No. 22-448

IN THE

Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, et al.,
Petitioners,

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR STATES OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. § 5497, violates the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.

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INTERESTS OF AMICI CURIAE

Congress established the Consumer Financial Protection Bureau (CFPB) as an independent federal agency to oversee nationwide consumer financial standards and enforce those standards. For over a decade, the CFPB has served as a valued regulatory and enforcement partner to the States, which have historically served at the forefront of efforts to protect consumers against fraudulent and abusive practices.

Amici curiae States of New York, Arizona, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin, and the District of Columbia submit this brief in support of petitioners CFPB and its Director. Amici urge this Court to reverse a decision of the U.S. Court of Appeals for the Fifth Circuit that (i) held that the CFPB's funding structure violates the Appropriations Clause, and (ii) vacated an otherwise lawful regulation on the ground that it was promulgated when the CFPB purportedly lacked a constitutionally valid source of funding.

Amici agree with the petitioners' argument that the CFPB's statutory funding structure does not violate the Appropriations Clause. Indeed, as the Second Circuit has held since this Court granted the petition for a writ of certiorari, "Congress expressly appropriated the CFPB's funding by enacting" the underlying statute, consistent with the Appropriations Clause. *CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 182–83 (2d Cir. 2023).

Amici States submit this amicus brief principally to explain that no matter how this Court resolves the

parties' dispute over the Appropriations Clause, amici have a compelling interest in preserving the validity of the CFPB's past and ongoing regulatory and enforcement actions. Amici States have a strong and longstanding role in protecting consumers from unfair practices, including by lenders and other providers of consumer financial products. In that role, States have sometimes partnered with the CFPB, and sometimes relied on the CFPB's actions to address a problem.

The Fifth Circuit's vacatur of a completed CFPB action is neither justified nor compelled by law as a remedy for a purported Appropriations Clause violation. If that remedy is not overturned, the States and their residents will be deprived not only of the protections provided by the specific payday-lending regulation at issue in this case, but also of the CFPB's role more broadly as a federal regulator and enforcer of consumer-protection laws in the financial domain. If accepted, the remedy ordered below would jeopardize many of the CFPB's regulatory actions from across its decade-long existence, to the detriment of the States that have relied on those actions to protect their residents, the financial market that has relied on the agency to guide its conduct, and the consumers who have relied on the agency for protection as they navigate the market.

STATEMENT

A. Congress Created the CFPB to Serve as a Bulwark Against Future Financial Crises.

1. Congress created the CFPB in the Consumer Financial Protection Act of 2010 (CFP Act), which was enacted as Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). *See* Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010). The Dodd-Frank Act responded to the 2008 financial crisis, which "nearly crippled the U.S. economy" and caused millions of Americans to lose their jobs, homes, and savings. S. Rep. No. 111-176, at 2, 9 (2010). As Congress found, the crisis had resulted from "the failure of the federal banking and other regulators to address significant consumer protection issues detrimental to both consumers and the safety and soundness of the banking system." *Id.* at 9.

Prior to the CFP Act, disparate federal statutes had authorized a collection of federal banking agencies to protect consumers from predatory lending practices and risky financial products. But under those existing statutory regimes, consumer protection had "fail[ed] to get the attention or focus it need[ed]," because it was "not the banking agencies' priority." *Id.* at 10. Those banking agencies instead focused on "the safe and sound operation of the banks." *Id.* Nor had those prior regimes covered nondepository financial companies (such as mortgage originators and brokers), even though they "were among the largest sellers of [the] subprime and exotic mortgages" that caused the 2008 crisis. *Id.* at 14; *see id.* at 11. To make matters worse, the multi-agency scheme had been saddled with "conflicting regulatory missions, fragmentation, and regulatory arbitrage." *Id.* at 10; *see id.* at 15 (recounting the

"spectacular failure of the [federal] prudential regulators").

The CFP Act established the CFPB as "an independent bureau" within the Federal Reserve System. 12 U.S.C. § 5491(a). In doing so, the Act transferred to the CFPB eighteen existing consumer financial statutory authorities that had belonged to other federal agencies, *id.* § 5481(12), and consolidated within the CFPB the consumer-protection functions of seven different federal agencies, *id.* § 5581(a)(2), (b). In addition to those functions, the Act expanded federal supervision over nondepository financial companies. *See id.* § 5514. And the Act authorizes the CFPB to promulgate rules and take other actions to protect consumers from "unfair, deceptive, or abusive acts or practices." *Id.* § 5531(b); *see id.* § 5531(a).

By consolidating functions within a single agency, Congress sought "to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced." H. Rep. No. 111-517, at 874 (2010) (Conf. Rep.). And the agency's structure further promoted "accountability" to the President and Congress, by ensuring that federal banking agencies could not shift blame to one another for any regulatory failures. S. Rep. No. 111-176, at 11.

2. Congress established a stable funding structure for the CFPB to "ensure that the Bureau has the funds to perform its mission," without the unpredictability that accompanies "repeated Congressional pressure." S. Rep. No. 111-176, at 163. Congress recalled that the former Office of Federal Housing Enterprise Oversight—the predecessor to the Federal Housing Finance Agency, which had unsuccessfully regulated Fannie Mae and Freddie Mac leading up to the financial crisis—had

been "forced to go through the annual appropriations process," which was "widely acknowledged" to have "helped limit [the Office's] effectiveness." *Id.*

Indeed, the funding of the federal banking agencies whose consumer financial statutory authorities the CFP Act transferred to the CFPB has long been provided through independent funding structures. *See generally* 12 U.S.C. § 5581(a)(2), (b) (listing agencies). For instance, the Office of the Comptroller of the Currency (OCC), as a component of the Department of the Treasury, has been funded through assessments levied on banks and savings associations for over a century. *See id.* §§ 16, 481, 482; *see also* Act of Feb. 19, 1875, ch. 89, 18 Stat. 329. Similarly, the Federal Deposit Insurance Corporation (FDIC) has been funded through insurance premiums that depository institutions pay for deposit insurance. *See* 12 U.S.C. §§ 1815(d), 1820(e); *see also* Banking Act of 1933, ch. 88, sec. 8, § 12B(*l*), (y), 48 Stat. 162, 172–76, 179–80. And the National Credit Union Administration has been funded through fees on credit unions. *See* 12 U.S.C. § 1755(a)–(b); *see also* Federal Credit Union Act, ch. 750, §§ 5, 6, 48 Stat. 1216, 1217–18 (1934).

Under the CFP Act, the CFPB is funded through "the combined earnings of the Federal Reserve System" through a designated "Bureau Fund" of the Federal Reserve. *Id.* § 5497(a), (b)(1). The Federal Reserve, in turn, derives its earnings from the interest on securities that it has acquired on the open market and from fees for services that it has offered to depository institutions. *See* Fed. Reserve Sys., *The Fed Explained: What the Central Bank Does* 4 (11th ed. 2021); *see also* 12 U.S.C. §§ 342–361. The Federal Reserve interacts with the Treasury with respect to its funding only if the Federal Reserve has a designated amount of surplus funds in

excess of its operating expenses. The Federal Reserve is required to deposit any such surplus funds into the general fund of the Treasury, rather than retain them for itself. *See* 12 U.S.C. §§ 289(a)(3)(B), 290. Should the CFPB require additional funding that would be drawn from the Treasury, the CFP Act requires the agency to obtain congressional approval. *Id.* § 5497(e).

As Congress recognized, "the CFPB budget is modest" "[b]y comparison with other financial regulatory bodies," such as the FDIC, OCC, and the Securities and Exchange Commission. S. Rep. No. 111-176, at 163–64. And as the CFPB explains (Pet. Br. 4), the Bureau Fund is subject to significant statutory limitations. The CFP Act leaves undisturbed Congress's plenary authority to modify the CFPB's funding structure through subsequent legislation. And the Act provides for several means of congressional oversight, including through annual audits and reports. *See* 12 U.S.C. §§ 5496, 5496a(b), 5497(a)(5).

B. Congress Designed the CFPB to Reinforce and Complement the States' Consumer-Protection Efforts.

The CFP Act also reinforced the coordinate roles of the CFPB and the States in protecting consumers. Congress designed a "strong and independent Bureau . . . to set a strong, consistent standard" in consumer financial laws nationwide. S. Rep. No. 111-176, at 174. The CFPB would "establish a basic, minimum federal level playing field for all banks and, for the first time, nondepository financial companies that sell consumer financial products and services to American families." *Id.* at 11.

The States, meanwhile, would be positioned to enact "more protective standards" "as problems arise." *Id.* at 174. The States have maintained a "traditional power" to take regulatory actions that are "designed for the protection of consumers." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963). And the CFP Act recognizes that States have historically been "much closer to abuses and are able to move more quickly when necessary to address them." S. Rep. No. 111-176, at 174.

To that end, the CFP Act clarified that its provisions do not preempt state consumer financial laws that afford greater protections to consumers than federal law. 12 U.S.C. § 5551(a). The Act also eased the existing restrictions against state laws governing national banks, certain nondepository institutions, and federal savings associations. *Id.* §§ 25b, 1465. And the Act preserves the regulatory authority of the States' various insurance regulators and securities commissions. *Id.* § 5517(f), (h); *see id.* § 5552(d)(2)–(3).

Indeed, the CFP Act contemplates that the CFPB's consumer financial reforms may follow from state reforms. The Act authorizes the States to request a federal consumer financial regulation from the CFPB. *See* 12 U.S.C. § 5551(c). In doing so, Congress recognized that "State initiatives can be an important signal to Congress and Federal regulators of the need for Federal action." S. Rep. No. 111-176, at 174.

The CFP Act also expanded the role of the States in pursuing enforcement actions. The Act authorizes any state attorney general to sue to enforce the CFPB's statutory or regulatory authorities. 12 U.S.C. § 5552(a)(1). States must notify the CFPB of such enforcement actions where "practicable" to facilitate

coordination, and the CFPB is then authorized to intervene in those actions. *Id.* § 5552(b)(1)(B), (2). But the CFPB's participation does not displace or conflict with the States' ability to proceed with an action. Rather, Congress contemplated a measure of cooperation, in authorizing the CFPB to promulgate regulations and guidance "to further coordinate actions with the State attorneys general and other regulators." *Id.* § 5552(c).

SUMMARY OF ARGUMENT

Amici States agree with the CFPB (Pet. Br. 13–38) that the CFP Act's funding structure does not violate the Appropriations Clause, as the Second Circuit has also recently held. *See Law Offs. of Crystal Moroney*, 63 F.4th at 182–83. This amicus brief focuses principally on whether the proper remedy for a purported Appropriations Clause violation is the vacatur of an otherwise lawful regulation. Respondents' arguments as to that remedial issue would not only require invalidating the payday-lending regulation at issue in this case but would also put at risk many other regulatory actions taken by the CFPB during the period when it was receiving allegedly unconstitutional funding.

Vacating the CFPB's regulations as a consequence of an Appropriations Clause violation threatens substantial harm to the States. The CFPB plays a critical role in the stability of key sectors of the financial market, including with respect to nondepository financial companies (such as mortgage brokers and originators) that had gone unsupervised prior to the 2008 financial crisis. The CFPB's regulations, moreover, set nationwide consumer financial standards—on topics

important to everyday consumers, ranging from mortgage lending requirements to debt-collection practices —that protect the States' residents and that the States may sue to enforce pursuant to the CFP Act. Significantly, those regulations often target financial sectors where the States may face challenges in regulating fraudulent and abusive practices. That dynamic is illustrated by the payday-lending rule at issue here, which sets nationwide standards to regulate situations where payday lenders have sought to move online in their attempts to escape state regulation.

The CFPB's important role in partnering with the States could be equally jeopardized by a broad remedy for any Appropriations Clause violation. The CFPB often coordinates in bringing joint or parallel enforcement actions with the States to enforce the CFPB's consumer financial standards. And the CFPB has engaged in still other functions—from handling consumer complaints to providing information to consumers on critical financial issues—that have complemented the States' consumer-protection efforts and have also guided conduct for the financial market. Losing the CFPB's continued contributions would seriously impair the States' efforts to combat fraud and abuse in the consumer financial market.

Such concrete harms to the States and their residents stand in sharp contrast to the indeterminate nature of any purported constitutional harm to respondents. Respondents—which are payday-lending industry groups—do not claim that the CFPB's specific source of funding from the Federal Reserve has itself resulted in a direct pecuniary harm to them. Nor can they seriously claim any harm to Congress's control of the CFPB, as Congress has retained plenary authority to modify the CFPB's funding through legislation and is able to engage in other forms of oversight. Indeed, it is altogether

speculative that the CFPB might somehow have behaved differently had its funding been drawn from the Treasury rather than the Federal Reserve.

The mismatch between the meager harms identified by respondents and the deleterious effects of the remedial order highlights the impropriety of vacating a CFPB regulation as a remedy for a purported Apportionment Clause violation. This case is not one where a federal agency acted in derogation of Congress's direction or in a manner inconsistent with express funding limitations. To the contrary, the Fifth Circuit found that the challenged rule was within the scope of the CFPB's delegated authority; in other words, the executive agency acted entirely as Congress commanded. Vacatur is not needed to mend a conflict between Congress and the Executive that does not otherwise exist.

ARGUMENT

I. STATES HAVE A STRONG INTEREST IN MAINTAINING THE CFPB'S INDEPENDENT REGULATORY AUTHORITY.

Congress responded to the 2008 financial crisis by establishing the CFPB as an independent federal regulator that sets nationwide consumer financial standards and coordinates with the States in their enforcement actions. Since then, the CFPB's robust, stable regulatory authority under the CFP Act has empowered the States to safeguard consumers from risky financial products. The Fifth Circuit's ruling threatens to upend that scheme, in undermining the validity of the CFPB's prior agency actions taken over the last twelve years.

A. States Substantially Benefit from the CFPB's Regulations.

1. The CFPB's exercise of its independent regulatory authority has "set a strong, consistent standard" in consumer financial laws nationwide. *See* S. Rep. No. 111-176, at 174. As Congress intended in enacting the CFP Act, the CFPB's regulations have established "a basic, minimum federal level playing field for all banks and, for the first time, nondepository financial companies that sell consumer financial products and services to American families." *Id.* at 11. Those regulatory actions, in turn, have bolstered the States' enforcement of consumer financial laws.

The CFPB's regulatory efforts reach numerous areas of core significance to the States, their residents, and the consumer financial community. For instance, the CFPB has issued regulations that require lenders to make a reasonable and good-faith determination of a consumer's ability to repay a mortgage before offering one in the first place. Those same regulations establish safe harbors, allowing mortgage lenders to adjust their practices to avoid potential liability.[1] The CFPB's regulations set forth the proper form of lenders' mortgage disclosures, which establish stable nationwide expectations for consumers and industry members alike.[2] The CFPB, moreover, has set nationwide standards for collecting consumer debts, including by prohibiting abusive debt-collection practices and by

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[1] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6,408 (Jan. 30, 2013).

[2] Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79,730 (Dec. 31, 2013).

requiring appropriate disclosures to consumers in the course of collection efforts.[3] And the CFP Act authorizes the CFPB to conduct examinations of banks and credit unions, including those that lend to servicemembers and their dependents, to ensure they are honoring the statutory protections for military families.[4]

Additionally, the CFPB plays a robust role in ensuring the soundness of key sectors of the financial market, including some industries that had escaped the oversight of federal banking agencies prior to the CFP Act. In particular, the CFPB holds the authority to examine previously unsupervised nondepository financial companies that interact with everyday consumers with respect to the most significant financial decisions of their lifetimes. Under that authority, the CFPB is authorized to supervise servicers of student loans, the financing market for automobile loans and leases, and other debt collectors.[5] In a similar vein, the CFPB is authorized to identify other novel nondepository financial companies (such as financial-technology or "fintech"

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[3] Debt Collection Practices (Regulation F), 85 Fed. Reg. 76,734 (Nov. 30, 2020).

[4] *See* Examinations for Risks to Active-Duty Servicemembers and Their Covered Dependents, 86 Fed. Reg. 32,723 (June 23, 2021).

[5] Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 80 Fed. Reg. 37,496 (June 30, 2015); Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73,383 (Dec. 6, 2013); Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775 (Oct. 31, 2012).

companies) that pose unique risks to consumers, and to examine those risks.[6]

As Congress predicted, securing a stable financial market for consumers has resulted in part from the presence of an independent federal regulator that complements the States by setting a federal consumer-protection baseline. In enacting the CFP Act, Congress was especially concerned with the "regulatory arbitrage between federal regulators and the states" in the leadup to the 2008 financial crisis. S. Rep. No. 111-176, at 10. Particularly with nondepository financial companies, Congress found that "the lack of any effective supervision [of] nondepositories led to a 'race to the bottom' in which the institutions with the least effective consumer regulation and enforcement attracted more business," leading in turn to pressures on state regulators to lower state regulatory standards. *Id.* And as Congress found, the lowering of these standards was directly connected to the "kinds of problems that led to the [2008] crisis." *Id.* at 16.

As envisioned by Congress, the States have also meaningfully relied on the CFPB's regulatory standards. The CFPB's issuance of regulations that span the student-loan to automobile-lending markets has necessarily diminished the need for the States to legislate. Notably, the CFP Act authorizes state attorneys general to identify unlawful consumer practices under the governing federal standards and bring enforcement actions based on violations of those federal regulations.

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[6] Procedural Rule to Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination, 78 Fed. Reg. 40,352 (July 3, 2013); *see* Consumer Fin. Prot. Bureau, Press Release, CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers (Apr. 25, 2022).

See 12 U.S.C. § 5552(a)(1). For instance, States have independently brought enforcement actions against lenders for offering predatory subprime home loans in violation of federal loan-disclosure regulations.[7] And States have brought actions against mortgage servicers for mishandling consumers' loans in violation of federal mortgage-servicing regulations.[8]

2. The payday-lending rule at issue in this case illustrates the strength of the States' interest in preserving the CFPB's regulatory authority. In particular, the regulation exemplifies the States' reliance on and benefits from the ability of an independent federal regulator to address areas where lenders may attempt to evade state regulation.

The regulation, in its current form, prohibits "an unfair and abusive practice" relating to the collection of payday and certain other loans. 12 C.F.R. §§ 1041.7, 1041.8; *see id.* § 1041.3(b). Specifically, the regulation targets a lender's attempts to withdraw payments directly from a consumer's bank account. The regulation requires lenders to disclose information to consumers before they attempt to withdraw payments in the first place. *Id.* § 1041.9. And once two prior consecutive attempts fail due to a lack of funds, the regulation prohibits further attempts unless the consumer reauthorizes the lender to withdraw payments. *Id.* §§ 1041.7, 1041.8(b).

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[7] *E.g.*, First Am. Compl. at 67–69, *New York v. Vision Prop. Mgmt., LLC*, No. 19-cv-7191 (S.D.N.Y. Sept. 27, 2019), ECF No. 24 (New York).

[8] *E.g.*, Second Am. Compl. ¶¶ 35–46, *Office of the Att'y Gen. v. Ocwen Fin. Corp.*, No. 17-cv-80496 (S.D. Fla. July 11, 2018), ECF No. 88 (Florida).

These federal consumer-protection standards are consistent with the basic purpose of the CFP Act. In enacting the CFP Act, Congress specifically highlighted problems arising from payday lending, including by noting that "[l]oans secured by personal checks or electronic access to the borrower's bank account can endanger the banking status of borrowers" and result in "additional fees" for consumers. S. Rep. No. 111-176, at 21. And for borrowers with overdraft protections, those "consumers have been charged multiple fees in one day without being notified until days later." *Id.* at 18. As the CFPB similarly found in examining the payday-lending problem in the present rulemaking, lenders' withdrawal practices in this area had resulted in consumers incurring significant overdraft fees and, in some cases, losing the deposit accounts at their banks. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 48,049 (July 22, 2016); *see also* Consumer Fin. Prot. Bureau, *Online Payday Loan Payments* 3 (Apr. 2016) (noting average of $185 in overdraft fees per borrower). And significantly, payday and other short-term lenders had often operated as nondepository financial companies that would have escaped supervision by federal banking agencies prior to the CFP Act. *See* 81 Fed. Reg. at 47,868.

In recognizing the need to complement the States' regulatory and enforcement efforts in this financial sector, the CFPB considered how numerous States had restricted payday loans and similar financial products and could bring their own enforcement actions under state law. *See* 81 Fed. Reg. at 47,875–76. As part of the rulemaking, the CFPB engaged in "a large number of meetings and calls with State Attorneys General, State financial regulators, and municipal governments."

Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,504–05 (Nov. 17, 2017); *see id.* at 54,505 (recounting that CFPB met "with many of them, some on multiple occasions"). In addition, the CFPB "carefully considered" comments on the proposal regarding lenders' withdrawal practices, *id.*, including those submitted by multiple States.[9]

The CFPB found that the payday-lending rule would complement the States' efforts by enhancing regulatory protections for consumers, providing additional avenues for enforcement, and eliminating loopholes that would allow bad actors to evade state restrictions. Just as Congress recognized that an effective federal baseline could prevent a "'race to the bottom'" among state regulatory authorities, *see* S. Rep. No. 111-176, at 10, the CFPB realized a similar dynamic playing out in the payday-lending industry. In proposing the regulation, the CFPB noted that online lenders had begun offering payday lending nationwide while attempting to claim they were exempt from state enforcement outside of the jurisdiction where they were located. 81 Fed. Reg. at 47,877. Although payday-lending laws vary from State to State, in-state banks—"even in states where the loans are banned entirely"—were often permitting abusive withdrawal practices from out-of-state lenders that operated in jurisdictions where such lending was

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[9] *See* Roy Cooper, N.C. Att'y Gen., *Payday Vehicle Title, and Certain High-Cost Installment Loans; Request for Information and Comments*, RIN 3170-AA40 (Oct. 7, 2016) (discussing payday lenders' attempts to evade state laws and "urg[ing] the [CFPB] to adopt the toughest rule possible"); *see also* Kamala D. Harris, Cal. Att'y Gen., *Comments on Proposed Rule for Payday, Vehicle-Title, and Certain High-Cost Installment Loans*, RIN 3170-AA40 (Oct. 7, 2016); Bob Ferguson, Wash. Att'y Gen., *Proposed Rules Affecting Small-Dollar Loans*, RIN 3170-AA40 (Oct. 7, 2016).

permitted.[10] It was thus a significant benefit to the States that the CFPB conducted a broader analysis of the payday-lending problem to formulate a federal baseline for lender practices, after confirming that lenders nationwide had engaged in abusive conduct. *See id.* at 47,868–79.

If permitted to stand, the Fifth Circuit's decision could lead to the vacatur of the regulation at issue and numerous other CFPB prior regulations that similarly set robust, nationwide protections for consumers, provide stable guidance in the financial market, and complement the States' regulatory and enforcement efforts. In addition, invalidating the CFPB's regulations would both substantially impede the States' efforts to pursue enforcement actions based on those rules and upend regulatory protections that the States' residents have relied on and benefitted from for years.

B. The States Rely on the CFPB as an Important Enforcement Partner.

1. In addition to its rulemaking authority, the CFPB "has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2193 (2020). As of December 2022, the CFPB had recovered $16 billion for consumers from its supervisory and enforcement work and obtained relief benefiting over 192 million consumers across the country, including

[10] Jessica Silver-Greenberg, *Major Banks Aid in Payday Loans Banned by States*, N.Y. Times (Feb. 23, 2013) (cited at 81 Fed. Reg. at 48,054 n.806).

in amici States.[11] The CFPB, moreover, has handled over three million consumer complaints concerning financial products and services.[12] The existence of a parallel, independent federal regulator dedicated to consumer protection has substantially reinforced the States' longstanding efforts to protect consumers from fraudulent and abusive practices in the consumer financial sector.

The CFPB also participates with the States in bringing enforcement actions, as the CFP Act contemplates. *See* 12 U.S.C. § 5552(a)(1), (b)(2).[13] In addition, the CFPB has memoranda of understanding with the attorneys general in twenty States and regulators in all fifty States, the District of Columbia, and Puerto Rico.[14] And the CFPB and the Conference of State Bank Supervisors (which acts on behalf of state financial regulatory authorities) have a framework on the supervision of

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[11] Consumer Fin. Prot. Bureau, *Enforcement by the Numbers* (Feb. 2023).

[12] Dave Uejio, Consumer Fin. Prot. Bureau, *Celebrating 10 Years of Consumer Protection* (July 21, 2021).

[13] *E.g.*, Compl. at 1–2, *CFPB v. Burlington Fin. Grp., LLC*, No. 21-cv-2595 (N.D. Ga. June 28, 2021), ECF No. 1 (Georgia); Second Am. Compl. at 2–4, *Bureau of Consumer Fin. Prot. v. Consumer Advocacy Ctr. Inc.*, No. 19-cv-1998 (C.D. Cal. Apr. 20, 2021), ECF No. 284 (California, Minnesota, North Carolina); Compl. at 1, *Bureau of Consumer Fin. Prot. v. Alder Holdings, LLC*, No. 4:20-cv-1445 (E.D. Ark. Dec. 11, 2020), ECF No. 1 (Arkansas); Am. Compl. at 1–2, *Bureau of Consumer Fin. Prot. v. Commonwealth Equity Grp., LLC*, No. 20-cv-10991 (D. Mass. Sept. 16, 2020), ECF No. 26 (Massachusetts). States may also bring their own actions to enforce the CFP Act. *See* Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31,940 (May 26, 2022).

[14] Consumer Fin. Prot. Bureau, Press Release, CFPB Bolsters Enforcement Efforts by States (May 19, 2022).

depository and nondepository financial companies that fall under their respective jurisdictions.[15]

Beyond participating in enforcement actions, the CFPB routinely publishes studies on issues relevant to vulnerable communities, such as on tenant background checks and elder exploitation.[16] The CFPB also guides consumers through numerous important financial decisions, from buying a home to securing an auto loan to paying for college to planning for retirement.[17] And the CFPB has collaborated with the States to develop and implement broad initiatives to combat abusive practices and tactics, to share information to monitor market practices and trends, and to more swiftly identify incipient fraudulent or abusive practices.

2. Joint enforcement actions between the CFPB and the States have achieved meaningful results for consumers across the nation. For example, in December 2020, the CFPB, all fifty States, and the District of Columbia brought a successful enforcement action against Nationstar Mortgage, LLC, for numerous unfair and deceptive practices relating to Nationstar's servicing of borrowers' mortgages. As the CFPB noted, Nationstar at the time was one of the country's largest mortgage servicers and the single largest nonbank, nondepository mortgage servicer. That action resulted

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[15] Consumer Fin. Prot. Bureau, Press Release, The CFPB Establishes Framework to Better Coordinate with State Regulators (May 21, 2013).

[16] *E.g.*, Consumer Fin. Prot. Bureau, *Tenant Background Checks Market Report* (2022); Consumer Fin. Prot. Bureau, *Recovering from Elder Financial Exploitation: A Framework for Policy and Research* (2022). *See generally* Consumer Fin. Prot. Bureau, *Research and Reports* (n.d.) (database of agency reports and analyses).

[17] Consumer Fin. Prot. Bureau, *Consumer Resources* (n.d.).

in about $73 million in relief to more than 40,000 borrowers.[18]

Similarly, in September 2020, the CFPB collaborated with forty-seven States and the District of Columbia in seeking relief against the loan originator for the ITT Technical Institute—a now-defunct for-profit technical school—for its unfair practices in offering loans that would be unaffordable to borrowers. As a result, the loan originator forgave around $330 million in debt to around 35,000 borrowers.[19] That effort itself built on prior federal–state efforts to curtail the unfair lending practices of for-profit institutions such as the Corinthian Colleges and their loan originators, as well as the conduct of those institutions' loan servicers, such as Navient Corporation.[20]

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[18] Consumer Fin. Prot. Bureau, Press Release, Consumer Financial Protection Bureau and Multiple States Enter into Settlement with Nationstar Mortgage, LLC for Unlawful Servicing Practices (Dec. 7, 2020); *see* Stipulated Final Judgment & Order, *Bureau of Consumer Fin. Prot. v. Nationstar Mortg. LLC*, No. 20-cv-3550 (D.D.C. Dec. 8, 2020), ECF No. 3.

[19] Consumer Fin. Prot. Bureau, Press Release, Consumer Financial Protection Bureau and Multiple States Enter Into Settlement with Owner of ITT Private Loans for Substantially Assisting ITT in Unfair Practices (Sept. 15, 2020); *see* Stipulated Final J. & Order, *Bureau of Consumer Fin. Prot. v. Peaks Trust 2009-1*, No. 20-cv-2386 (S.D. Ind. Oct. 1, 2020), ECF No. 9.

[20] Consumer Fin. Prot. Bureau, Press Release, CFPB Takes Action Against Aequitas Capital Management for Aiding Corinthian Colleges' Predatory Lending Scheme (Aug. 17, 2017); Consumer Fin. Prot. Bureau, Press Release, CFPB Wins Default Judgment Against Corinthian Colleges for Engaging in a Predatory Lending Scheme (Oct. 28, 2015); *see* Compl., *CFPB v. Navient Corp.*, No. 3:17-cv-101 (M.D. Pa. Jan. 18, 2017), ECF No. 1.

Several States supporting respondents on the merits have claimed that, without a congressional appropriations process, the States do not know "what the [CFPB] is up to" (West Virginia Cert. Amicus Br. 15) and lamented the CFPB's "indifference" to their needs and the lack of "any meaningful voice in agency decisions that affect the nation's economic security and the day-to-day lives of millions of American consumers" (*id.* at 17–18). These stated concerns are belied by the participation of these very States in enforcement actions with the CFPB, such as those described above, which have resulted in substantial relief for these States and their residents. See *supra* at 20 n.13, 20–21.

The CFPB's collaboration with States has continued to this day. In July 2022, the CFPB joined forces with Delaware, New Jersey, and Pennsylvania (and the U.S. Department of Justice) in enforcement actions against Trident Mortgage Company for redlining majority-minority neighborhoods when offering loans and refinancing products. The actions resulted in a global settlement that requires Trident to pay over $18 million toward offering loan subsidies that apply toward those neighborhoods and $2 million to fund corrective marketing efforts, as well as a $4 million fine to be paid to victims.[21]

Additionally, in an effort to combat unfair and deceptive practices, the CFPB and New York have recently brought an enforcement action against a predatory auto lender that offered loans that consumers

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[21] Consumer Fin. Prot. Bureau, Press Release, CFPB, DOJ Order Trident Mortgage Company to Pay More Than $22 Million for Deliberate Discrimination Against Minority Families (July 27, 2022); *see* Consent Order, *CFPB v. Trident Mortg. Co.*, No. 2:22-cv-2936 (E.D. Pa. Sept. 14, 2022), ECF No. 13.

were unable to repay and that hid the true cost of the loan.[22] This was an example of an action by the independent federal regulator responding to developments in the States, as that New York action came about after Massachusetts had reached an earlier settlement with the same lender.[23]

The Fifth Circuit's decision threatens these ongoing enforcement actions. In the wake of that decision, some courts have halted enforcement actions in which the States are involved together with the CFPB, and other courts are considering applications for similar relief.[24] Thus, it is apparent that if the decision below is not overturned, amici States and their residents are at risk of losing the important support of the CFPB in numerous actions.

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[22] Consumer Fin. Prot. Bureau, Press Release, CFPB and New York Attorney General Sue Credit Acceptance for Hiding Auto Loan Costs, Setting Borrowers Up to Fail (Jan. 4, 2023); *see* Compl., *CFPB v. Credit Acceptance Corp.*, No. 23-cv-38 (S.D.N.Y. Jan. 4, 2023), ECF No. 1.

[23] Mass. Att'y Gen., Press Release, In Largest Settlement of Its Kind, AG Healey Secures $27 Million for Thousands of Massachusetts Consumers From Subprime Auto Lender (Sept 1, 2021).

[24] *See, e.g.*, *CFPB v. MoneyGram Int'l, Inc.*, No. 22-cv-3256 (S.D.N.Y. Dec. 9, 2022), ECF No. 52 (staying CFPB and New York enforcement action pending the resolution of the Appropriations Clause issues raised in this petition).

II. EVEN IF THE COURT WERE TO INVALIDATE THE CFPB'S FUNDING STRUCTURE, IT SHOULD NOT VACATE COMPLETED REGULATORY ACTIONS.

Petitioners are correct in arguing that the CFPB's funding structure does not violate the Appropriations Clause (Pet. Br. 13–38). Thus, the CFP Act is itself the appropriations legislation that satisfies constitutional requirements. But even if this Court were to locate an Appropriations Clause violation, it should not vacate regulatory actions taken during a time when the CFPB was receiving funding in a manner the Court may find to be unconstitutional.

This Court has repeatedly rejected the argument that a challenged agency action "must be completely undone," just because the agency operated with a constitutional defect at the time of its action. *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021); *see, e.g.*, *Seila Law*, 140 S. Ct. at 2208–11 (refusing to invalidate a civil investigative demand issued by a prior CFPB Director who had an unconstitutional removal protection at the time). That holding applies even when the Court determines that a statutory scheme violates the separation of powers, as the respondents have claimed here (Resp. Br. in Opp. 1). *See Collins*, 141 S. Ct. at 1783. Rather, a challenger is entitled to only as much relief as would be "sufficient" to correct the particular constitutional defect, based on traditional remedial principles. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010); *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (requiring relief that is "no broader than necessary to achieve its desired goals").

Here, the purported Appropriations Clause defect arises from Congress having enacted an independent

funding structure, rather than from the CFPB having "lacked the authority to carry out the functions of the office." *See Collins*, 141 S. Ct. at 1788. Indeed, the Fifth Circuit in this case affirmatively concluded that the payday-lending rule at issue was a reasonable exercise of the CFPB's statutory authority under the CFP Act to prohibit unfair, deceptive, or abusive acts or practices. (Pet. App. 9a–14a.) The CFPB thus had the authority to act, and the soundness of that authority is not before the Court. *See Community Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 143 S. Ct. 981 (2023) (denying respondents' cross-petition raising issues concerning CFPB's authority).

Nor is there any allegation that the CFPB in promulgating its rule spent funds that were outside of Congress's explicit design, such that the CFPB's own actions were the source of the constitutional defect. The Appropriations Clause stands for the "straightforward and explicit" proposition that "'no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). The clause permits Congress to control "how federal employees and officers may make or authorize payments." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020); *see also United States Dep't of Navy v. Federal Lab. Relations Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Kavanaugh, J.) (finding that the clause supports "Congress's control over federal expenditures"). But here, the CFP Act broadly authorizes the CFPB's use of funds that are "reasonably necessary to carry out [its] authorities," 12 U.S.C. § 5497(a)—which the court of appeals determined that the CFPB was

carrying out in promulgating its rule (*see* Pet. App. 9a–14a).

"[R]etrospective relief" against the CFPB's prior actions also cannot be justified here based on the mistaken view that—even though the CFPB acted as authorized by Congress—Congress's funding structure "inflict[ed] compensable harm" on respondents. *See Collins*, 141 S. Ct. at 1788. That is, there is no meaningful indication that, had the CFPB's funding conformed to the court of appeals' understanding of the Appropriations Clause, the "Director might have altered his behavior in a way" that relates to the challenged rule. *See id.* at 1789. The CFPB's history of dealing with other structural constitutional problems suggests just the opposite. After this Court held in *Seila Law* that the Director had been operating with unconstitutional removal protections, which included the period in which the payday-lending rule was issued, the Director ratified and then reissued the relevant provisions of that regulation. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 41,905 (July 13, 2020); Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44,382 (July 22, 2020). Similarly, there is reason to expect that the CFPB would issue the same regulation once again, after any Appropriations Clause defect was corrected. And respondents' interest in the CFPB's funding source is otherwise considered "'comparatively minute and indeterminable,'" and "'so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity,'" *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 600 (2007) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923)).

Any judge-made remedy that aligns with traditional remedial principles would instead address the specific constitutional defects in the CFPB's funding, by moving that funding closer to Congress's control. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The Court has stated its "decisive preference for surgical severance" of offending statutory provisions to resolve a constitutional problem, "rather than wholesale destruction" of a federal agency's operations. *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350–51 (2020) (op. of Kavanaugh, J.). Indeed, were respondents correct that a bare violation of the Appropriations Clause could support vacating an otherwise lawful regulation, then it is difficult to see how any prior or ongoing action of the CFPB could evade that same result. As a result, amici States and their residents would stand to lose the regulatory and enforcement benefits of the CFPB that they have relied on for over a decade.

This Court should therefore consider whether there are "means of remedying the defect in the CFPB's structure" other than invalidating challenged agency actions taken when that any unconstitutional funding was in place. *See Seila Law*, 140 S. Ct. at 2211. The Court could, as petitioners suggest (Pet. Br. 41), sever the CFP Act's provision that precludes the House and Senate Committees on Appropriations from reviewing the CFPB's budget. *See* 12 U.S.C. § 5497(a)(2)(C). If the Court agrees with respondents (Resp. Br. in Opp. 14–15) that it is problematic that the CFPB's unspent funds remain available from year to year, the Court could sever the provision that permits the CFPB to roll over its funds. *See* 12 U.S.C. § 5497(c)(1). Each of those remedies would ensure the necessary degree of congressional control.

Indeed, this Court's precedents confirm that the lack of valid congressional appropriations should not in and of itself invalidate agency actions taken during the absence of appropriations. The Court has held that, even if the federal government takes actions and incurs obligations that have not been properly funded through appropriations, that funding "insufficiency does not . . . cancel its obligations." *Maine Cmty. Health Options*, 140 S. Ct. at 1321 (quotation marks omitted). This understanding makes sense. Whenever the federal government acts—whether through promulgating regulations, holding adjudications, forming contracts, or issuing grants—members of the public and the regulated community (as well as the States) rely on those actions in shaping their affairs. And generally, "it is not reasonable to expect" those with no specific familiarity with the appropriations process "to know how much of [an] appropriation remain[ed] available for [an agency] at any given time." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 1999 (2012) (quotation marks omitted).

This Court has confronted a number of instances where the federal government acted in the purported absence of valid congressional appropriations, and in none of those cases has the Court questioned the validity of the underlying action itself. For instance, in *Maine Community Health Options*, the Court considered a statute in which Congress created a legal obligation for the United States to pay certain healthcare insurers if they were unprofitable. 140 S. Ct. at 1320–21. Even though Congress had failed to appropriate sufficient funds to pay for that eventuality, *see id.* at 1324–25, the Court concluded that the failure to appropriate funds did not, on its own, invalidate the obligation itself, *see id.* at 1321–22. Or where the federal government entered into a lease for a property in the absence of

appropriations to in fact pay the lease, this Court did not question the validity of the lease itself. *See Reeside v. Walker*, 52 U.S. (11 How.) 272, 289 (1850). Rather, the landlord could properly "have presented her claim on the United States to Congress" based on that valid lease, "and prayed for an appropriation to pay for it." *Id.* at 291. Or where the federal government established a customs program, this Court stated that a constitutional objection based on the Appropriations Clause "does not make void" the purportedly unfunded program itself. *Head Money Cases*, 112 U.S. 580, 599 (1884); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308 321 (1937) (purported lack of an appropriations statute for the use of proceeds from a sales tax does not affect the validity of the tax). The same result should obtain here.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be reversed.

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