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.

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

BRIEF OF *AMICUS CURIAE* THIRD PARTY PAYMENT PROCESSORS ASSOCIATION SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Payday Lending Rule, 12 C.F.R. §§ 1041.1 *et seq.*; 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041), should be vacated because the Consumer Financial Protection Bureau's ("CFPB") statutory authorization to choose its own amount of annual public funding subject only to an illusory cap, in perpetuity and for core executive powers, violates the Appropriations Clause.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the Third Party Payment Processors Association ("TPPPA") is a national, not-for-profit association of payment processors and their banks. *Amicus* TPPPA's mission is to help its members operate efficiently and comply with applicable regulations by developing best practices for third-party payment processing.

Amicus TPPPA was formed in 2013, largely to facilitate dialogue between *Amicus* TPPPA's members and regulatory agencies, including the CFPB. *Amicus* TPPPA has successfully worked with the CFPB and other federal agencies to develop the TPPPA Compliance Management System ("CMS"), a best-practices control framework for payment processors and their banks. The CMS was designed upon the foundation of the CFPB's and Department of Justice's guidance on Compliance Management Systems, further incorporating Third-Party Risk Management guidance from Federal Banking Regulators, "Culture of Compliance" guidance, and other Financial Crimes Enforcement Network guidance. The end result is a risk-based, documented, compliance-management system that addresses

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[1] Under Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Third-Party Risk Management, Consumer Protection, and Bank Secrecy/Anti-Money Laundering principles. The CMS aids *Amicus* TPPPA's members with regulatory compliance for all payment methods with these risk-based, documented compliance management system controls that are tailored to the members' distinct payment-processing programs and their related requirements and responsibilities. In the aggregate, *Amicus* TPPPA's members process over several billions of dollars in payments each year. *Amicus* TPPPA regularly engages in the rule-making process by responding to requests for comments on matters that impact its members. *Amicus* TPPPA routinely files amicus briefs in cases of importance to its members, like this one. *See, e.g.*, Pet.App.1a–46a; *Cmty. Fin. Servs. Ass'n v. CFPB*, 143 S. Ct. 981 (2023); *Hunstein v. Preferred Collection and Mgmt. Servs., Inc.*, 17 F.4th 1016 (11th Cir.), *reh'g en banc granted, opinion vacated*, 17 F.4th 1103 (11th Cir. 2021), *and on reh'g en banc*, 48 F.4th 1236 (11th Cir. 2022); *CFPB v. Intercept Corp.*, No. 3:16-cv-144, 2017 WL 3774379 (D.N.D. Mar. 17, 2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress created the CFPB, it set forth in statutory text five specific objectives for this agency to pursue—two consumer-protection objectives, 12 U.S.C. § 5511(b)(1)–(2), and three regulatory-burden/competition/innovation objectives, *id.* § 5511(b)(3)–

(5). Since then, however, the CFPB has often single-mindedly focused its actions on its own vision of the consumer-protection objectives, while typically paying no heed to the regulatory-burden/competition/innovation objectives. Given the freedom from congressional oversight that the CFPB enjoys due to its unconstitutional funding structure, the CFPB has pursued with impunity its own agenda.

CFPB's Payday Lending Rule (the "Rule") is the poster child for the CFPB issuing rules without giving due consideration to the statutory regulatory-burden/competition/innovation objectives. The Rule does not "reduce unwarranted regulatory burdens," *id.* § 5511(b)(3), adding unnecessary regulation on payment processors that directly conflicts with the CFPB's existing electronic fund transfer rule, Regulation E. The Rule does not promote "fair competition," *id.* § 5511(b)(4), ignoring the already existing compliance efforts from trade organizations like *Amicus* TPPPA and self-regulatory organizations like Nacha (formerly known as the National Automated Clearinghouse Association).[2] And the Rule fails to facilitate consumers' access to, or the innovation of, the consumer-financial market, *id.*

[2] These compliance efforts include those of Nacha, which in each year of the past decade has issued multiple, significant changes to its robust compliance systems for the effective self-regulation of the payment-processing industry.

§ 5511(b)(5), but instead prevents innovation, ultimately to the detriment of consumers.

This Court correctly holding that CFPB's statutory funding mechanism violates the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, would empower Congress to check meaningfully whether the CFPB is pursing the objectives that Congress has set out for it, just as the Founders intended. The CFPB's unprecedented funding mechanism has allowed it to ignore its congressional mandate, unconstitutionally insulating it from Congress' oversight authority, creating the most politicized agency in the Federal Government.

Amicus TPPPA respectfully submits that the most appropriate remedy for this Court to resolve this Appropriations Clause violation is one that retroactively reaches only currently challenged CFPB actions, including the Payday Lending Rule, leaving in place all unchallenged actions, including (but not limited to) those outside of the Administrative Procedure Act's ("APA") six-year statute of limitations. The Solicitor General's proposed remedy is entirely inadequate and contrary to precedent. *Amicus* TPPPA's proposed remedy, in contrast, offers meaningful, measured relief that is consistent with this Court's case law. This Court would apply its Appropriations Clause holding retroactively to the Payday Lending Rule itself—ordering vacatur of that Rule—and to any pending challenges to CFPB actions or rules. The Court's holding would also, of course,

apply to all future CFPB actions and rules unconstitutionally funded through CFPB's statutory mechanism. The Court should not apply its Appropriations Clause holding to other, unchallenged CFPB actions or rules, in recognition of the significant disruption that such application would cause. Invalidation of the Payday Lending Rule imposes no such disruption costs, given that it has never gone into effect and—if it ever did—would be disastrous for banks, payment processors, and consumers.

ARGUMENT

I. The CFPB Has Long Ignored Its Congressional Mandate, Culminating In The Disastrous Payday Lending Rule

A. When Congress created the CFPB in 2011, it set forth the overarching purpose and objectives for this new agency in the text of the enabling statute. 12 U.S.C. § 5511 (a)–(b). Congress directed the CFPB to "implement and, where applicable, enforce Federal consumer financial law" to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." *Id.* § 5511(a).

The CFPB's congressional objectives are five-fold. Under its first two objectives—the consumer-protection objectives—the CFPB must ensure that consumers receive "timely and understandable

information to make responsible decisions about financial transactions," *id.* § 5511(b)(1), and that consumers are "protected from unfair, deceptive, or abusive acts and practices and from discrimination," *id.* § 5511(b)(2). Under the three regulatory-burden/competition/innovation objectives, the CFPB must ensure that "outdated, unnecessary, or unduly burdensome regulations" regarding consumer-financial law "are regularly identified and addressed in order to reduce unwarranted regulatory burdens," *id.* § 5511(b)(3); that "[f]ederal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition," *id.* § 5511(b)(4); and that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation," *id.* § 5511(b)(5).

The CFPB's consumer-protection objectives have been the near-exclusive focus of its regulatory mission to date. The CFPB has taken some important regulatory action in the consumer-finance marketplace, pursuant to these first two objectives. For example, it has amended Regulation Z, 12 C.F.R. §§ 1026.1 *et seq.*, to limit the fees that a credit card issuer may require a consumer to pay to 25% of the credit limit in effect when the consumer opens their account, 12 C.F.R. § 1026.52. And it adopted the Debt Collecting Rule, 12 C.F.R. §§ 1006.14 *et seq.*, which prohibits certain harassing or threatening conduct by debt collectors, *e.g.*, 12 C.F.R. § 1006.14(a), .34.

As for the CFPB's other three objectives—reducing unwarranted regulatory burdens, 12 U.S.C. § 5511(b)(3), promoting fair competition, *id.* § 5511(b)(4), and facilitating access and innovation in the market consumer financial products, *id.* § 5511(b)(5)—the CFPB has generally ignored them. So far as *Amicus* TPPPA is aware, the CFPB has never taken any meaningful steps to eliminate regulatory burdens. 12 U.S.C. § 5511(b)(3); *see generally*, Rohit Chopra, *Rethinking The Approach To Regulations*, June 17, 2022 (noting that the CFPB intends to "dramatically increase[e] the amount of guidance it is providing to the marketplace" and regulate by "heavily focusing on implementing longstanding Congressional directives," and "reviewing other authorities authorized by Congress that have gone unused").[3] Instead, the CFPB has often added duplicative, unnecessary regulatory burdens, promulgating myriad rules and guidance touching all aspects of the consumer-financial industry. *See* CFPB, *Final Rules* (2023);[4] *Amici* Br. of the Mortg. Bankers Ass'n, *et al.* at 4.

B. The Payday Lending Rule is the latest—and one of the most egregious—examples of the CFPB

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[3] Available at https://tinyurl.com/bdc3mkrm (all websites last visited July 9, 2023).

[4] Available at https://tinyurl.com/55cy6ctc.

taking regulatory action without due regard to its regulatory-burden/competition/innovation objectives.

The CFPB proposed the Rule in 2016, ostensibly to reign in payday, vehicle title, and other types of high-cost installment loans. 82 Fed. Reg. at 54,472. But rather than regulating the lenders that offer these loans, the CFPB chose an indirect approach: make it so difficult for banks and payment processors to process these loans lawfully that they stop servicing these disfavored lenders altogether—a tactic similar to that employed by other federal agencies in "Operation Choke Point."[5] Specifically, the Rule limits the number of times a bank or a payment processor may attempt to withdraw repayments for a covered loan from a consumer's account through withdrawals that the consumer had already legally authorized in writing or by other methods allowable under the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 *et seq.*; 82 Fed. Reg. at 54,472.

Under the Rule, after a withdrawal attempt fails twice because of insufficient funds in the consumer's account, the bank or payment processor may not

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[5] *See generally* Frank Keating, *Operation Choke Point Reveals True Injustices Of Obama's Justice Department*, The Hill (Nov. 7, 2018), https://tinyurl.com/hwc7rvtv (describing program where federal officials would "pressure[ ] banks to close the accounts of businesses solely because they were ideologically opposed to their existence").

attempt additional withdrawals, unless the consumer specifically authorizes them again—otherwise, the lender has committed an "unfair and abusive" practice. 82 Fed. Reg. at 54,472. That two-withdrawal-limit scheme imposes significant compliance costs on banks and payment processors: it is directly contrary to the preauthorized-withdrawal regulatory scheme for collection of electronic payments, and it ignores the reality that banks and payment processors have no way of discerning whether any particular withdrawal is for a covered loan or not, meaning that they have no current means to avoid liability under the Rule. *Infra* pp.12–13. So, given those burdens, banks and payment processors may cease servicing covered loans altogether.

The Rule runs contrary to the three regulatory-burden/competition/innovation objectives that the CFPB has consistently ignored. *See supra* Part I.A.

The Rule is an unwarranted regulatory burden, *contra* 12 U.S.C. § 5511(b)(3), directly conflicting with the CFPB's preexisting regulatory scheme for consumer electronic payments: Regulation E, 12 C.F.R. §§ 1005.1 *et seq.* (implementing 15 U.S.C. §§ 1693, *et seq.*). Regulation E allows a consumer to pre-authorize electronic fund transfers from her accounts as recurring payments for a debt and to freely revoke such authorization, *id.* §§ 1005.2(k), (m), 1005.10(c)(1)—without limiting the number of electronic fund transfers that a payment processor may attempt, *see* Marsha Jones, TPPPA, Comment

Letter at 4 (May 15, 2019) (hereinafter "TPPPA Comment").[6] In contrast, the Rule prohibits a payment processor from initiating an electronic fund withdrawal to collect a covered loan payment after two consecutive attempts have failed due to insufficient funds—unless the consumer provides "new and specific authorization to make further withdrawals." 82 Fed Reg. at 54,473; 12 C.F.R. §§ 1041.7–.8. Even though a consumer has already authorized electronic fund transfers from her account under Regulation E, 12 C.F.R. § 1005.2(k); even though Regulation E already empowers consumers to revoke such authorization, *id.* §§ 1005.2(m); 1005.10(c)(1); and even though Regulation E does not cap the number of withdrawal attempts that a payment processor may initiate, the Rule imposes a two-attempt withdrawal limit on payment processors for covered loans—unless they take the costly and burdensome step of requiring the lender to provide yet another, duplicative authorization, 82 Fed Reg. at 54,473; 12 C.F.R. §§ 1041.7–.8; *contra* 12 U.S.C. § 5511(b)(3)–(4).

The Rule also stifles fair competition by ignoring the already existing, effective, and efficient private-compliance efforts in the payment processing industry. *Contra* 12 U.S.C. § 5511(b)(4). *Amicus* TPPPA has crafted voluntary and robust compliance management structures for industry members, which are grounded in CFPB and Department of Justice

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[6] Available at https://tinyurl.com/kmef64kx.

guidance applicable to financial products and services and general corporate compliance. Nacha, a payments industry self-regulatory organization that operates and governs the automated clearinghouse network ("ACH") (over which network most, if not all, of the affected payments under the Rule will be made), has expended considerable resources to create robust compliance systems for industry members that protect consumers. TPPPA Comment at 1, 3, 6; William D. Sullivan, Nacha, Comment Letter at 2–3 (Sept. 13, 2016) (hereinafter "Nacha Comment").[7] For example, the Nacha rules impose a two-attempt limit for failed payments due to insufficient funds, with the two-attempt threshold resetting for each monthly payment in an installment plan. Nacha Comment at 4. Because *Amicus* TPPPA, Nacha, and other similar industry groups may enact or update their rules and recommendations without going through, for example, the APA's notice-and-comment rulemaking process, they are able to amend their rules to combat predatory withdrawal practices far more swiftly than agencies like the CFPB, and they may also consider the impact of rulemaking on the programming requirements and constraints of the various national payments systems. So, if the CFPB were concerned with timely and effective protections for consumers, it would work with *Amicus* TPPPA, Nacha, and other groups to strengthen these existing, workable systems for everyone, *accord* TPPPA Comment at 1; Nacha Comment at 3–4—rather than

[7] Available at https://tinyurl.com/u3be22n3.

saddling the industry with rules like the Payday Lending Rule, *contra* 12 U.S.C. § 5511(b)(3)–(4).

Finally, the Rule does not facilitate consumers' access to, or the innovation of, the consumer-financial market, given the substantial and unnecessary costs it imposes on the payment processing industry and—ultimately—on low-income consumers. *Contra id.* § 5511(b)(5).

The Rule by design imposes significant costs and risks on banks and payment processors. Because of the Rule, banks and payment processors must engage in the costly and time-consuming process of developing entirely new compliance procedures and systems, due to the fundamentally different operating protocols imposed by the Payday Lending Rule. TPPPA Comment at 1–2; *contra* 12 U.S.C. § 5511(b)(5). This is because, under the Nacha rules and other operating protocols, a payment processor's two-attempt threshold resets for each subsequent payment in an installment plan. *Supra* pp.9–10. Under the Rule, in contrast, the liability period for exceeding two withdrawal attempts extends indefinitely. *Supra* pp.8–9. Further, although the Rule applies only to covered loans—primarily payday loans and other short-term, small-dollar consumer loans offered by non-bank lenders, *see* 12 C.F.R. § 1041.3—payment processors *do not know* at the time that they initiate an electronic withdrawal whether they are processing a covered payment or a non-covered consumer bill, and "[t]here is currently

no means" for a payment processor to "identify[ ] payments related specifically to covered loans" under the rule, TPPPA Comment at 5 (emphasis added). Thus, the Rule exposes payment processors to significant liability without any acceptable available solution. *Id*. at 5; *compare* 12 U.S.C. § 5511(b)(5).

Payment processors and banks can only respond to these increased costs and risks in two ways—both of which ultimately harm the low-income consumers who disproportionately rely on the payday loans and other loans covered by the Rule. *Contra* 12 U.S.C. § 5511(b)(5). First, payment processors or banks may charge higher payment-processing fees to covered payday lenders or other issuers of covered loans to recoup these institutions' own costs and risks. *See* TPPPA Comment at 2; *see also* Todd J. Zywicki, *The Case Against New Restrictions on Payday Lending*, 4–5 (George Mason Univ. Mercatus Ctr., Working Paper No. 09-28).[8] Payday lenders will then, in turn, charge higher interest rates to consumers to cover those increased payment-processing costs. Second, payment processors or banks may refuse altogether to process payments for any covered payday lender or other issuer of covered loans, increasing the repayment difficulties for consumers and ultimately triggering more loan defaults and/or reducing the pool of consumers who are willing to take out such loans, given the risks. *See* TPPPA Comment at 2; Donald P. Morgan & Michael R. Strain, *Payday Holiday: How*

[8] Available at https://tinyurl.com/3e24h8z2.

Households Fare After Payday Credit Bans, Fed. Reserve Bank of N. Y. Staff Reports, No. 309 at 26 (Feb. 2008).[9] Either outcome would be disastrous for the low-income consumers who rely on loans covered by the Rule to cover emergencies, rent, utilities, groceries, or gas bills when their paychecks are out of sync with the due dates for these bills. Zywicki, *supra* at 9–10; *see* State Attorneys General, Comment Letter at 2, 26–27, 29 (Oct. 7, 2016);[10] Neil Bhutta, Jacob Goldin, & Tatiana Homonoff, *Consumer Borrowing After Payday Loan Bans*, 59 J. of L. & Econ. 225, 227 (2016).[11]

II. The CFPB's Unconstitutional Insulation From Congress' Appropriations Clause Authority Has Allowed It To Flout Its Congressional Mandate

The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, thereby vesting the People's "immediate representatives" in Congress with the "power over the purse," *The Federalist* No. 58, at 394 (J. Cooke ed. 1961) (J. Madison); *see also* Pet.App.27a–42a. The Clause is part of the Constitution's separation of powers, providing

[9] Available at https://tinyurl.com/2p9687vp.

[10] Available at https://tinyurl.com/yc6nudua.

[11] Available at https://tinyurl.com/4mb3tjn9.

Congress with a check over the Executive Branch—including administrative agencies—by subjecting "the disbursing authority of the Executive department" to Congress' commands. *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 321 (1937); *see also OPM v. Richmond,* 496 U.S. 414, 427 (1990). Congress' "power over the purse," which includes the power to deny "the supplies requisite for the support of government," is the "most complete and effectual weapon" for combating "the *overgrown prerogatives* of the other branches." *The Federalist* No. 58, at 394 (emphasis added); *see* Resp'ts Br.11–15.

The CFPB's unprecedented funding mechanism circumvents the Appropriations Clause, unconstitutionally insulating the CFPB from Congress' oversight and emboldening it to pursue its own "overgrown prerogatives." *The Federalist* No. 58, at 394. Three features of the CFPB's funding mechanism achieve this unconstitutional result. Resp'ts Br.15–16. First, the CFPB may collect directly from the Federal Reserve "the amount determined by the Director to be reasonably necessary" for the agency's activities each year, up to an almost $600 million cap (now almost $750 million, adjusted for inflation), 12 U.S.C. § 5497(a)(1)—and these "funds derived from the Federal Reserve . . . shall not be subject to review by the Committees on Appropriations," *id.* § 5497(a)(2)(C); Resp'ts Br.16–19. Second, the CFPB can continue this self-funding in perpetuity unless prohibited by Congress and the President, rather than receiving funding each year

upon the *agreement* of Congress and the President. Pet.App.33a, 36a n.14; Resp'ts Br.19–21. Third, the CFPB can use its self-collected funds in furtherance of any of "its duties and responsibilities," as it alone deems fit. 12 U.S.C. § 5497(c)(1); Resp'ts Br.22–23.

If this Court correctly declares that this funding structured is unconstitutional and provides a meaningful remedy, then the CFPB will finally become accountable to Congress. The CFPB would have to approach Congress for the appropriations necessary for its regulatory activity. That, in turn, would give Congress an actionable, constitutional opportunity to review the CFPB's actions and measure its compliance with Congress' express purpose and objectives for this agency. *See* 12 U.S.C. § 5511(a)–(b). And if Congress deems that the CFPB has unfaithfully pursued its congressional objectives in favor of the CFPB's own "overgrown prerogatives," *The Federalist* No. 58, at 394, either House of Congress could choose not to appropriate further funds to CFPB, *see* U.S. Const. art. I, § 9, cl. 7—unlike the prevailing regime now, *see* 12 U.S.C. § 5497, which requires both Houses to pass a statute that cuts off the CFPB's self-funding, either with the support of the President or with veto-override-sized majorities.

III. A Remedy That Applies Retroactively Only To Currently Challenged CFPB Actions, Including The Payday Lending Rule, Is A Measured Approach To Addressing The Appropriations Clause Violation Here

If this Court properly concludes that the funding structure for the CFPB violates the Appropriations Clause, *supra* Part II; Resp'ts Br.11–43, it must then determine the appropriate remedy for that constitutional violation, *see, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021). The Solicitor General's proposed remedy is contrary to this Court's case law and is entirely inadequate. *Infra* Part III.A. *Amicus* TPPPA respectfully submits that this Court apply its Appropriations Clause holding retroactively to the Payday Lending Rule itself—thereby vacating that Rule—and to CFPB actions or rules currently subject to challenge in pending cases. *Infra* Part III.B. This Court should not apply its holding to other prior CFPB actions or rules, which are not subject to current challenge in the courts. This sensible, measured approach fully remedies the Appropriations Clause violation in this case (as well as other pending cases) and secures Congress' oversight over CFPB going forward, while avoiding the significant destabilization that may result from threatening all prior CFPB actions and rules.

A. The Solicitor General's Proposed Remedy Is Contrary To This Court's Case Law And Is Entirely Inadequate

Respondents have powerfully explained that because the CFPB promulgated the Payday Lending Rule using a funding mechanism that violates the Appropriations Clause, the Court should vacate the Rule. Resp'ts Br.46–52; *accord infra* Part III.B. The Solicitor General, however, argues that this Court should decline to vacate the Rule even if it concludes that the CFPB's statutory funding mechanism is unconstitutional under the Appropriations Clause. Pet'rs Br.38–48. This Court should reject the Solicitor General's remedial suggestions.

This Court cannot save the Payday Lending Rule through a severability analysis, Resp'ts Br.43–45, contrary to the Solicitor General's claims, Pet'rs Br.39–42. That is because the CFPB's statutory funding mechanism has three interrelated flaws: it is "self-actualizing" and "double-insulated" from Congress, it is "perpetual," and it funds CFPB's "capacious portfolio." Resp'ts Br.44 (quoting Pet.App.33–37a & n.14); *supra* Part II. This Court cannot sever any part of these enmeshed, unconstitutional features, as that would require the Court to "re-write" this funding statute from the ground up. *Seila Law LLC v. CFPB,* 140 S. Ct. 2183, 2211 (2020). For example, to even attempt to "cure" these constitutional defects, the Court would have to specify the amount of funds CFPB may receive, when

it may receive them, and for what agency operations they may be used. Resp'ts Br.44–45. Relatedly, severing any portion of the CFPB's unconstitutional funding mechanism is also not available because there are many "possible ways" that Congress could constitutionally fund the CFPB, *Randall v. Sorrell,* 548 U.S. 230, 262 (2006) (plurality op.), with no one way being the natural choice, Resp'ts Br.45. Finally, the Appropriations Clause context makes any attempt to sever CFPB's statutory funding structure especially improper, since the Appropriations Clause also bars judicial orders for Congress to expend unauthorized federal funds. Resp'ts Br.45 (citing *OPM*, 496 U.S. at 426).

Contrary to the Solicitor General's arguments, Pet'rs Br.42–48, this Court ordering vacatur of the Payday Lending Rule is appropriate and justified in all other respects, Resp'ts Br.46–51. The CFPB had no authority to promulgate the Rule without a valid appropriation from Congress, Resp'ts Br.46–47, and so the proper remedy is to vacate the Rule—including to continue incentivizing parties to raise separation-of-powers challenges to such unlawful executive action, Resp'ts Br.47–48 (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018)). And while the Solicitor General claims that vacatur is not needed because Congress empowered the Executive to take action against officials who have unlawfully expended funds, Pet'rs Br.43–44, that does not supplant the vacatur remedy for private parties, and it would provide no

meaningful relief for the regulated parties injured by the lawless executive action here, Resp'ts Br.48–49.

The Solicitor General's spaghetti-against-the-wall invocation of various doctrines from far-flung areas—such as qualified immunity, the exclusionary rule, and the *de facto* validity doctrine, Pet'rs Br.45–47—is a nonstarter. Under the doctrine of qualified immunity, officers are shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under the exclusionary rule, this Court will not exclude evidence obtained in violation of the Fourth Amendment where the "costs" of exclusion "outweigh" the "benefits." *Hudson v. Michigan,* 547 U.S. 586, 594 (2006) (citation omitted). Those are completely different situations than the remedial question here: whether to vacate an unconstitutional agency rule that is the very object of the challenge in the case before the Court. And this Court repudiated the *de facto* validity doctrine in *Ryder v. United States*, 515 U.S. 177, 184 (1995). *See* Resp'ts Br.49.

Finally, the Solicitor General argues that this Court invalidating all CFPB rules and actions would cause significant disruption. Pet'rs Br.47–48. But as *Amicus* TPPPA respectfully offers immediately below, this Court can—and should—avoid such disruption by adopting a measured remedy. *Infra* Part III.B.

B. This Court Should Invalidate The Payday Lending Rule, While Allowing Other Prior CFPB Actions Not Subject To Pending Challenge To Remain In Place

This Court should vacate the Payday Lending Rule and make clear that its holding applies to all other challenges to CFPB actions currently pending on direct review. This Court should further explain that this holding does not apply to currently unchallenged CFPB action, including (but not limited to) those challenges barred by the APA's six-year statute of limitations. This measured approach remedies Respondents' harms without inflicting the costs that would come from retroactively invalidating all prior, currently unchallenged CFPB action.

1. As Justice Souter explained in his controlling opinion in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), "[a]s a matter purely of judicial mechanics," this Court has historically identified three ways in which courts have determined the retroactive or prospective effect of their remedies after announcing a new rule. *Id.* at 535. First, "a decision may be made fully retroactive," which is the historically preferred approach. *Id.* This retroactivity, in Justice Souter's conception, had important limits, such as lawsuits barred by the relevant statute of limitations. *Id.* Second, "there is the purely prospective method," where "a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it

might be applied to conduct or events occurring before that decision." *Id.* at 536. Third, there is the so-called "modified" or "selective" prospective approach, where a court will "apply a new rule in the case in which it is pronounced" and also prospectively to all future cases, but not "to all other[ ] [cases] arising on facts predating the pronouncement," including other cases on direct review. *Id.* at 537.

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), followed *Beam* and still represents this Court's most current, fulsome articulation of its remedial authority when announcing new civil rule. Building on Justice Souter's "controlling" opinion in *Beam*, *Harper*, 509 U.S. at 96–97, *Harper* announced a "normal rule of retroactive application" for this Court, *id.* at 97 (citations omitted), under which new civil decisions will retroactively apply both to the case at bar, as well as to similarly situated cases then-pending on "direct review," *id.* at 94–95. *Harper* "adopted a rule requiring retroactive application of a civil decision," *id.* at 96, that announces a new rule to "all cases still open on direct review," including the case at bar, *id.* at 97; *accord Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995). This "approach to retroactivity," *Harper* explained, flows from the "basic norms of constitutional adjudication" that a federal court may not "disregard current law" in a pending case or "treat similarly situated litigants differently." 509 U.S. at 97 (citations omitted).

Harper disavowed federal courts' authority to issue a "modified" or "selective" prospective remedy. 509 U.S. at 97. Under that now-repudiated approach, courts would apply a newly announced legal rule in criminal decisions prospectively to future defendants and then retrospectively *only* to the defendant in the case before it, to the exclusion of similarly situated defendants with open, ongoing cases on direct review. *See id.*; *Beam*, 501 U.S. at 537 (controlling opinion of Souter, J.). This Court had utilized this approach "during a period in which the Court formulated new [criminal-procedure] rules, prophylactic or otherwise, to insure protection of the rights of the accused," 501 U.S. at 537–38 (controlling opinion of Souter, J.); *Harper*, 509 U.S. at 107–09 (Scalia, J., concurring). That kind of "selective application of new rules" violates the very constitutional requirements that *Harper* sought to protect with the retroactivity norm: not to "disregard current law" in pending cases or to "treat similarly situated litigants differently." 509 U.S. at 97 (citations omitted).

While *Harper* forecloses the "modified" or "selective" prospective remedy, it did not reject the purely prospective remedy. Under that remedy, a new civil decision would have only prospective effect. *See Harper*, 509 U.S. at 97; *Reynoldsville Casket Co.*, 514 U.S. at 752. *Harper* explained that "*[w]hen* this Court applies a rule of federal law to the parties before it," then this Court may not refuse to apply that rule retroactively to other pending cases on direct review. *Harper*, 509 U.S. at 97 (emphasis added). In

other words, "*[w]hen* this Court does not reserve the question whether its holding should be applied to the parties before it," its holding "is properly understood to have followed the normal rule of retroactive application" that *Harper* adopted. *Id.* (citations omitted; emphasis added). So, as *Reynoldsville Casket* later indicated, *Harper* could be read as only foreclosing this Court from "(selectively) permit[ing] the prospective-only application of a new rule of law." 514 U.S. at 753.

Justice Scalia's concurring opinion in *Harper*, unlike the Court's opinion, does clearly and squarely reject the purely prospective remedy approach. Justice Scalia explained that purely "[p]rospective decisionmaking"—which he deemed "the handmaid of judicial activism"—was "quite incompatible with the judicial power." *Id.* at 105–06 (Scalia, J., concurring). At "'common law there was no authority for the proposition that judicial decisions made law *only* for the future.'" *Id.* at 106 (quoting *Linkletter v. Walker,* 381 U.S. 618 (1965)) (brackets omitted; emphasis added). It is "'the province and duty of the judicial department to say what the law *is,*' not what the law *shall be*." *Id.* at 107 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). So, Justice Scalia concluded, this Court may only "determin[e] . . . the existing law [ ] in relation to some existing thing already done or happened," while Congress may "predetermin[e] . . . what the law shall be for the regulation of all future cases." *Id.* (citations omitted);

accord Montgomery v. Louisiana, 577 U.S. 190, 229 & n.* (2016) (Thomas, J. dissenting).

While Justice Souter's controlling opinion in *Beam*, the *Harper* majority, and Justice Scalia's *Harper* concurrence all strongly favor applying a new civil decision retroactively to cases pending on direct review, they leave open to courts the authority to decline to apply that ruling to cases not pending on direct review, including—but not limited to—those cases barred by the relevant statute of limitations. Under such a remedial approach, for example, if a plaintiff successfully challenges a particular regulation based upon a constitutional provision that this Court has not squarely confronted in the past, this remedy would invalidate that regulation as to any party who, like the plaintiff, is negatively affected by it. Going forward, the ruling would also apply to pending challenges to other regulations that share the same constitutional defect as the unconstitutional regulation in the case at bar. The remedy would *not*, however, otherwise operate retrospectively to invalidate additional regulations not currently subject to pending challenges, although those regulations may have the same infirmity.

This remedial approach fits within *Harper*'s approach to retroactivity. *Harper* described its core requirement that a new civil rule's retroactive effect must apply "in all cases still open on *direct review*," since the rule would govern the dispute between the parties regarding the legal effect of events occurring

in the past, as well as the disputes of similarly situated parties with then-pending cases. *See* 509 U.S. at 97 (emphasis added); *Beam*, 501 U.S. at 534–37 (controlling opinion of Souter, J.). "[T]he majority opinion in *Harper* discussed the retroactive application being applied to '*all cases still open on direct review*.'" 2 Rotunda and Nowak's Treatise on Constitutional Law – Substance and Procedure § 13.1(a) at n.13 (5th ed. June 2023 update) (quoting *Harper*, 509 U.S. at 97) (emphasis added). Thus, when a case premised on events predating the announcement of a new rule "was not pending on direct review at the time the [ ] Court decided" that rule, *Harper* permits—but does not require—the retroactive application of that new rule to that case. *Quantum Res. Mgmt., LLC v. Pirate Lake Oil Corp.*, 112 So. 3d 209, 216 & n.3 (La. 2013), *cert. denied sub nom. Haydel v. Zodiac Corp., Ltd.*, 571 U.S. 828 (2013); *see also, e.g.*, *Strelecki v. Okla. Tax Comm'n*, 872 P.2d 910, 917 n.47 (Okla. 1993); Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 Am. J. Comp. L. 37, 50 (2014). Accordingly, a court deciding to limit the retroactive effect of its new civil rule to cases pending on direct review, including but not limited to cases subject to doctrines like "res judicata" and "statutes of limitation," *Beam*, 501 U.S. at 535, 542–43 (controlling opinion of Souter, J.), is permissible under this Court's case law.

This approach also fits squarely within courts' remedial powers more broadly. Federal courts'

remedial power comes from applicable statutes, common-law rules, and traditional equitable principles. *See Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. 320, 326–28 (2015). This includes the principles that remedies must "not unnecessarily infringe on competing interests," *United States v. Morrison,* 449 U.S. 361, 364 (1981); should take account of "the public interest" and "the balance of equities," *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008); and should be "no broader than necessary to achieve [the] desired goals," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010). In the appropriate circumstances, announcing a remedy that retroactively applies to challenges pending on direct review resolves the dispute between the parties before the court, applies to all similarly situated parties, yet limits the disruption to the public or the infringement on competing interests that may result from a broader retroactive application.

2. This case is an ideal candidate for the measured remedy described above. This Court should apply its Appropriations Clause holding retroactively to the Payday Lending Rule, thereby vacating the Rule as to all regulated parties, while making clear that the ruling applies to all challenges to CFPB action currently pending on "direct review." *Harper*, 509 U.S. at 97. This Appropriations Clause holding would also, of course, apply to all future CFPB actions and rules issued without constitutional appropriations.

And this Court should make clear that its holding does not apply to other prior, currently unchallenged CFPB actions and rules funded by CFPB's statutory funding mechanism—including, but not limited to, situations where the APA's six-year statute of limitations may have run, Resp'ts Br.51 (citing 28 U.S.C. § 2401(a)); *see Beam*, 501 U.S. at 535, 542–43 (controlling opinion of Souter, J.)—in recognition of the enormous reliance costs that such application would inflict on the American economy.

To begin, this Court declaring that CFPB's statutory funding mechanism violates the Appropriations Clause would decide a constitutional issue that the Court has not previously addressed, and so it would raise the question of whether to address the retroactivity of any remedy. *Beam*, 501 U.S. at 534 (controlling opinion of Souter, J.). As the Solicitor General and Respondents generally agree, Pet'rs Br.43; Resp'ts Br.23–24, this case is a constitutional challenge of first impression to an unprecedented statute: the Court has never held that a statute violates the Appropriations Clause, and Congress has never enacted an agency funding mechanism as egregious as the one at issue in the present case. So, while *Amicus* TPPPA agrees with Respondents that CFPB's statutory funding mechanism violates the Appropriations Clause under that Clause's plain text and original public meaning, such a holding from this Court would answer a constitutional question for the first time.

Applying the remedial impact of this ruling in this way proposed here is a measured approach to remedy the Payday Lending Rule's harms, as well as to stop the CFPB's constitutional violations going forward, without upsetting the economy's significant reliance interests on the CFPB's actions and rules.

Under the retroactive component of this proposed remedy, this Court would vacate the Payday Lending Rule, which fully remedies the harms Petitioners have asserted in this case. *See Madsen*, 512 U.S. at 765; *see also Free Enter. Fund*, 561 U.S. at 513. As the Fifth Circuit explained, Petitioners "sued the Bureau on behalf of payday lenders and credit access businesses, seeking an 'order and judgment holding unlawful, enjoining, and setting aside' the Payday Lending Rule." Pet.App.6a. This remedy, therefore, gives Petitioners precisely the relief they have requested. *Id.*

Further, this Court's holding would apply to all future CFPB actions and rules unconstitutionally funded by CFPB's statutory funding mechanism. That ensures that CFPB will be accountable to Congress under the Appropriations Clause going forward, such that CFPB must seek constitutional appropriations from Congress to take action in the future. *See supra* Part II.

This Court should not, however, permit vacatur of any other prior, currently unchallenged CFPB actions or rules, in recognition of the costs that such

application would inflict on the consumer-financial industry and the economy more broadly. *See Morrison,* 449 U.S. at 364; *Winter,* 555 U.S. at 20. As this Court recognized in *Seila,* 140 S. Ct. 2183, vacating all of the CFPB's prior actions "would trigger a major regulatory disruption" and do "appreciable damage to Congress's work in the consumer-finance arena." *Id.* at 2210. That remains true today. *See, e.g.*, *Amici* Br. of the Mortg. Bankers Ass'n, *et al.* at 5–16. As *Amicus* TPPPA explained above, it recognizes that CFPB has taken some important action in the consumer-finance marketplace over its 12-year history. *Supra* p.6.

Notably, this Court's invalidation of the Payday Lending Rule would not cause "regulatory disruption" or "damage to Congress' work in the consumer-finance arena." *Seila Law LLC*, 140 S. Ct. at 2210. The Rule has never gone into effect, Pet.App.5a–6a, thus neither regulated industry nor society more broadly could have any legitimate reliance interests on that Rule. Further, the Rule going into effect would be disastrous for payment processing throughout the Nation, imposing unnecessary costs on consumers. *Supra* Part I. Thus, all considerations of the public interest favor this Court applying its holding retroactively to invalidate the Rule here.

CONCLUSION

This Court should hold that CFPB's statutory funding mechanism violates the Appropriations Clause. This Court should apply that holding both to the Payday Lending Rule itself and to other currently pending challenges to CFPB's actions or rules.

Respectfully submitted,

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