No. 17-184

In The
Supreme Court of the United States

GREAT PLAINS LENDING, LLC,
AND PLAIN GREEN, LLC,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF OKLAHOMA, INDIANA, AND NEVADA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a generally applicable federal statute, which is silent as to its applicability to Indian Tribes, should nevertheless be presumed to apply to Tribes.

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INTERESTS OF *AMICI*[1]

Amici curiae are the States of Oklahoma, Indiana, and Nevada. Without statutory authority, the Consumer Financial Protection Bureau (CFPB) is attempting to expand its jurisdiction to online lenders operated by tribal sovereigns. As part of this effort, the CFPB now claims to have jurisdiction to regulate States, as well. *Amici* States offer a number of financial services that could be swept up in the CFPB's regulatory gambit. This includes student loan programs, credit unions, and other endeavors that will be imperiled if the decision below is allowed to stand and proliferate. The States therefore have a very good reason to push back against the CFPB's overreach, as it threatens our institutions and diminishes our sovereignty as well as that of other actors in our federal system.

SUMMARY OF ARGUMENT

The CFPB threatens our government's separation of powers – both horizontal and vertical.

First, the very existence of the CFPB represents a serious violation of the horizontal separation of the powers of the federal government. As a panel of the D.C. Circuit has already held, the concentration of power in the hands of one unelected individual in the Executive Branch, unaccountable to the elected head

[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

of that Branch or to the Legislative Branch, violates the horizontal separation of powers. This case is emblematic of the abuses of power that can occur when it is impermissibly concentrated in one man.

Second, and more directly, this case is about the vertical separation of powers, because the CFPB has claimed – without express statutory authority – that it may regulate both sovereign States and federally recognized Indian tribes. Despite this threat to our structure of government, the Ninth Circuit disregarded this Court's command that federal statutes should not be construed to apply to sovereign entities, such as States and Indian tribes, absent a clear statement from Congress. The Ninth Circuit's decision deepens a circuit split over an important question that this Court has acknowledged is unanswered. *Amici* States face the prospect of the CFPB – and potentially other federal agencies – asserting jurisdiction over States and their agencies without clear congressional authorization. This would severely damage the vertical separation of powers.

ARGUMENT

In FEDERALIST NO. 47, James Madison wrote that the "accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."[2] The vertical and horizontal separation of

[2] THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed. 1961).

powers were crafted to avoid such a result. To the Framers, the separation of powers and the system of checks and balances it enabled "were more than just theories"; rather, "[t]hey were practical and real protections for individual liberty in the new Constitution."[3] As a result, this Court "has repeatedly invoked the 'separation of powers' and 'the constitutional system of checks and balances' as core principles of our constitutional design."[4]

Since its inception on July 21, 2010, the CFPB has been fraught with controversy precisely because of its clashes with the separation of powers. The CFPB was explicitly designed to be an "independent" bureaucratic agency – a questionable enough proposition, constitutionally[5] – but with a twist that makes things far more problematic: Unlike most other independent agencies, the CFPB is "headed not by a multi-member commission but rather by a single Director."[6] And because the CFPB is an independent entity, the President can only remove this Director for cause.[7]

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[3] *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring in the judgment).

[4] *Id.* at 1215.

[5] *See, e.g., Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216, 1219 (1983) (White, J., dissenting) ("[T]he independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch. I cannot believe that the Constitution commands such a result.").

[6] *PHH Corp. v. CFPB*, 839 F.3d 1, 6-7 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017).

[7] *Id.* at 5-6.

As a panel of the D.C. Circuit has recently observed, current CFPB Director Richard Cordray: (1) "possesses more unilateral authority . . . than any single commissioner or board member in any other independent agency in the U.S. Government"; (2) "enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President"; and (3) "possesses enormous power over American business, American consumers, and the overall U.S. economy."[8] More specifically,

> [t]he Director unilaterally enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices. The Director alone decides what rules to issue; how to enforce, when to enforce, and against whom to enforce the law; and what sanctions and penalties to impose on violators of the law. . . . That combination of power that is massive in scope, concentrated in a single person, and unaccountable to the President triggers [constitutional concerns].[9]

On top of all that, the CFPB also controls its own budget and is therefore immune from Congress checking it with the purse.[10]

Last fall, after finding that the CFPB's structure "represents a gross departure from settled historical practice," the D.C. Circuit panel struck down the

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[8] *Id.* at 6-7.

[9] *Id.* at 7.

[10] *See* 12 U.S.C. § 5497(a)(1)-(2).

requirement that the CFBP director be fired "for cause" as unconstitutional.[11] The "concentration of enormous executive power in a single, unaccountable, unchecked Director," Judge Kavanaugh wrote, "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency."[12]

The hubris that necessarily follows such an accumulation of power is on full display in the present case. Not content with the enormous clout it already claims over individual citizens and corporate entities, the CFPB has now unilaterally sought to exert its will over sovereign States and tribes. Under the Consumer Financial Protection Act (CFPA), "State[s]" are to be co-regulators with the CFPB.[13] The CFPA defines "State" to include sovereign States, such as *amici*, as well as Indian tribes and their arms, including Petitioners.[14] Elsewhere, the CFPA grants the CFPB the authority to investigate "any person" who provides consumer financial products or services or violates federal consumer financial laws.[15] The term "person" is defined as "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust,

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[11] *PHH Corp.*, 839 F.3d at 8.

[12] *Id.*

[13] 12 U.S.C. § 5495; *see also* 12 U.S.C. §§ 5493(c)(2)(B), 5493(e)(1)(B)-(C), 5493(g)(3), 5512(c)(6)-(7), 5514(b)(3), 5515(b)(2), 5515(e)(2), 5551(a)-(b), 5552(a).

[14] 12 U.S.C. § 5481(27).

[15] 12 U.S.C. § 5562(c)(1).

estate, cooperative organization, or other entity."[16] Notably absent from this list, of course, are States and tribes.

As part of a series of legal rules designed to protect and promote federalism,[17] this Court has held that, absent a clear statement from Congress, federal statutes do *not* subject sovereign entities to regulation.[18] This Court has also held that ambiguous language is to be interpreted in favor of Indian tribes.[19] But the CFPB is not exactly known for respecting well-established legal rules.[20] Instead, ignoring this Court's clear guidance and the plain text of the statute, the CFPB interpreted "person" under the CFPA as *including* both States and

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[16] 12 U.S.C. § 5481(19).

[17] *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) (abstention); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (presumption against preemption); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (choice of law).

[18] *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000).

[19] *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767-68 (1985); *cf. Wyeth v. Levin*, 555 U.S. 555, 565 (2009) (requiring clear statement before interpreting federal law to preempt State law).

[20] *See PHH Corp.*, 839 F.3d at 8 ("[T]he single-Director structure of the CFPB represents a gross departure from settled historical practice."); *see also* Ronald L. Rubin, *The Tragic Downfall of the Consumer Financial Protection Bureau*, NATIONAL REVIEW ONLINE, Dec. 21, 2016, *available at* http://www.nationalreview.com/article/443227/consumer-financial-protection-bureau-tragic-failures ("For two decades, HUD had interpreted the law and provided guidance. . . . Cordray's decision was stunning: HUD's interpretation was wrong.").

Indian tribes, such that the CFPB could send extensive civil investigative demands to Petitioners and *amici*.[21]

The stated purpose of the CFPB's invasive requests was a vague and open-ended fishing expedition: to determine "whether small-dollar online lenders or other unnamed persons have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products" in violation of federal law.[22] And the request for documents was expansive: The CFPB demanded "all contracts and agreements with partner companies; all marketing or solicitation materials; all corporate filings; and all policies and procedures for handling consumer inquiries, consumer complaints, refunds, debt collection, consumer payments, and the like."[23] The costs of complying with these demands are substantial, but they pale in comparison to the specter of fines the unchecked CFPB is authorized to impose for non-compliance: up to $1,000,000 per violation, per day.[24]

The CFPB's insulation from the political branches means that the judiciary is often the only check on its power. But rather than ensure that the CFPB strictly

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[21] Brief of Petitioner-Appellee CFPB at 30, *CFPB v. Great Plains Lending, LLC*, No. 14-55900 (9th Cir.) ("As an initial matter, states and state-owned companies are neither exempt from regulation under the CFPA, nor exempt from complying with the Bureau's CIDs.").

[22] Pet. 7 (quoting civil investigative demands).

[23] Pet. 7.

[24] 12 U.S.C. § 5565(c)(2)(C).

adheres to its statutory bounds, the Ninth Circuit chose to allow the CFPB to expand its jurisdictional reach, all while elevating Ninth Circuit precedent over this Court's rulings. This mistake is detailed sufficiently in the Petitioners' brief.[25] What matters most to the *amici* States is that, in its briefing and at oral argument before the Ninth Circuit, the CFPB claimed that it had jurisdiction over the States for the same reason it has jurisdiction over the tribes.[26] If this is correct, States operate a number of agencies that the CFPB may now regulate, investigate, and coerce in the same way the CFPB is investigating Petitioners as arms of Indian tribes.[27] Allowing the CFPB – an independent, unchecked, and virtually unaccountable bureaucratic agency – to regulate States in this manner would significantly alter the balance of power in our federalist system of government. It is certain Congress did not implement so fundamental a change through such oblique statutory language.[28]

The CFPB's decision to unleash the full panoply of its regulatory armory against tribes, States, and their agencies is without textual support, bad policy, and

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[25] Pet. 1-22.

[26] *See supra* n.21.

[27] The Ninth Circuit declined to address whether the CFPB could regulate States. Pet. App. 17a n.5. But it is clear that if the CFPB is allowed to go after Indian tribes, States are next on the Bureau's list.

[28] *Cf. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.").

contrary to our system of federalism and the separation of powers. Unfortunately, five federal Courts of Appeals have interpreted generally applicable statutes to cover sovereign entities without express language authorizing such coverage, ignoring this Court's rule of statutory interpretation requiring the opposite.[29] In contrast, only two Courts of Appeals have honored this Court's precedent and declined to assume that generally applicable statutes apply to Indian tribes in the absence of clear statutory intent.[30] This is a significant circuit split requiring this Court's resolution.

This Court has also recognized the need for more clear and robust precedent in this area of law. In *New York v. United States*, the Court observed that the majority of cases "interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws" and acknowledged that this "Court's jurisprudence in this area has traveled an unsteady path."[31] Likewise, in

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[29] Pet. App. 1a; *NLRB v. Little River Band of Ottawa Indians Tribal Gov.*, 788 F.3d 537 (6th Cir. 2015); *Fla. Paraplegic, Assoc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989).

[30] *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

[31] 505 U.S. 144, 160 (1992); *see, e.g.*, *Maryland v. Wirtz*, 392 U.S. 183 (1968) (applying Fair Labor Standards Act to States); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz*); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Usery*); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991) (declining to extend Age Discrimination Employment

United States v. Lopez, the Court remarked that with respect to federalism, "there seem[s] to be much uncertainty respecting the existence, and the content, of the standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers."[32]

This case is a good opportunity to provide a more vigorous judicial bulwark protecting federalism and the separation of powers. Decisions like that of the Ninth Circuit chip away at sovereignty, and they do so without any clear instruction from Congress. Furthermore, *amici* States are especially alarmed that the CFPB claims jurisdiction over States and State entities in the same breath as its claims authority over

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Act to State judges); *South Carolina v. Baker*, 485 U.S. 505 (1988) (holding that Tax Equity and Fiscal Responsibility Act applies to States and does not violate Tenth Amendment); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (holding that Age Discrimination Employment Act applies to State and local government employees and does not violate Tenth Amendment); *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678 (1982) (holding that Railway Labor Act applies to State-owned railroad and does not violate Tenth Amendment); *Fry v. United States*, 421 U.S. 542 (1975) (holding that Economic Stabilization Act applied to State and local government employees and does not violate Tenth Amendment); *New York v. United States*, 326 U.S. 572 (1946) (holding that 1932 Revenue Act applies to State governments and does not violate Tenth Amendment).

[32] 514 U.S. 549, 575 (1995).

Indian tribes.[33] Such unchecked assertion of power requires this Court's attention and review.

CONCLUSION

For these reasons, this Court should grant Petitioners the writ of certiorari.

Respectfully submitted,

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[33] To be clear, *amici* do not mean to imply that States and tribes enjoy identical sovereignty, as the two are not co-extensive. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 165 (1980) (Brennan, J., concurring in part and dissenting in part) ("While they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.").