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

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

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

Amici curiae States of New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin, and the District of Columbia, submit this brief in support of petitioner Consumer Financial Protection Bureau (CFPB). Amici States urge this Court to grant the CFPB's petition for a writ of certiorari to resolve the confusion and regulatory chaos created by a decision of the U.S. Court of Appeals for the Fifth Circuit that held that the CFPB's funding scheme violates the Appropriations Clause and that vacated an otherwise lawful regulation on the ground that it was promulgated when the CFPB purportedly lacked a constitutionally authorized source of funding.

The CFPB is an independent federal agency tasked with enforcing numerous federal consumer-protection statutes and enacting regulations in furtherance of those efforts. For over a decade, the CFPB has served as a valued enforcement and regulatory partner to the States, which have historically served at the forefront of efforts to protect consumers against fraudulent and abusive practices. Amici States therefore have a compelling interest in preserving the CFPB's authority, and its past regulatory actions, no matter how this Court resolves the parties' dispute over the CFPB's funding mechanism.

In this case, the court of appeals concluded that the statutory provisions for funding the CFPB violated the Appropriations Clause. The court then determined that the proper judicial remedy was to vacate the Payday

Lending Rule, 12 C.F.R. pt. 1041, which was promulgated at a time when the CFPB received funding under that statutory scheme. Amici States agree with the United States that the funding structure is lawful, and that the question warrants this Court's review. (*See* Pet. 10–31.) We file this amicus brief, however, to address specifically the remedial issue in the event that the Court were to find a constitutional defect, explaining that the remedy imposed by the court below was neither justified nor compelled by law, and that this issue also warrants this Court's review. The remedy imposed below would deprive the States and their residents not only of the protections given by the specific regulation at issue, but also of the CFPB's role more broadly as a federal regulator and enforcer of consumer financial laws. Left undisturbed, the court of appeals' reasoning could jeopardize many of the CFPB's actions from across its decade-long existence, to the detriment of both consumers protected by those actions and financial-services providers that rely on them to guide their conduct.

STATEMENT

A. Congress Created the Consumer Financial Protection Bureau as a Bulwark Against Future Financial Crises.

Congress created the CFPB in the Consumer Financial Protection Act of 2010 ("CFP Act"), Pub. L. No. 111-203, 124 Stat. 1955, which was enacted as Title X of the Dodd-Frank Act. The Dodd-Frank Act responded to the 2008 financial crisis, which "nearly crippled the U.S. economy," S. Rep. No. 111-176, at 2 (2010), and caused millions of Americans to lose their jobs, homes, and savings, *id.* at 9. 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.* Although various federal statutes had charged different federal agencies with protecting consumers from predatory lending practices and risky financial products, Congress determined that this multi-agency scheme had given rise to "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 establishes the CFPB as "an independent bureau" in the Federal Reserve System. 12 U.S.C. § 5491(a). In doing so, the Act transfers eighteen preexisting federal consumer financial authorities that had belonged to other federal agencies to the CFPB. *Id.* § 5481(12). And the Act authorizes the CFPB to promulgate rules and take other actions to protect consumers against "unfair, deceptive, or abusive acts or practices." *Id.* § 5531(b); *see id.* §§ 5511(b)(2), 5531(a).

Congress established a clear funding structure for the CFPB to "ensure that the Bureau has the funds to perform its mission," without being placed under "repeated Congressional pressure." S. Rep. No. 111-176, at 163. Indeed, Congress observed that the annual appropriations process was "widely acknowledged" to have limited the effectiveness of the former Office of Federal Housing Enterprise Oversight—a predecessor to the Federal Housing Finance Agency that had unsuccessfully regulated Fannie Mae and Freddie Mac leading up to the financial crisis. *See id.*; *see also OFHEO's Final Report on Fannie Mae: Hearing Before the Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on*

Fin. Servs., 109th Cong. 3 (2007) (statement of Rep. Michael G. Oxley, Chairman, H. Comm. on Fin. Servs.).

The CFP Act therefore provides that the CFPB is funded through "the combined earnings of the Federal Reserve System" through a specific "Bureau Fund" of the Federal Reserve. 12 U.S.C. § 5497(a), (b)(1). The Federal Reserve derives its earnings, in turn, from the interest on securities that it has acquired on the open market and from fees for services that it has offered to other 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 regarding funding only if the Federal Reserve has a designated amount of surplus funds in excess of its operating expenses, which it deposits into the general fund of the Treasury rather than retain for itself. *See* 12 U.S.C. §§ 289(a)(3)(B), 290. That is, in funding the Federal Reserve (including the Bureau Fund), Congress has required nothing to be "drawn from the Treasury." *See* U.S. Const. art. I, § 9, cl. 7.

The funds statutorily available to the CFPB cannot exceed twelve percent of the Federal Reserve's operating expenses, as reported in 2009 and adjusted for inflation—an amount that presently exceeds $700 million. 12 U.S.C. § 5497(a)(2)(A)(iii); *see* Pet. App. 34a n.12. Up to that statutory limit, the Federal Reserve is authorized to transfer to the Bureau Fund "the amount determined by the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law," after accounting for the prior year's funding. 12 U.S.C. § 5497(a)(1).

The CFP Act leaves undisturbed Congress's plenary authority to modify the CFPB's funding scheme through subsequent legislation. And the Act requires a request for congressional approval if the CFPB were to require funding from the Treasury. *Id.* § 5497(e). In addition, the Act requires the Comptroller General of the Government Accountability Office to conduct an annual audit of the CFPB's assets, liabilities, income, and expenses, which the Comptroller General must submit to Congress. *Id.* § 5497(a)(5); *see id.* § 5496a(b). The CFPB Director must also submit a report containing, inter alia, "a justification of the budget request of the previous year" to the Senate Committee on Banking, Housing, and Urban Affairs of the Senate and the House Committees on Financial Services and on Energy and Commerce. *Id.* § 5496(c)(2); *see id.* § 5496(b). And the Director must then appear at semiannual hearings before those Committees to address the report. *Id.* § 5496(a)(2).

B. Congress Intended for the Consumer Financial Protection Bureau to Complement and Reinforce the States' Consumer-Protection Efforts.

The CFP Act reinforces the coordinate role of the States and CFPB in protecting consumers. Congress expressly envisioned a "strong and independent Bureau" that would be able "to set a strong, consistent standard" in consumer financial laws nationwide. S. Rep. No. 111-176, at 174. The States, meanwhile, would be positioned to enact "more protective standards" "as problems arise" in recognition of the fact that they are "much closer to abuses and are able to move more quickly when necessary to address them" through enforcement actions. *Id.*

To that end, the CFP Act clarifies that its provisions do not preempt state consumer financial laws that afford greater protections to consumers than federal law. *See* 12 U.S.C. § 5551(a). The Act further makes more restrictive the existing standards and procedures for preempting state laws governing national banks, certain nondepository institutions, and federal savings associations. *Id.* §§ 25b, 1465. And the Act preserves the authority of the States' insurance regulators and securities commissions. *Id.* § 5517(f), (h); *see id.* § 5552(d)(2)–(3). By ensuring that the States maintain their concurrent ability to protect consumers, Congress further 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. Consistent with that understanding, the Act requires the CFPB to issue a proposed rule when a majority of States request a consumer financial regulation. 12 U.S.C. § 5551(c).

The CFP Act also expands 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. *Id.* § 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). The CFPB's participation does not displace or conflict with the States' ability to proceed with an action. Rather, the Act authorizes 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 support the CFPB's argument (Pet. 10–31) that this Court should review the court of appeals' decision with respect to the Appropriations Clause. This amicus brief focuses principally on the extraordinary remedy ordered by the court of appeals for that purported Appropriations Clause violation—vacatur of an otherwise lawfully promulgated regulation.

The sweeping remedy ordered by the court of appeals threatens substantial harm to the States. The CFPB's regulations offer nationwide consumer financial protections and target areas where the States may face challenges in regulating fraudulent and abusive practices, such as here when payday lenders seek to move online in attempting to escape state regulation. The CFPB often partners with the States when the States bring suit to enforce the CFPB's regulations, as authorized by the CFP Act. And the CFPB has engaged in other functions—from handling consumer complaints to providing information to consumers on critical financial issues—that have meaningfully complemented the States' efforts in protecting consumers and guided conduct for financial-services providers. Losing the CFPB's important contributions would seriously impair the States' efforts to combat fraud and abuse in the consumer marketplace.

Such concrete harms stand in sharp contrast to the indeterminate nature of the purported constitutional harm identified by the court of appeals. Respondents (two payday-lending industry groups) do not claim that the CFPB's specific source of funding from the Federal Reserve has resulted in a direct pecuniary harm to them.

Nor can they seriously assert any harm to the congressional control of the CFPB, as Congress has retained plenary authority to modify the CFPB's funding through legislation and engages 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 harms identified by the court of appeals and the remedial order highlights the impropriety of the ruling. This case is not one where a court found that an agency had acted in derogation of Congress's direction or in a manner inconsistent with express funding limitations. To the contrary, the court of appeals found that the Payday Lending Rule was well within the scope of the CFPB's delegated authority. Vacatur of the rule was not needed to respect the separation of powers between Congress and the Executive: the executive agency was acting entirely as Congress commanded. It was the court of appeals that stepped in to create a conflict between the branches that did not otherwise exist.

REASONS FOR GRANTING THE PETITION

I. THE VALIDITY OF THE CFPB'S REGULATORY AUTHORITY IS OF SUBSTANTIAL IMPORTANCE TO THE STATES.

The CFPB has provided valuable contributions in protecting consumers nationwide, as Congress intended when it responded to the 2008 financial crisis by establishing an independent federal regulator that could set nationwide consumer financial standards and coordinate with the States in their enforcement actions. By invalidating an important CFPB regulation and throwing into doubt the validity of other agency actions taken over the last eleven years, the court of appeals has engendered substantial uncertainty and created the risk of meaningful consumer harms. This Court should not let such a result stand.

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

The CFPB's exercise of its regulatory authority has "set a strong, consistent standard" in consumer financial laws nationwide, *see* S. Rep. No. 111-176, at 174, and has bolstered state enforcement of consumer financial laws. As envisioned by Congress, States have relied on the CFPB's regulatory standards in identifying unlawful consumer practices and in bringing enforcement actions based on violations of those regulations. *See* 12 U.S.C. § 5552(a)(1). In the past several years, for example, States have independently brought actions against lenders for offering predatory subprime home loans in violation of loan-disclosure regulations and mortgage servicers for mishandling consumers' loans in violation of mortgage-servicing regulations.[1]

The Payday Lending Rule illustrates the strength of the States' interest in preserving the CFPB's regulatory authority. The regulation, in its current form, prohibits "an unfair and abusive act or practice" relating to 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 from a consumer's account once two prior consecutive attempts had failed due to a lack of funds, unless the consumer reauthorizes the lender to withdraw payments. *See id.* §§ 1041.7, 1041.8(b). In addition to requiring reauthorization after two failed withdrawal attempts, the regulation requires lenders to disclose information to consumers before they attempt to withdraw payments in the first place. *Id.* § 1041.9. As the CFPB found, lenders' withdrawal practices in this area resulted in consumers incurring significant overdraft fees and, in some cases, losing their deposit accounts. *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).

The CFPB recognized that numerous States had restricted payday loans and similar financial products and could bring enforcement actions under state law.

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[1] *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); 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).

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"). And the CFPB "carefully considered" comments on the proposal regarding lenders' withdrawal practices, *id.*, including from multiple States.[2]

The CFPB concluded that the Payday Lending Rule would complement state efforts by enhancing regulatory protections, providing additional avenues for enforcement, and eliminating loopholes that would allow bad actors to evade state restrictions.[3] In proposing the regulation, the CFPB noted, for instance, that online lenders had begun offering payday lending while claiming exemptions from state enforcement. 81 Fed. Reg. at 47,877. And state authorities had raised concerns more broadly that in-state banks were permitting abusive withdrawal practices from out-of-state payday lenders, "even in states where the loans are banned entirely."[4] It

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[2] *E.g.*, 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).

[3] *See, e.g.*, 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 attempts to evade state laws).

[4] 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).

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 often engaged in abusive practices such as attempting multiple consecutive withdrawals from consumers' bank accounts. *See id.* at 48,050.

The Payday Lending Rule is just one example of the importance of the CFPB to state consumer-protection enforcement. The rule exemplifies the way in which States have relied on and benefited from the ability of an independent federal regulator to address areas where lenders and other market participants have taken advantage of customers while evading state regulation.

Here, the court of appeals not only vacated the Payday Lending Rule but did so based on reasoning that could require vacatur of numerous other CFPB regulations that set robust, nationwide protections for consumers, provide guidance to financial-services providers, and complement the States' regulatory and enforcement efforts.[5] For instance, the CFPB's regulations set forth the proper form of lenders' and providers' mortgage disclosures and protections from liability for mortgage lenders, which establish nationwide expectations for consumers and industry members alike.[6] Vacatur of the CFPB's regulations would therefore both substantially impede the States' efforts to pursue

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[5] *See generally* Consumer Fin. Prot. Bureau, *Rules and Policy*.

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

enforcement actions based on the CFPB's regulatory protections and upend beneficial rules that the States' residents have relied on for years. These dramatic consequences amply support the need for this Court's intervention.

B. The CFPB Is an Integral Enforcement Partner to the States.

In addition to its regulatory power, 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 July 2021, the CFPB had recovered $14.4 billion for consumers from its supervisory and enforcement work and obtained relief benefiting over 183 million consumers across the country, including in Amici States. The CFPB, moreover, has handled over three million consumer complaints concerning financial products and services.[7] The existence of a parallel federal agency dedicated to consumer protection has reduced the risk that fraudulent and abusive practices will evade scrutiny, added tools to curb such misconduct, and provided additional deterrence against consumer financial abuses occurring in the first place.

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

The CFPB also participates with the States in bringing enforcement actions, as the CFP Act contemplates, *see* 12 U.S.C. § 5552(b)(2).[8] The CFPB has issued interpretive rules that help to clarify and encourage the coordinate role of the States in enforcing federal consumer financial laws. *See* Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31,940 (May 26, 2022). And 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.[9]

Joint enforcement actions between the CFPB and the States have achieved meaningful results for consumers across the nation. For example, 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

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[8] *E.g.*, Compl. at 1–2, *Consumer Fin. Prot. Bureau 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. 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).

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

fund corrective marketing efforts, as well as a $4 million fine to be paid to victims.[10]

In December 2020, the CFPB, all fifty States, and the District of Columbia brought a successful action against Nationstar Mortgage, LLC, for numerous unfair and deceptive practices relating to servicing borrowers' mortgages. As the CFPB noted, Nationstar at the time was one of the country's largest mortgage servicers and the single largest nonbank mortgage servicer. That action resulted in almost $75 million in relief to more than 40,000 borrowers.[11] 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 institute—for 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.[12] That effort itself built on prior federal–state efforts to curtail

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[10] 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, *Consumer Fin. Prot. Bureau v. Trident Mortg. Co.*, No. 22-cv-2936 (E.D. Pa. Sept. 14, 2022), ECF No. 13.

[11] 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.

[12] 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.

the unfair lending practices of for-profit institutions such as the Corinthian Colleges and their loan originators and of those institutions' loan servicers such as Navient Corporation.[13]

In addition to enforcement actions, the CFPB routinely publishes studies on issues relevant to vulnerable communities, such as tenant background checks and elder exploitation.[14] The CFPB also offers guides for consumers on numerous important financial decisions, from buying a home to securing an auto loan to paying for college to planning for retirement.[15] 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.

Troublingly, private litigants have sought to wield the court of appeals' ruling to challenge other actions of the CFPB. For instance, defendants in responding to enforcement actions have already sought to halt those actions by contending that the CFPB, or the CFP Act as

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[13] 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., *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 17-cv-101 (M.D. Pa. Jan. 18, 2017), ECF No. 1.

[14] *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* (database of agency reports and analyses).

[15] Consumer Fin. Prot. Bureau, *Consumer Resources*.

a whole, violates the Appropriations Clause.[16] The States and their residents could stand to lose the benefit of the CFPB's critical enforcement, regulatory, and informational functions if the decision below stands and is interpreted to impair the CFPB's ongoing operations. This Court's review is therefore necessary.

II. THE COURT OF APPEALS ERRED IN VACATING THE CHALLENGED REGULATION.

The court of appeals erred in holding that the CFPB's funding scheme violates the Appropriations Clause for the reasons stated by petitioners. (Pet. 11–23.) The CFPB's operations do not require any funds to be "drawn from the Treasury," *see* U.S. Const. art. I, § 9, cl. 7, and consistent with the Appropriations Clause, the CFP Act provides that any actual funding from the Treasury requires requesting congressional approval through the appropriations process, *see* 12 U.S.C. § 5497(e). But even if this Court disagrees that the merits of the Appropriations Clause issue are worthy of certiorari, it should grant the petition to review at least the question of whether the court of appeals erred in vacating a regulation promulgated during a time when the CFPB received allegedly unconstitutional funding.

This Court has repeatedly rejected the argument that a challenged agency action "must be completely

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[16] Order, *Consumer Fin. Prot. Bureau 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); *see* Def.'s Mem. of Law in Supp. of Mot. to Dismiss at 3–4, 15, 20, *Pennsylvania v. Mariner Fin., LLC*, No. 22-cv-3253 (E.D. Pa. Oct. 25, 2022), ECF No. 27-2 (seeking dismissal of Pennsylvania's enforcement action based on an alleged Appropriations Clause violation in CFP Act).

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 (refusing to invalidate a civil investigative demand issued by a prior CFPB Director with unconstitutional removal protection). That holding applies even when the Court holds that a statutory scheme "violates the separation of powers" (as the court of appeals held here, *see* Pet. App. 28a–42a). *See Collins*, 141 S. Ct. at 1783. Rather, a challenger is entitled to only as much relief as would be "sufficient" to correct the specific 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").

The nature of an Appropriations Clause violation demonstrates that any judicial relief must be focused on correcting the CFPB's funding. The 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 plain import of the constitutional provision is that it protects Congress's authority over the Treasury's funds. The clause thus addresses only Congress's control over "how federal employees and officers may make or authorize payments," rather than distinct agency actions that have no bearing on federal spending. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020); *see also U.S. Dep't of Navy v. Federal Labor Relations Auth.*, 665 F.3d 1339, 1348

(D.C. Cir. 2012) (finding that the clause supports "Congress's control over federal expenditures").

Here, respondents are two payday-lending industry groups seeking to challenge a discrete CFPB regulation. Respondents do not claim that they are depository institutions that might conceivably need to pay additional, identifiable amounts into the Federal Reserve System, because of the Federal Reserve's needing to share some portion of its funding with the CFPB. And respondents' interests in the CFPB's appropriations—rather than the CFPB's specific regulatory actions—are traditionally 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)). In other words, the hypothetical difference between the CFPB's funding coming from the Federal Reserve or from the Treasury is minute at best, and is by no means a basis to afford judicial relief against the CFPB's regulations or other actions.

Moreover, there is no indication that, if the CFPB's funding had conformed to respondents' proposed constitutional rule, the "Director might have altered his behavior in a way" relevant to the Payday Lending Rule. *See Collins*, 141 S. Ct. at 1789. The record suggests just the opposite, if the CFPB's history of dealing with other structural constitutional problems is any guide. Even after this Court found 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). That is, there is strong evidence that the CFPB would have issued the same regulation once again, after any constitutional defect was corrected.

A "judge-made remedy" that aligns with traditional remedial principles would address the specific constitutional defects in the CFPB's funding, by bringing it closer to Congress's control. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The Court could, as petitioners suggest (Pet. 24), 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). Or the Court could require the CFPB to request funding from the Committees going forward, as the CFP Act itself contemplates when there is a need for additional appropriated funds. *See id.* § 5497(e). Each of those remedies would be sufficient to ensure the necessary degree of congressional control.

This Court's precedents confirm that the CFPB's lack of periodic congressional appropriations should not invalidate the CFPB's regulatory actions. The Court has held that, if the federal government takes actions and incurs obligations that have not been properly funded through appropriations, the 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 has acted—whether through promulgating regulations, holding adjudications, forming contracts, or issuing grants—members of the public (including Amici States) rely on those actions in shaping their affairs. And "it is not reasonable to expect" those with no 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 should thus grant certiorari and confirm that the absence of valid appropriations "does not make void" a prior unfunded action. *See The Head Money Cases*, 112 U.S. 580, 599 (1884).

CONCLUSION

The petition for a writ of certiorari should be granted.

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