No. 22-448

IN THE
Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,
Petitioners,

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED, ET AL.,
Respondents.

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

MOTION OF THE STATE WEST VIRGINIA AND 26 OTHER STATES TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Under Supreme Court Rules 28.4 and 28.7, the States of West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming move for leave to participate in oral argument as *amicus curiae* supporting Respondents. The *Amici* States ask that they be allowed ten minutes of argument time, with the remaining twenty minutes allocated to Respondents. Petitioners did not respond to a request for their position on the motion, while Respondents oppose.

In this case, the Court will consider whether an indefinite delegation of funding authority to the Consumer Financial Protection Bureau, see 12 U.S.C. § 5497, is consistent with the Constitution's Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7. In the decision below, the Fifth Circuit concluded that the CFPB's funding structure violated the Clause. And in their amicus brief, the *Amici* States explain some of the reasons why the Fifth Circuit got it right—and further describe some of the painful consequences that have followed from giving the CFPB unilateral spending authority.

The Court should permit the *Amici* States to expound on those points at oral argument. While their position complements Respondents' arguments, the *Amici* States bring specific perspectives and information that would not otherwise be available to the Court.

First, the States bring special expertise in the consumer-protection field that Respondents, as regulated parties, do not share. As this Court has recognized before, consumer protection is the States' traditional domain. See *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Likewise, circuit courts have repeatedly recognized how the consumer-protections laws—particularly in the banking field—"are squarely within the ambit of the states' historic powers." *Greenwood Tr. Co.* v. *Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992); see also, *e.g.*, *SPGGC, LLC* v. *Blumenthal,* 505 F.3d 183, 194 (2d Cir. 2007) ("[C]onsumer protection is a field traditionally subject to state regulation."); *Aguayo* v. *U.S. Bank,* 653 F.3d 912, 917 (9th Cir. 2011) (same). Given how the States have engaged with consumer-protection issues for so long, they have a special understanding of how an unbounded CFPB can damage the consumer-financial markets—and impair the States' own abilities to regulate those markets. The *Amici* States can explain why congressional appropriations preserve the States' voice in this traditional field. See, *e.g.*, Mot. of the State of Ind. to Participate in Oral Argument as *Amicus Curiae* and for Divided Arg. at 3, *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, 143 S. Ct. 1444 (2023) (No. 21-806) (arguing, in successful motion oral argument time by state amici, that amici could explain "the dynamics that arise between state and federal agencies in the administration of [federal] programs" and how certain actions "affect those dynamics," "undermine the political accountability of state and federal officials alike," and fail to "safeguard States' capacities to function as independent sovereigns"). The private Respondents cannot provide that fuller picture by themselves.

Second, the States bring special expertise in the banking and financial services realm, too. Other than the federal government—which will, of course, already be represented at argument—no entity beyond the States can bring a regulator's perspective to this question. In our "dual banking system," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 15 n.7 (2007), States work as partners with the federal government to regulate the safety-and-soundness of the nation's banks. And the state role is substantial: "State regulators charter and supervise approximately 3,981 banks with more than $7.15 trillion in combined assets, representing 79% of all U.S. banks." *Keeping Up With the Codes—Using AI For Effective RegTech, Hearing before H. Fin. Servs. Comm. A.I. Task Force of the H. Comm. on Fin. Servs.*, 117th Cong. 2 (2022) (testimony of Melanie Hall, Comm'r, Mont. Div. of Banking & Fin. Institutions), *available at* https://bit.ly/44zOsbz. State laws and regulations apply extensively even to federally chartered institutions. See *Atherton* v. *FDIC*, 519 U.S.

213, 223 (1997). At the same time, "state banking entities are the main nonbank fintech regulators." Kate Buckley, *Should Nonbank Fintechs Have Access to the Fed's Internal Systems?*, 39 REV. BANKING & FIN. L. 761, 770 (2020); see also Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739, 1770 (2021) ("The power to engage in the licensing and regulation of nonbanks comes from the inherent police powers of the states.").

Third, Congress recognized the unique importance of States' voices in this context when it enacted the Dodd-Frank Consumer Protection Act—the law that's at issue here. Congress specifically empowered state Attorneys General to enforce the Act (with certain exceptions). See 12 U.S.C § 5552(a). Congress also took special care to preserve state authority over areas that might otherwise fall under the CFPB's jurisdiction. See *id.* § 5552(d). Even the Bureau has acknowledged that it "is not the only enforcer of these laws," as "Congress provided States with their own Bureau enforcement authority." Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31,940, 31,940-41 (May 26, 2022). And here, *Amici* States read the Act's funding provisions differently from the Bureau. Compare States.Amici.Br.2 ("[T]he Bureau does not receive appropriations."), with CFPB.Br.12 ("Section 5497 more than satisfies the classic elements of an appropriation.").

In the past, the Court has granted States argument time when, as here, they take a differing view from the federal government of a statute that both States and the federal government enforce. See, *e.g.*, *Leegin Creative Leather Prod., Inc.* v. *PSKS, Inc.*, 551 U.S.

877, 883 (2007) (granting New York argument time in Sherman Act case); *United States* v. *Atl. Rsch. Corp.*, 551 U.S. 128, 132 (2007) (granting Washington argument in Comprehensive Environmental Response, Compensation, and Liability Act case).

Fourth, the *Amici* States highlight additional problems that result from the CFPB's structure aside from the injuries for which Respondents seek relief. Most obviously, as the *Amici* States explained in their brief, this case is about both vertical and horizontal separation of powers. An unbounded CFPB ultimately strikes at the States' powers over the financial markets. And "[t]he paradigmatic case warranting state amicus participation is where the federal government and amici states disagree on how power should be divided between them." Dan Schweitzer, *The Modern History of State Attorneys Arguing As Amici Curiae in the U.S. Supreme Court*, 22 GREEN BAG 2D 143, 153 (2019). Beyond that, the States stand in the stead of their own consumers. States have a strong interest in protecting their consumers and residents. See *Pilgrim* v. *Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011). They "have a fundamental right to protect their citizens and prevent harmful conduct from occurring in their jurisdictions[,] [and] [t]he interests of the states and the Bureau may not always be completely aligned." *Pennsylvania v. Navient Corp.*, 967 F.3d 273, 286 (3d Cir. 2020). In other words, if the CFPB is going to take up the mantle of consumer defender, see, *e.g.*, Pet.48, then the States should be permitted to explain why their consumers actually suffer when the agency is not kept sufficiently accountable. And although Respondents can speak to some of these consumer impacts, their perspective is necessarily shaped by "private interests in the outcome" that the States do not carry. *Universal Oil Prod. Co.* v. *Root Ref. Co.*, 328 U.S. 575, 581 (1946).

This Court has often granted argument time to States and other sovereigns acting as amici. See, *e.g.*, *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, 143 S. Ct. 300 (2022) (Indiana); *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 783 (2019) (Illinois); *McGirt v. Oklahoma*, 140 S. Ct. 2562 (2020) (Creek Nation); *Carpenter v. Murphy*, 139 S. Ct. 398 (2018) (Creek Nation); *Sturgeon v. Frost*, 139 S. Ct. 357 (2018) (Alaska); *Gamble* v. *United States*, 139 S. Ct. 582 (2018) (Texas); *ONEOK, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 884 (2014) (Kansas); *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 844 (2006) (New York); *City of Littleton* v. *Z.J. Gifts D4, LLC*, 124 S. Ct. 1625 (2004) (Ohio); *City of Boerne* v. *Flores*, 117 S. Ct. 762 (1997) (Ohio). In fact, "[s]ince 1960, the Court has granted about 41% of amicus oral argument motions made by states and local governments." Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 700 (2021). Considering the interests at stake, we respectfully urge the Court to follow that practice here.

For all these reasons, the Court should grant the *Amici* States' request for ten minutes of time at oral argument. Doing so would provide the Court with additional helpful views on the issues at stake. And apportioning time in this way would not materially prejudice anyone; Respondents will retain the majority of their time, and this Court routinely grants time at argument to government amici who seek to support the private parties' positions. It would only ensure that the Court has the most complete information as it reaches a decision on this issue of grant importance.

Respectfully submitted,

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