

D.C. Circuit Rules Small Bank has Standing to Challenge the Constitutionality of Consumer Financial Protection Bureau

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Last week, in *State National Bank of Big Spring v. Lew*, the D.C. Circuit Court of Appeals reversed a District Court decision dismissing a bank's complaint challenging the constitutionality of the CFPB and held that the bank had standing to challenge the constitutionality of its own regulator. In 2012, State National Bank of Big Spring ("State National") a small Texas bank, joined by the Competitive Enterprise Institute and a non-profit senior citizen advocacy group, filed suit in the D.C. District Court challenging the constitutionality of the creation of the Consumer Financial Protection Bureau (CFPB), the appointment of CFPB Director Richard Cordray, and the operation and creation of the Financial Stability Oversight Council (FSOC).[1] The states of Michigan, Oklahoma, South Carolina Alabama, Georgia, Kansas, Montana, Nebraska, Ohio, Texas, and West Virginia later joined the suit as plaintiffs to challenge Dodd-Frank's grant of orderly liquidation authority to the Treasury, the Fed, and the FDIC. State National, a small regional bank with three locations in Texas, is a federally chartered community bank with less than \$275 million in deposits. It offers checking accounts, savings accounts, certificates of deposits, and individual retirement accounts—consumer financial products

subject to CFPB regulation. In its district court complaint challenging the agency’s constitutionality, the bank argued that creation of the CFPB violated separation of powers principles because Congress “delegated effectively unbounded power to the CFPB, and coupled that power with provisions insulating the CFPB against meaningful checks by the Legislative, Executive, and Judicial Branches.” The bank also alleged that the CFPB, as an independent agency, needs to be headed by multiple members, not a single person, to be constitutional. State National also claimed that CFPB Director Cordray’s appointment was unconstitutional because it was made without the Senate’s advice and consent in alleged violation of the Appointments Clause. The bank alleged injuries caused by the formation and operation of the CFPB consisting of compliance costs, loss of profitability in remittance transfers, loss of revenue in mortgage lending, and a discontinuation of mortgage lending due to loss of revenue. The district court found these alleged injuries insufficient to establish standing to challenge the constitutionality of the CFPB and that it was not enough to simply say that State National was “directly subject to the authority of the agency.” The court also found that the claims were not ripe because the specific rules challenged were not applicable to the bank. In the D.C. Circuit opinion, the court found that all that the Bank was required to show was that it was regulated by the CFPB in order to have standing to challenge its constitutionality—which it found that the Bank had established below. The court also noted that State National did not challenge the regulations *of* the CFPB, but rather regulation *by* the CFPB, so as to have demonstrated ripeness. It applied this same rationale to find standing to challenge the constitutionality of Cordray’s appointment to head the agency. However, the court also opined that State National did not have standing to challenge the FSOC, because State National was a small bank, not subject FSOC regulations as a “too big to fail entity.” The court did not accept State National’s “competitor standing” theory, *i.e.* the bank’s argument that it had standing because it competed with entities subject to FSOC regulation. Finally, the court found that the states lacked standing to challenge the constitutionality of the orderly liquidation authority as not ripe, because the states could identify no specific action under the orderly liquidation authority as an injury in fact. In a footnote, the Court noted that, if action is taken under which a state could show such an injury, the states could raise their constitutionality arguments at that time. The case was remanded to permit State National to advance its challenge to the constitutionality of the CFPB and the appointment of Director Cordray on the merits in the district court. Thus, State National still faces the legal burdens inherent in challenging the constitutionality of any agency. Nevertheless, the decision provides precedent for covered entities to establish standing to challenge CFPB authority as a result of being subject to its regulations. [Read the full opinion »](#) ___

[1] The plaintiffs sued the CFPB and Director Cordray; the FSOC and the individual members of the FSOC; the Federal Reserve System (the “Fed”), the Fed Chairman, Vice Chairman, Board of Governors, and individual members of the Board of Governors; the Federal Deposit Insurance Corporation (the “FDIC”), the FDIC Director, and the Board of Directors; the Department of the Treasury (the “Treasury”) and Secretary of the Treasury; the Comptroller of the Currency; the Chairman of the U.S. Commodity Futures Trading Commission; the Chair of the National Credit Union Administration Board; and the Chair of the Securities and Exchange Commission.

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Consumer Finance

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