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STATE ENFORCEMENT AS A FEDERAL LEGISLATIVE TOOL

ROHIT CHOPRA* & SETH FROTMAN†

ABSTRACT

Enacted in the wake of the 2008 financial crisis, the Consumer Financial Protection Act ("CFPA")—which was Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")—made sweeping changes to the federal framework for consumer financial protection. This law created the Consumer Financial Protection Bureau ("CFPB") and included a broad range of new protections for consumers, as well as a wide variety of tools for law enforcement and regulators to enforce the Act's provisions.[1] Among the most important features of the CFPA is its embrace of cooperative federalism. Specifically, section 1042 of the CFPA empowers states to enforce federal consumer financial protections against entities covered by the CFPA,[2] and section 1044 safeguards state efforts to build on federal protections.[3]

This article examines the use of the CFPA by state law enforcement agencies. Our analysis finds that all fifty states have collectively participated in about fifty total actions using this authority across the country, regardless of the political party of state officials.[4] We also find that this cooperative federalism model and the use of the CFPA by states has been successful in ensuring robust protections for consumers, complementing in several significant ways federal enforcement of the federal consumer financial protection laws, as well as private enforcement by individual citizens of many of those laws. Given this success, state law enforcement officials may wish to utilize this tool even more in the coming years. In turn, the article highlights the power of cooperative federalism to ensure the comprehensive enforcement of federal law, a lesson that lawmakers could carry into more policy areas.

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* *Director, Consumer Financial Protection Bureau*

† *General Counsel, Consumer Financial Protection Bureau.* The authors wish to acknowledge the significant assistance they received in the drafting process from Ben Kaufman and Brad Lipton, Nick Kime, Colin Wilson, Veronica Spicer, and Kristin Bateman at the CFPB.

[1] *See infra* Part II Section C.

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1042, 12 U.S.C. § 5552.

[3] *See* 12 U.S.C. § 25b.

[4] *See infra* Part III Section A. For reference, the CFPB itself filed about 350 enforcement actions in total from its founding in 2011 through January 2024. *See* CFPB, *Enforcement by the Numbers*, https://www.consumerfinance.gov/enforcement/enforcement-by-the-numbers/ [https://perma.cc/2RSE-VNGY].

I. INTRODUCTION

> The Commission concludes that . . . the Office of the Comptroller of the Currency and the Office of Thrift Supervision preempted the applicability of state laws and regulatory efforts to national banks and thrifts, thus preventing adequate protection for borrowers and weakening constraints on this segment of the mortgage market.[5]

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") into law.[6] This legislation marked the "most far reaching Wall Street reform in history."[7] Title X of this new law, the Consumer Financial Protection Act ("CFPA"), made wholesale changes to the federal framework for consumer financial protection.[8]

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[5] FIN. CRISIS INQUIRY COMM'N (FCIC), THE FINANCIAL CRISIS INQUIRY REPORT 125–26 (2011).

[6] Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, Pub. L. No. 111-203 (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

[7] *Wall Street Reform: The Dodd-Frank Act*, OBAMA WHITE HOUSE (last visited Sept. 29, 2024), https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/UYF7-KUCY].

[8] *See* Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, §§ 1001–1100H (codified at 12 U.S.C. §§ 5301–5641).

Many of these reforms addressed the federal regulators that had previously been charged with consumer protection and the rules they had made to carry out this role, which had not prevented—and indeed may have helped cause—the financial crisis and the massive harms it inflicted on consumers.[9] Perhaps the most visible example of reforms along these lines was the creation of the Consumer Financial Protection Bureau ("CFPB")—a "transformative" new federal consumer financial regulator headquartered in Washington, D.C.[10] Yet, notwithstanding the focus on, and importance of, these changes with respect to federal regulators, one of the CFPA's most innovative and important features involves *state* law enforcement and regulators. This article tells that story.

In particular, this article examines the wide, bipartisan success that state law enforcement has had in bringing claims against consumer finance companies under the CFPA, which gives states the ability to enforce the protections of the federal consumer financial laws,[11] while also providing important safeguards against federal preemption of state law.[12] In doing so, this article highlights the power of cooperative federalism to ensure the robust and comprehensive combatting of consumer harm. This regime has also complemented private enforcement of some of these consumer protections by individual citizens, especially as this private enforcement has been curtailed in some respects.[13]

Academic literature points to several different congressional rationales behind provisions that specifically allow for dual enforcement of federal law by the federal government and states, which has been concentrated in the areas of consumer protection and antitrust.[14] These motivations include a desire to overcome limitations inherent in reliance on only federal enforcers, such as federal agencies having limited resources that states can complement;[15] a perception of increased consumer harm throughout the mid-20th century, necessitating an enhanced response;[16] and a hope that multi-state actions could

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[9] *See* FCIC, *supra* note 5, at 75–80.

[10] *Fact Sheet: President Obama Announces Final Rules to Better Protect Service Members from Financial Abuse on Fifth Anniversary of Signing Wall Street Reform into Law*, OBAMA WHITE HOUSE (July 21, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/21/fact-sheet-president-obama-announces-final-rules-better-protect-service [https://perma.cc/BYV6-CUAA].

[11] *See* 12 U.S.C. § 5552; *see also* Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940 (May 26, 2022) (explaining state authority to address violations of the federal consumer financial laws committed by "covered persons" and "service providers" as violations of the CFPA).

[12] 12 U.S.C. § 25b.

[13] *See infra* Part II Section A.

[14] *See* Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 55 (2011); *see generally* Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd–Frank*, 99 IOWA L. REV. 115 (2013); Arthur E. Wilmarth, Jr., *The Dodd–Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893 (2011).

[15] *See* Widman & Cox, *supra* note 14, at 58.

[16] *See id.* at 78.

address cross-state misconduct that would otherwise require successive actions across individual states.[17] Scholars have also noted that dual enforcement allows states to tailor the application of law to local customs, markets, and institutions;[18] to permit states to "experiment";[19] and to more effectively deliver monetary recoveries to consumers.[20]

As demonstrated in the examples discussed below, by giving authority to a decentralized group of law enforcement officials, Congress in section 1042 of the CFPA ensured that consumer financial protection is far more comprehensive and effective than it would have been if only regulators at the federal level had authority to address violations of the federal consumer financial laws. Specifically, enforcement at the state level (as well as by territories and tribes) has enabled law enforcement and regulators with localized information and/or unique, state-specific priorities to address emerging consumer financial risks and harms to vulnerable communities that have not yet, or may never, become a subject of significant federal action.[21]

Additionally, in granting states enforcement authority via section 1042, Congress implicitly acknowledged that harms that emerge in one state are no longer likely to remain localized, such that empowering states to address harms early is a matter of *federal* consumer protection. The nationwide consumer financial protection framework has also benefitted from state action against actors and with respect to types of conduct that may have otherwise gone unaddressed under state law (including where state law is preempted) or by private cases brought by individual citizens.[22] And section 1042 has provided states with remedies and other advantages that may not be available under state law and can be especially impactful in multistate litigation.[23] The dual enforcement of the protections of the federal consumer financial laws by state and federal officials has also led to helpful development of the law—providing protection for consumers and regulatory clarity for financial institutions—by providing more interpretations of the law by courts and regulators.[24] Finally, by providing safeguards against federal preemption, the CFPA preserves states' ability to experiment with stronger protections or remedies as the states deem appropriate.[25]

Section 1042's cooperative federalism regime is arguably the most significant instance of Congress specifically empowering states to play such an important role in the enforcement of federal consumer protections, building on similar provisions in a range of prior consumer protection statutes on narrower subject matters. In light of section 1042's demonstrated effectiveness, this

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[17] *See id.* at 58.

[18] *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 679–81 (2003); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1698–700 (2001).

[19] *See* Weiser, *supra* note 18, at 1701–03.

[20] *See* Calkins, *supra* note 18, at 691–93.

[21] *See infra* Parts III.B.1–2.

[22] *See* discussion *infra* Parts III.3–4.

[23] *See* discussion *infra* Part III.B.5.

[24] *See* discussion *infra* Part III.B.7.

[25] *See* Weiser, *supra* note 18; *infra* notes 108–111 and accompanying text.

regime could serve as a model to be adopted in more areas of law. Private and dual federal-state enforcement can be used to create a comprehensive enforcement framework that may have relevance across policy areas subject to emerging regulation, such as data privacy, artificial intelligence, and more.

A. Overview of Section 1042 of the Consumer Financial Protection Act

To be sure, states have long played an important role in the enforcement of certain consumer financial protections.[26] For example, states have prohibitions on unfair and deceptive practices under their own laws,[27] and before the CFPA, state regulators and law enforcement also had some, albeit often limited, ability to enforce provisions of certain federal consumer financial laws.[28] However, the period before 2008 was marked by the federal government's increasing sidelining of state law enforcement, regulators, and consumer protection legislation. In particular, it has been well-documented how the Office of the Comptroller of the Currency ("OCC") and Office of Thrift Supervision ("OTS")[29] aggressively preempted state efforts to address

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[26] *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x; Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d); Truth in Lending Act, 15 U.S.C. § 1640(e); *see also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 38 (1980) ("[B]oth as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. . . . [S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities").

[27] *See generally* Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NAT'L CONSUMER L. CTR. ("NCLC") (Mar. 1, 2018), https://www.nclc.org/resources/how-well-do-states-protect-consumers/ [https://perma.cc/9MWR-FDV9]. States began adopting these protections in the 1960s after Paul Rand Dixon, the Chair of the Federal Trade Commission ("FTC"), began urging states to enact laws that reflected the federal FTC Act. *See* Paul Rand Dixon, Fed. Trade Comm'n, *Remarks Before Public Seminar of the Fla. Dep't of Agriculture and Consumer Servs.*, at 3–6 (Mar. 8, 1974). Dixon argued that such laws would produce "quicker and more precise action" given state government's proximity to "matters primarily involving intrastate or local commerce . . ." *Consumer Interests of the Elderly: Hearing Before the Subcomm. on Consumer Interests of the Elderly of the S. Special Comm. on Aging*, 90th Cong., at 95 (1967). Subsequent model consumer protection acts, including the Uniform Deceptive Trade Practices Act, the Unfair Trade Practices and Consumer Protection Law, and the Uniform Consumer Sales Practices Act, helped promote states' creation of "Little FTC Acts," and by 1981 "every state had adopted some form" of consumer protection act. Charles Byrd, *A 50-State Survey of Consumer Protection Acts and Their Connections to the Federal Trade Commission Act*, PRO TE: SOLUTIO (Mar. 13, 2019), https://protesolutio.com/2019/03/13/a-50-state-survey-of-consumer-protection-acts-and-their-connections-to-the-federal-trade-commission-act/ [https://perma.cc/B33C-V6K5].

[28] *See* discussion *infra* Part II.A.2.

[29] The OCC "charters, regulates, and supervises all national banks and federal savings associations." *Who We Are: Organization*, OCC, https://www.occ.treas.gov/about/who-we-are/organizations/index-organization.html [https://perma.cc/47RK-HQ8L]. Previously, the OTS had chartered, regulated, and supervised federal savings associations, but in 2011, the Dodd-Frank Act dissolved the OTS and transferred many of its authorities to the OCC. *See* 12 U.S.C. § 5413.

consumer-harming practices that eventually caused or contributed to the financial crisis.[30]

In response to these failures, when crafting the CFPA, Congress aimed to strengthen the states' role in consumer protection, defend that role from federal interference, and ensure that states could quickly address potential misconduct given the rapidly changing nature of financial markets.[31] The results were section 1044 of the CFPA, which shields against federal preemption of state laws to protect consumers,[32] and section 1042 of the law, which gives states—specifically, the attorneys general and other appropriate regulators of states, territories, and Indian tribes—the ability to enforce federal consumer financial protections without being beholden to the priorities of federal agencies.[33] Much academic attention has been paid to section 1044 and broader issues around preemption after Dodd-Frank.[34] Less, however, has been written about section 1042, which deputizes states as consumer financial enforcers in addition to the federal government, and the extent to which this legislative design was a direct response to the failure of the pre-crisis enforcement system.[35] As the CFPB has articulated, section 1042 applies in a broad set of circumstances—indeed, among other things, it enables states to enforce the law with respect to a wider range of institutions than the CFPB itself can—and it empowers states to enforce the protections of more than a dozen consumer financial protection laws against entities covered by the CFPA.[36]

With these authorities in hand, state regulators and law enforcement agencies across the country—with leaders spanning the ideological spectrum—have used section 1042 in a growing range of enforcement actions.[37] States have brought about fifty enforcement actions to date under section 1042 of the CFPA. These have invoked a variety of different laws and claims—including alleged violations of the CFPA's prohibition on unfair, deceptive, or abusive acts or practices as well as the "Enumerated Consumer Laws" (eighteen other consumer financial protection laws that the CFPA defines to be part of "federal consumer financial law")—against a range of different financial institutions. And they have won consumers a wide range of significant relief.[38]

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[30] *See* FCIC, *supra* note 5, at 48.

[31] *See generally* Totten, *supra* note 14.

[32] *See generally id.*

[33] *See* 12 U.S.C. § 5552.

[34] *See generally* Danyeale I. Hensley, *Section 1044 of Dodd-Frank: When Will State Laws Be Preempted under the OCC's Revised Regulations*, 16 N.C. BANKING INST. 161 (2012); Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1296 n.160 (2011); Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163 (2011); Michael Bolos, *The Application of Dodd-Frank's Dual Preemption Standard to State UDAP Laws*, 14 U. PA. J. BUS. L. 289 (2011).

[35] *But see* Totten, *supra* note 14; Wilmarth, *supra* note 14.

[36] *See* Press Release, CFPB, *CFPB Bolsters Enforcement Efforts by States* (May 19, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-bolsters-enforcement-efforts-by-states/ [https://perma.cc/D8GY-NJZF].

[37] *See* discussion *infra* Part III.

[38] *See* discussion *infra* Part III.B.5.

Thus, for more than a decade, and with growing frequency, states' widespread use of section 1042 has served as an important complement to federal efforts to protect consumers in the consumer financial marketplace and to private enforcement of the federal consumer financial laws. This outcome marks a stark break from the period before 2010, when federal intervention diminished state tools and thereby stymied consumer protection.

II. THE CFPA FRAMEWORK FOR DUAL ENFORCEMENT OF FEDERAL CONSUMER FINANCIAL LAW

As explained below, historically, federal consumer protection statutes—including those relating to consumer finance—were enforced both by federal regulators and by private citizens on their own behalf. Over time, private enforcement has been diminished by a variety of factors, and Congress began to include state enforcement when it enacted a number of new consumer protection statutes focused on specific subject matters. State enforcement of federal consumer financial protection statutes, however, remained somewhat limited until Dodd-Frank was passed in the wake of the 2008 financial crisis. It was widely recognized that federal interference with state consumer protection efforts was a significant cause of the crisis, and Congress responded by passing the CFPA, which created new consumer protections, consolidated their administration and federal enforcement in the CFPB, and provided states new tools to enforce these protections.

A. Private and State Enforcement of Federal Law, Including the Federal Consumer Financial Protection Laws, Before Dodd-Frank

1. Private Enforcement of Federal Consumer Protection Statutes

Private enforcement of federal consumer protection laws by individual citizens has long served as an important backstop to federal enforcement. Most of the federal consumer financial laws—many of which date to the 1970s or earlier—expressly provide consumers with a private right of action for violations of those laws.[39] In some cases, consumers may be able to pursue civil

[39] *See, e.g.*, 15 U.S.C. § 1692(k) (assigning civil liability for violations of the Fair Debt Collection Practices Act); *id.* §§ 1681(n)–(o) (assigning civil liability for willful and negligent noncompliance of the Fair Credit Reporting Act); *id.* § 1640 (establishing civil liability for failure to comply with the Truth in Lending Act); *id.* § 1693(m) (creating civil liability for violation of the Electronic Fund Transfers Act); 12 U.S.C. §§ 2605, 2607–2608 (granting private rights of action for three violations of the Real Estate Settlement Procedures Act); 15 U.S.C. § 1691(e) (establishing civil liability for failure to comply with the Equal Credit Opportunity Act ("ECOA")); 10 U.S.C. § 987(f) (granting a private right of action for violations of the Military Lending Act); 15 U.S.C. § 1709 (assigning civil liability for violations of the Interstate Land Sales Full Disclosure Act); 12 U.S.C. § 4907 (granting a private right of action for violations of the Homeowners Protection Act of 1998); 15 U.S.C. § 1666(i) (assigning civil liability for the Fair Credit Billing Act); *id.* § 1667(d) (defining the civil liability of lessors for the Consumer Leasing Act of 1976).

actions against financial institutions for violations of all provisions of a federal consumer financial protection statute.[40] Other federal consumer financial protection statutes assign civil liability only for certain provisions or violations.[41] In a minority of the enumerated consumer laws, financial institutions may not be held civilly liable by individual citizens.[42]

Starting in the 1980s, however, driven in part by a political landscape adverse to private enforcement of federal law at the urging of industry, some policymakers and courts took steps to undermine private litigation of consumer protection statutes, especially those that, unlike the federal consumer financial laws, do not expressly refer to private enforcement.[43] Enforcement of the federal consumer financial laws via private rights of action nonetheless has continued to be a significant mechanism for effectuating these protections, but has also been cut back by some of the forces affecting other consumer protection statutes. As just one indicator of the continued vibrancy of private enforcement, the Supreme Court continues to hear many cases addressing claims brought by private litigants under the federal consumer financial laws.[44] Yet, new judicial precedent on standing, as well as courts' willingness to enforce arbitration agreements, have served as unfortunate obstacles to private enforcement of the federal consumer financial laws.[45]

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[40] *See, e.g.*, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p and the Electronic Fund Transfer Act, *id.* §§ 1693–1693r.

[41] *See, e.g.*, the Fair Credit Reporting Act, *id.* §§ 1681–1681x, and the Real Estate Settlement Procedures Act, 12 C.F.R. 1024–1024.41.

[42] *See, e.g.*, the Gramm Leach Bliley Act, 15 U.S.C. §§ 6802–6809, and the Consumer Financial Protection Act, 12 U.S.C. §§ 5481–5603. In many cases, however, for those statutes without a private right of action, similar state laws exist that allow consumers to pursue legal action against financial institutions for violations like those defined in the enumerated statute. *See, e.g.*, Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911 (2017) (discussing private enforcement of state unfair and deceptive trade practices laws).

[43] *See* Stephen B. Burbank and Sean Farhang, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 16 (2017) (describing the counterrevolution against private enforcement focused on reducing statutory incentives for private enforcement, establishing procedural rules to inhibit private litigation, and eliciting federal court precedent to create further barriers to private enforcement).

[44] *See, e.g.*, Jesinoski v. Countrywide Home Loans, Inc., 574 U.S. 259 (2015) (regarding the Truth in Lending Act); Chase Bank USA, N.A. v. McCoy, 562 U.S. 195 (2011) (same); Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998) (same); TransUnion LLC v. Ramirez, 594 U.S. 413 (2021) (regarding the Fair Credit Reporting Act); Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (same); TRW Inc. v. Andrews, 534 U.S. 19 (2001) (same); Rotkiske v. Klemm, 589 U.S. 8 (2019) (regarding the Fair Debt Collection Practices Act); Henson v. Santander Consumer USA Inc., 582 U.S. 79 (2017) (same); Midland Funding, LLC v. Johnson, 581 U.S. 224 (2017) (same); Freeman v. Quicken Loans, Inc., 566 U.S. 624 (2012) (regarding the Real Estate Settlement Procedures Act).

[45] Regarding recent decisions limiting consumer standing, *see TransUnion*, 594 U.S. at 414 (limiting standing for private litigation over violation of a statute to those plaintiffs who have been concretely harmed by a defendant); *see also Spokeo*, 578 U.S. at 330. Regarding arbitration, *see* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 228 (2013) (holding that the prohibitively high cost of an arbitration proceeding is not sufficient to overrule an arbitration clause); *see also* CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); Smith v. Spizzirri, 601

2. State Enforcement of Federal Consumer Protection Statutes

Statutes with broad private rights of action may implicitly authorize state enforcement under the *parens patriae* doctrine.[46] As the trends cutting back private enforcement of consumer protection statutes took shape, Congress in the last few decades explicitly provided for state enforcement to supplement federal enforcement in new consumer protection statutes.[47] These statutes were focused on specific, fairly narrow subject matters, and therefore served as precedents for the more substantial, wholesale dual enforcement consumer financial protection regime that Congress eventually passed in the CFPA, as described below.

For example, in 1998, Congress passed the Children's Online Privacy Protection Act ("COPPA")[48] to address growing concerns about children's privacy. Unlike an earlier privacy law from 1970, the Fair Credit Reporting Act ("FCRA"), the COPPA does not include any private enforcement. However, the COPPA authorizes state attorneys general to bring civil actions on behalf of state residents when there is reason to believe that persons have violated the COPPA regulations.[49] Similar state enforcement provisions, rather than a private right of action, are included in the Consumer Review Fairness Act ("CRFA"), which was enacted in 2016.[50] Like the COPPA, the CRFA also authorizes state attorneys general to bring civil actions on behalf of residents of the state in federal district court to obtain relief for violations of the CRFA, rather than establishing a private right of action.

Numerous other consumer protection statutes enacted during this time period grant similar explicit enforcement powers to state attorneys general and other relevant state enforcement officers.[51] In total, since 1976, Congress has

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U.S. 472, 477–78 (2024); Imre S. Szalai, *The Future of Arbitration in the United States: Textualism, A Tectonic Shift, and A Reshaping of the Civil Justice System*, 25 CARDOZO J. CONFLICT RESOL. 13 (2023); Sarah Staszak, *Explanations for the Vanishing Trial in the United States*, 18 ANN. REV. L. & SOC. SCI. 43 (2022).

[46] As *parens patriae*, a state may bring civil actions to protect its quasi-sovereign interests. *See* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 258 (1972). Courts have recognized states' *parens patriae* standing in suits brought under federal statutes when the statute reflects a clear congressional intent to enable such suits. *See, e.g.*, Connecticut v. Health Net, Inc., 383 F.3d 1258, 1262 (11th Cir. 2004). Private rights of action can implicitly authorize this state authority only if they are broadly constructed. *See* Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 121 (2d Cir. 2002) (noting that federal statutes implicitly granting states *parens patriae* standing all contain broad civil enforcement provisions).

[47] *See* Widman & Cox, *supra* note 14, at 56–60.

[48] 15 U.S.C. §§ 6501–6505.

[49] *Id.* § 6504(a)(1).

[50] *Id.* § 45b. Although consumers are not empowered to bring lawsuits to enforce its provisions, the CRFA invalidates form contract provisions that would prohibit or restrict a consumer's ability to leave reviews of products or services and prohibits companies from penalizing consumers who leave negative reviews. *Id.* § 45b(b)(1).

[51] These include the Better Online Ticket Sales Act (*id.* § 45c), the INFORM Consumers Act (*id.* § 45f), the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) (*id.* §§ 7701–7713), the Telephone Disclosure and Dispute Resolution Act

enacted more than twenty federal statutes on specific subject matters that explicitly grant state attorneys general or applicable state agencies the ability to act in response to alleged violations of federal law.[52]

Statutory provisions in the federal consumer financial protection laws giving enforcement authority to states played a fairly limited role before the enactment of the CFPA—perhaps in part due to the robust private enforcement of these laws. For example, a 1983 amendment to the Real Estate Settlement Procedures Act ("RESPA") empowered state attorneys general to enforce a prohibition on kickbacks in real estate transactions.[53] In addition, the Home Ownership Equity Protection Act ("HOEPA") of 1994 allowed state attorneys general to enforce new provisions in the Truth in Lending Act ("TILA") requiring certain enhanced disclosures for, and limits on, specific high-cost mortgages.[54] Finally, a 1996 amendment to the FCRA empowered state attorneys general to take injunctive action with respect to any violations of that law, but restricted when states could initiate actions for damages with respect to certain violations, such as certain violations committed by "furnishers."[55] Accordingly, before the CFPA, enforcement of the federal consumer financial protection laws was primarily by the federal government and citizens themselves.

B. Federal Interference in State Consumer Protection in the Run-Up to the Financial Crisis

Before the enactment of the CFPA in 2010,[56] a wide range of federal laws relating to consumer financial protection were administered by a range of different federal regulators.[57] Further, how financial institutions were regulated at the federal level depended on the organization of the institution.[58] In turn, the state laws that applied to a particular institution could be preempted by the federal laws that applied to that institution.[59]

(*id.* §§ 5701–5724), the Credit Repair Organizations Act (*id.* §§ 1679–1679j), the Restore Online Shoppers' Confidence Act (*id.* §§ 8401–8405), and the Telemarketing and Consumer Fraud and Abuse Prevention Act (*id.* §§ 6101–6108).

[52] *See* Widman & Cox, *supra* note 14, at 56–60.

[53] 12 U.S.C. § 2607(d)(4).

[54] 15 U.S.C. § 1640(e).

[55] *See id.* §§ 1681s(c)(1), (c)(5).

[56] *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 322 (2013).

[57] *See generally id.*

[58] Banks and similar federally insured depository institutions (such as a federal thrifts and credit unions) were subject to enforcement of federal law and other oversight by a federal regulator under the "organic" or "organizing" statute that applied to those institutions. *See id.* at 343–44. Other companies—often referred to as "nonbanks"—were subject to federal laws relating to consumer financial protection, but not a comparable "organic" statute, and hence comparatively less oversight by federal regulators. *See* FCIC, *supra* note 5, at 94 (describing how "[t]he nonbank subsidiaries were subject to enforcement actions by the Federal Trade Commission, while the banks and thrifts were overseen by their primary regulators").

[59] *See* Wilmarth, *supra* note 14, at 910 (describing how federal laws did not preempt state laws protecting consumers from nonbank financial institutions, and that states enforced several

Before the 2008 financial crisis, federal regulators acting in this framework often worked to stymie states' activities to respond to growing consumer harm in the consumer financial marketplace, interfering with state-level lawmaking, regulating, and enforcement.[60] In particular, as the Financial Crisis Inquiry Report would later explain, many states had attempted in the 2000s to address then-emerging issues in the mortgage market, including passing various anti-predatory lending statutes.[61] Yet, the OCC and OTS aggressively stretched federal law to preempt, and therefore quash, these state laws' applicability to the financial institutions they regulated (national banks and federal thrifts, respectively).[62]

Most notably, in 1996, the OTS issued rules stating that federal law preempted laws that states had passed to address predatory lending to the extent they applied to federally chartered thrifts[63] and their subsidiaries.[64] The OCC then followed suit for nationally chartered banks, issuing preemptive orders against state anti-predatory lending laws in 2003 and adopting a general preemption rule blocking any state laws from interfering with national banks in 2004.[65] At the time, the OCC stated that this guidance was intended to minimize uncertainty for national banks operating in multiple states,[66] though many observers attributed these changes to competition among banking regulators to attract financial institutions to apply for charters as well as deregulatory ideology.[67] A range of other actions also contributed to a sustained effort to preempt states from protecting consumers.[68] For example, the OCC purported to

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consent orders requiring nonbank mortgage lenders to pay large penalties, but how this was inadequate to curb predatory lending because the OCC and the OTS regulations preempted "the states' ability to act against federal thrifts, national banks, and their subsidiaries and agents").

[60] *See generally* ALAN WHITE ET AL., CENTER FOR COMMUNITY CAPITAL AT U.N.C., THE PREEMPTION EFFECT: THE IMPACT OF FEDERAL PREEMPTION OF STATE ANTI-PREDATORY LENDING LAWS ON THE FORECLOSURE CRISIS (2010).

[61] FCIC, *supra* note 5, at 13, 112. Note that the FCIC also pointed to other areas beyond consumer protection where preemption exacerbated the crisis, such as for state laws on gaming and bucket shops (*id.* at 48), restrictions on out-of-state banks competing within a state's borders (*id.* at 52), and allowing state securities regulators to oversee private placements (*id.* at 170).

[62] *See* FCIC, *supra* note 5, at 112.

[63] 61 Fed. Reg. 50951 (Oct. 30, 1996).

[64] 61 Fed. Reg. 66561, 66563 (Dec. 18, 1996).

[65] *See* 68 Fed. Reg. 46264 (Aug. 5, 2003); 69 Fed. Reg. 1904 (Feb. 12, 2004).

[66] *See* U.S. GEN. ACCT. OFF., GAO-04-280, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SPECIAL COMMITTEE ON AGING, U.S. SENATE (Jan. 2004), https://www.gao.gov/assets/gao-04-280.pdf [https://perma.cc/6X3V-E5CY].

[67] *See* Wilmarth, *supra* note 14, at 903 (explaining that "[t]he FRB, the OTS and the OCC Followed Deregulatory Policies During the Nonprime Lending Boom"); KATHLEEN ENGEL AND PATRICIA MCCOY, *OTS and OCC Power Grab*, *in* THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2011); Kathleen Engel and Patricia McCoy, *Federal Preemption and Consumer Financial Protection: Past and Future*, 3 BANKING & FIN. SERVS. POLICY REP. 25, 26 (2012) (discussing how preemption "helped the OCC lure banks to its fold").

[68] *See, e.g.*, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004); FCIC, *supra* note 5, at 13 (describing how in 2001 Julie Williams, the chief counsel of the OCC, delivered a lecture to state attorneys general in a meeting in

prevent enforcement of even *non*-preempted state laws against national banks.[69] Although the Supreme Court ultimately rejected the OCC's position—which Justice Antonin Scalia deemed "[b]izarre"—it affirmed the OCC's view that states cannot issue subpoenas to national banks to gather information about possible law violations.[70]

The results of this preemption crusade were disastrous for consumers and countless Americans. Banks converted from state to federal charters, with the OCC's and OTS's policies freeing them from strong state consumer protections.[71] These unencumbered financial institutions accelerated their work to drive prospective homeowners into risky mortgages that lenders often knew would fail, backed by Wall Street's securitization machine.[72] With state consumer protections preempted, financial institutions were more likely to issue mortgages with subprime features and that ended up in default.[73] And when the market eventually turned, millions of consumers were left underwater on their mortgages, helping to produce a generational crisis with lasting repercussions across the economy.[74]

C. The Consumer Financial Protection Act

In response to the financial crisis, the Dodd-Frank Act instituted sweeping reforms across the financial services industry.[75] Title X of this new law, the CFPA, fundamentally restructured America's framework for consumer financial protection.[76] As described below, this included new consumer

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Washington warning them that the OCC would "quash" them if they "persisted in attempting to control the consumer practices of nationally regulated institutions"); State of Illinois, Office of the Attorney General, *Re: Financial Crisis Inquiry Commission Hearing on January 14, 2010* (April 27, 2010), https://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2010-04-27%20Lisa%20Madigan%20Hearing%20One%20Follow-Up.pdf [https://perma.cc/9JL4-8EFB] (including as exhibits AA, BB, and CC responses from banks indicating that they would respond only to the OCC and not to state enforcers given that the banks were nationally chartered).

[69] *See* Cuomo v. Clearing H. Ass'n, LLC, 557 U.S. 519, 525 (2009) (discussing 12 C.F.R. § 7.4000).

[70] *See id.* at 529, 536.

[71] *See* Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 281–83 (2004).

[72] *See* Di Wu, Abdoul G. Sam, and Xiangrui Wang, *Spillover Effects of Financial Deregulation: The Unintended Consequences of the OCC Preemption Rule on Mortgage Lending Practices,* 95 INT'L REV. FIN. ANAL. (2024).

[73] *See* Lei Ding, Roberto G. Quercia, Carolina K. Reid, and Alan M. White, *The Impact of Federal Preemption of State Antipredatory Lending Laws on the Foreclosure Crisis*, 31 J. POL. ANAL. MGMT., 367–87 (2012).

[74] *See* FCIC, *supra* note 5, at 389 ("Millions of families entered foreclosure and millions more fell behind on their mortgage payments").

[75] *See* H.R. REP. NO. 111-367, at 91 (2009) (blaming the disparate consumer financial regulatory system, in part, for contributing to the financial crisis and as a reason for the need for the CFPA).

[76] *See id.* at 90 (describing how the CFPA "would consolidate in this new commission all consumer protection functions related to financial products").

protections, as well as new tools for states, in addition to the federal government, to enforce these protections.

1. New Federal Consumer Financial Protections

First, the CFPA created important new substantive protections in the consumer financial marketplace, including most notably a prohibition on unfair, deceptive, or abusive acts or practices ("UDAAPs") by consumer finance companies.[77] In the CFPA, Congress aimed to have robust consumer financial protections cover the full sweep of harmful practices that drove the subprime mortgage crisis.[78] The most obvious tool in consumer protection law was the ban on "unfair" and "deceptive" practices that had been present in the Federal Trade Commission Act since the early 1900s.[79] But Congress concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited,[80] necessitating the creation of even further-reaching tools.[81] Accordingly, Congress created a suite of new federal protections that apply specifically to mortgages.[82] Additionally, Congress created a new prohibition in the consumer financial marketplace on "abusiveness," defined as any practice that "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or takes "unreasonable advantage" of a consumer's lack of understanding of a product or service, inability to protect his or her own interests, or reasonable reliance on a covered person (financial company) to act in the consumer's interests.[83] Through the addition of the abusiveness prohibition, Congress focused on conduct presumed to be harmful or distortionary to the proper functioning of the market, specifically addressing the (1) obscuring of important features of a product or service, or (2) leveraging of circumstances to take an unreasonable advantage of consumers.[84]

The CFPA, including its prohibition on UDAAPs, applies broadly across companies that offer or provide consumer financial products or services.[85] In particular, the CFPA applies to "any person that engages in offering or providing a consumer financial product or service" and service providers to such

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[77] 12 U.S.C. § 5531.

[78] *See* Levitin, *supra* note 56, at 15 (explaining how "the CFPB has rulemaking, supervision, and enforcement authority over an extremely broad swath of the consumer financial services industry"); H.R. REP. NO. 111-517, at 874 (2009) (stating that "the Bureau will have authority to issue rules applicable to all financial institutions, including depository institutions that offer financial products and services to consumers").

[79] Federal Trade Commission Act, Pub. L. No. 75-447, 52 Stat. 111 (1938).

[80] 88 Fed. Reg. 21883, 21884 (April 12, 2023).

[81] *See* Rohit Chopra, *Enforcing the Post-Financial Crisis Ban on Abusive Conduct*, 14 U.C. IRVINE L. REV. 625, 637 (2024).

[82] *See* Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, §§ 1400–1498, 124 Stat. 1376 (2010).

[83] 12 U.S.C. § 5531(d).

[84] H.R. REP. NO. 111-367, *supra* note 75, at 91.

[85] 12 U.S.C. § 5481(6).

institutions.[86] The CFPA also makes it unlawful for "any person," full stop, "to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the [UDAAP prohibition]."[87]

2. A New Federal Agency

Next, Congress created a new agency—the CFPB—that would centralize the administration of the federal consumer financial laws and enforce the law consistently with respect to large banks and nonbanks.[88] As noted above, previously, many regulators had authority over pieces of consumer financial protection, but no regulator or enforcer had consumers as their main focus.[89] Congress believed that, under that status quo, "[a]ccountability was lacking because responsibility was diffuse and fragmented."[90] In turn, moving the administration of consumer protection law away from the prudential regulators helped address conflicts that had previously been present between consumer safety and systemic risk.[91] Congress noted that these conflicts had led regulators to shy away from reining in certain harmful practices, including forms of subprime lending, for fear that doing so might undermine financial institutions' "safety and soundness."[92] Accordingly, Congress gave the CFPB regulatory

[86] *Id.* § 5481(6)(a). This definition was modeled on definitions of consumer financial activity in the Bank Holding Company Act, which sets the boundaries for financial holding companies through a definition of activities that are "financial in nature." *See id.* § 1843(k) (2024).

[87] *Id.* § 5536(a)(3).

[88] H.R. REP. NO. 111-367, *supra* note 75, at 90.

[89] *See* S. REP. NO. 111-176, at 10 (2010) ("The current system is also too fragmented to be effective. There are seven different federal regulators involved in consumer rule writing or enforcement. . . . This fragmentation led to regulatory arbitrage between federal regulators and the states, while the lack of any effective supervision on nondepositories led to a 'race to the bottom' in which the institutions with the least effective consumer regulation and enforcement attracted more business, putting pressure on regulated institutions to lower standards to compete effectively, 'and on their regulators to let them'"); H.R. REP. NO. 111-367, *supra* note 75, at 91 ("This disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis, such as subprime and nontraditional mortgages").

[90] OBAMA WHITE HOUSE, *supra* note 7.

[91] *See, e.g.*, Adam J. Levitin, *The Consumer Financial Protection Agency* 4 (Pew Fin. Reform Project, Geo. L., Working Paper No. 1447082, 2009) ("For federal banking regulators, there is a conflict between their primary mission—bank safety-and-soundness—and the consumer protection mission. Safety-and-soundness ultimately means profitability because only profitable financial institutions can be safe and sound. Unfair, deceptive, and abusive practices, however, can be highly profitable; that is the only reason to engage in them. If they are even mildly profitable, the regulatory and reputational risk would make the practice not worthwhile. Placing the two missions together in a single agency ensures that one will trump the other, and historically consumer protection has not won out, except when the most egregious practices are at stake").

[92] *See* Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, *supra* note 8 ("To begin with, placing consumer protection regulation and enforcement within safety and soundness regulators does not lead to better coordination of the two functions, as some would argue. As has been made amply apparent, when these two functions are put in the same agency, consumer protection fails to get the attention or focus it needs. Protecting consumers is not the banking agencies' priority, nor should it be. . . . [Instead,] bank regulators

authority over both the new protections in the CFPA and eighteen other consumer financial laws—the "Enumerated consumer laws."[93]

Further, the CFPB enforces the CFPA against both large depository institutions (for example, banks and credit unions) and nonbank financial institutions[94] and enforces the Enumerated Consumer Laws and a few other statutes and regulations (such as the Military Lending Act) against those institutions and certain others (generally those specifically covered by those authorities).[95] Notably, however, as described further below, Congress did not provide private enforcement of the CFPA, including the UDAAP prohibition, by individual citizens.[96]

Finally, the CFPB's supervisory authority—that is, the ability to conduct examinations for consumer protection purposes—extends to large banks, certain nonbank financial institutions, and their service providers,[97] while other federal

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conduct consumer protection supervision with an eye toward bank safety and soundness by, for example, trying to protect the banks from reputation and litigation risks rather than examining how products and services affect consumers. . . . This may lead, as some witnesses before the Committee testified, to an emphasis by the regulators on the short term profitability of the banks at the expense of consumer protection"); H.R. REP. NO. 111-367, *supra* note 75, at 91 (referencing the testimony of Kathleen Keest, *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing Before the Committee on Financial Services*, 111th Cong. 94 (2009)) (statement of Kathleen Keest, Senior Policy Counsel, Center for Responsible Lending) ("Because abusive practices often produce short-term profit, these regulators have typically viewed consumer protections as nothing more than a constraint on bank activity and revenues, rather than as an integral part of the safety and soundness of the system. These regulators' failure to restrain the abuses that led to today's credit crisis demonstrates the need for an agency solely focused on the rigorous consumer protection needed to ensure that financial institutions can flourish in a sustainable way").

[93] 12 U.S.C. § 5481(12); *see, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692l(d); ECOA, *id.* § 1691b; Electronic Fund Transfer Act, *id.* § 1693b(a). There are some exclusions from the CFPB's authorities, however. *See, e.g.*, 12 U.S.C. § 5517 (on "limitations on authorities of the Bureau"); *id.* § 5519 (excluding auto dealers from CFPB rulemaking, supervisory, enforcement, or other authority).

[94] *See* 12 U.S.C. §§ 5514(c), 5515(c), 5516(d), 5564(a). Again, this authority is subject to some exclusions. *See id.* §§ 5517, 5519.

[95] *See id.* § 5564(a); *see, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692l(b)(6); Electronic Fund Transfer Act, *id.* § 1693o(a)(5); Truth in Lending Act, *id.* § 1607(a)(6); Military Lending Act, 10 U.S.C. § 987(f)(6). Again, this authority is subject to some exclusions. *See* 12 U.S.C. §§ 5517, 5519. The CFPB began enforcing the Military Lending Act in 2013 through an amendment allowing its implementing regulation to be enforced by those agencies specified in section 108 of the Truth in Lending Act. *See* 32 C.F.R. § 232.10 (2015). The prudential regulators, such as the OCC and the Federal Deposit Insurance Corporation ("FDIC"), also supervise and enforce the CFPA and other federal consumer financial laws against smaller banks and federal credit unions under their jurisdiction, *see* 12 U.S.C. § 5516(d), while the FTC and other federal regulators generally continue to enforce consumer financial laws that they enforced prior to the enactment of Dodd-Frank. *See id.* § 5581(c).

[96] *See infra* note 118.

[97] 12 U.S.C. §§ 5514, 5515; *see also* S. REP. NO. 111-176, *supra* note 89, at 11 ("The CFPB will have enough flexibility to address future problems as they arise. Creating an agency that only had the authority to address the problems of the past, such as mortgages, would be too short sighted"); S. COMM. ON BANKING, HOUS., AND URB. AFFS. 111TH CONG., BRIEF SUMMARY OF

regulators continue to supervise smaller banks[98] as well as institutions they charter under existing authorities that the CFPA did not modify.[99] Coupled with the CFPB's enforcement authority over nonbanks, this feature helps address the way in which the nonbank financial companies that had been on the rise before the financial crisis escaped federal scrutiny.[100] On the whole, this structure ensures that the CFPB has a range of tools to administer federal consumer financial law consistently and to address harmful and illegal practices.[101]

3. A New Regime Empowering States

These new federal protections marked an important step forward for consumers. However, with the lessons of the financial crisis in mind, Congress also restored and expanded the role of states in consumer protection in the CFPA. First, Congress abolished the Office of Thrift Supervision ("OTS")—arguably

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THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: CREATE A SOUND ECONOMIC FOUNDATION TO GROW JOBS, PROTECT CONSUMERS, REIN IN WALL STREET AND BIG BONUSES, END BAILOUTS AND TOO BIG TO FAIL, PREVENT ANOTHER FINANCIAL CRISIS (2010) ("With many agencies sharing responsibility, it's hard to know who is responsible for what, and easy for emerging problems that haven't historically fallen under anyone's purview, to fall through the cracks"); *see also Real Change: Turning Up the Heat on Non-Bank Lenders*, ROOSEVELT INST. (Sept. 4, 2009), https://rooseveltinstitute.org/real-change-turning-heat-non-bank-lenders/ [https://perma.cc/9G4W-B9WF].

[98] 12 U.S.C. § 5516. In general, the CFPB may include its own examiners in examinations that the prudential regulators conduct of depository institutions and credit unions with less than $10 billion in assets to assess their compliance with federal consumer financial laws. *Id.* § 5516(c). However, the prudential regulators retain exclusive authority to enforce federal consumer financial law with respect to those institutions. *Id.* § 5516(d). In addition, a company that acts as a service provider to a "substantial number" of depositories and credit unions with less than $10 billion in assets is subject to the CFPB's supervision and enforcement authority. *Id.* § 5516(e).

[99] *See, e.g.*, *id.* § 481 (authorizing the OCC to supervise national banks).

[100] *See* S. REP. NO. 111-176, *supra* note 89, at 167 ("Oversight of [nonbank] companies has largely been left to the States, and they are not currently subject to regular Federal consumer compliance examinations comparable to examinations of their depository institution competitors. According to one Treasury official, 'The federal government spends at least 15 times more on consumer compliance and enforcement for banks and credit unions than for nonbanks—even though there are at least five times as many nonbanks as there are banks and credit unions.' The Federal Trade Commission has approximately 70 staff members assigned to perform enforcement and monitoring functions for approximately 100,000 nondepository financial service providers nationwide. The FTC's authority to issue rules regarding unfair and deceptive practices is constrained by procedural requirements, and it does not have authority to conduct compliance exams, as bank regulators do. For that reason, it has brought fewer than 25 lawsuits in the last five years against mortgage originators, payday lenders and debt collectors. The authority provided to the Bureau in this section will establish for the first time consistent Federal oversight of nondepository institutions, based on the Bureau's assessment of the risks posed to consumers and other criteria set forth in this section"); *see, e.g.*, Stanley Fischer, Vice Chairman, Board of Governors of the Federal Reserve System, Address at Debt and Financial Stability—Regulatory Challenges Conference: The Importance of the Nonbank Financial Sector (Mar. 27, 2015), https://www.federalreserve.gov/newsevents/speech/fischer20150327a.htm [https://perma.cc/EC4D-3J3R].

[101] *See* S. REP. NO. 111-176, *supra* note 89, at 11 ("The legislation ends the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring accountability").

the worst offender on preemption matters[102]—entirely.[103] Next, Congress ensured that the remaining prudential regulators—in particular, the OCC—would not unduly intervene in future state efforts to rein in predatory industry practices. Specifically, in section 1044 of the CFPA, Congress codified a practical, non-categorical standard for preemption based on Supreme Court precedent:[104]

> State consumer financial laws are preempted, only if—
> (A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or
> (C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.[105]

While the OCC has tried in certain instances to ignore Congress's rebuke of its categorical approach to preemption,[106] the Supreme Court recently unanimously again rejected the OCC's position, holding instead that the preemption standard codified in Dodd-Frank requires a practical, non-categorical assessment.[107]

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[102] *See* FCIC, *supra* note 5.

[103] 12 U.S.C. § 5413.

[104] Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, *id.* § 25b.

[105] *Id.*

[106] *See, e.g.*, Department of the Treasury, *Re: Docket ID OCC-2011-0006* (June 27, 2011), available at https://graphics8.nytimes.com/packages/pdf/business/20110629bank/treasury.pdf [https://perma.cc/8HR8-47FJ] (wherein the Treasury Department's General Counsel states that the OCC's proposed 2011 preemption rule "is not centered on the key language of the Dodd-Frank Act's preemption standard" and, despite Congress's codification of the practical, non-categorical approach to preemption, "could be read to preempt *categories* of state laws").

[107] Specifically, relying on section 1044, the Supreme Court reversed a categorical approach to preemption (long endorsed by the OCC, including in an amicus brief in a court of appeals) that, for the purposes of prong (B) of section 1044, any state law significantly interferes with the business of banking if it "exert[s] control over" a national bank. Cantero v. Bank of America, N.A., 602 U.S. 205, 213 (2024). On the other hand, the OCC has issued regulations that attempt to do an "end run" around section 1044. *See* Arthur E. Wilmarth, Jr., *Policy Brief: The OCC's Repeated Failures to Comply with the Dodd-Frank Act and Other Legal Authorities Governing the Scope of Preemption for National Banks and Federal Savings Associations* (GW L. Fac. Publ'ns & Other Works, Working Paper No. 51, 2021).

The CFPA also enacted new procedures to prevent federal regulators from cavalierly preempting state law:

> (3) CASE-BY-CASE BASIS.—
>
> (A) DEFINITION.—As used in this section the term "case-by-case basis" refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms.
>
> (B) CONSULTATION.—When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.[108]

As such, section 1044 ensured that states would remain able to build and experiment on top of a strong federal floor for consumer protections. In more than a decade since the CFPA's enactment, the OCC has not preempted a single state law using these procedures, though it may have overreached on preemption in other ways.[109] Additionally, section 1047 of the CFPA codified the Supreme Court's rejection of the OCC's "[b]izarre"[110] position that states could be prohibited from enforcing even state laws that were not preempted.[111]

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[108] 12 U.S.C. § 25b; *see also* S. REP. 111-176, at 16 (2010) ("Where federal regulators refused to act, the states stepped into the breach. . . . Unfortunately, rather than supporting these anti-predatory lending laws, federal regulators preempted them. In 1996, the OTS preempted all State lending laws. The OCC promulgated a rule in 2004 that, likewise, exempted all national banks from State lending laws, including the anti-predatory lending laws. At a hearing on the OCC's preemption rule, Comptroller Hawke acknowledged, in response to questioning from Senator Sarbanes, that one reason Hawke issued the preemption rule was to attract additional charters, which helps to bolster the budget of the OCC").

[109] *See* Christopher K. Odinet, *OCC Again Overreaches on Preemption Law*, AM. BANKER (Dec. 28, 2020), https://www.americanbanker.com/opinion/occ-again-overreaches-on-preemption-law [https://perma.cc/8TE3-8UN5].

[110] *See* Cuomo v. Clearing H. Ass'n, L.L.C., 557 U.S. 519, 529 (2009).

[111] *See* 12 U.S.C. § 25b(i). That said, the CFPA did not address the OCC's position that states cannot issue subpoenas to national banks to gather information about possible law violations. National banks apparently continue to resist such subpoenas. *See, e.g.*, Office of the Attorney General, State of New York, *Supervisory Guidance Requested: State Investigations of Federally Chartered Banks* (Dec. 6, 2023), https://ag.ny.gov/sites/default/files/letters/multistate-ltr-to-occ.pdf [https://perma.cc/JCS5-32FT]. Nonetheless, the CFPB has urged national banks to comply with state information requests, noting that preventing unlawful conduct is critically important for the financial well-being of households across the country, as well as for the safety and soundness of individual institutions, and promotes the stability of the financial system as a whole. Indeed, the CFPB has noted that it will consider a large bank's failure to cooperate with other law enforcement and regulatory authorities about potential misconduct as a risk factor when exercising its visitorial supervision. *See, e.g.*, CFPB, *Re: Evasion of State Law and Lack*

And in section 1042 of the CFPA, Congress empowered states to enforce the full suite of safeguards that the CFPA created, including a CFPA provision that makes it unlawful for entities covered by the CFPA to violate the other federal consumer financial laws.[112] Section 1042 states:

> (a) IN GENERAL.—
>
> (1) ACTION BY STATE .—Except as provided in paragraph (2), the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law. A State regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law (except as provided in paragraph (2)), and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.
>
> (2) ACTION BY STATE AGAINST NATIONAL BANK OR FEDERAL SAVINGS ASSOCIATION TO ENFORCE RULES.—
>
> (A) IN GENERAL.—Except as permitted under subparagraph (B), the attorney general (or equivalent thereof) of any State may not bring a civil action in the name of such State against a national bank or Federal savings association to enforce a provision of this title.
>
> (B) ENFORCEMENT OF RULES PERMITTED.—The attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State against a national bank or Federal savings association in any district court of the United States in the State or in State court that is located in that State and that has jurisdiction over the

of Cooperation by Large Banks, POLITICO (May 14, 2024), https://subscriber.politicopro.com/f/?id=0000018f-937d-d166-a5af-df7fd2470000 [https://perma.cc/5GT3-NJPE].

[112] 12 U.S.C. § 5552. In 2022, the CFPB issued an interpretive rule explaining the authority of states to enforce the CFPA under section 1042. 87 Fed. Reg., *supra* note 11.

> defendant to enforce a regulation prescribed by the Bureau under a provision of this title and to secure remedies under provisions of this title or remedies otherwise provided under other law.[113]

This provision creates a powerful dual enforcement regime for federal consumer financial protections. In particular, as the CFPB has explained, this language gives states the following tools:

- States—specifically, state attorneys general and other state regulators—may bring civil actions or other appropriate proceedings against covered entities (excluding national banks) to address violations of the CFPA. Since the CFPA makes it unlawful for covered entities to violate any of the federal consumer financial laws, states can bring such actions to address violations of the CFPA's own restrictions (including the UDAAP prohibition) and violations of the protections of the Enumerated Consumer Laws by covered entities;[114]
- State attorneys general may bring civil actions against national banks for violations of regulations that the CFPB has promulgated under the CFPA;[115]
- State attorneys general and other state regulators may bring civil actions or other appropriate proceedings against entities excluded from the CFPB's enforcement authority, such as auto vehicle dealers and others;[116] and
- State attorneys general and other state regulators may bring civil actions or other appropriate proceedings even if the CFPB is already taking action against the same entity.[117]

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[113] 12 U.S.C. § 5552. The CFPA requires states to notify the CFPB before initiating any action under section 1042. *Id.* § 5552(b). One court has concluded that this notice requirement "may be waived or overcome by considerations of equity such that noncompliance does not remove [a] court's ability to consider" a state's substantive claim. Pennsylvania by Shapiro v. Mariner Fin., LLC, 711 F. Supp. 3d 463, 469 (E.D. Pa. 2024).

[114] 87 Fed. Reg., *supra* note 11, at 31941 (stating that "when a covered person or service provider violates any of the Federal consumer financial laws, section 1042 gives States authority to address that violation by bringing a claim under section 1036(a)(1)(A) of the CFPA," which makes it unlawful for a covered person or service provider to violate any federal consumer financial law). Note that in January 2024, a federal judge affirmed that section 1042 allows states to address violations not just of the CFPA's prohibition on unfair, deceptive, and abusive acts and practices, but also its prohibition on violating the Enumerated Consumer Laws. *Mariner Fin.*, 711 F. Supp. 3d at 482.

[115] 12 U.S.C. § 5552(a)(2)(B).

[116] 87 Fed. Reg., *supra* note 11, at 31942 ("Because Congress applied these limitations . . . only to the Bureau, they do not extend to States exercising their enforcement authority under section 1042").

[117] *Id.* ("State attorneys general and regulators may bring (or continue to pursue) actions under section 1042 even if the Bureau is pursuing a concurrent action against the same entity"); *see also* Pennsylvania v. Navient Corp., 967 F.3d 273, 295 (3d Cir. 2020) (holding that Pennsylvania could bring a parallel enforcement action against a company after the CFPB had already taken action against the same company); R. & R., Texas v. Colony Ridge, Inc., No. 23-cv-4729, 2024 WL 4553111, at *5 (S.D. Tex. Oct. 11, 2024) (same with respect to Texas).

Accordingly, section 1042 of the CFPA significantly expanded state enforcement of federal consumer financial protections (including both those that existed before Dodd-Frank and the protections created by the CFPA itself) and thus paved the way for increased state enforcement of federal consumer protection statutes as a whole. Indeed, because Congress did not provide private enforcement of the CFPA itself (and hence did not provide for private enforcement of the UDAAP prohibition),[118] section 1042 is particularly important because it allows states to complement what would otherwise be solely a federal enforcement regime.

III. APPLYING SECTION 1042

A. States Taking Up the Mantle of Federal Consumer Financial Protection

Armed with the authorities outlined above, states across the country have used section 1042 in an increasing number and variety of enforcement actions, producing a more rigorous and comprehensive framework for consumer financial protection. States have brought about fifty enforcement actions under section 1042 since passage of the CFPA. These cases illustrate how Congress's vision for nationwide consumer financial protection through federal law is being realized.

The states using section 1042 span geographies, and state regulators and law enforcement officials that have invoked the provision have been both Democrats and Republicans. Two of the approximately fifty actions that invoked section 1042 have involved all fifty states and the District of Columbia,[119] and twenty-three states—from California[120] and New York[121] to Texas[122] and Arkansas[123]—have participated in at least one other action under section 1042.[124]

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[118] *See* 12 U.S.C. §§ 5531(a), 5564(a).

[119] *See* Complaint, Alabama v. Nationstar Mortg. LLC, No. 1:20-cv-03551 (D.D.C. Dec. 7, 2020); Complaint, Alabama v. PHH Mortg. Corp., No. 18-cv-0009 (D.D.C. Jan. 3, 2018).

[120] *See, e.g.*, Complaint, People of the State of Cal. v. Volkswagen AG, No. 3:16-cv-03620 (N.D. Cal. June 27, 2016).

[121] *See, e.g.*, Complaint, People of the State of N.Y. v. Pa. Higher Educ. Assistance Agency, No. 19-cv-9155 (S.D.N.Y. Oct. 3, 2019); First Amended Complaint, People of the State of N.Y. v. Vision Prop. Mgmt., LLC, No. 19-cv-7191 (S.D.N.Y. Sept. 27, 2019); Assurance of Voluntary Compliance, New York v. Intuit (May 4, 2022), https://agturbotaxsettlement.com/Portals/0/Document%20Files/Final%20AVC.pdf?ver=ktHm0t4iOO2k2RruoESSLA%3D%3D [https://perma.cc/ATP7-RNSY].

[122] *See, e.g.*, First Amended Complaint, Texas v. Colony Ridge, Inc., No. 23-cv-4729 (S.D. Tex. May 24, 2024).

[123] *See, e.g.*, Complaint, Bureau of Consumer Fin. Prot. v. Alder Holdings, LLC, No. 4:20-cv-01445 (E.D. Ark. Dec. 11, 2020).

[124] *See, e.g.*, Temporary Order to Cease and Desist, *In re* SoLo Funds Inc., NMLS #1909701 (Conn. May 4, 2022); Complaint, CFPB v. Snyder, No. 6:19-cv-02794-DCC (D.S.C. Oct. 1, 2019); First Amended Complaint, Puerto Rico v. Equifax, Inc., No. 1:17-md-2800-TWT (N.D. Ga. Apr. 4, 2019); Complaint, Pennsylvania v. Navient Corp., No. 17-cv-1814 (M.D. Pa. Oct. 5, 2017); Second Amended Complaint, Florida v. Ocwen Fin. Corp., No. 9:17-cv-80496 (S.D. Fla.

The CFPB joined fifteen of the lawsuits that states have brought under section 1042, with the rest being brought only by states.[125] Finally, in addition to the two instances of actions under section 1042 that involved all fifty states, seven of the other state lawsuits under section 1042 involved more than one state as a plaintiff.[126]

The lawsuits that states have brought under section 1042 have invoked a wide set of laws and claims.[127] Twenty-four of the state suits under section 1042 asserted only CFPA UDAAP violations, thirteen alleged wrongdoing under the Enumerated Consumer Laws, and the remaining thirteen suits made both types of claims.[128] Moreover, states are more frequently bringing a greater variety of claims under section 1042.[129] In particular, states have recently addressed both conduct that violates the Enumerated Consumer Laws and violations of the CFPA UDAAP prohibition in the same suit.[130]

July 11, 2018); Second Amended Complaint, Mississippi v. Experian Info. Sols., Inc., No. 1:14-cv-00243 (S.D. Miss. Apr. 24, 2015).

[125] *See, e.g.*, First Amended Complaint, Bureau of Consumer Fin. Prot. *ex rel.* Healey v. Commonwealth Equity Grp., LLC, No. 1:20-cv-10991 (D. Mass. Sept. 16, 2020); Complaint, Bureau of Consumer Fin. Prot. *ex rel.* Rutledge v. Candy Kern-Fuller, No. 6:20-cv-00786 (D.S.C. Feb. 20, 2020).

[126] *See, e.g.*, Complaint, Consumer Fin. Prot. Bureau *ex rel.* Herring v. Nexus Servs., Inc, No. 5:21-cv-00016 (W.D. Va. Feb. 22, 2021); Complaint, Bureau of Consumer Fin. Prot. *ex rel.* Rutledge v. Candy Kern-Fuller, No. 6:20-cv-00786 (D.S.C. Feb. 20, 2020); Third Amended Complaint, Bureau of Consumer Fin. Prot. *ex rel.* Stein v. Consumer Advoc. Ctr. Inc., No. 8:19-cv-01998 (C.D. Cal. Oct. 21, 2019).

[127] By far the most frequently invoked of the Enumerated Consumer Laws has been the Truth in Lending Act and its implementing rule, Regulation Z; claims based on violations of this law appeared in sixteen of the approximately fifty section 1042 lawsuits. *See, e.g.*, Complaint at 3, Office of the Att'y Gen., State of Ind. v. MV Realty of Ind., LLC, No. 1:23-cv-01578 (S.D. Ind. Sept. 5, 2023); Second Amended Complaint at 1, Tennessee *ex rel.* Skrmetti v. Ideal Horizon Benefits, LLC, No. 3:23-cv-00046, 2023 U.S. Dist. LEXIS 34118 (E.D. Tenn. Dec. 14, 2023). The next most common of the Enumerated Consumer Laws to appear, the Electronic Fund Transfer Act ("EFTA"), was used in three of the section 1042 lawsuits. *See, e.g.*, Navajo Nation v. Wells Fargo & Co., 344 F. Supp. 3d 1292, 1308 (D.N.M. 2018).

[128] *See, e.g.*, First Amended Complaint, Puerto Rico v. Equifax, Inc., No. 1:17-md-2800-TWT (N.D. Ga. April 4, 2019) (asserting a deceptiveness claim); Second Amended Complaint at 35, Florida v. Ocwen Fin. Corp., No. 9:17-cv-80496 (S.D. Fla. July 11, 2018) (asserting a claim that Ocwen violated RESPA); Commonwealth of Pennsylvania v. Think Fin., Inc., No. 2:14-cv-7139, 2016 WL 183289, at *19–25 (E.D. Pa. Jan. 14, 2016) (asserting deceptiveness and abusiveness claims as well as claims regarding EFTA).

[129] *See, e.g.*, First Amended Complaint at 51–57, 67–71, The People of the State of N.Y. v. Vision Prop. Mgmt., LLC, No. 1:19-cv-07191 (S.D.N.Y. Sept. 27, 2019) (UDAAP and TILA); *Navajo Nation*, 344 F. Supp. 3d at 1308 (UDAAP, EFTA, ECOA, TILA, FCRA, Truth in Savings Act ("TISA")); *Think Fin., Inc*., 2016 WL 183289, at *25–26 (UDAAP and EFTA).

[130] *See, e.g.*, Second Amended Complaint at 1, Tennessee *ex rel.* Skrmetti v. Ideal Horizon Benefits, LLC, No. 3:23-cv-00046, 2023 U.S. Dist. LEXIS 34118 (E.D. Tenn. Dec. 14, 2023); First Amended Complaint at 58–64, Texas v. Colony Ridge, Inc., No. 4:24-cv-00941 (S.D. Tex. May 24, 2024); Complaint at 70–72, 76–79, 80–83, Office of the Att'y Gen., State of Ind. v. MV Realty of Indiana, L.L.C., No. 1:23-cv-01578 (S.D. Ind. Sept. 5, 2023); Complaint at 1–3, Commonwealth of Puerto Rico v. Navient Co., No. 3:23-cv-1410, 2023 WL 5321831 (D.P.R. Aug. 18, 2023).

B. States' Uses of Section 1042 Show How Dual Enforcement Advances Federal Law

Admittedly, states may be deterred from bringing federal claims for a variety of reasons, from the perception that state law enforcement bringing state law claims in front of state court judges will receive more deference, to greater familiarity with state court procedures for bringing state law claims.[131] Yet the actions that states have taken under section 1042 show how the empowerment of states has contributed to comprehensive and effective combatting of consumer harm in the consumer financial marketplace. States, relying on localized information and priorities, have addressed emerging risky products or entities that appear focused on specific geographic areas, sometimes seemingly in an effort to evade federal scrutiny. Further, state law enforcement has access to on-the-ground information regarding harm to vulnerable communities that federal regulators may be hard-pressed to otherwise uncover. States have also brought cases against actors and with respect to types of conduct that may otherwise go unaddressed under state law (such as where relevant state law is preempted) and have procured remedies that may not have been otherwise available. Section 1042 can also prove especially valuable in multistate actions because the process for settling such an action may be more straightforward in cases where states—and sometimes the CFPB—bring a shared set of federal claims under section 1042. And state enforcement has provided more interpretations of the law by courts and regulators, which protects consumers and offers regulatory clarity for financial institutions.

1. Swift Action Against Localized Emerging Risks

Although the CFPB's enforcement of the federal consumer financial protection laws has been robust, the CFPB, like any other institution, nonetheless has limited resources. At the time of publication, the CFPB's leadership has focused on prioritizing scrutiny of the largest institutions, which often create nationwide or at least multi-state harm, as well as repeat offenders.[132] The structure of the CFPA reinforces this dynamic of focusing on

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[131] *See* Amy Pritchard Williams, Ryan Strasser, and Ashley Taylor, *State Attorney General Actions: Strategies for Venue and Settlement Differ from Typical Litigation*, REUTERS (Feb. 16, 2023), https://www.reuters.com/legal/legalindustry/state-attorney-general-actions-strategies-venue-settlement-differ-typical-2023-02-16/ [https://perma.cc/H9CF-YNNC].

[132] *See, e.g.*, Rohit Chopra, *Written Testimony of Director Rohit Chopra Before the Senate Committee on Banking, Housing, and Urban Affairs*, CFPB (Apr. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-rohit-chopra-before-the-senate-committee-on-banking-housing-and-urban-affairs/ [https://perma.cc/DB4J-JPDG] ("When small businesses violate the law, federal enforcers are often quick to levy crippling sanctions. But when larger players repeatedly violate the law, agencies are far more lenient. This is highly inappropriate. I am committed to ensuring that the CFPB does not follow this path. The CFPB is shifting enforcement resources away from investigating small firms and instead focusing on repeat offenders and large players engaged in large-scale harm").

the largest institutions by, for example, enabling the CFPB to conduct examinations of large depository institutions and nonbank "larger participants" in consumer financial markets.[133] Yet, in section 1042, Congress empowered state law enforcement with tools—including the ability to enforce the law against some entities in instances in which the CFPB cannot[134]—to fill in the consumer protection framework with important albeit relatively more localized actions. Hence, the provision empowers attorneys general and regulators to deploy firsthand, on-the-ground information to combat localized harms that can nonetheless have a nationwide impact. In a world of scarce resources, even at the federal level, having more law enforcement agencies on the beat provides significantly more protection for consumers.

One recent example of how section 1042 has allowed states to respond to new and emerging risks is the growing market for financing related to energy-related home improvements, such as the installation of solar panels.[135] This area of consumer finance is rapidly expanding, and scams and other harms are also starting to proliferate in the space.[136] However, with limited exceptions,[137] federal law enforcement has only just begun taking action to address these problems.[138]

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[133] 12 U.S.C. § 5514(a)(1)(B) (defining the CFPB's supervisory authority as extending to larger participants in markets for consumer financial products or services, as defined by rule).

[134] 87 Fed. Reg., *supra* note 11, at 31941.

[135] For more information on the solar financing market and common solar financing business models, *see* CFPB Office of Markets, *Solar Financing* (Aug. 7, 2024), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-solar-financing/ [https://perma.cc/Y6A8-DLYL].

[136] *See, e.g.*, CFPB, PROPERTY ASSESSED CLEAN ENERGY (PACE) FINANCING AND CONSUMER FINANCIAL OUTCOMES (2023), https://files.consumerfinance.gov/f/documents/cfpb_pace-rulemaking-report_2023-04.pdf [https://perma.cc/DLX6-5T9F]; CAMPAIGN FOR ACCOUNTABILITY, WHAT CONSUMER COMPLAINTS REVEAL ABOUT THE SOLAR INDUSTRY (2017), https://campaignforaccountability.org/wp-content/uploads/2017/12/CfA-Report-FTC-Complaints-Solar-12-7-17.pdf [https://perma.cc/SNJ3-NULJ]; Breanne Deppisch, *Scams Proliferate Alongside Solar Buildout*, WASHINGTON EXAMINER (May 13, 2024), https://www.washingtonexaminer.com/news/2993847/scams-proliferate-alongside-solar-buildout/ [https://perma.cc/8AA4-ZST3].

[137] *See, e.g.*, Press Release, FTC, FTC, California Act to Stop Ygrene Energy Fund from Deceiving Consumers About PACE Financing, Placing Liens on Homes Without Consumers' Consent (Oct. 28, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-california-act-stop-ygrene-energy-fund-deceiving-consumers-about-pace-financing-placing-liens [https://perma.cc/A6VA-PAS3].

[138] On August 7, 2024, the FTC also released a consumer advisory on solar financing scams. *See* Larissa Bungo, *How to Avoid Getting Burned by Solar or Clean Energy Scams*, FTC CONSUMER ADVICE (Aug. 7, 2024), https://consumer.ftc.gov/consumer-alerts/2024/08/how-avoid-getting-burned-solar-or-clean-energy-scams [https://perma.cc/XF3A-L2XD]. On the same day, the U.S. Department of the Treasury, the FTC, and the CFPB, along with the U.S. Department of Energy and the Department of Housing and Urban Development, announced an interagency taskforce to address solar financing. *See* Press Release, U.S. Dep't of Treas., U.S. Department of the Treasury, Consumer Financial Protection Bureau, and Federal Trade Commission Announce Steps to Protect Residential Solar Consumers, Ensure Access to Credits (Aug. 7, 2024), https://home.treasury.gov/news/press-releases/jy2522 [https://perma.cc/R2SL-AC2F].

Enter section 1042. In 2023, Tennessee and Kentucky sued the at-home solar energy company, Solar Titan USA, over claims that it "misle[d] consumers about the qualities and characteristics of the solar system and installation services they are selling to consumers" and "omit[ted] material information about the qualities of Mosaic's products and services when financing Solar Titan's solar system sales."[139] In particular, the states allege that Solar Titan violated the CFPA's prohibition on UDAAPs by representing to consumers that they would generally be eligible for a substantial tax credit that was not actually available to all homeowners and by incorrectly describing when billing on loans would begin.[140] Notably, Solar Titan USA operates in only limited areas of the country, not nationwide,[141] making it an ideal candidate for state enforcement. And under section 1042, states were able to act to enforce the CFPA as soon as they became aware of these significant harms. The case is still pending at the time of publication.

2. Capitalizing on Familiarity with Local Communities

Section 1042 has also strengthened enforcement of the federal consumer financial laws by capitalizing on local law enforcement's familiarity with specific local communities and their diverse needs. This aspect of the law is particularly powerful given that many financial scams take advantage of the trust that people often place in people with whom they share community bonds.[142] And section 1042 may be especially relevant in this regard because, as noted above, the abusiveness standard that Congress created in the CFPA applies with respect to entities that take "unreasonable advantage" of a consumer's reasonable reliance on a covered person to act in the consumer's interests.[143]

One example of how section 1042 allowed states to protect consumers based on their localized knowledge of individual communities was Minnesota's recent lawsuit against Chadwick Banken,[144] an operator of companies offering a type of risky seller-financing for homes called "contracts for deed."[145]

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[139] Second Amended Complaint, Tennessee *ex rel.* Skrmetti v. Ideal Horizon Benefits, LLC, No. 3:23-cv-00046, 2023 U.S. Dist. LEXIS 34118, at *12, 20 (E.D. Tenn. Dec. 14, 2023).

[140] *Id.* at *67–89.

[141] *See Areas We Serve*, SOLAR TITAN (2021), https://web.archive.org/web/20210809224934/https://solartitanusa.com/ [https://perma.cc/9GYJ-4SNU].

[142] *See* CFPB, SELECTING FINANCIAL PRODUCTS AND SERVICES (2015), https://files.consumerfinance.gov/f/201507_cfpb_selecting-financial-products-and-services.pdf [https://perma.cc/UEK5-EPRG]; CFPB, MARKETING AND SCAMS AIMED AT MILITARY COMMUNITIES, https://files.consumerfinance.gov/f/documents/cfpb_ymyg-servicemembers-handout_military-affinity-marketing-scams.pdf [https://perma.cc/L3CA-KQ2Y].

[143] 12 U.S.C. § 5531(d)(2)(c).

[144] *See* Complaint at 20, State of Minnesota *ex rel.* Ellison v. Banken, No. 27-cv-24-8179 (Dist. Ct. of Fourth Jud. Dist., Hennepin Cnty., Minn. May 14, 2024).

[145] *See* Jessica Lussenhop, Joey Peters, and Haru Coryne, *Real Estate Investors Sold Somali Families on a Fast Track to Homeownership in Minnesota. The Buyers Risk Losing Everything.*, PROPUBLICA (Nov. 21, 2022), https://www.propublica.org/article/how-contracts-for-deed-put-families-at-financial-risk [https://perma.cc/7WUG-D8HD].

Minnesota has one of the largest Muslim populations in America,[146] and the state alleged that Banken targeted Muslim home purchasers "by selling them homes on grossly unfair terms using contract terms that are designed to fail."[147] In particular, the state alleged that Banken "leverage[d] Muslim customer[s'] religious beliefs to extract both higher down payments *and* increased monthly installment payments than contracts offered to non-Muslims" by framing the Muslim-targeted loans as being "Sharia compliant."[148] Banken's alleged scheme involved "hundreds of home sales,"[149] thereby having a large impact, especially on this particular community, notwithstanding that the operation was limited to a specific region and so, again, may not have immediately drawn the scrutiny of federal regulators.

Minnesota's suit under section 1042 alleged that Banken violated the CFPA's prohibition on abusiveness, emphasizing how his actions specifically targeted Muslims, as well as the prohibition on unfairness and the Truth in Lending Act.[150] In spotlighting harm to this specific community, the state illustrated how familiarity with local communities, their needs, and the way that scammers may attempt to take advantage of those communities can bolster CFPA enforcement.[151]

Another example of how section 1042 allows local knowledge to flow into CFPA enforcement is the Navajo Nation's 2017 suit against Wells Fargo related to that bank's notorious fake account scandal.[152] Similar to allegations that the CFPB and states such as California had already made against the company,[153] the Tribe alleged that Wells Fargo employees, "[u]nder intense pressure from superiors to grow sales figures," created "unauthorized bank accounts" and "activated unauthorized debit cards" in consumers' names.[154] The

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[146] ASSOCIATION OF STATISTICIANS OF AMERICAN RELIGIOUS BODIES, 2020 U.S. RELIGION CENSUS (2020), https://www.usreligioncensus.org/sites/default/files/2023-06/2020_USRC_Group_Detail.xlsx [https://perma.cc/W92W-FBNM].

[147] Complaint at 2, *Banken*, No. 27-cv-24-8179.

[148] *Id.* at 18 (emphasis in original).

[149] *Id.* at 10.

[150] *See id.* at 13, 24.

[151] Note that the use of section 1042 in this case also provided Minnesota certain other advantages. Minnesota does not have a state-level equivalent of the Truth in Lending Act. Accordingly, without section 1042, the state may not have been able to hold Banken accountable for certain aspects of his allegedly deceptive conduct.

[152] Navajo Nation v. Wells Fargo & Co., 344 F. Supp. 3d 1292 (D.N.M. 2018); *see also* Stipulated Final Judgment and Order, Consumer Fin. Prot. Bureau v. S/W Tax Loans, Inc., No. 15-cv-00299 (D.N.M. Apr. 16, 2015) (regarding Navajo Nation's suit against S/W Tax Loans). As defined in 12 U.S.C. § 5481(27), "[t]he term 'State' means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 5131(a) of Title 25."

[153] *See* CFPB, *Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts* (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/ [https://perma.cc/S44H-PXLE].

[154] Complaint at 2, Navajo Nation v. Wells Fargo & Co., No. 1:17-cv-1219 (D.N.M. Dec. 12, 2017).

Navajo Nation's complaint added extensive detail on how Wells Fargo specifically targeted the Tribe, including by noting that Wells Fargo "is often the only banking choice for Navajo people living on the Navajo Nation," making tribe members "particularly vulnerable to Wells Fargo's unlawful sales practices."[155]

This conduct was especially damaging as it pertained to Navajo elders. The Tribe's complaint alleged that Wells Fargo "specifically targeted elderly members of the Navajo Nation," even though these elders generally "do not have a need for traditional banking product" given that "the Navajo Nation operates largely as a cash-carrying society."[156] Often, these "elders could not speak English or write their names," so Wells employees would "have the elders apply a thumbprint" in lieu of a signature.[157] Illustrating what this alleged conduct looked like, the complaint stated: "[s]ales personnel would go to flea markets to encourage vendors to open unnecessary accounts. Elderly women selling Navajo products or crafts were particularly promising targets; because many could not read, they could be easily conned into opening accounts that they did not need or understand."[158]

Although the CFPB and others had already taken action against Wells Fargo, the Navajo Nation's ability to sue under section 1042 helped ensure that the Tribe could tell the story of the harm specific to their community and seek redress. Local knowledge of the bank's conduct allowed the Navajo Nation to shine a national spotlight on specific practices that often do not make it into a federal complaint. While the CFPB's own action may have covered some of Wells Fargo's conduct in general, it did not detail the targeting of Tribe members. Accordingly, the Navajo Nation's action illustrates how section 1042 makes the enforcement of the CFPA more complete, thereby advancing the consumer protection framework Congress envisioned when drafting the law.

3. Conduct that May Not be Addressed by State Law

Another powerful aspect of section 1042 is that states may address conduct that may not be able to be addressed under state law. Specifically, in certain instances, the states' ability to enforce the protections of the CFPA itself and the CFPA's prohibition on violating the Enumerated Consumer Laws has allowed them to take action to address a broader set of practices than they might otherwise be able to under state law. For example, state statutes may enumerate only a specific set of prohibited actions,[159] be found to be preempted by federal

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[155] *Id.* at 17.
[156] *Id.* at 3.
[157] *Id.* at 20.
[158] *Id.* at 22.
[159] *See, e.g.*, NEV. REV. STAT. § 598; MISS. CODE ANN. § 75-24-5; COLO. REV. STAT. § 6-1-105.

law,[160] or have hurdles or other limitations that dampen the effectiveness of state consumer protections, such as a prohibition only on deceptiveness and/or unfairness.[161] Accordingly, Congress implicitly recognized that state law may be insufficient to address certain practices, especially activity that may have a nationwide effect, and empowered states to take action regarding the full scope of conduct addressed by the federal consumer financial laws and actors covered by the CFPA.

For example, Texas recently brought a lawsuit against Colony Ridge, a set of land development companies, and its owner, John Harris.[162] In that case, Texas alleged that Colony Ridge "targets foreign born and Hispanic consumers with limited or no access to credit with promises of cheap, ready to build land and financing without proof of income," "lies in a multitude of ways about the conditions that those buyers will experience" on the land, and then sells people land with defects that "preclude the buyer from actually making any practical use of the land."[163] As a result, the buyer "defaults on the land financing at jaw-dropping rates," at which time Colony Ridge "forecloses on the buyer, re-possesses the land having lost nothing, and then turns around and sells the same land again to another unsuspecting buyer with the same deceptive set of misrepresentations."[164]

Texas's suit raised two counts against Colony Ridge and Harris under state laws prohibiting deceptive trade practices and fraud related to the extensive misrepresentations that Harris and his employees allegedly made as part of their scheme.[165] Texas also included a count alleging violations of the CFPA's prohibition on deceptive acts or practices relating to many of these alleged lies and misrepresentations.[166] And because of section 1042, Texas was also able to take action against other misconduct that Congress had specifically recognized and targeted in the federal consumer financial laws.[167] In particular, Texas alleged, via section 1042, that Colony Ridge's conduct violated the Interstate Land Sales Full Disclosures Act ("ILSA"), which Congress passed in 1968 to protect consumers when leasing or buying land.[168] Among other requirements under ILSA, developers must provide consumers with a property report disclosing relevant information about the land for sale or lease.[169] ILSA's implementing regulations also prohibit misleading sales practices.[170] Texas alleged that Colony Ridge violated ILSA by failing to provide these specifically

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[160] *Compare, e.g.*, Ojogwu v. Rodenburg L. Firm, No. 19-cv-0563, 2019 WL 6130450, at *5 (D. Minn. Nov. 19, 2019), *overturned on other grounds by* Ojogwu v. Rodenburg L. Firm, 26 F.4th 457, 460 (8th Cir. 2022) (noting "intradistrict conflict"), *with* Resler v. Messerli & Kramer, PA, No. Civ. 02-2510, 2003 WL 193498 (D. Minn. Jan. 23, 2003).

[161] *See, e.g.*, NCLC, *supra* note 27.

[162] *See* First Amended Complaint, Texas v. Colony Ridge, Inc., No. 4:24-cv-00941 (S.D. Tex. Mar. 24, 2024).

[163] *Id.* at 2.

[164] *Id.*

[165] *Id.* at 50, 56.

[166] *Id.* at 58.

[167] *Id.* at 61.

[168] *See* H.R. REP. NO. 1785, at 161 (1968).

[169] 15 U.S.C. § 1707.

[170] 12 C.F.R. § 1011.25 (2011).

required disclosures and failing to provide non-English speakers "with contracts or any other documents in any other language than English" as that law requires.[171] Had section 1042 not been available, Texas would not have been able to enforce these affirmative requirements of federal law. A federal magistrate judge recently recommended denying Colony Ridge's motion to dismiss, finding that Texas sufficiently alleged violations of both the CFPA and ILSA.[172]

Similarly, in 2019, New York brought a lawsuit against the Pennsylvania Higher Education Assistance Agency ("PHEAA"), a student loan servicer that previously serviced millions of federal student loans.[173] In that case, New York alleged that PHEAA "failed miserably in its administration" of Public Service Loan Forgiveness ("PSLF"), a key program that offers federal student loan borrowers debt cancellation after a decade of service in their communities.[174] In particular, the state alleged that PHEAA had proven "unwilling or unable" to "accurately count[] the qualifying payments" borrowers had made toward cancellation, left borrowers "waiting for months to over a year" when they contacted PHEAA with problems, failed "to fairly and correctly administer" the payment plans borrowers needed to be enrolled in to access PSLF, and more.[175]

New York was able to use state laws banning deceptive practices and fraud to levy three causes of action against PHEAA.[176] These causes of action generally covered the allegations that PHEAA lied to or otherwise misled borrowers. However, because New York is one of a handful of states that do not outlaw unfair practices,[177] it could not use state law to address certain other ways that PHEAA had allegedly caused "substantial injury" that was not "reasonably avoidable" or "outweighed by countervailing benefits to consumers or to competition."[178] These alleged harms include PHEAA failing to keep accurate records, to process paperwork timely and accurately, or to conduct adequate quality assurance over payment counts.[179] Section 1042 made it possible for New York to take action against PHEAA's allegedly unfair conduct by invoking the unfairness prohibition of the CFPA. Accordingly, New York included a count

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[171] First Amended Complaint at 64, *Colony Ridge, Inc.*, No. 4:24-cv-00941.

[172] R. & R., Texas v. Colony Ridge, Inc., No. 23-cv-4729, 2024 WL 4553111, at *12–13 (S.D. Tex. Oct. 11, 2024).

[173] *See* Complaint, New York v. Pa. Higher Educ. Assistance Agency, No. 1:19-cv-09155 (S.D.N.Y. Oct. 3, 2019). Note that at this time, PHEAA serviced one out of every ten dollars of non-mortgage consumer debt in the United States, an amount over $400 billion. Brief for the Kentucky Equal Justice Center and the Student Borrower Protection Center as Amici Curiae, at 3, Pa. Higher Educ. Assistance Agency v. Kentucky, 2018-ca-001246 (Ky. App. 2019).

[174] Complaint at 3, *Pa. Higher Educ. Assistance Agency*, No. 1:19-cv-09155.

[175] *Id.* at 3.

[176] *Id.* at 57–58.

[177] *See* Carter, *supra* note 27; *see also* Governor Kathy Hochul, *Governor Hochul Unveils First Proposal of 2024 State of the State: The Consumer Protection & Affordability Agenda* (Jan. 2, 2024), https://www.governor.ny.gov/news/governor-hochul-unveils-first-proposal-2024-state-state-consumer-protection-affordability [https://perma.cc/557V-MRKK].

[178] 12 U.S.C. § 5531(c)(1).

[179] Complaint at 59, *Pa. Higher Educ. Assistance Agency*, No. 1:19-cv-09155.

in its complaint alleging that PHEAA violated the CFPA's prohibition on unfair practices in eleven different ways, including by "[s]teering borrowers into less-favorable repayment options such as forbearance and consolidation," "[a]pplying policies inconsistently to borrowers," and "[f]ailing to provide timely explanations to borrowers for PSLF payment count determinations."[180] Absent section 1042, this misconduct—which might not fit neatly into the state's prohibitions on deceptive or other fraudulent practices—may not have been addressed. Again, this action demonstrates how section 1042 enables more robust and comprehensive consumer protection.

New York's PHEAA case also alleged a violation of the CFPA's prohibition on abusive practices, a ban that is not present in New York law. Indeed, although some state laws may address "unconscionability"—a concept which bears some similarity to abusiveness—only one state, California, currently has a prohibition on abusive practices analogous to the one in the CFPA.[181] This gap means that, absent section 1042, some states may lack the authority to take action when companies obscure important features of a product or service, or leverage aspects of their relationship with consumers (such as gaps in understanding or bargaining power, or companies' knowledge that consumers will reasonably rely on them when making decisions) to gain an unreasonable advantage.[182] Among the approximately fifty actions that states have taken under section 1042, more than a third have included claims under the CFPA's abusiveness prohibition.[183]

One of these cases was Illinois's lawsuit against Westwood College, a for-profit college that the state alleged had operated a years-long scheme to direct students into expensive loans for low-quality educational programs that did not lead to jobs.[184] Illinois's consumer fraud statute prohibited unfair and deceptive acts and practices, so—in addition to the state making an unfairness claim under section 1042—the state already had tools it could use to seek redress for many of the outright misrepresentations that Westwood made about program quality and student outcomes, as well as for certain ways in which the school engaged in predatory lending. However, the availability of the abusiveness prong enabled Illinois to also hold Westwood accountable for one of the core aspects of its scheme—taking advantage of students' reasonable reliance on school admissions and financial aid officials to act in their best interests—with a law specifically designed to stop this type of abuse. As the complaint states, Westwood and its co-defendants "held themselves out as schools that would help students better their lives" while "admissions and financial aid staff solicited

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[180] *Id.* at 59–60.

[181] *See* Cal. Fin. Code § 90009(c)(2)–(3) (defining abusiveness using same language as in section 1031(d) of the CFPA and requiring that the term "abusive" be interpreted consistently with the Dodd-Frank Act); *see also* Cal. Fin. Code § 90003(a)(1) (prohibiting abusive acts or practices); Carter, *supra* note 27.

[182] *See* Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883 (Apr. 12, 2023).

[183] *See, e.g.*, First Amended Complaint, New York v. Vision Prop. Mgmt., No. 19-cv-7191 (S.D.N.Y. Sept. 27, 2019); Navajo Nation v. Wells Fargo & Co., 344 F. Supp. 3d. 1292 (D.N.M. 2018); Complaint, California v. Volkswagen AG, No. 3:16-cv-03620 (N.D. Cal. Jun. 27, 2016).

[184] *See* Second Amended Complaint, Illinois v. Alta Colls., Inc., No. 1:14-cv-3786 (N.D. Ill. Sept. 30, 2014).

students' reliance and trust," only to then misrepresent the costs students would pay and push students into high-cost loans that officials knew would fail.[185] The CFPA's prohibition on abusive practices therefore broadened Illinois's toolkit so that it could efficiently address this significant aspect of Westwood's broader misconduct.

4. Actors that Could Otherwise Fall Through the Cracks

As noted above, when Congress drafted the CFPA, it aimed to cover the full sweep of companies and industries that consumers interact with in their financial lives.[186] Section 1042 allows states to bring actions addressing violations of the federal consumer financial laws by any "covered person," namely, companies that offer or provide consumer financial products or services,[187] or "service providers" thereof,[188] as well as those who knowingly or recklessly substantially assist such violations.[189] Hence, states may address consumer harms committed by a set of entities that may be broader than those covered by many state consumer financial protection laws, which may be narrower or have significant carve-outs.[190]

To give one example, Michigan has a prohibition on "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce."[191] However, the state exempts from these protections any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."[192] State courts have held that this exemption applies to many

[185] *Id.* at 78.

[186] H.R. REP. NO. 111-367, *supra* note 75, at 90 (describing how the CFPA "would consolidate in this new commission all consumer protection functions related to financial products"). That said, as noted, there are some exclusions from the CFPB's authorities. *See supra* note 93.

[187] 12 U.S.C. § 5481(6).

[188] *Id.* § 5481(26).

[189] *Id.* § 5536(a)(3).

[190] *See, e.g.*, Mich. Comp. Laws Ann. § 445.904(1)(a) (exempting transactions or conduct authorized under laws administered by a regulatory body, an exemption that Michigan courts have interpreted as exempting consumer lending).

[191] *Id.* § 445.903(1).

[192] *Id.* § 445.904(1)(a).

industries,[193] significantly cutting back the general state consumer protection law.[194]

Section 1042 helps fill this breach. To date, Michigan has brought four suits under section 1042, including one case it brought on its own and three that it joined as part of multi-state efforts.[195] For example, in 2019 Michigan used section 1042 to take action against Sierra Financial, "an online lender that offers loans with interest rates between 388.55% and 1505.63%," and its owner, Huggy Lamar Price.[196] Michigan alleged that Sierra Financial and Price violated the CFPA's prohibition on UDAAPs through an extensive list of harmful practices that included "misrepresenting contract terms over the phone, harassing or pressuring consumers into signing up for loans, and refusing to let consumers pay off their loans early."[197] In addition, Michigan alleged that Sierra Financial and Price violated state interest rate limitations and "engaged in activities constituting common law nuisance."[198] In 2020, Sierra Financial and Price agreed to an assurance of voluntary compliance, wherein they stopped collecting on existing loans past the principal balance and must notify the Michigan Attorney General within 120 days if they intend to do business in Michigan again.[199]

Moreover, even in instances where carve-outs to state law are less clear or categorical, section 1042's broad application is still valuable. Consider Massachusetts's 2017 case against PHEAA, the same student loan servicer that New York took action against in the separate case described above.[200] At this time, PHEAA was one of the largest financial companies in the world, servicing one out of every ten dollars of non-housing consumer debt in the United

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[193] *See* Liss v. Lewiston-Richards, Inc., 732 N.W.2d 514, 521 (Mich. 2007); *see also* Plaintiff-Appellant's Supplemental Reply Brief, Attorney Gen. v. Eli Lilly & Co., S.C. 165961 (Mich. May 10, 2024). Challenging these interpretations, Attorney General Dana Nessel noted in a press release that "[t]he *Smith* and *Liss* decisions were decided on a misapplication of the law, and today are weaponized by corporations evading scrutiny into how they treat consumers." Press Release, Mich. Dept. of Att'y Gen., Michigan Supreme Court to Hear Oral Arguments on AG Nessel's Appeal of Controversial 1999 and 2007 Consumer Protection Decisions (Feb. 2, 2024), https://www.michigan.gov/ag/news/press-releases/2024/02/02/michigan-supreme-court-to-hear-oral-arguments-on-ag-nessels-appeal [https://perma.cc/8VGM-BH7X].

[194] *See* Totten, *supra* note 14, at 135.

[195] *See* Complaint, Nessel v. Price, No. 2:19-cv-13078 (E.D. Mich. Oct. 18, 2019). For lawsuits in which the state of Michigan joined other states, *see* Complaint, Alabama v. Nationstar Mortg. LLC, No. 1:20-cv-03551 (D.D.C. Dec. 7, 2020); Complaint, Alabama v. PHH Mortg. Corp., No. 18-cv-0009 (D.D.C. Jan. 3, 2018); Complaint, Pennsylvania v. Navient Corp., No. 17-cv-1814 (M.D. Pa. Oct. 5, 2017).

[196] Complaint, *Price*, No. 2:19-cv-13078.

[197] *Id.*

[198] *Id.* at 16.

[199] Press Release, Mich. Dept. of Att'y Gen., AG Nessel Protects Consumers from Alleged Predatory Lender (Apr. 16, 2020), https://www.michigan.gov/ag/news/press-releases/2020/04/16/ag-nessel-protects-consumers-from-alleged-predatory-lender [https://perma.cc/KY3K-2CNH].

[200] *See* Commonwealth v. Pa. Higher Educ. Assistance Agency, 34 Mass. L. Rptr. 616 (Mass. Super. Ct. 2018).

States.[201] Again, section 1042 filled a possible gap in coverage. Massachusetts brought claims under state law and section 1042, accusing PHEAA of "depriving dedicated public servants of" earned opportunities for federal student debt cancellation after breakdowns blocked borrowers from accessing PSLF and the Teacher Loan Forgiveness program.[202] However, because PHEAA purports to be a quasi-governmental entity founded by the Commonwealth of Pennsylvania, the company challenged whether it was covered by Massachusetts's prohibition on unfair and deceptive practices.[203] In particular, the Massachusetts law applies only to "persons" engaged in "trade or commerce,"[204] and PHEAA argued it was not a person or corporation but a public instrumentality.[205]

This argument ultimately failed,[206] but even if it had not, section 1042 would have ensured that the ample federal claims against PHEAA would have survived. The CFPA clearly defines "servicing loans" as a "financial product or service,"[207] the "offering" of which makes a company a "covered person" for the purposes of the law's protections.[208] Accordingly, even if PHEAA had prevailed with respect to coverage under state law, there is no serious dispute about whether the CFPA covers PHEAA.[209] Thus, section 1042 allowed Massachusetts to allege that PHEAA violated the CFPA in several ways, including that it engaged in "unfair" acts by denying borrowers the opportunity to make progress toward debt forgiveness, failing to properly track their progress toward cancellation, and collecting without refunding amounts that borrowers did not owe.[210] Massachusetts's case shows how the CFPA's clear coverage of a broad set of consumer finance companies helps fill in the potential gaps in state laws, allowing states to be full partners in rooting out misconduct in consumer financial markets that can have nationwide effect. This clarity helps ensure that states can confidently enforce the CFPA, helping to ensure comprehensive enforcement that bolsters the protection paradigm that Congress intended.

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[201] PHEAA serviced $392 billion as of June 2017. *See* PHEAA, https://web.archive.org/web/20191211112250/https://www.pheaa.org/about/pdf/financial-reports/annual/2018AuditedFinancialStatements.pdf#page=8 [https://perma.cc/KH27-L9VB]. There was $3.7 trillion in total non-housing consumer debt in the U.S. at the end of Q2 2017. *See* Federal Reserve Bank of New York, *Household Debt and Credit Report*, CENTER FOR MICROECONOMIC DATA, https://www.newyorkfed.org/microeconomics/hhdc.htm [https://perma.cc/N2ZZ-AUHX].

[202] Complaint, Commonwealth v. Pa. Higher Educ. Assistance Agency, No. 1784-cv-02682 (Mass. Super. Aug. 23, 2017).

[203] *Pa. Higher Educ. Assistance Agency*, 34 Mass. L. Rptr. at 617.

[204] 15 MASS. GEN. LAWS ch. 93A, § 2.

[205] *See Pa. Higher Educ. Assistance Agency*, 34 Mass. L. Rptr. at 621.

[206] *Id.*

[207] 12 U.S.C. § 5481(15)(A)(i).

[208] *Id.* § 5481(6).

[209] *See* Stipulated Final Judgment and Order, CFPB v. PHEAA, No. 1:24-cv-00756 (M.D. Pa. May 6, 2024) (stipulating PHEAA settlement with the CFPB for violations of the CFPA).

[210] *See* Complaint, Commonwealth v. Pa. Higher Educ. Assistance Agency, No. 1784-cv-02682 (Mass. Super. Aug. 23, 2017).

5. Remedies and Statute of Limitations

CFPA section 1042 can also allow states to procure significant relief for consumers that may not otherwise be available under either federal or state law. The CFPA provides for a wide range of remedies that states, as well as the CFPB, are able to seek in enforcement actions, such as disgorgement of profits, damages, and restitution.[211] In enforcement actions brought under section 1042, states have procured a wide variety of relief, ranging, for example, from payments to borrowers that were foreclosed on,[212] to refunds of interest charged in violation of TILA.[213] The scale of this relief has also been significant, including a judgment against a bond services company for $811 million.[214]

In addition, by joining forces with the CFPB in bringing federal claims under section 1042, states can increase the chance that the victims affected by the defendant's conduct will receive full compensation for their harm. That is because, where one or more states partner with the CFPB and obtain a judgment against a defendant, victims can potentially receive compensation from the CFPB's "civil penalty fund."[215] Under the CFPA, this fund is available to provide "payments to the victims of activities for which civil penalties have been imposed under the federal consumer financial laws."[216] Monies available through this fund can help make victims whole when, among other things, companies that have broken the law do not have sufficient funds to provide consumers redress. The availability of the civil penalty fund is particularly important given that states often lack an analogous generally available pool of funds, meaning that consumer redress can be limited when companies that violate state law are insolvent.[217]

The importance of the civil penalty fund was demonstrated in the action that the CFPB and eleven states brought against Prehired, a company that operated an online training "bootcamp" that used promises of high-paying technology sales

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[211] *See* 12 U.S.C. § 5552(a)(1) (stating that states may "secure remedies under provisions of this title"); *id.* § 5565(a)(2) (stating that relief includes, without limitation, "(A) rescission or reformation of contracts; (B) refund of moneys or return of real property; (C) restitution; (D) disgorgement or compensation for unjust enrichment; (E) payment of damages or other monetary relief; (F) public notification regarding the violation, including the costs of notification; (G) limits on the activities or functions of the person; and (H) civil money penalties"); *see, e.g.*, Stipulated Final Judgment and Order, *In re* Prehired, LLC, No. 23-50438 (Bankr. D. Del. Nov. 20, 2023) (seeking disgorgement of all money the company derived as a result of the conduct described in the action).

[212] *See, e.g.*, Complaint, Alabama v. PHH Mortg. Corp., No. 18-cv-0009 (D.D.C. Jan. 3, 2018).

[213] *See, e.g.*, Lawsky v. Condor Cap. Corp., No. 14 Civ. 2863(CM), 2014 WL 3858496 (S.D.N.Y. Aug. 1, 2014).

[214] *See* Amended Final Judgment Order, CFPB v. Nexus Servs., Inc., No. 5:21-cv-00016 (W.D. Va. Feb. 21, 2024) (on appeal).

[215] *See* Consumer Financial Civil Penalty Fund, 78 Fed. Reg. 26489-01 (May 7, 2013) (to be codified at 12 C.F.R. pt. 1075); CFPB, *Civil Penalty Fund*, https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/ [https://perma.cc/CKX5-W6VV].

[216] 12 U.S.C. § 5497(d)(2).

[217] *But see*, *e.g.*, Assem. Bill 1864, 2019-2020 Reg. Sess., ch. 157, 2020 Cal. Stat. (creating a "Financial Protection Fund").

jobs to trap consumers with expensive debts.[218] Prehired had already declared bankruptcy by the time this joint action arose, making it possible that funds from the entity itself were limited and likely would not be available to provide consumers redress if only state law had been invoked. However, the states' and the CFPB's stipulated judgment against Prehired imposed a civil money penalty under federal law, thereby opening the door for the company's victims to access federal relief.[219] To the extent that this relief might not have otherwise been available for states to access on their own without section 1042, the Prehired case shows how section 1042 helps ensure that consumers receive relief for their injuries.

Further, the CFPA's statute of limitations may also help ensure that unlawful conduct is able (or fully able) to be addressed by state law enforcement, especially where that conduct is only discovered by regulators after some period of time. The statute of limitations for actions brought under the CFPA is generally "3 years after the date of discovery of the violation to which an action relates."[220] As noted above, in addition to its own prohibitions (most notably UDAAP), the CFPA makes it unlawful for covered entities to violate the Enumerated Consumer Laws. Accordingly, the CFPA's statute of limitations applies to claims brought by states addressing CFPA-covered entities' violations of either the CFPA itself or of the Enumerated Consumer Laws. This period may be longer than the limitations periods that apply under state law, particularly if those laws do not tie the statute of limitations to when the violation was discovered.[221]

6. Multistate and Federal Partnership Actions

The process for settling a multi-state action may also be more straightforward in cases where states—and sometimes the federal government, typically the CFPB—bring a shared set of federal claims under section 1042 than when they bring a series of related claims under state law. Where states—and possibly the federal government—are bringing a shared set of federal claims, the states and defendants involved need to negotiate only one proposed settlement about that single set of claims and one judicial proceeding to implement the settlement.[222] By contrast, multi-state actions and state-federal partnership cases that draw on claims involving the laws of multiple states (and/or claims brought exclusively by the federal government under federal law) require individualized

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[218] *See* Complaint, Washington v. Prehired, LLC, No. 23-50438 (Bankr. D. Del. July 13, 2023).

[219] *See id.*

[220] 12 U.S.C. § 5564(g)(1).

[221] *See, e.g.*, Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.565 (establishing a statute of limitations of two years after the deceptive act or after the consumer became aware of the act); Idaho Consumer Protection Act § 48-619 (establishing a statute of limitations for two years after the alleged violation).

[222] *See, e.g.*, Consent Judgment, Alabama v. Nationstar Mortg. LLC, No. 1:20-cv-3551 (D.D.C. Dec. 7, 2020); Consumer Fin. Prot. Bureau v. Alder Holdings, LLC, No. 4:20-cv-01445 (E.D. Ark. Aug. 4, 2021).

settlements for the claims based on the laws of each jurisdiction and separate proceedings, with different judges in different jurisdictions to implement them, all on different timelines.[223] Section 1042 thereby makes it significantly more efficient to enforce the law, helping ensure robust enforcement and advancing Congress's goals for consumer financial protection.

7. Section 1042 Helps Advance Consumer Financial Protection Law

Finally, in the years since the CFPA's enactment, several state actions under section 1042 have been litigated. Both this judicial precedent and the state enforcement actions themselves provide beneficial guidance about how courts and regulators interpret the law. Applying the law to specific factual circumstances creates regulatory clarity for entities and increases consumer protection because regulated entities know more definitively whether their conduct is lawful or unlawful.

In particular, among the approximately fifty actions that states have brought under section 1042, more than a third have been litigated to a decision. These state cases under section 1042 have addressed important questions about the federal consumer financial laws. For example, the case brought by Illinois against Westwood College clarified the nature of certain practices that may qualify as unfair or abusive under the CFPA.[224] Among other claims, the state alleged that Westwood violated the CFPA's prohibition on unfair and abusive acts or practices by targeting students who they assumed would have little knowledge of financial aid and higher education, and misrepresenting both the cost of Westwood's programs and the jobs available for graduates, all while knowing that most students would leave Westwood without a degree or a job.[225] Westwood countered in part by claiming the CFPA's prohibition of unfair, deceptive, or abusive acts or practices was "unconstitutionally vague."[226] Ruling on Westwood's motion to dismiss, the United States District Court for the Northern District of Illinois rejected Westwood's constitutional challenge and held that Westwood's actions "[were] sufficient to state CFPA claims for unfair and abusive practices."[227] By making this ruling, the court contributed to the body of caselaw clarifying the acts or practices that may qualify as unfair or abusive and are prohibited by the CFPA.

IV. CONCLUSION: APPLYING DUAL ENFORCEMENT BEYOND CONSUMER FINANCIAL PROTECTION

[223] *See, e.g.*, Complaint, California v. Ameriquest, No. RG06260804 (Sup. Ct. Ca., Alameda Mar. 21, 2006); Maine v. Ameriquest, No. CV-06 (Sup. Ct. Me., Kennebec Mar. 23, 2006) (obligating states in the master settlement agreement to individually file civil or administrative actions against Ameriquest).

[224] *See, e.g.*, Illinois v. Alta Colls., Inc., No. 1:14-cv-3786, 2014 WL 4377579 (N.D. Ill. Sept. 4, 2014).

[225] *See id.*

[226] *Id.* at *3.

[227] *Id.* at *2.

Out of the wreckage of the financial crisis, Congress crafted a key role for states in its effort to reshape American consumer financial protection. Part of that effort involved ensuring that states would be clearly empowered to build on top of a strong federal floor of consumer protections through state-level experimentation. In addition, Congress enshrined the sharing of enforcement authority for federal protections between states and the federal government. This "dual enforcement" tool has played a key role in America's step forward from a broken pre-crisis consumer safety net to a more robust post-crisis consumer protection ecosystem and complements private enforcement of the federal consumer financial protection laws, especially as private enforcement has been cut away by industry efforts.

The aspects of section 1042 included above, and the examples of their real-world value, vindicate Congress's success in crafting the CFPA's dual enforcement mechanism. More than a decade after its passage, the CFPA, in general, and section 1042, in particular, have helped states seek redress for a far greater set of actors and conduct than they otherwise would be able, and to secure fuller relief when doing so. In turn, this has contributed to a comprehensive consumer financial protection framework, with state enforcement based on decentralized information that is not limited by the knowledge or priorities of any particular federal regulator at any particular time, while nonetheless acknowledging that localized emerging risks are matters of *federal* consumer protection given their likelihood of quickly spreading. It is clear that people across the country would be significantly worse off without the benefits of state enforcement of the federal consumer financial protection laws.

Congress's success in deploying private and dual state-federal enforcement to advance consumer financial protection—as well as in a few other policy areas[228]—suggests a playbook it can use to address other emerging challenges.[229] Our country is currently having a conversation about how to address novel issues related to market consolidation, widespread financialization, the rise of artificial intelligence, online consumer surveillance, and more. In considering how to address these issues, lawmakers should understand that private enforcement of key protections by individual citizens has historically served as an extremely strong method for ensuring compliance—and that dual state and federal enforcement mechanisms can also contribute to a robust and comprehensive enforcement mechanism for federal law.

For example, while there is not currently a comprehensive federal data privacy regime, many states have recently passed data privacy bills that offer people a suite of protections from widespread surveillance and place certain important limitations on companies that would collect consumer data.[230] States

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[228] *See supra* notes 14–20 and accompanying text.

[229] Indeed, there is some evidence that it already may be doing so. *See, e.g.*, Kids Online Safety Act, S. 118-1409, 118th Cong. (2023).

[230] *See* Andrew Folks, *US State Privacy Legislation Tracker*, IAPP (July 22, 2024), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ [https://perma.cc/TE75-KATZ].

have therefore demonstrated their attention to this emerging risk in a way that echoes the advantages described above of dual enforcement. Accordingly, data privacy may be one area in which the tool of dual enforcement could effectively aid future federal lawmaking. But this is just one area where private and state enforcement may prove valuable for preventing and addressing consumer harm. As Congress debates a range of pressing issues, the widespread, bipartisan success of section 1042 in driving better outcomes for consumers shows how these enforcement mechanisms can help lawmakers reach their goals.[231]

[231] *See, e.g.*, Kids Online Safety Act, *supra* note 229.