panel opinion's substantive findings regarding the Real Estate Settlement Procedures Act, the underlying statutory basis for the CFPB's enforcement action. *Id.* at 83.

4. 591 U.S. 197 (2020).

5. *Id.* at 238.

6. Collins v. Yellen, 594 U.S. 220 (2021).

7. § 51 F.4th 616 (5th Cir. 2022), *rev'd*, 601 U.S. 416 (2024).

8. § 4 F.4th 446 (5th Cir. 2022).

9. *CFSA*, 51 F.4th at 623.

provide jury trials in administrative proceedings violated the constitutional right to a jury trial.[10] Both of these cases made their way to the United States Supreme Court, which ruled on these matters in May and June 2024, rejecting arguments that the CPFB's funding mechanism is unconstitutional, but affirming arguments that the SEC's administrative adjudication of certain fraud claims violates the Seventh Amendment's right to a jury trial.[11]

Community Financial Services Ass'n v. CFPB

The Fifth Circuit Ruling

In October 2022, the Fifth Circuit declared the CFPB's funding mechanism unconstitutional in *Community Financial Services Ass'n v. CFPB*.[12] The court heard a challenge from the plaintiffs seeking to invalidate the 2017 Payday Lending Rule[13] on both statutory and constitutional grounds. The Community Financial Services Association of America ("CFSA") argued that the Rule exceeded the CFPB's statutory authority and that the CFPB was unconstitutionally structured.[14] The court rejected CFSA's statutory claims and most of its constitutional claims, but accepted its arguments on the CFPB's funding mechanism.[15]

The Fifth Circuit found the CFPB acted within its statutory authority when it promulgated the Rule.[16] It found that the CFPB has the statutory authority under the Consumer Financial Protection Act ("CFPA") to implement and enforce consumer protection laws to ensure financial products and services are "fair, transparent, and competitive."[17] The court held that the CFPB had a reasonable basis to conclude that the practice the Rule was intended to address was unfair, as the practice was a proximate cause of consumer harm and consumers could not reasonably avoid the harm because the consecutive withdrawal attempts tended to happen in short succession.[18] Following *Collins* and *Seila Law*, the court agreed that the removal restriction violated the Constitution but found that CFSA failed to demonstrate a sufficient harm caused by the director's removal restriction and was, therefore, not entitled to relief on this issue.[19]

Next, the court turned to CFSA's non-delegation argument. Under the non-delegation doctrine, Congress may not delegate its legislative power to other branches of government.[20] To ensure that federal agencies are sufficiently guided

10. *Jarkesy*, 34 F.4th at 459.
11. CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 420 (2024); SEC v. Jarkesy, 144 S. Ct. 2117 (2024).
12. In March 2023, the Second Circuit held that the CFPB's funding structure is not unconstitutional, creating a split with the Fifth Circuit at the time. CFPB v. Law Offices of Crystal Moroney, P.C., 63 F.4th 174 (2d Cir. 2023).
13. *See* 12 C.F.R. pt. 1041 (2025).
14. *CFSA*, 51 F.4th at 623.
15. *Id.*
16. *Id.* at 629.
17. *Id.* at 634.
18. *Id.* at 629–30.
19. *Id.*
20. *Id.*

by Congress, the Supreme Court requires Congress to guide federal agencies with "an intelligible principle."[21]

Here, the court found that Congress did not violate the non-delegation doctrine. It held that the CFPA is not a broad and unspecified grant of power to the CFPB, but rather, it gives the CFPB "a specific purpose, objectives, and definitions to guide the Bureau's discretion" in enforcing the Act, finding that "[t]his was more than sufficient to confer an intelligible principle."[22]

The court distinguished the present case from its decision in *Jarkesy v. SEC*, which found the SEC's authorizing statute in violation of the non-delegation doctrine. Unlike the statute at issue in *Jarkesy*, the CFPA was not an "open-ended delegation" that offers "no guidance whatsoever," rather, it gave the CFPB specific criteria for evaluating whether a practice is unfair or abusive.[23] In *CFSA*, the court relied heavily on prior Supreme Court precedent, requiring only "an intelligible principle to which the person or body authorized to [act] is directed to conform" to avoid a violation of the non-delegation doctrine.[24]

The crux of the CFSA's argument asserted that the CFPB's unique funding structure violated the Appropriations Clause "and the separation of powers principles enshrined in it."[25] Rather than rely on annual appropriations for funding from Congress, the CFPB requests the amount that the director determines is "reasonably necessary" to carry out the CFPB's functions, up to 12 percent of the Federal Reserve's operating expenses.[26] The court also noted that the Federal Reserve itself is shielded from congressional oversight, thereby resulting in an "unprecedented" dual insulation from Congress's purse strings, i.e., neither the CFPB nor the Federal Reserve is subject to Congress's annual appropriations process.[27]

The *CFSA* court held that Congress relinquished its power over the purse when it created the CFPB's funding mechanism, insulating the CFPB from congressional oversight on the front end by allowing the CFPB to draw funds from a federal agency that is itself insulated from congressional appropriations power.[28] In reaching its decision, the court rejected several of the CFPB's arguments to the contrary. In the court's view, the fact that Congress created the funding mechanism was not sufficient to satisfy the Appropriations Clause: "[o]therwise, . . . no federal statute could ever violate the Appropriations Clause because Congress, by definition, enacts them."[29] Nor does the ability of Congress to alter the mecha-

21. *Id.*
22. *Id.* at 633.
23. *Id.* at 634.
24. *Id.* at 633–34 (citing Touby v. United States, 500 U.S. 160, 165 (1991)).
25. *CFSA*, 51 F.4th at 635.
26. *Id.* (citing 12 U.S.C. § 5497(a)).
27. *See id.* at 638–39 ("So Congress did not merely cede *direct* control over the Bureau's budget by insulating it from annual or other time limited appropriations. It also ceded *indirect control* by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process . . . .").
28. *Id.* at 639.
29. *Id.* at 640.

nism after the fact cure the constitutional defect: "[o]therwise, no law could run afoul of Article I."[30] Finally, the court declined to embrace the CFPB's comparison of its funding mechanism to those of other federal agencies, such as the Federal Deposit Insurance Corporation. The court found that the CFPB's funding mechanism "goes a significant step further than that enjoyed by the other agencies," because no comparable agency wields the same enforcement and regulatory authority as the CFPB.[31]

The Supreme Court Decision

The Supreme Court issued its decision in May 2024.[32] The 7-to-2 majority opinion, authored by Justice Thomas, reversed the Fifth Circuit's decision and held that the CFPB's funding process is constitutionally permissible. The Supreme Court viewed the question in much simpler terms than the Fifth Circuit did. It began by noting the basic terms of the Appropriations Clause: "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[33] The Court focused its inquiry on determining whether the funding constitutes an "Appropriation made by Law." Looking at various historical definitions of the term "appropriation," the Court determined that a permissible "appropriation" is "a law authorizing the expenditure of particular funds for specified ends."[34] This definition casts a wide net into which the Court found that the CFPB's funding mechanism easily fit.[35]

The Supreme Court also undertook an historical analysis of how various forms of government raised funds over the course of recent history and how they characterized their doing so. Indeed, the Court noted that from the Middle Ages through ratification of the U.S. Constitution—from parliamentary rule through colonial practice—governmental "appropriation" needed only to identify a source of funds for some specified use:

> In short, the origins of the Appropriations Clause confirm that appropriations needed to designate particular revenues for identified purposes. Beyond that, however, early legislative bodies exercised a wide range of discretion. Some appropriations required expenditure of a particular amount, while others allowed the recipient of the appropriated money to spend up to a cap. Some appropriations were time limited, others were not. And, the specificity with which appropriations designated the objects of the expenditures varied greatly.[36]

The Court also noted the post-ratification onset of various fee- and commission-based funding schemes for government operations, such as for the Post Office and organizations tasked with overseeing shipping imports, concluding that these

30. *Id.* at 641.
31. *Id.*
32. CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 420 (2024).
33. *Id.* at 438.
34. *Id.* at 427.
35. *Id.* at 435.
36. *Id.* at 431–32.

mechanisms also "adhered to the minimum requirements of an identifiable source of public funds and purpose."[37]

Applying these definitions and understandings of a permissible "appropriation," the Court found that the CFPB's funding scheme embodies all the characteristics of a congressional appropriation because the underlying statute authorizes the CFPB to draw funds from a particular source—the earnings of the Federal Reserve, in an amount not exceeding an inflation-adjusted cap.[38] The statute further specifies the purpose or object for which the CFPB can use those funds—the payment of the CFPB's expenses.[39] With these criteria satisfied, the Court found that the CFPB's funding mechanism was a permissible "appropriation" under the Appropriations Clause.[40]

The Court then addressed the plaintiffs' three main arguments, rejecting each in turn. First, the Court rejected the contention that the CFPB's funding is not "drawn . . . in Consequence of Appropriations Made by Law" because the CFPB, rather than Congress itself, decides the amount of annual funding that it will receive up to the statutorily prescribed limit. The Court disagreed, ruling that, because the statute includes a cap, the CFPB's purported discretion in choosing its funding amount is limited. The fact that the CFPB may select an amount within that cap to ultimately draw does not change this result.[41]

Second, the Court rejected the plaintiffs' argument that the CFPB's funding is not a permissible appropriation because it is not time-limited. As the Court observed, the Constitution's text allows Congress to enact—at least in some circumstances—standing appropriations. Moreover, other federal agencies such as the Customs Service and the Post Office have received appropriations without time limits, a fact which the Court construed to mean that Congress intentionally did not intend for all appropriations to be assigned a given time limit.[42]

Finally, the Court rejected the plaintiffs' argument that condoning the CFPB's funding structure would give Congress the metaphorical blueprints for uniting the sword and the purse to thereby create autonomous federal agencies unbound by either Congress or the President, a result the Appropriations Clause was designed to forbid. In rejecting this argument, the Court noted that while the Appropriations Clause presupposes Congress' power over the purse, it is not the source of those powers. The Appropriations Clause requires only a law that authorizes the disbursement of specific funds for an identified purpose, and the plaintiffs' argument—even if correct—would not take the CFPB's funding structure outside the confines of that framework.[43]

37. *Id.* at 434.
38. *Id.* at 435.
39. *Id.*
40. *Id.*
41. *Id.* at 435–36.
42. *Id.* at 436.
43. *Id.* at 436–37.

Jarkesy v. SEC

The Fifth Circuit Decision

In *Jarkesy v. SEC*,[44] the Fifth Circuit heard a challenge to a decision made by an SEC administrative law judge ("ALJ") finding that a hedge fund manager and the hedge fund's advisor engaged in securities fraud.[45] The court ruled in favor of the defendants on three grounds.

First, the Fifth Circuit found that the SEC's administrative proceeding violated the defendant's Seventh Amendment right to trial by jury. Whether a defendant is entitled to a jury trial depends on whether the claims made involve private harm or public harm.[46] In *Jarkesy*, the Fifth Circuit found that the defendants faced fraud claims, which "are quintessentially about the redress of private harms."[47] Fraud prosecutions have a long history in common law, extending back to the laws of England, where defendants were subject to a civil penalty.[48] Here, the court found the SEC was seeking civil penalties, which entitled defendants to a trial by jury even though other elements of the SEC's action were "more equitable in nature."[49] As discussed below, because the CFPB's UDAAP authority is also derived from general fraud powers, the *Jarkesy* decision may also affect CFPB enforcement authorities.

The Fifth Circuit also ruled that Congress violated the non-delegation doctrine when it gave the SEC discretion to choose whether to bring enforcement actions in front of an SEC ALJ or district judge.[50] The non-delegation doctrine generally precludes Congress from delegating its authorities "which are strictly and exclusively legislative."[51]While the Supreme Court has, in more recent decisions, found that Congress may grant regulatory power to an agency, it must do so by providing an "intelligible principle" by which the agency can exercise that power.[52] The court found that Congress failed to provide the SEC with an intelligible principle by which to guide the agency in deciding the proper forum to bring an action and that, in fact, "Congress offered *no guidance* whatsoever" on where to bring an action, which violated the Constitution.[53]

Finally, the court held that the ALJs who oversee SEC administrative proceedings enjoy unconstitutional, two-layered for-cause removal protection.[54] To reach this

44. 34 F.4th 446 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).
45. *Id.* at 450.
46. *Id.* at 453–55.
47. *Id.* at 458.
48. *Id.* at 453.
49. *See id.* at 454 ("The Supreme Court has held that the Seventh Amendment applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too." (citing Ross v. Bernhard, 396 U.S. 531, 537–38 (1970); SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002)).
50. *Id.* at 461.
51. *Id.* at 460 (quoting Wayman v. Southard, 23 U.S. 1, 42 (1825)).
52. *Id.* at 461 (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)).
53. *Id.* at 462.
54. *See id.* at 464 (providing SEC ALJs "can only be removed by the SEC Commissioners if good cause is found by the Merits Systems Protection Board; SEC Commissioners and MSPB members can

result, the court relied upon the Supreme Court's decision in *Lucia v. SEC*,[55] where the Supreme Court found that the SEC ALJs are "inferior officers" under the Appointments Clause because they have substantial authority within SEC enforcement actions.[56]

The Supreme Court Decision

The Supreme Court affirmed the Fifth Circuit's decision on the basis of the Seventh Amendment right to a jury trial, finding that: "The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury."[57] In making this determination, the Court found that the right to a jury trial extends to claims that are "legal in nature," in contrast to suits equitable in nature—as a result, the Court found the remedy sought to be "all but dispositive."[58] Because the SEC was seeking money damages, "the prototypical common law remedy," the claim was legal in nature and the defendant was entitled to a jury trial.[59] The Supreme Court did not address the other two bases for the Fifth Circuit's decision, non-delegation and the removal restriction.

Potential Ramifications for the CFPB

The CFPB may be vulnerable to similar arguments regarding the constitutional infirmities identified in *Jarkesy*. First, like the SEC's enforcement authority, the CFPB's enforcement authority is derived from common law theories of fraud and misrepresentation. For instance, "UDAAP" regulations—i.e., Unfair, Deceptive, and Abusive Acts and Practices—prohibit businesses from making a material "representation, omission, act, or practice that misleads or is likely to mislead a consumer."[60] Deceptive acts may include misleading consumers about loan terms or failing to disclose terms in television advertising.[61] These theories of harm are similar to the elements of common law fraud, which include knowingly making a material misrepresentation of fact to a party unaware of the falsehood.[62] Moreover, the

only be removed by the President for cause; so, SEC ALJs are insulated from the President by at least two layers of for-cause protection from removal, which is unconstitutional").

55. 585 U.S. 237 (2018).

56. *Jarkesy*, 54 F.4th at 464 (citing Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018)).

57. SEC v. Jarkesy, 144 S. Ct. 2117, 2127 (2024).

58. *Id.* at 2129.

59. *Id.* The Supreme Court also addressed and rejected the argument that what it termed the "public rights" exception applied here. *Id.* at 2131–39.

60. 12 U.S.C. § 5536(a)(1)(B) (2024) (prohibiting unfair, deceptive, or abusive acts and practices); *see also* Consumer Fin. Prot. Bureau, Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) Examination Procedures 5 (Oct. 1, 2012), https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures/ (explaining that the CFPA adopts the FTC's standard for deception).

61. 12 U.S.C. § 5531 (2024); *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts*, CFPB (July 10, 2013), https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf; *see also* FTC Act Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception.

62. *See, e.g.*, Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197, 1210 n.3 (9th Cir. 2012).

CFPB may seek civil money penalties along with equitable remedies.[63] As such, UDAAP claims may entitle defendants to a trial by jury.

While the Supreme Court did not address the two additional bases in the Fifth Circuit's *Jarkesy* ruling, these arguments may still pose avenues to contest CFPB actions. Congress gave the CFPB discretion in the Dodd-Frank Act to choose whether to bring an action before its administrative tribunal or in federal district court.[64] This discretion is precisely what the Fifth Circuit found an unconstitutional delegation of Congress's authority to the SEC.[65]

The CFPB's ALJs also serve many of the same important executive functions as the SEC's ALJs while also enjoying the same removal protections the *Jarkesy* court found impermissible. Like SEC ALJs, CFPB ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence.[66] They also have the power to make enforcement recommendations, and, like the SEC ALJs, their decisions can become final and binding.[67] Finally, the CFPB's ALJs can be discharged only for good cause established based upon a complaint filed with the Merit Systems Protection Board ("MSPB"). The Supreme Court found in *Lucia v. SEC* that the MSPB insulates SEC ALJs from presidential control.[68]

Given the Supreme Court's ruling in *Jarkesy*, the CFPB may yet face additional constitutional challenges on these bases. But the funding challenge in particular may not be dead yet. One theory that arose shortly after the Supreme Court's decision in *CFSA* takes a different tack to the funding mechanism challenge, arguing that the Federal Reserve may provide funds to the CFPB only out of profits, and because the Federal Reserve has not turned a profit since 2022, then the CFPB funding may be illegal.[69] Multiple academics and practitioners have weighed in on this theory since its promulgation,[70] and a leasing company filed an affirmative challenge to the CFPB's authority based on this theory in July 2024, among other arguments.[71]

63. 12 U.S.C. § 5565 (2024).
64. *Compare* 12 U.S.C. §§ 5563–64 (2024), *with* 15 U.S.C. § 78u-2(a) (2024).
65. *Jarkesy*, 34 F.4th at 462.
66. 12 C.F.R. § 1081.104 (2024).
67. *See, e.g.*, Integrity Advance v. CFPB, 48 F.4th 1161 (10th Cir. 2022).
68. 585 U.S. 237, 248–49 (2018).
69. *See* Hal Scott, *The CFPB's Pyrrhic Supreme Court Victory*, Wall St. J. (May 20, 2024), https://www.wsj.com/articles/the-cfpb-pyrrhic-supreme-court-victory-federal-reserve-18099f59.
70. *See, e.g.*, Adam Levitin, *CFPB Bitter-Enderism*, Credit Slips Blog (May 20, 2024), https://www.creditslips.org/creditslips/2024/05/cfpb-bitter-enderism.html; Alex Pollock, *The Fed Has No Earnings to Send to the CFPB*, Federalist Soc'y Blog (May 21, 2024), https://fedsoc.org/commentary/fedsoc-blog/the-fed-has-no-earnings-to-send-to-the-cfpb; Jeff Sovern, *Is the CFPB Facing Still Another Challenge?*, Consumer Law & Pol'y Blog (June 9, 2024), https://clpblog.citizen.org/is-the-cfpb-facing-still-another-challenge/; Alan S. Kaplinsky, *A Reply to Professor Sovern's Arguments as to Why the Fed, Notwithstanding Its Losses, Can Still Lawfully Fund the CFPB*, Consumer Fin. Monitor Blog (June 11, 2024), https://www.consumerfinancemonitor.com/2024/06/11/a-reply-to-professor-soverns-arguments-as-to-why-the-fed-notwithstanding-its-losses-can-still-lawfully-fund-the-cfpb/.
71. *See* Complaint at 27–28, Acima Digital, LLC v. CFPB, No. 4:24-cv-662 (E.D. Tex. July 22, 2024). The complaint cites Professor Scott's *Wall Street Journal* article raising this theory. *Id*. at 28 n.6. *See* Scott, *supra* note 69.