No. 24-185

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST, *et al.*,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND STRUCTURED FINANCE ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. THE QUESTION PRESENTED IS EXTRAORDINARILY IMPORTANT TO THE FUNCTIONING OF THE SECURITIES AND CREDIT MARKETS	7
II. THE DECISION BELOW IS WRONG	11
A. The Decision Below Misconstrues the Role of Passive Securitization Trusts, Which Are Incapable of "Engaging in the Provision of Financial Products or Services."	11
B. The Decision Below Frustrates Congress' Careful Statutory Drafting to Limit CFPB Enforcement Authority to Active Conduct	14
C. The Decision Below is Inconsistent with the SEC's Regulatory Approach to Passive Securitization Vehicles	17
CONCLUSION	21

TABLE OF AUTHORITIES

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716 F.2d 56 (D.C. Cir. 1983) 17

CFPB v. *Nat'l Collegiate Master Student Loan Trust*,
96 F.4th 599 (3d Cir. 2024) 12

CFPB v. *Nat'l Collegiate Master Student Loan Trust*,
575 F. Supp. 3d 505 (D. Del. 2021) 13

CFPB v. *Penn. Higher Edu. Assistance Agency et al.*,
No. 1:24-CV-00756
(M.D. Pa. May 6, 2024) 11

Circuit City Stores, Inc. v. *Adams*,
532 U.S. 105 (2002) 13

Fed. Housing Fin. Agency v. *Nomura Holding Am., Inc.*,
104 F. Supp. 3d 441 (S.D.N.Y. 2015) 8

Haro v. *City of Los Angeles*,
745 F.3d 1249 (9th Cir. 2014) 13

In re Thurmon,
625 B.R. 417 (Bankr. W.D. Mo. 2020) 13

Loan Syndications & Trading Ass'n v. *Sec. & Exch. Comm'n*,
882 F.3d 220 (D.C. Cir. 2018) 13

Mohasco Corp. v. *Silver*,
447 U.S. 807 (1980) 14-15, 17

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596 U.S. 450 (2022) 12, 13

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Consumer Financial Protection Act,
12 U.S.C. §§ 5481 *et seq.* 2, 4, 14-17, 19

§ 5481(6)(A) 4, 5, 14

Exchange Act Section 16, 15 U.S.C. § 78p .. 19

17 C.F.R. § 229.1101(c)(1) 17-18

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17 C.F.R. § 240.15Ga-1 20

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H.R. 3126, 111th Cong. (July 8, 2009)......... 15, 16

H.R. 4173, 111th Cong. (Dec. 2, 2009) 15, 16

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Heath P. Tarbert, *The Dodd-Frank Act—Two Years Later*, 66 Consumer Fin. L.Q.Rep. 373 (2012) 14, 19

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P. Giordano et al., *New NCSLT Ruling Could be Negative for U.S. Consumer Structured Finance*, FitchRatings (Apr. 3, 2024), https://www.fitchratings.com/research/structured-finance/new-ncslt-ruling-could-be-negative-for-us-consumer-structured-finance-03-04-2024 10

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S. 3217, 111th Cong. (Comm. Print Mar. 15, 2010) 16

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance and efficient market operations and resiliency. SIFMA is the U.S. regional member of the Global Financial Markets Association.

On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed-income markets and related products and services. SIFMA regularly files *amicus* briefs in cases such as this that have broad implications for financial markets and has frequently appeared as *amicus curiae* in this Court.

The Structured Finance Association ("SFA") is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market to help its members and public policy makers responsibly grow credit availability for consumers and businesses

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[1] Pursuant to Rule 37.6, *Amici* state that no Counsel for any Party authored this Brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to fund or intended to fund the preparation or submission of this Brief. Counsel for *Amici* have provided notice to Counsel for all Parties of their intention to file this Brief, and Counsel for all Parties have no objection to the timing of that notice.

across all communities. With over 370 members, SFA represents all stakeholders in the securitization market, including consumer and commercial lenders, institutional investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers, and trustees. SFA was established with the core mission of supporting a robust and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy. As part of that core mission, SFA is dedicated to furthering public understanding among members, policy makers, consumer and business advocacy groups, and other constituencies about structured finance, securitization, and related capital markets.

SIFMA and SFA share a strong interest in the second question presented in the Petition for *Certiorari*: Whether, under the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. §§ 5481 *et seq.*, the Petitioner Trusts are "covered persons" subject to the enforcement authority of the Consumer Financial Protection Bureau ("CFPB").[2] While SIFMA's and SFA's members play diverse roles and have varying perspectives on securitization transactions, all of their respective members have a strong interest in ensuring that the multi-trillion dollar U.S. securitization market is not materially disrupted, and in ensuring that the CFPB's enforcement authority remains within Congressionally-authorized boundaries.

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[2] *Amici* also support the position of Petitioners with respect to the first issue regarding the constitutional infirmity of this enforcement action. This Brief will focus on the importance of the second issue.

INTRODUCTION

The Third Circuit's acceptance of the CFPB's claim of enforcement authority over passive investment trusts threatens to destabilize a basic building block of the Nation's credit markets—and thereby, the economy. The U.S. consumer enjoys access to the most available and affordable credit in the world. This affordable credit is available primarily because of a risk-spreading tool known as "securitization," which the CFPB's enforcement efforts put at risk.

Securitization is the mechanism by which consumer credit risk is pooled and shared among institutional investors. To accomplish this, securitizations aggregate consumer loans such as the student loans at issue here into entirely passive "securitization trusts." These securitization trusts exist solely to hold the loans, and their sole function is to receive loan payments and allocate those payments to investors according to their constitutive documents.

These passive securitization trusts have no assets other than the loans. They have no operations; they have no employees; and they are legally separate from the other entities involved in the securitization process. And—critically—they are legally separate from the third parties that service the loans (the loan "servicers"). Through this structure, investors in securitization trusts have exposure only to the performance of the underlying loans, without also gaining exposure to operational and other risks. By design, those risks remain outside of the trusts and reside instead with other parties to the securitization. This elimination of exogenous risk is a key feature of securitization that attracts investors, thereby vastly increasing the capital available to consumers as loans, while decreasing the cost of that capital.

By bringing enforcement actions against these passive securitization trusts for the alleged misconduct of the third-party loan servicers, the CFPB breaks the fundamental structure upon which securitization is based—and in the process also frustrates investors' legitimate expectations. Thus, the CFPB's enforcement experiment not only is contrary to the statutory authorization of the CFPA as Petitioners make clear, it also will unjustly harm securitization investors, who, like the securitization trusts themselves, have no practical ability to influence the actions of the servicers. Ironically, it will also harm the very consumers whom the CFPB exists to protect, as those consumers will lose access to affordable loans.

The courts below did not need to allow this. They did so through an artificial interpretation of the CFPA's definition of "covered person"—which is one who "engages in offering or providing a consumer financial product or service," 12 U.S.C. § 5481(6)(A), alongside words taken out of context from the trust documents. Merely stating the definition shows that the Third Circuit's decision is badly misguided. Passive securitization trusts lack *any* means to do *anything* other than act as a pass-through. As passive vehicles that by design can only hold assets and with no ability to conduct operations, the securitization trusts cannot "engage in" anything, including "offering or providing a consumer financial product or service." *Id*. The CFPB's interpretation, and the Third Circuit's decision endorsing it, are based on a fundamental misperception of the nature of passive securitization trusts.

SUMMARY OF THE ARGUMENT

The Court should grant the Petition for Certiorari because the question presented is of fundamental importance to the national securities markets and to the consumer credit markets that depend on them. Passive securitization trusts are the key link in the system that makes consumer credit widely available in this country. The CFPB's enforcement interpretation of "covered person" to include passive investment trusts breaks that link—both for existing trusts that were created, priced, and sold with no expectation of operational liability, and for the ability to create new investment vehicles that investors can be assured will enjoy risk and price stability. As such, the decision below will harm investors, because any costs imposed on the trusts will simply reduce the value of their investments. It also will harm the very consumers whom the CFPB exists to protect, by driving investors away and making consumer credit less available and less affordable. Perversely, it will have no impact on the conduct of loan servicers, because the securitization trusts have no operational mechanism of overseeing the servicers' activities.

The Third Circuit's decision also is wrong. *First*, the CFPB's enforcement theory is based on a warped reading of the statutory definition of "covered person," which, again, is defined as one who "engages in offering or providing a consumer product or service." 12 U.S.C. § 5481(6)(A). Passive securitization trusts do not "engage in" anything—much less "providing . . . consumer product[s] or service[s]." *Id*. Passive securitization trusts exist solely to hold consumer loans. Other entities offer and provide those loans to consumers. And still other entities perform the collection services that ensure delinquent loans are

paid. Passive securitization trusts are just what they are named—they "passively" host the loans around which all of this activity revolves.

Second, the CFPB's and the Third Circuit's reading of the "covered person" definition is contrary to Congress's intent to include as "covered persons" only those who are directly engaged with consumers, which as evidenced by the legislative history of the enactment of the "covered person" definition. In drafting the definition of "covered persons," Congress expressly decided that even entities that "indirectly" engage in the provision of consumer financial products or services would not be included. Passive securitization trusts are one step further removed, because they do not engage even indirectly in any activity. The Third Circuit's decision has extended the CFPB's reach two steps beyond what Congress intended in its clear statutory definition.

Third, the CFPB's approach conflicts with the regulatory approach of the Securities and Exchange Commission ("SEC"), which is the industry's primary regulator. The SEC pervasively regulates the securitization industry across a number of rules and regulations—and that regulatory scheme requires securitization trusts to remain entirely passive to qualify as asset-backed securities. The operational obligations the CFPB is attempting to impose on these trusts, under pain of liability, wholly conflict with the SEC's regulatory scheme.

This case is only the tip of the spear. Armed with the imprimatur of the District Court's and Third Circuit's decisions, the CFPB is seeking to further expand its reach with theories such as vicarious liability. This Court's intervention is urgently needed to curb this improper expansion of the CFPB's authority.

ARGUMENT

I. THE QUESTION PRESENTED IS EXTRAORDINARILY IMPORTANT TO THE FUNCTIONING OF THE SECURITIES AND CONSUMER CREDIT MARKETS

The economic miracle of the affordable and accessible consumer credit markets that help drive the world's most powerful economy is driven largely by the risk pricing and risk spreading function of securitization. Securitization opens the consumer credit market to institutional investors, who provide a deep pool of liquidity that allows credit to be extended to a wide array of consumers.

In 2021, $8.6 trillion of U.S. consumer debt was securitized, accounting for 52% of the $16.6 trillion total consumer debt outstanding. US Asset Backed Securities Statistics, SIFMA (Aug. 2, 2022), https://www.sifma.org/resources/research/us-asset-backed-securities-statistics/ (last visited Sept. 18, 2024). As of the fourth quarter of 2021, approximately $146 billion of student loan debt, $11.5287 trillion of residential mortgage debt, $220.6 billion of automobile loan debt and $53.9 billion in credit card receivables was securitized. *Id.* Billions more in other types of consumer debt is securitized, including such diverse instruments as cell phone contracts, boat and recreational vehicle loans, and equipment loans. *Id.*

Consumer loans are typically created (or "originated") by traditional financial institutions. Securitization provides a mechanism for these loan originators to package and sell loans into the capital markets, widening and deepening the pool of liquidity that is available for consumer credit. Securitization also removes loans from the balance sheets of those loan

originators, freeing up capital to make new loans. In this way, securitization increases the supply of consumer credit, which in turn lowers its cost, allowing consumers to borrow at more affordable rates.

Investors participate in passive securitization trusts by purchasing asset-backed securities ("ABS"), which are securities derived from the pool of underlying assets held in the trusts (*i.e.*, the loans). Several types of parties actively participate in the transactions that create these ABS. "Originators" issue loans that are ultimately placed in the trusts. "Sponsors" acquire loans from one or more originators. Sponsors then package the loans together and sell them to "depositors," which usually are special-purpose vehicles. See Reed D. Auerbach & Charles A. Sweet, Offerings of Asset-Backed Securities § 1.02 (4th ed. 2022) ("Offerings of ABS"); see also *Fed. Housing Fin. Agency* v. *Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 462–64 (S.D.N.Y. 2015). The depositors then deposit the loans into entirely passive trusts, in exchange for certificates. The depositors then sell the certificates to underwriters, who take them to market. See *Nomura Holding Am., Inc.*, 104 F. Supp. 3d at 464. In this manner, "[s]ecuritization . . . separat[es] the risks inherent in any pool of receivables from the other risks related to the originator," such as the risks of servicing the loans. Offerings of ABS § 2.01.

The cash flows generated by borrower payments on the underlying loans are used to make payments to investors on a fixed schedule. *Id.* This requires a "servicer" to collect payments, to pursue non-paying borrowers and to remit the payments to the passive securitization trust. Credit Encyclopedia Series: Structured Finance Encyclopedia, Fitch Ratings 7, https://www.fitchratings.com/campaigns/structured-fi

nance-encyclopedia (last visited Sept. 18, 2024) ("Fitch Structured Finance Encyclopedia"). The allegedly bad conduct that the CFPB is targeting is the conduct of these servicers, who may have engaged in unfair or improper practices while servicing these loans.

Securitized debt only becomes attractive to investors if those investors are confident that they can accurately value the underlying loans. "[T]he primary goal of securitization is to issue ABS whose credit risk can be evaluated by credit rating agencies and investors based solely on the projected cash flows from the underlying asset pool, together with any credit enhancement mechanisms that are embedded in the securitization structure." Offerings of ABS § 1.02. To accomplish this, the securitized loans reside within "passive securitization trusts" that do *nothing* except hold the pool of loans. The passive securitization trusts do not originate the loans; they do not package the loans; and they do not service the loans. They are mere receptacles, designed to passively hold the loans and allow the loans to be valued based solely on their cash flows.[3]

The passive nature of these securitization trusts makes them a uniquely poor target for CFPB enforcement. Passive securitization trusts have no legal or practical ability to control the functions performed by any other participants in the securitization process. In particular, because they have no employees or operations, they have no means to supervise or otherwise influence

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[3] Fitch Ratings, for example considers only "the credit profile of the underlying assets, the legal and financial structure of the transaction, credit enhancement, liquidity protection mechanisms, [and] isolation from the risk of default of the securitization's counterparties" when rating securitizations. Fitch Structured Finance Encyclopedia 9.

the behavior of loan servicers. Nor could the trusts be restructured to accommodate the new responsibility the CFPB seeks to impose on them, as giving the trusts an operational role would destroy their fundamental characteristic as passive entities. See C. Flanagan et al., *CFPB v. NCSLT: A Potential Risk to Securitization & Credit Availability*, B of A Securities 1 (Mar. 17, 2022).

Moreover, because the trusts have no assets other than the payments generated by the loans they hold, they have no means of satisfying a CFPB penalty other than diverting loan payment streams away from investors. This upsets the expectations of all who did not anticipate that these securitization trusts might be forced to bear the operational risks of other parties to the securitization. *Id.* at 1–2; P. Giordano et al., *New NCSLT Ruling Could be Negative for U.S. Consumer Structured Finance*, FitchRatings 1-2 (Apr. 3, 2024), https://www.fitchratings.com/research/structured-finance/new-ncslt-ruling-could-be-negative-for-us-consumer-structured-finance-03-04-2024. These investors include pension plans, insurance companies and university endowments, which comprise some of the largest investors in securitizations. Going forward, these investors will at a minimum attempt to price in these new risks, raising the cost and lowering the level of investment in ABS. More likely, they will forego these investments—which many institutional investors must do if the products do not meet certain rating thresholds.[4] In either case, consumer credit will become more expensive and less available.

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[4] Moody's downgraded several of the Trusts in 2018 as a result of this enforcement action. Rating Action: Moody's Takes Rating Actions on 15 NCSLT Securitizations, MOODY'S (Jan. 12, 2018) at 4-5 (citing "the potential negative impact to cash flow from penalties which may be imposed by the CFPB").

In short, by seeking to unfairly penalize passive securitization trusts for the actions of loan servicers, the CFPB is shifting the costs of misbehavior away from the alleged wrongdoers and onto uninvolved, third-party investors, undermining the very feature of consumer debt securitization—the passive, isolated nature of the trust—that makes securitized debt an attractive investment in the first place. And because investors demand a higher return for riskier investments, the added complexity and risk resulting from treating passive securitization trusts as covered persons, if it can be priced at all, will increase the cost of, and reduce access to, consumer credit.

This is not an idle concern. The CFPB is running with its newfound authority in cases filed against other passive trusts. And the CFPB is branching out with new, derivative theories, seeking to impose vicarious liability on the trusts. See *CFPB* v. *Penn. Higher Edu. Assistance Agency et al.*, 1:24-CV-00756 (M.D. Pa.) (filed May 6, 2024). The proliferation of these cases has the potential for devastating consequences for the securitization industry, its investors, and the economy.

II. THE DECISION BELOW IS WRONG

A. The Decision Below Misconstrues the Role of Passive Securitization Trusts, Which Are Incapable of "Engaging in the Provision of Financial Products or Services."

The Third Circuit's decision is based on a myopic and incorrect reading of the statutory language and trust documents, wrenched out of context from the world in which passive securitization trusts exist. Passive securitization trusts exist solely to hold a pool

of loans and effectuate the pass-through of cash flows from loan payments. They have no employees, and no independent operations. Thus—by design—they do not and cannot "engage in" offering or providing consumer financial products or services such as the debt collection services at issue here—and they certainly do not do so directly. The only parties who engage in the provision of consumer products or services here are the originators of the loans and the servicers and sub-servicers of the loans. The Petitioner Trusts play no role.

Passive trusts, by definition, cannot engage in *any* activity, so, *a fortiori*, they cannot engage in any activity within the purview of the CFPB. In reaching its decision, the Third Circuit relied on language in the Trust Agreements that the Petitioner Trusts "provide for . . . the servicing of [loans]." *CFPB* v. *Nat'l Collegiate Master Student Loan Trust*, 96 F.4th 599, 610 (3d Cir. 2024) (App. 107). By "provid[ing] for" this servicing, the Third Circuit concluded, the trusts "engage in" loan servicing and debt collection. *Id*. This conclusion wholly fails to recognize the distinct nature of a passive entity.

In failing to respect this distinction, the Third Circuit contradicted this Court's interpretation of the word "engage" in *Sw. Airlines Co.* v. *Saxon*, 596 U.S. 450, 457 (2022). *Nat'l Collegiate Master Student Loan Trust*, 96 F.4th at 611. The Third Circuit relied on *Saxon*'s proposition that "engaged . . . means 'occupied,' 'employed,' or 'involved' in something." *Id.* (internal quotes omitted). But this Court actually held in *Saxon* that "any class of workers *directly* involved in transporting goods across state or international borders" were "engaged" in interstate commerce. *Saxon*, 596 U.S. at 457 (emphasis added). This holding built on

precedent holding that to be "engaged" in interstate commerce, a class of workers "must at least play a *direct* and 'necessary role in the free flow of goods'" and "must be *actively* 'engaged in transportation' of those goods . . ." *Saxon*, 596 U.S. at 458 (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 121 (2002) (emphasis added)).[5]

Far from directly or actively engaging in debt collection or servicing, passive securitization trusts have no involvement in any operations or transactions related to their securitized assets. See *Loan Syndications & Trading Ass'n* v. *Sec. & Exch. Comm'n*, 882 F.3d 220, 230 (D.C. Cir. 2018). Nor could they, as the trusts have no employees or agents to carry out any such functions. In the decision upheld by the Third Circuit, the district court overlooked the *active* nature of "engagement," and instead interpreted "engage" to "encompass actions taken on a person's behalf by another," reasoning that a dairy farmer is engaged in and liable for the milking cow business even if he contracts with a farmhand. *CFPB* v. *Nat'l Collegiate Master Student Loan Trust*, 575 F. Supp. 3d at 505, 509 (D. Del. 2021). But unlike a farmer, who can supervise and direct a farmhand in how she treats the livestock, the passive trust is little more than a pool of assets with no means to monitor, police, or undertake any other activity. Here, the CFPB is not suing the farmer, it is suing the bucket of milk.

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[5] Courts in other circuits have correctly interpreted "engage" to mean direct, active or personal involvement. See *Haro* v. *City of Los Angeles*, 745 F.3d 1249, 1257 (9th Cir. 2014) ("engag[ing] in fire suppression" refers to "those who are dispatched to the fire scene and actively engage the fire."); *In re Thurmon*, 625 B.R. 417, 422 (Bankr. W.D. Mo. 2020) ("engaged in" under the Small Business Reorganization Act means "to be actively and currently involved").

B. The Decision Below Frustrates Congress' Careful Statutory Drafting to Limit CFPB Enforcement Authority to Active Conduct.

The Third Circuit also failed to consider the CFPA's statutory history, which makes clear that to qualify as a "covered person" subject to the CFPB's enforcement power, an entity must be *directly* engaged in "providing a consumer financial product or service." 12 U.S.C. 5481(6)(A). Congress enacted the CFPA as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). Dodd-Frank targeted multiple sectors of the finance industry that Congress perceived to have played a role in causing or exacerbating the 2008 financial crisis. For example, Dodd-Frank created new standards for mortgage lenders; new disclosure requirements and heightened legal liability for credit-rating agencies; and new reporting and registration requirements for hedge funds. See Heath P. Tarbert, *The Dodd-Frank Act—Two Years Later*, 66 Consumer Fin. L.Q.Rep. 373, 376-78 (2012); see generally Baird Webel et al., Cong. Rsch. Serv., R41350, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Background and Summary* (2017), https://crsreports.congress.gov/product/pdf/R/R41350 ("CRS on Dodd-Frank"). Tellingly, Congress did not target passive securitization vehicles in this massive legislative reform.

In fact, in enacting the CFPA, Congress expressly considered and rejected a definition of "covered person" that would have extended the statutory reach to any entity that "*indirectly*...engages in offering or providing a consumer financial product or service." (Emphasis added). See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 822-24 (1980) (deleting language from a statute before

enactment constitutes "expressly reject[ing]" that language). This rejection narrowed the statute's reach and drew a necessary line by excluding *indirect* participants. This exclusion of indirect participants necessarily excludes passive securitization trusts, which lack the capacity to participate even indirectly in providing a financial product or service, as articulated *supra*.

An examination of the House and Senate bills that formed the basis for Dodd-Frank shows that Congress intended the CFPA to cover actors with a direct role in the conduct it targeted, not indirect actors and not passive securitization vehicles. Predecessor bills to the CFPA included (1) the Consumer Financial Protection Agency Act (H.R. 3126), (2) the Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173) and (3) the Restoring American Financial Stability Act (S. 3217) ("RAFSA"). In the progression of these three bills, Congress deleted language that would have extended the CFPA to indirect participants, demonstrating Congress' intent to exclude passive securitization trusts.

Early versions of these three bills—H.R. 3126, H.R. 4173 (Dodd-Frank) and S. 3217 (RAFSA)—defined "covered person" as one who "*directly or indirectly*" engages in the provision of financial products or services. Specifically, the July 8, 2009 draft of H.R. 3126, the November 10, 2009 discussion draft of S. 3217, and the December 2, 2009 draft of H.R. 4173, all defined "covered person" as "any person who engages *directly or indirectly* in a financial activity, in connection with the provision of a consumer financial product or service" (emphasis added). See H.R. 3126, 111th Cong. (as introduced to House, July 8, 2009); S. 3217, 111th Cong. (discussion draft Nov. 10, 2009), https://www.llsdc.org/assets/DoddFrankdocs/bill-111th-s3217-disc

ussion-draft.pdf; H.R. 4173, 111th Cong. (as introduced to House, Dec. 2, 2009).

This overbroad language triggered immediate, negative attention. A representative of the National Association of Mortgage Brokers ("NAMB") testified that the overbroad "direct or indirect" language would assign too much power to a new and untested agency. Warning that the broad language of H.R. 3126 could give the CFPB jurisdiction "over all persons covered by the statutes the agency implements, including banks and bank affiliates, non-bank entities, and institutions currently regulated exclusively by one of the federal prudential regulators," NAMB cautioned that "the CFPA may be regulating in areas that have not been addressed by Congress and therefore, not subject to hearings, oversight or certain checks and balances." The Impact of Financial Regulatory Restructuring on Small Businesses and Community Lenders Before the H. Comm. on Small Bus., 111th Cong. 83 (2009) (statement of Mike Anderson, Vice-Chairman of Government Affairs, National Association of Mortgage Brokers). NAMB specifically advocated for a narrower definition of "covered person." *Id.* at 84.

Shortly after this testimony, Congress removed the "indirectly" language. None of the March 19, 2010 "committee print" draft of S. 3217, the April 15, 2010 draft of S. 3217, or the May 2020 draft of H.R. 4173, included the broad "directly or indirectly" language. Instead, they defined "covered persons" as the term was ultimately enacted: "any person that engages in offering or providing a consumer financial product or services." See S. 3217, 111th Cong. (Comm. Print Mar. 15, 2010); see also S. 3217, 111th Cong. (as introduced to Senate, Apr. 15, 2010); H.R. 4173, 111th Cong. (as passed by Senate in lieu of S. 3217, May 20, 2010).

This statutory history shows that Congress plainly knew how to authorize the CFPB to regulate a wide variety of actors involved with the provision of financial services. Congress expressly considered and decided against giving the CFPB even authority over those who "indirectly" engage in those activities. And passive securitization trusts do not even do that. Where Congress considers and changes proposed statutory language, courts should interpret the change as deliberate, *Mohasco Corp.*, 447 U.S. at 822-24, and "may not assume" that Congress made a change for "no reason at all." *Ashton* v. *Pierce*, 716 F.2d 56, 62 (D.C. Cir. 1983). By considering and deleting the word "indirectly" from the definition of "covered person," Congress limited the reach of the CFPA to entities directly engaged in a consumer financial product or service, thus placing both "indirect" actors and the even more removed "passive" securitization trusts, beyond the reach of the CFPA.

C. The Decision Below is Inconsistent with the SEC's Regulatory Approach to Passive Securitization Vehicles.

Permitting the CFPB to regulate passive securitization trusts also is at odds with the regulatory approach of the SEC, the primary regulator of the securitization industry. The SEC has a pervasive regulatory framework for asset-backed securities, which imposes obligations and liabilities upon virtually every entity involved in asset-backed securitization—except for passive securitization trusts.

The SEC's comprehensive set of regulations addressing publicly issued asset-backed securities, Regulation AB ("Reg AB"), requires securitization trusts to be completely passive. To qualify as an "asset-backed security," the definition requires, in relevant part, that the issuing entity's "activities . . . are limited to

passively owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto." 17 C.F.R. §§ 229.1101(c)(1), (c)(2)(ii). This definition codifies the SEC's longstanding view that the "limited function and permissible activities" of the issuing entity are "fundamental" to the notion that an asset-backed security is essentially "a security that is to be backed solely by a pool of assets." Asset-Backed Securities, 70 Fed. Reg. 1506 at 1516 (Jan. 7, 2005) ("2005 Reg AB Adopting Release"). The Reg AB Adopting Release further recognizes that securitization trusts do not collect payments from obligors "[b]ecause the issuing entity is designed to be a passive entity." *Id.* at 1511. The implementing release further recognizes that the trusts have "no business or management." *Id.*

Because the SEC regulatory scheme requires the trusts to remain passive, the SEC limits its various registration, disclosure, and reporting requirements to the loan sponsors, depositors, and servicers—and imposes no such obligations on passive securitization trusts. See, *e.g.*, Asset-Backed Securities Disclosure and Registration, 79 Fed. Reg. 57184 at 57299–300 (Sept. 24, 2014) ("2014 Reg AB Adopting Release") (requiring sponsor to report any changes in interest on Form 8-K); 57267 (imposing certification shelf transaction requirement on depositor's CEO); 57242 (describing amendments to Reg AB Items 1104, 1108, and 1110 requiring disclosure regarding sponsor, servicer, or 20% originator's interest retained in the transaction). In addition, given the "restrictive activities of the issuing entity [the passive securitization trust] in connection with the ABS transaction," Reg AB exempts asset-backed securities altogether from certain Exchange Act disclosure requirements that are imposed on

issuers of other types of securities. See 2005 Adopting Release at 1580; see also 17 C.F.R. § 240.3a12-12 (exempting asset-backed securities, as defined in Reg AB, from Exchange Act Section 16, 15 U.S.C. § 78p). In short, the framework of Reg AB demonstrates the SEC's recognition that imposing direct obligations or liabilities on passive securitization trusts is inconsistent with the very nature of those entities, and that any obligations or liabilities related to issuing and servicing the underlying securities should rest with other parties such as the servicers.

Likewise, the SEC's Dodd-Frank Rules regarding asset-backed securities—which comprise a host of rules targeting various entities involved in securitization—do not impose direct obligations or liabilities upon passive securitization trusts. These rules were enacted in the wake of the 2008 financial crisis, in parallel with the CFPA. Because one type of securitized product, mortgage-backed securities, was perceived to have played a key role in precipitating the financial crisis, the SEC responded by creating a host of new regulations targeting various entities involved in securitization. See Tarbert, 66 CONSUMER FIN. L.Q. REP. at 378. Tellingly, none of these regulations impose direct obligations or liabilities upon passive securitization trusts.

For example, the final risk retention rules for asset-backed securities, codified in 17 C.F.R. §§ 246.1 to 246.22 ("Reg RR"), which were promulgated pursuant to Section 941 of Dodd-Frank, require that the party who organizes and initiates the securitization—the "securitizer" (*i.e.*, the sponsor/depositor—or, in certain circumstances, the originator)—retain at least a 5% credit risk in an asset-backed transaction. Credit Risk Retention, 79 Fed. Reg. 77602 (Dec. 24, 2014) ("Reg RR Adopting Release"). In the adopting release for Reg

RR, the SEC acknowledged the "broad purpose" of Dodd-Frank to "restore investor confidence in asset-backed finance, and permit securitization markets to resume their important role as sources of credit for households and businesses." Reg RR Adopting Release at 77655 & n.173 (quoting S. Rep. No. 111-176, at 129 (internal quotation marks omitted)). To further that purpose, Reg RR requires securitizers to retain an interest in the asset-backed transaction. Reg RR seeks to "align[] [the] economic interests" of those who "organize and initiate the securitizations" with those of investors by requiring securitizers to "have 'skin in the game'." *Id.*

Notably, while Reg RR imposes these obligations on securitizers, it does not require passive securitization trusts to maintain any of the credit risk of the asset-backed securities, again demonstrating the SEC's understanding of the issuing entity's wholly passive role in the securitization process. Simply put, the passive securitization trust has no behavior to influence and no interests to align, contrary to the apparent rationale of the court below.

Similarly, Rule 15Ga-1, which imposes certain asset-review and repurchase disclosure requirements on sponsors and depositors of asset-backed securities, does not impose any requirements on passive issuing entities. See Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 4489 (Jan. 26, 2011) (codified in 17 C.F.R. § 240.15Ga-1). The SEC's Dodd-Frank rules also impose disclosure obligations and conflict of interest requirements on other entities involved in securitizations—such as credit rating agencies and providers of third-party due diligence services for asset-backed securities—but not

on the passive securitization trusts themselves. See 17 C.F.R. § 240.17g-5 ("Rule 17g-5").

Through multiple rounds of regulation, across decades, the SEC has carefully avoided imposing *any* obligations or liabilities upon passive securitization trusts—and has indeed made the passivity of the trusts a *sine qua non* for a product's status as ABS. The CFPB's attempts to bring enforcement actions against the trusts—which does nothing to protect consumers—are entirely inconsistent with the SEC's regulatory scheme.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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