



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 21, 2022

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Consumer Financial Protection Bureau, et al. v. Community Financial Services Association of America, Limited, et al., No. 22-448

Dear Mr. Harris:

The government does not oppose respondents' request for a 30-day extension of time to file a brief in opposition to the petition for a writ of certiorari because the parties have agreed to a schedule that would allow the Court to consider both the petition and respondents' forthcoming cross-petition at its February 17, 2023 conference. If the Court grants the government's petition in February, the government respectfully submits that the Court should order expedited briefing and hear the case during the April 2023 sitting. Delaying resolution of this case beyond this Term—and thus likely until sometime in 2024—would severely prejudice the Consumer Financial Protection Bureau (CFPB), consumers, and the entire financial industry.

This case concerns the constitutionality of the statute providing funding to the CFPB, 12 U.S.C. 5497. In Section 5497, Congress provided that the CFPB shall receive up to a capped amount of funding each year from the earnings of the Federal Reserve System, and that the CFPB may use that funding to fulfill its statutory responsibility to administer and enforce consumer financial protection laws. Disagreeing with the D.C. Circuit, the court of appeals held that the CFPB's statutory funding mechanism violates the Appropriations Clause of the Constitution, and the court vacated a CFPB regulation because it was promulgated at a time when the CFPB was receiving funding through the purportedly invalid mechanism. No other court has ever held that Congress violated the Appropriations Clause by passing a statute authorizing spending.

As the petition explains (at 10-11, 30-31), the Court should hear and decide this case this Term. Although the court of appeals' vacatur affects only the regulation challenged here, the court's sweeping holdings threaten the validity of virtually every action the CFPB has taken in the 12 years since it was created—as well as its ongoing activities. Those holdings will remain governing Fifth Circuit precedent until this Court intervenes, and they have already created severe disruption and uncertainty for the CFPB and for the financial services industry, which has ordered its affairs in reliance on the CFPB's regulations and administrative actions. Cf. *Mortgage Bankers Ass'n Amici Br. at 10, Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7) (emphasizing that a decision “calling into question the ongoing legitimacy of the CFPB's past actions” could be “catastrophic for the real estate finance industry”). If the Court does not hear the case until next fall, that disruption and uncertainty would likely persist until sometime in 2024.

To facilitate the Court’s consideration of the case this Term, the government filed its petition less than a month after the court of appeals’ decision and explained (at 31) that it had acted with such speed to allow the Court to consider the petition at its January 6, 2023 conference and hear the case during its April 2023 sitting. After respondents expressed their intent to file a cross-petition, the parties agreed to a schedule under which both the petition and cross-petition could be considered at the Court’s February 17, 2023 conference. Respondents will file their brief in opposition and cross-petition on January 13; the government will file its brief in opposition to the cross-petition on January 25; and respondents will waive the Rule 15.5 period to allow both the petition and the cross-petition to be distributed on February 1. If the Court grants the petition, the government respectfully requests that the Court order expedited briefing so that the case can be heard during the Court’s April sitting. The Court has previously expedited important cases granted in February for consideration during the same Term. See, e.g., *Biden v. Texas*, 142 S. Ct. 2528 (2022) (No. 21-954) (granting certiorari on February 18, 2022 and directing that “[t]he case will be set for argument in the second week of the April 2022 argument session”); *Department of Commerce v. New York*, 139 S. Ct. 953 (2019) (No. 18-966) (granting certiorari on February 15, 2019 and directing that “[t]he case will be set for argument in the second week of the April argument session”); Stephen M. Shapiro et al., *Supreme Court Practice* 13-5, 14-13 & n.25 (11th ed. 2019). The Court should follow the same course here.

Respondents contend (Resp. Letter 2) that the Court should defer consideration of the case until next Term because “the parties and the Court would benefit from briefing, arguing, and deciding this case in a more deliberate fashion than even a January grant would permit.” But the Court routinely grants and decides cases presenting important questions on similar timelines, and the disruptive effects of the Fifth Circuit’s decision provide a compelling reason to do so here. And to the extent the Court has any concerns about the somewhat expedited briefing schedule that would be required if certiorari were granted in February rather than January, the government respectfully submits that the proper course would not be to defer the case until next Term, but rather to deny respondents’ extension request. The Court could then distribute the government’s petition on December 21, 2022 for consideration at the January 6, 2023 conference, which would allow the case to be heard during the April 2023 sitting on a standard briefing schedule. The questions to be presented in the forthcoming cross-petition are alternative grounds for invalidating the challenged regulation. See Pet. App. 9a-27a. Those questions have no legal or logical connection to the important question presented in the government’s petition, and there is no comparable urgency requiring that they be decided promptly. Consideration of respondents’ cross-petition could thus be deferred until a later conference, and the questions presented by the cross-petition could be briefed and argued next Term if this Court grants certiorari.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

cc: See Attached Service List

22-0448
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