No. 22-448

In the Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,
Petitioners,

v.

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

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

BRIEF OF AMICUS CURIAE JOHN MICHAEL "MICK" MULVANEY IN SUPPORT OF RESPONDENTS

ERIC BLANKENSTEIN
LAW OFFICES OF ERIC BLANKENSTEIN PLLC
1701 Pennsylvania Ave., NW, #200
Washington, DC 20006
eric@blankensteinlegal.com

BRUNN W. ROYSDEN III
Counsel of Record
FUSION LAW PLLC
7600 N. 15th St., Suite 150
Phoenix, AZ 85020
(602) 315-7545
beau@fusion.law

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Amicus curiae John Michael "Mick" Mulvaney has served in numerous government positions, including: on the U.S. House of Representatives Committee on Financial Services, which has primary oversight responsibility for the Bureau of Consumer Financial Protection ("Bureau" or "CFPB"); as the Director, in an acting capacity, of the Bureau; and as the Director of the Office of Management and Budget, with responsibility related to the budgeting and appropriations of nearly the entire executive branch. He is the only individual to have served in all three of these capacities. As a result, he is uniquely situated to understand how Congress's appropriations authority disciplines Congress, curbs executive overreach, and promotes liberty in general, and in particular how lack of appropriations affects the conduct of the CFPB. He submits this brief to highlight for the Court just some of the harms that come from the CFPB's unconstitutional lack of accountability to Congress through the appropriations process.

SUMMARY OF ARGUMENT

How the CFPB is funded is contrary to the separation of powers that undergirds our entire system of constitutional government. It gives a single director control over hundreds of federal workers and hundreds of millions of dollars. It deprives Congress of any meaningful oversight of one of the most

---

[1] Pursuant to Rule 37.6, the undersigned certifies that no party's counsel authored this brief, and only amicus and counsel made a monetary contribution to this brief's preparation and submission.

impactful federal financial services regulators. By extension, it denies the American citizenry the opportunity to effect change, even if a majority of them want to do so.

By simple virtue of the Bureau's funding mechanism, then, it is one of the most opaque, least transparent, and potentially most abusive agencies in the federal government.

Concern about abuse is not just theoretical; in ways both large and small the CFPB encroaches on the liberty of the people, violates their statutory and procedural rights, and otherwise flouts legal requirements. Following the constitutionally required appropriations process would not guarantee against these violations, but it should help restrain the CFPB's worst impulses. This is because it has done so in the past with other agencies; in a closely analogous example, Congress used its spending power to rein-in an overexpansive interpretation of "unfairness" by the F.T.C.

As Justice Kennedy once observed, "[m]oney is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). The CFPB, unlike nearly every other federal agency, lacks those "traditional constitutional restraints" because it funds its operations—including bringing enforcement actions and promulgating binding regulations—not by Congressional appropriation, but by merely instructing the Federal Reserve Board of Governors to provide whatever

amount the CFPB Director requests. 12 U.S.C. § 5497(a)(1). This "instrument of policy" is solely in the hands of the executive. Indeed, there are no practical restraints on the Director's request beyond his own determination of what is "reasonably necessary" for the Bureau's operations. *Id*. And while nominally there is a "funding cap," *id*. at § 5497(a)(2), that cap provides no meaningful limit, both because it is so high that the Bureau has never requested the full amount,[2] and because, unlike most appropriated agencies, the Bureau can retain unused funds from one year and use them in the next.[3]

This arrangement is contrary to the separation of powers that informs our whole system of constitutional government. The Framers placed the power of the purse in the hands of Congress, and only Congress, to check executive overreach. Further, they required Congress to provide appropriations for executive actions to make Congress responsible for what government does. This separation of powers was designed to foster accountability and protect the

---

[2] Consumer Financial Protection Bureau, "Financial report of the Consumer Financial Protection Bureau – Fiscal Year 2022" (Nov. 15, 2022) at 9, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_financial-report_fy2022.pdf.

[3] *Compare* 12 U.S.C. § 5497(c)(1) (CFPB funds "remain available until expended") *with Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 587 (D.C. Cir. 1977) ("As a general rule, when budget authority is made available for a specified period, it terminates at the end of that time.").

.

people from out-of-control government. But the Bureau's funding structure does neither.

ARGUMENT

I. Separation of Powers Protects Liberty.

"Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton*, 524 U.S. at 450 (Kennedy, J. concurring). Respondents and the court below both ably explained why this is the case, but it bears emphasizing just how central separation of powers is to the American constitutional order, especially as it relates to spending.

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam), *superseded by statute on other grounds*. The Constitution was drafted this way because "structural protections against abuse of power were critical to preserving liberty." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)). James Madison noted that "usurpations are guarded against by a division of the government into distinct and separate departments," which provides "security . . . to the rights of the people." THE FEDERALIST No. 51 (James Madison). "[S]eparation of powers is at the heart of our constitutional government in order to preserve the people's liberty and the federal government's accountability to the people." *Consumer*

Fin. Prot. Bureau v. All Am. Check Cashing, Inc., 33 F.4th 218, 221 (5th Cir. 2022) (Jones, J., concurring).

II. Regular Congressional Appropriations Provides Accountability and Allows Effective Legislative Control of the Executive Branch.

While separation of powers as a general matter helps safeguard liberty, requiring Congress to appropriate government funds is a particularly effective way of doing so. Congress is the branch closet to the people, and therefore most responsive to them. If an American is upset about the conduct of the Department of Justice or Defense, he can petition his member of Congress. That member of Congress is much more likely than the President to give time and thought to the constituent's complaint given the different natures of their offices. If the member of Congress agrees with his constituent, or even if he does not agree but the position is held by a sufficiently large portion of his constituency that political realities require action, the Congressman can exercise whatever influence he has over the appropriations process to address the issue, in addition to seeking substantive changes to the law.

But that avenue is closed for Americans concerned about how the Bureau conducts itself.

A. Congress Is Obligated to Appropriate on a Regular Basis.

The Framers vested Congress with "the power over the purse," so that it would maintain "a controlling influence over the executive power" by "hold[ing] at its own command all the resources[] by which a chief magistrate could make himself formidable." JOSEPH

STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 531 (1833). As Madison emphasized, Congress's power to deny "the supplies requisite for the support of government" would be its "most compleat and effectual weapon" for defeating "the overgrown prerogatives of the other branches." THE FEDERALIST No. 58 (James Madison).

The constitution vests the "power over the purse" in Congress by, among other things, mandating that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. Const. Art. I, § 9, Cl. 7 (the "Appropriations Clause"). The Appropriations Clause is therefore "a bulwark of the Constitution's separation of powers" that "is particularly important as a restraint on Executive Branch officers," *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.), because "[a]ny exercise of a power" vested in the Executive remains "limited by a valid reservation of congressional control over funds" needed to carry it out, *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990).

But the Appropriations Clause is not just a limitation on the executive and the judiciary; it controls Congress as well. It is in Article I, Section 9, which limits Congressional authority in important ways. This suggests that the Appropriations Clause cabins Congress's spending power as much as it restricts the actions of other branches. In the same way that the Bill of Attainder Clause limits the types of legislation Congress can pass, U.S. Const. Art. I, § 9, Cl. 3, the Appropriations Clause places a real restriction on Congress's power of the purse. Congress must be the one to authorize every

withdrawal from the treasury. As one commentator noted, "Congress has not only the power but also the duty to exercise legislative control over federal expenditures," because otherwise "the Executive alone defines the scope and character of the public sphere, especially in areas that inherently require significant executive discretion." Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988); *see also id.* at 1349 (Appropriations Clause "takes away from Congress . . . the option *not* to require legislative appropriations prior to expenditure." (emphasis in original)). Congress "renders meaningless" the Appropriations Clause if it "creates spending authority without . . . time limitations and fails to subject such authority to periodic legislative review." *Id.* at 1383. Time limitations on appropriations are "especially important . . . where the Executive has significant authority to define government policy and has significant discretion in deciding the means of policy implementation." *Id.* The Bureau is exactly the kind of agency that "has significant discretion" over policy decisions and their implementation, such that time limited appropriations are constitutionally necessary.

This reading of the Appropriations Clause is consistent with both the Constitution's separation of powers and the political theory that supports that separation. Just as John Locke observed that a legislature cannot legitimately "transfer the Power of Making Laws to any other hands," JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 141 (1690), Congress cannot transfer the power of making appropriations to any other hands, especially the executive. *Cf. Clinton*, 524 U.S. at 452 (Kennedy, J.,

concurring) ("[O]ne Congress cannot yield up its own powers, much less those of other Congresses to follow.").

This Court would rightly find unconstitutional a law that gave broad discretion to the executive to enact regulations that it found "reasonably necessary" for the good of the Nation. The same logic applies here with equal if not greater force; the separation of powers embodied in the Constitution requires Congress, not the executive, to determine funding levels that are "reasonably necessary to carry out" the core functions of government that are exercised by the CFPB, 12 U.S.C. § 5497(a)(1).

As Judge Jones of the 5th Circuit noted, there is nothing special about the Bureau *per se* that blesses the funding arrangement only for it, and not the rest of government. *All Am. Check Cashing, Inc.*, 33 F.4th. at 237 ("If the CFPB's funding structure is constitutionally ignored, this will not be the last federal agency to assume a level of fiscal independence that shields it from any effective public accountability."). It would make a mockery of the separation of powers if Congress were to, for example, authorize the Navy to spend whatever it deems "reasonably necessary" in defense of the country—in perpetuity.[4] But that is exactly what Congress has done with the Bureau.

---

[4] As if granting the Bureau the unfettered ability to appropriate its own funds were not enough, the law further deems that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 5497(c)(2). It is unclear how funds specifically intended "to pay the expenses of" a government agency "in

The Framers created a "finely wrought" system for separating legislative and executive power. *Bowsher*, 478 U.S. at 755 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). This included giving Congress the power of the purse. But the CFPB's funding structure impermissibly gives that power back to the executive by, in perpetuity, allowing the Bureau's director to set the agency budget without input or oversight from Congress.

In this case the Court need not define the outer boundaries of a permissible appropriation by Congress; it need only recognize that, wherever those boundaries are located, the current CFPB funding structure far exceeds them.

B. Congress Uses Appropriations to Manage Executive Activity.

Petitioner and *amici* contend that the current arrangement is allowable under the Constitution in part because "Congress can of course repeal or modify standing appropriations at any time." Pet. Br. at 20; *see also* Brief of Current and Former Members of Congress as Amici Curiae in Support of Petitioners at 15 (noting that "Congress can always repeal" "lump sum" and "no year" appropriations). This argument is misplaced for both theoretical and practical reasons.

1. That Congress has chosen to fund the Bureau this way, and retains the authority to alter that process, is of no consequence. "[T]he fact that a given

---

carrying out its duties and responsibilities," *id.* § 5497(c)(1)—responsibilities that include bringing enforcement actions and promulgating legally binding regulations—can be considered anything other than government funds that the Constitution requires Congress to appropriate.

law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944. By requiring Congress to appropriate funds before they can be used by the executive, the Constitution requires Congress to act first before the government can do anything. The current funding structure of the Bureau impermissibly reverses this process; the government will continue to act unless Congress does something to stop it.

Further, the CFPB funding mechanism insulates Congress from the accountability it should have to the people. Voting for (or against) an agency's appropriation—or permitting or prohibiting funds for a particular use—is a statement approving (or disapproving) of how that agency is conducting itself. It was, in fact, concern about "Congressional pressure" exerted "through the annual appropriations process" that motivated the 111th Congress to insulate the Bureau from that process entirely. S. Rep. 111-176, at 163 (2010). But the ability of the people's representatives to influence how the executive conducts its business is a feature of our system, not a bug, even if the 111th Congress thought otherwise.

2. While these theoretical considerations are important, it is practical experience that shows the power of regular Congressional appropriations. There can be no doubt that Congress uses the appropriations process to exert substantial influence over the conduct of the executive branch. This is as the Constitution intended.

1. As a general matter, Congress can use the appropriations process to limit spending on specific programs—or even specific positions—as a way to exert greater control over the conduct of the executive. *See generally* Jenna Portnoy and Lisa Rein, "House Republicans revive obscure rule that allows them to slash the pay of individual federal works to $1," WASH. POST, Jan. 5, 2017, https://www.washingtonpost.com/local/virginia-politics/house-republicans-revive-obscure-rule-that-could-allow-them-to-slash-the-pay-of-individual-federal-workers-to-1/2017/01/04/4e80c990-d2b2-11e6-945a-76f69a399dd5_story.html.

Outside of this general authority, Congress routinely uses the power of the purse to limit executive action. Perhaps the most famous of these are the realm of foreign affairs. In 1973, Congress used its appropriations authority to prohibit military activity in Southeast Asia. Continuing Appropriations, 1974, Pub. L. No. 93-53 § 108, 87 Stat. 130, 134 ("[N]o funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia."). The "Boland Amendments" prohibited the executive from attempting to overthrow the government of Nicaragua or supporting the contra group that was trying to do so. Act of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865; Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935. It was the executive's efforts to evade these restrictions that led to the Iran-Contra investigations. *See generally* Lawrence E. Walsh,

FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, Aug. 4, 1993.

But Congressional appropriations control executive conduct in the domestic policy sphere as well. For example, in 2011 the White House drafted, but did not issue, an executive order that would have required companies submitting bids on federal contracts to disclose certain information about their political activity. Elissa Flynn-Poppey, "Congress Seeks to Block Proposed Federal Executive Order that Would Require Disclosure of Political Spending by Government Contractor," Jun. 23, 2011, https://www.jdsupra.com/legalnews/congress-seeks-to-block-proposed-federal-24017/. Congress disagreed, and used its appropriations authority to specifically prohibit the collection of that information. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 § 823, 125 Stat. 1298, 1502. Congress also can reduce an agency's budget in response to misbehavior by the agency. *See*, *e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 188–191 (reducing IRS appropriation in response to revelation of political targeting).

2. Most analogous for this case is how Congress used appropriations to change conduct at the Federal Trade Commission ("FTC"). In the 1970s and 1980s the FTC issued "a series of rulemakings relying upon broad, newly found theories of unfairness that often had no empirical basis, could be based entirely upon the individual Commissioner's personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace." J. Howard Beales, "The FTC's Use

of Unfairness Authority: Its Rise, Fall, and Resurrection" (May 30, 2003) ("Beales Speech"), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection. Many of the same complaints are leveled at the Bureau's use of its "unfairness" authority today.[5] But, unlike now with the Bureau, in 1980 Congress still retained appropriations authority over the FTC, and used that authority to "simply shut down the FTC for several days." *Id*. It did this in concert with consideration of a bill that would have substantively altered the FTC's authorities. Merrill Brown, "FTC Temporarily Closed in Budget Dispute," WASH. POST, May 1, 1980, https://www.washingtonpost.com/archive/business/1980/05/01/ftc-temporarily-closed-in-budget-dispute/5c63ef5d-4e28-471d-8f9c-014d4d28d360/ (noting that the FTC shutdown "came despite eleventh-hour congressional action to limit sharply the agency's power."). "Thus chastened, the Commission abandoned most of its rulemaking initiatives, and began to re-examine unfairness to develop a focused, injury-based test to evaluate practices that were allegedly unfair." Beales Speech, *supra*.

---

[5] Both the FTC and the CFPB regulate acts and practices that are "unfair," defined as those that cause or are likely to cause substantial harm to consumers, where the harm is neither avoidable by the consumer or outweighed by any benefits of the act or practice. *Compare* 12 U.S.C. § 5531 (CFPB unfairness) *with In the Matter of Int'l Harvester Co*., 104 F.T.C. 949, 1074 (1984) (FTC unfairness). Concerns about Bureau conduct are not limited to how it deals with "unfairness." *See* Section III, *infra*.

Having removed the Bureau's funding from the appropriations process, today's Congress cannot effectively manage the Bureau's use of unfairness (and other legal authorities) the way Congress did with the FTC in 1980. This has had serious consequences for the public.

III. The Bureau's Lack of Accountability to Congress Has Contributed to Its Improper Conduct.

Under normal circumstances, Congress's appropriations power acts like a sword of Damocles hanging over the agency; the agency knows that any misstep could have serious budgetary ramifications, so it strives to act in a manner that is reasonable and will not provoke Congress to act. But the Bureau does not operate under normal circumstances.

Since the Bureau need not worry itself with whether Congress approves of its actions, it repeatedly has acted as one would expect from an unaccountable government agency: without regard for the law or the rights of those it is pursuing. As a former Deputy Director of the Bureau put it, the lack of oversight by Congress "tempts directors into pursuing initiatives that bear little relation to the priorities of the American people nor the boundaries of statutory authority." Testimony of Brian Johnson before the Subcommittee on Financial Institutions and Monetary Policy of the Committee on Financial Services United States House of Representatives (Mar. 9, 2023), https://docs.house.gov/meetings/BA/BA20/20230309/115384/HHRG-118-BA20-Wstate-JohnsonB-20230309.pdf. While, thankfully, the actions

described below are the exception rather than the rule, they are too numerous and too extreme (especially as compared to appropriated agencies) to think that the lack of Congressional oversight through the appropriations process is harmless. Indeed, rather than being unfortunate, isolated byproduct of zealous advocacy by Bureau attorneys, the conduct outlined below appears to have been intentional, as the Bureau's goal was to "push[] the envelope" in carrying out its functions. Michael Grunwald, "Trump Wants to Dismantle Elizabeth Warren's Agency. Good Luck With That," POLITICO MAGAZINE (Dec. 3, 2017), https://www.politico.com/magazine/story/2017/12/03/trump-cfpb-elizabeth-warren-215997/.

a. The Bureau violates the Federal Rules of Civil Procedure to the detriment of the rights of those against whom it is litigating. For example, in its litigation against a constellation of debt collectors, service providers, and individuals, the Bureau engaged in egregious discovery misconduct. Defendants in that case sought 30(b)(6) depositions of the Bureau. The Bureau opposed the depositions on a number of grounds, most of which the district court rejected. *Consumer Fin. Prot. Bureau v. Brown, et al.,* No. 21-14468, 69 F.4th 1321, 1323–28 (11th Cir. June 12, 2023). Rather than accept the district court's ruling and participate in the 30(b)(6) process in good faith, the Bureau "engag[ed] in dramatic abuse of the discovery process" that was "nowhere near proper conduct." *Id.* at 1323. Among the "impermissible tactics" employed by the Bureau, it interposed objections to questions and instructed the witness not to answer based on theories that the district court had

already specifically rejected. *Id.* at 1324–28.[6] The district court determined that the Bureau's conduct was undertaken "in bad faith . . . to frustrate the purpose" of the depositions, and dismissed the Bureau's case against certain defendants as a discovery sanction. *Id.* at 1328–29 and n. 12. That dismissal was upheld on appeal because "the CFPB's discovery abuses were sufficiently egregious to merit dismissal." *Id.* at 1329.

Another example of the Bureau misbehaving during discovery is its litigation against Fifth Third Bank over allegations of improper account opening. The Bureau sought wide-ranging discovery of the account-opening practices at issue, but was rebuffed when the Court asked the parties to work on a sampling methodology. *Consumer Fin. Prot. Bureau v. Fifth Third Bank, N.A.,* 1:21-cv-00262-DRC (S.D. Ohio), Dkt. No. 107 at 4–5. The Bureau was undeterred, and sent a "mass email" to Fifth Third customers, including a link to survey about the alleged improper account opening practices. *Id.* at 14. When Fifth Third brought this conduct to the district court's attention, the court observed that the email had "a lot of the hallmarks of spam, or phishing expeditions," and was "surprised that CFPB would think it was a good idea." *Id.* According to the court the email and survey were "a poor choice . . . designed to create a wedge between Fifth Third and its customers." *Id.* at 16. But, perhaps most egregious was the Bureau's defense, which asserted that it was not bound by the Federal Rules of Civil Procedure or

[6] The appellate court noted that there were "many, many examples" of the Bureau's "egregious" and "obstructive" conduct. *Id.* at 1325–27 and n. 5, 9.

the court's instruction to pursue sampling. The district court summarized the Bureau's position as "we're the CFPB so, essentially, *we can do whatever we want*." *Id*. at 18 (emphasis added).

This cavalier attitude toward the rights of Americans, even large banks and other financial service providers, is anathema to our constitutional principles and is one of the main reasons why our government is structured to separate power between the executive and the legislature.

b. Even before getting to the discovery stage, the Bureau many times fails to provide adequate notice of what it believes individuals did wrong. For example, the CFPB sued Intercept Corporation for violation of the Consumer Financial Protection Act. The court granted Intercept's motion to dismiss because "the complaint [did] not provide the court with sufficient information or factual detail to analyze whether it is sufficient to state a claim for relief." *Consumer Fin. Prot. Bureau v. Intercept Corp.*, No. 3:16-CV-144, 2017 WL 3774379, at *4 (D.N.D. Mar. 17, 2017). The court further noted that "[a] complaint containing mere conclusory statements without sufficient factual allegations to support the conclusory statements cannot survive a motion to dismiss" because complaints "must give defendants fair notice of the grounds for the claim and at least a general indication of what the litigation involves." *Id*. at *4, 3. In dismissing the complaint, the district court found that the Bureau did neither.

Similarly, the Bureau lost a motion to dismiss in its case against Ocwen Financial Corporation because it filed an impermissible "shotgun pleading" that so

muddied the allegations it was "nearly impossible for Defendants and the Court to determine with any certainty which factual allegations give rise to which claims for relief." *Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp.*, No. 17-80495-CIV, 2019 WL 13203853, at *11 (S.D. Fla. Sept. 5, 2019) (quoting *Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1356 (11th Cir. 2018)). After being allowed to replead, the CFPB lost the case *again*, this time because the court found each of the Bureau's claims was barred by a prior settlement between the parties. *Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp.*, No. 17-cv-80495 (S.D. Fla.), Dkt. No. 813 (May 2, 2023) (Summary Judgment Order (Second) on Remand from the Eleventh Circuit Court of Appeals).

The Bureau fails to give adequate notice to parties in more than just its complaints. As part of its authority to enforce Federal consumer financial law, the Bureau is entitled to issue civil investigative demands (CIDs). 12 U.S.C. § 5562(c). But, each CID the Bureau issues must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." *Id.* § 5562(c)(2). This is an important safeguard because it "ensures that the recipient of a CID is provided with fair notice as to the nature of the Bureau's investigation," *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 690 (D.C. Cir. 2017) ("ACICS"), and, if necessary, enables the recipient to prepare to defend itself. On at least two occasions the Bureau failed to adhere to this basic procedural safeguard. *Id.*; *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, 903 F.3d 456 (5th Cir. 2018).

This failure not only prejudices the recipient, it also undermines the ability of courts to conduct meaningful review of whether the CID was lawfully issued. *ACICS*, 854 F.3d at 691. The *ACICS* court observed that the CID was deficient because it gave "no description whatsoever" of the focus of the CFPB's investigation, which likely prevented the court from "accurately determin[ing] whether the inquiry is within the authority of the agency and whether the information sought is reasonably relevant." *Id.*; *see also Source for Pub. Data*, 903 F.3d at 459 ("Because the CID issued to Public Data fails to identify the conduct under investigation or the provision of law at issue, we cannot review it under our 'reasonable relevance' standard," which frustrates judicial review so that "a CID recipient has no opportunity to challenge an agency's investigatory authority.").

In each of these instances, the judiciary was able to vindicate the rights of the institutions that were the targets of the Bureau's deficient pleadings. But that does not mean that the Bureau's failures did not impose costs, both in reputational harm and the time and expense incurred in resisting the Bureau's efforts. And these are just some of the reported cases; there are any number of institutions that did not challenge deficient CIDs, or entered into a settlement and consent order rather than incur the time, expense, and risk of litigation to fully vindicate their rights. The separation of powers was designed to check the impulses that impose those types of costs on society.

c. The Bureau also has brought numerous enforcement actions based on novel, extreme interpretations of relevant law. Paradigmatic of this behavior is the Bureau's conduct in its litigation with

PHH Corporation. The question in that case was whether and how the Real Estate Settlement Procedures Act ("RESPA") applied to PHH's practice of conditioning referrals to mortgage insurers on those mortgage insurers agreeing to use PHH's captive reinsurer. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 82 (D.C. Cir. 2018) ("*PHH en banc*"), *abrogated on other grounds by Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). The CFPB took the position that such an arrangement violated RESPA's prohibition on kickbacks. *Id*. at 82–83. It took this position despite existing guidance from the Department of Housing and Urban Development ("HUD"), in place for more than a decade before the Bureau commenced its action, that allowed such tying arrangements "so long as the mortgage insurer paid no more than reasonable market value for the reinsurance." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 40 (D.C. Cir. 2016) (Kavanaugh, J.) ("*PHH Panel*"), *reh'g en banc granted, order vacated* (Feb. 16, 2017).[7] The D.C. Circuit rejected the Bureau's interpretation of RESPA, describing the question as "not a close call." *Id*. at 41. It made this determination because the Bureau's interpretation "flout[ed] not only the text of the statute but also decades of carefully and repeatedly considered official government interpretations." *Id*. at 42.

In addition to improperly interpreting the statute and reversing this longstanding HUD guidance, the

[7] Even though the panel opinion was vacated when rehearing was granted, the panel opinion was reinstated "as it related to the interpretation of RESPA and its application to PHH" and its captive insurer. *PHH en banc*, 881 F.3d at 83 (D.C. Cir. 2018).

Bureau sought to apply its new interpretation *retroactively*. *Id*. The D.C. Circuit also rejected this effort as a "violat[ion] of due process." *Id*. at 44. According to the D.C. Circuit, the Bureau's position was contrary to "Rule of Law 101," and its "gamesmanship" was anathema to the Due Process Clause. *Id.* at 41, 48–49.

In that case the CFPB also took the position that no statute of limitations applied to actions brought in its in-house adjudication proceedings. *Id*. at 50. The D.C. Circuit rejected that position as "absurd" and "especially alarming." *Id*. at 54–55. *PHH* was not a one-off; the Bureau argued in other cases that it was not bound by statutes of limitations. *See*, *e.g.*, *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1376 (N.D. Ga. 2015) (rejecting the Bureau's argument that no statute of limitations applies to its Fair Debt Collection Practices Act claims).

d. Related to this, the Bureau has acted to evade explicit statutory limitations on whom it can regulate. For example, the Bureau is specifically prohibited from "exercise[ing] any rulemaking, supervisory, enforcement, or any other authority" over auto dealers, with only certain narrow exceptions. 12 U.S.C. § 5519. Undeterred by this near-blanket prohibition, on multiple occasions the CFPB has tried to regulate the conduct of auto dealers by other means.

In 2013 the CFPB issued a bulletin that purported to explain how it would regulate those institutions "within the jurisdiction" of the Bureau, but in reality took issue with (and tried to change the conduct of)

how auto dealers acted as part of the auto lending process. CFPB Bulletin 2013-02 (Mar. 21, 2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf. The bulletin discussed "practices that permit *dealers* to increase consumer interest rates and that compensate dealers with a share of the increased interest revenues" due to concern about potential discrimination *by the dealers* based on prohibited characteristics such as race. *Id.* at 1–2 (emphasis added). Put another way, the Bureau was concerned about the business practices of dealers, but, unable to regulate them directly, sought to regulate their business partners instead, in the hope that those business partners would act to change dealer conduct.[8] Congress ultimately invalidated the Bureau's efforts in this area, Joint Resolution of May 21, 2018, Pub. L. No. 115-172, 132 Stat. 1290, in part because it was "an attempt to regulate auto dealers who were explicitly exempted from the CFPB's supervision and regulation under the Dodd-Frank Act." 164 Cong. Rec. S2200 (daily ed. Apr. 17, 2018) (statement of Sen. Crapo).[9]

---

[8] This was improper because "[w]hat cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. - - (Slip. Op. 39) (June 29, 2023). But there also were myriad other legal and practical problems with the Bureau's approach to this issue. *See* Republican Staff of the Committee on Financial Services, U.S. House of Representatives, "Unsafe At Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending," (Nov. 24, 2015), https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf.

[9] The fact that Congress was able to use the Congressional Review Act ("CRA"), 5 U.S.C. § 801 *et seq.*, to check the Bureau in this area was the result of the rare circumstance where, within

Recently, despite express Congressional repudiation of its prior attempt to regulate auto dealers, the Bureau took another bite at the auto dealer apple by bringing an enforcement action against Credit Acceptance Corporation ("CAC"). *Consumer Fin. Prot. Bureau, et al., v. Credit Acceptance Corp.*, 1:23-cv-00038 (S.D.N.Y.), Dkt. No. 1. As with its prior foray into this area, the Bureau complains of improper conduct by auto dealers, such as inflating the sales price of the car or selling add-on products to increase the loan value. *See e.g.*, *id.* at ¶ 39. And as with its prior attempt, it seeks to hold an indirect finance company accountable for actions taken by the auto dealers, likely as part of an effort to enlist CAC in the Bureau's effort to change dealer behavior. Without effective oversight by Congress through the appropriations process, there is no reason to think that the Bureau will adhere to statutory limits on its authority.

e. These are just some of the ways that an unaccountable Bureau acts without regard to the rights and liberties of others as part of its enforcement function. But the Bureau's improper conduct is not limited to enforcement. According to media accounts, during the supervision process the Bureau "aggressively demand[s]" that companies produce material protected by the attorney-client or other applicable privileges. *See* Sam Manas, "MBA

---

the CRA review period, there was a change in Presidential administration to one that did not approve of the Bureau's position, *and* a majority of both the House and the Senate disapproved. This infrequent occurrence is no substitute for the constitutionally-mandated checks-and-balances through the appropriations process.

Questions CFPB Authority to Seek Privileged Information," Inside Mortgage Finance (May 9, 2022), https://www.insidemortgagefinance.com/articles/224540-mba-asks-cfpb-to-justify-privileged-info-requests?v=preview. The Bureau also engages in "regulation by enforcement," and lately regulation-by-speech and blog-post, rather than follow the procedures authorized by Congress for regulating industry. *See*, *e.g.*, Consumer Financial Protection Bureau, "Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association" (Mar. 9, 2016), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/ (defending use of "regulation by enforcement" as "convey[ing] an intelligible direction to the marketplace, so as to create deterrence that can be readily understood and implemented" by compliance officers); Consumer Financial Protection Bureau, "The CFPB has entered the chat" (Jun. 7, 2023), https://www.consumerfinance.gov/about-us/blog/cfpb-has-entered-the-chat/ (discussing use of "chatbots" by financial service providers and implying that their use may violate Federal consumer financial law).

As with the Bureau's conduct in enforcement, there are "many, many" other examples of such "egregious" conduct.

* * *

Discovery misconduct, pursuit of facially implausible legal theories, and other bad behavior by a litigant is an unfortunate fact of the American legal

system. But the government can and must do better. Unlike a private party, whose only job is to seek maximum advantage (within the rules) as part of a contested proceeding, the job of the government is to faithfully and reasonably interpret the law. *Cf.* THE FEDERALIST NO. 51 (James Madison) ("Justice is the end of government"). As then-Attorney General Holder instructed new assistant United States attorneys, "[y]our job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing." Nedra Pickler, "Holder tells prosecutors that justice is top priority," THE SAN DIEGO UNION-TRIB., Apr. 8, 2009, https://www.sandiegouniontribune.com/sdut-holder-ethics-040809-2009apr08-story.html. It is not the right thing for a government agency to "push the envelope" when that means trampling on procedural and substantive rights of others, or otherwise flouting legal requirements. And it is not enough to say that the judiciary stands ready to guard against these abuses; the entire purpose of separation of powers is to help prevent such abuses from occurring in the first place. *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). It may be that the conduct outlined above is exactly what Congress wanted the Bureau to do; that Congress thought the Bureau was doing the "right thing" in all of those cases. Congress even may have wanted the Bureau to "push the envelope" even more than it was. But if congress had objected, and wanted to try to reign in what it perceived as bad behavior, it would have had a very difficult time doing so.

While no doubt even the most scrupulous, closely monitored government agency will err from time to time, lack of accountability to Congress and ultimately the people through the appropriations process makes it more likely—not less—that such improper conduct will occur. This is exactly what the separation of powers was designed to protect against.

CONCLUSION

Consider the following scenario: An acting director of a federal agency—someone confirmed by the United States Senate for another position, but not the role he was serving at this moment—walks into the front door of the Federal Reserve and presents a handwritten note to the receptionist:

> Please put $800,000,000 into the account of the Consumer Financial Protection Bureau at the New York Federal Reserve.
>
> Thank you.
>
> John Michael Mulvaney
> Acting-Director, CFPB

In response, the Federal Reserve not only moves the money, but does so without inquiry of any sort. And most certainly without any referral of the matter to Congress.

That very nearly happened in 2018. And the fact that it did not had absolutely nothing to do with a concern about what the law required; in fact, the relevant statute allows this.

But the constitution does not.

"By structuring the Bureau the way it has, Congress established an agency primed to ignore due process and abandon the rule of law in favor of Bureaucratic fiat and administrative absolutism." Semi-annual report of the Bureau of Consumer Financial Protection (Apr. 2018) at 1–2 (Message from Mick Mulvaney), https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-mmulvaney-20180411-sd001.pdf. The structure, funding, and operation of the Consumer Financial Protection Bureau is the exact kind of unchecked executive adventurism the Framers sought to avoid by obligating Congress, and Congress alone, to regularly appropriate funds for use by the executive.

The Bureau's funding structure is unconstitutional and the holding from the Fifth Circuit should be affirmed.

Respectfully submitted,

ERIC BLANKENSTEIN
LAW OFFICES OF ERIC BLANKENSTEIN PLLC
1701 Pennsylvania Ave., NW, #200
Washington, DC 20006
eric@blankensteinlegal.com

BRUNN W. ROYSDEN III
Counsel of Record
FUSION LAW PLLC
7600 N. 15th St.,
Suite 150
Phoenix, AZ 85020
(602) 315-7545
beau@fusion.law

Counsel for Amicus Curiae