ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

United States Court of Appeals for the District of Columbia Circuit

No. 15-1177

PHH CORPORATION, et al.,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Review of an Order of the Consumer Financial Protection Bureau

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS ON EN BANC REHEARING

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MARCH 10, 2017

Certificate as to Parties, Rulings, and Related Cases

Pursuant to D.C. Cir. R. 28(a)(1), Amicus Curiae ACA International certifies:

Parties and Amici

As far as ACA knows, all Parties, Intervenors, and Amici appearing before the District Court and in this Court are listed in the Petitioners' brief.

Rulings Under Review

An accurate reference to the order at issue appears in the Petitioners' brief.

Related Cases

As far as ACA knows, there are no related cases.

ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH Corporation, et al.,

Petitioners,

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Consumer Financial Protection Bureau,

Respondent.

AMICUS CURIAE ACA INTERNATIONAL'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae ACA International states that it is a Minnesota nonprofit corporation. It is not a subsidiary or affiliate of any other corporation. No publicly held corporation owns 10 percent or more of its stock.

Pursuant to D.C. Cir. R. 26.1, ACA states that it is the trade association for the credit-and-collections industry. Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational

and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

March 10, 2017.

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s/ Brian Melendez

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Certificate of Counsel Regarding
Necessity of Separate Brief

Pursuant to D.C. Cir. R. 29(d), counsel for Amicus Curiae ACA International states that a separate amicus brief is necessary because ACA has a perspective distinct from that of other Amici. ACA is the trade association for the credit-and-collections industry, and all or nearly all of ACA's members operate under the consumer-finance laws that the Consumer Financial Protection Bureau implements. The credit-and-collection industry operates in a nationwide market, and ACA can address the regulatory and public-policy implications of how the Bureau interprets and applies those consumer-finance laws from an industry-wide perspective in a way that the Parties themselves cannot. Other Amici may have some members who are subject to the consumer-finance laws, or may consist primarily of members who are subject to certain consumer-finance laws, but ACA consists almost entirely of members who are subject to a broad range of the consumer-finance laws that the Bureau implements.

Table of Contents

Table of Authorities[1]

Federal Cases

[1]Authorities upon which we chiefly rely are marked with asterisks.

Federal Statutes

Constitutional Provisions

Other Authorities

Statement of Identity, Interest, and Source of Authority to File

Pursuant to Fed. R. App. P. 29(c)(4), Amicus Curiae ACA International states:

ACA International, the Association of Credit & Collection Professionals, is a Minnesota nonprofit corporation with offices in Washington, D.C., and Minneapolis, Minnesota.

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA company members range from small businesses with a few employees to large, publicly held corporations. They include small businesses that operate within a single community or state, and large corporations doing business in every state. But most ACA company members are small businesses, collecting rightfully owed debts on behalf of

other small and local businesses. Of ACA's member organizations, 86 percent have fewer than 50 employees, and 48 percent have fewer than nine employees.[2]

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars — dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses on those businesses' financial statements. Without an effective collection process, the economic viability of these businesses — and, by extension, the American economy in general — is threatened. Recovering rightfully owed consumer debt lets organizations survive; helps prevent job losses; keeps credit, goods, and

[2]Josh Adams, *ACA International White Paper, Small Businesses in the Collection Industry: An Overview of Organization Size and Employment* 2 (Aug. 2016), http://www.acainternational.org/files.aspx?p=/images/40363/aca-wp-smallbusiness.pdf.

services available; and reduces the need for tax increases to cover governmental budget shortfalls.

In 2013, Ernst &Young conducted a study to measure the various impacts of third-party debt collection on the national and state economies. In addition to recovering rightfully-owed consumer debt totaling $44.9 billion in 2013 alone, the study found that third-party debt collectors directly provided over 136,000 jobs and $6.4 billion in payroll. When factoring in jobs created indirectly, those numbers doubled to 231,000 jobs and $12.4 billion in payroll. Third-party debt collectors paid $687 million in state and local taxes and $724 million in federal taxes. The total state and local tax impact of third-party debt collectors was $1.3 billion, and the total federal impact was $1.4 billion.[3]

All the Parties have consented to ACA filing this brief, so ACA is filing this brief under Federal Rule of Appellate Procedure 29(a)(2).

[3]Ernst &Young, *The Impact of Third-Party Debt Collection on the National and State Economies in 2013*, July 2014, http://www.acainternational.org/economicimpact.aspx.

Statement Under Rule 29(c)(5)

Pursuant to Fed. R. App. P. 29(c)(5), Amicus Curiae ACA International states:

(A) No Party's counsel authored this brief in whole or in part.

(B) No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief.

(C) No person — other than Amicus Curiae ACA International, its members, and its counsel — contributed money that was intended to fund preparing or submitting this brief.

Summary of the Argument

The Consumer Financial Protection Act of 2010 established the Bureau of Consumer Financial Protection. The Bureau is granted various "executive and administrative powers."[4] The Bureau is headed by an individual Director. The "Federal consumer financial laws" under which the Bureau may "regulate the offering and provision of consumer financial products or services" include 18 enumerated statutes that touch every aspect of American economic life.[5] The consumer-financial-protection functions of seven federal agencies were transferred to the Bureau.

The Bureau's structure and function are unique. No other federal agency wields power over such a broad swath of Americans' lives. No other federal agency concentrates power in the hands of a single appointee in the way that the Consumer Financial Protection Act concentrates power in the hands of the Director. And no other executive agency is so insulated from democratic accountability. That combination of factors is ripe for abuse —

[4] 12 U.S.C. § 5492 (executive and administrative powers).

[5] *See* 12 U.S.C. § 5481(14) (defining ""Federal consumer financial laws," which include "the enumerated consumer laws"); *id.* (12) (defining the "enumerated consumer laws").

for the arbitrary and unrestrained exercise of power in disregard for due process, and for the constitutional rights of the objects upon whom that power is exercised. This case illustrates the unconstitutional consequences that can result.

First, the Bureau's structure amounts to an unconstitutional delegation of legislative authority to a single individual. The Bureau's authority is defined generally in terms of "prohibiting unfair, deceptive, or abusive acts or practices."[6] The addition of the term "abusive" was an innovation in the Consumer Financial Protection Act of 2010, and the term was defined only with respect to a consumer's subjective understanding or reliance. That subjective definition, depending entirely on one individual's (the Director's) interpretation of what another individual (the consumer) understands or perceives, does not "lay down . . . an intelligible principle to which" the Director "is directed to conform."[7] The Director is instead given practically unfettered discretion to impose an idiosyncratic view of what constitutes

[6]12 U.S.C. § 5531 (prohibiting unfair, deceptive, or abusive acts or practices).

[7]*Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

"abusive" acts or practices, and wield vast regulatory and enforcement powers in imposing that view. Such authority, concentrated in one pair of hands, is an unconstitutional delegation of legislative power.

Second, the Bureau's insulation from Presidential and Congressional oversight deprives its work of democratic accountability. The Director holds more individual power over domestic affairs than any individual governmental officer in American history other than a President. But a President depends on the voters in order to get elected, and on the elected Congress in order to pay for and run the government. An unelected Director need answer neither to the voters, nor to the President or to Congress. The limitations on the President's ability to direct or remove the CFPB Director unconstitutionally insulate the Director from Presidential oversight. The Bureau's independence from Congressional appropriations insulates the Bureau from accountability to Congress.

Third, the Bureau's unique funding mechanism, in addition to being insulated from accountability, also raises an unusual conflict of interest: The Civil Penalty Fund creates a perverse incentive for the Bureau to use enforcement actions as a funding mechanism, where the Bureau is both

prosecutor and beneficiary. This concern about a conflict of interest is more than hypothetical: it arose in this case. The Administrative Law Judge recommended that the Petitioners disgorge $6,442,399; the Director increased that amount nearly 17-fold, to $109,188, 618 — an amount that may flow to the Bureau's coffers if the Director's decision is upheld.

Finally, the Bureau's conduct in practice has evaded traditional, transparent mechanisms of administrative procedure in favor of back-door policymaking through litigation and enforcement. The Bureau's structure and function —wielding power over a broad swath of Americans' lives, concentrating power in the hands of a single Director, insulated from democratic accountability —is ripe for the arbitrary and unrestrained exercise of power in disregard for due process, and for the constitutional rights of the objects upon whom that power is exercised. This case illustrates the unconstitutional consequences that can result. The Bureau is subject to the Administrative Procedure Act, and has engaged in extensive rulemaking. But the traditional, transparent mechanisms of administrative procedure are cumbersome and time-consuming, which results in a great temptation to make policy through back-door means such as litigation and enforcement.

The Director succumbed to that temptation in this case: he used a decision in an administrative action to announce a significant departure from precedent in the interpretation of the Real Estate Settlement Procedures Act. The Bureau's structure leaves the door open to similar back-door policymaking in any other area as well, and regulated actors — such as the credit grantors, collection agencies, attorneys, and asset buyers who comprise ACA's membership — should not learn that the ground rules have changed only when they are facing an enforcement action that the Bureau has brought.

The credit-and-collection industry operates in a nationwide market, so both public policy and due process favor consistent and predictable application of the consumer-finance laws. But for the credit-and-collection industry and other financial-services actors to comply with the consumer-finance laws, those laws must be consistently and predictably applied — that is, a debt collector or other actors must know what the law prohibits and what it allows: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is

forbidden or required."[8] In a nationwide market, that outcome requires consistent and predictable nationwide direction on which a debt collector can rely. A change of course that gets announced in an enforcement action raises an issue of constitutional dimension because it deprives the enforcement action's target of fair notice of what the law requires and what it prohibits. The Petitioners are being subject to liability for *following* well-established precedents of which they had fair notice. To impose liability under these circumstances would violate due process.

[8] *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 132 S. Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

Argument

The Consumer Financial Protection Act of 2010[9] established the Bureau of Consumer Financial Protection, defined by law both as "an independent bureau" and as "an Executive agency."[10] The Bureau's mandate is to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[11] The Bureau is granted various "executive and administrative powers,"[12] including "implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions."[13] The Bureau is headed by an individual Director.[14]

The "Federal consumer financial laws" under which the Bureau may "regulate the offering and provision of consumer financial products or

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[9]Consumer Financial Protection Act of 2010, *in* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1375, 1955 (2010) (codified at 12 U.S.C. ch. 53, subch. V).

[10]12 U.S.C. § 5491(a).

[11]*Id.*

[12]12 U.S.C. § 5492 (executive and administrative powers).

[13]*Id.* (a)(10).

[14]12 U.S.C. § 5491(b)(1) ("There is established the position of the Director, who shall serve as the head of the Bureau.").

services" include 18 enumerated statutes that touch every aspect of American economic life.[15] The consumer-financial-protection functions of seven federal agencies were transferred to the Bureau.[16]

The Bureau's structure and function are unique. No other federal agency wields power over such a broad swath of Americans' lives. No other federal agency concentrates power in the hands of a single appointee in the way that the Consumer Financial Protection Act concentrates power in the hands of the Director. And no other executive agency is so insulated from democratic accountability. That combination of factors is ripe for abuse — for the arbitrary and unrestrained exercise of power in disregard for due process, and for the constitutional rights of the objects upon whom that power is exercised. This case illustrates the unconstitutional consequences that can result.

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[15] *See* 12 U.S.C. § 5481(14) (defining ""Federal consumer financial laws," which include "the enumerated consumer laws"); *id.* (12) (defining the "enumerated consumer laws").

[16] 12 U.S.C. § 5581(b) (transfer of consumer financial protection functions — in general).

I. The Bureau's structure amounts to an unconstitutional delegation of legislative authority to a single individual.

The Constitution's article I — indeed, its first sentence after the preamble — vests "[a]ll legislative powers herein granted . . . in a Congress of the United States . . . ."[17] Congress cannot delegate that power to any other person or body, not even a federal agency:[18] "Congress . . . may delegate no more than the authority to make policies and rules that implement its statutes."[19] And when Congress does delegate such secondary authority, it must also "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[20]

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[17]U.S. Const., art. I, § 1.

[18]*Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) ("This text permits no delegation of those powers" (citing *Loving v. United States*, 517 U.S. 748, 771, (1996)).

[19]*Loving v. United States*, 517 U.S. 748, 771 (1996); *see J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law").

[20]*Whitman*, 531 U.S. at 472 (quoting *J. W. Hampton, Jr., & Co.*, 276 U.S. at 409).

The Bureau's authority is defined generally in terms of "prohibiting unfair, deceptive, or abusive acts or practices":[21]

> (a) **In general**
>
> The Bureau may take any action authorized under part E [enforcement powers] to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.
>
> (b) **Rulemaking**
>
> The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.[22]

But while the term "unfair and deceptive acts and practices" has a meaning that is statutorily defined[23] and well understood from decades of application and interpretation under the Federal Trade Commission Act[24] — a meaning

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[21] 12 U.S.C. § 5531 (prohibiting unfair, deceptive, or abusive acts or practices).

[22] *Id.* (a)–(b).

[23] 15 U.S.C.S. § 45(n) (definition of unfair acts or practices).

[24] *See id.* (a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."). The original version, adopted in

that Congress presumably intended to import[25] — the addition of the term "abusive" was an innovation in the Consumer Financial Protection Act of 2010. The term was defined only with respect to a consumer's subjective understanding or reliance:

> (d) **Abusive** The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—
> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
> (2) takes unreasonable advantage of—

1914, provided that "unfair methods of competition in commerce are hereby declared unlawful." An Act To create a Federal Trade Commission, to define its powers, and for other purposes, § 5, 63rd Cond., 2d Sess., ch. 311, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914). The statute was amended to in 1938 to extend to "unfair or deceptive acts or practices." An Act To amend the Act creating the Federal Trade Commission, to define its powers, and for other purposes, § 3, 75th Cong., 3d Sess., ch. 49, Pub. L. No. 75-447, 52 Stat. 111, 111 (1938).

[25] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (citing *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) ("presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them")); *see also Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[26]

That subjective definition, depending entirely on one individual's (the Director's) interpretation of what another individual (the consumer) understands or perceives, does not "lay down . . . an intelligible principle to which" the Director "is directed to conform." The Director is instead given practically unfettered discretion to impose an idiosyncratic view of what constitutes "abusive" acts or practices, and wield vast regulatory and enforcement powers in imposing that view. The incumbent Director, Richard Cordray, has acknowledged to Congress that the term "abusive" is "a little bit of a puzzle" and that the Bureau has no intention of offering a definition or other guidance about its meaning:

> Mr. Cordray. So the term abusive in the statute is, for the reasons you say, a little bit of a puzzle because it is a new term. . . .

[26] 12 U.S.C. § 5331(d).

> For us, since abusive is a new term, since it is apparently different from unfair and deceptive, the first question is, well, what is something that would be abusive but wouldn't also be unfair and deceptive. And if it is one or the other, I think it is straightforward to deal with in that term. In terms of abusive specifically is, we have been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs——[27]

The Director has wielded his authority to promulgate sweeping and complex regulations in areas such as mortgage servicing, credit-card agreements, automobile financing, mortgage loans, debt-collection practices, credit reporting, and consumer leasing — 60 final rules or interim final rules from April 2012 to January 2017, more than one rule per month on

[27] *How Will the CFPB Function Under Richard Cordray*, Hearing Before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs of the House Committee on Oversight & Government Reform, 112th Cong. (2012) (statement of Richard Cordray), *online at* https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73165/html/CHRG-112hhrg73165.htm (accessed Mar. 9, 2017).

average.[28] Such authority, concentrated in one pair of hands, is an unconstitutional delegation of legislative power.

When Congress established the Federal Trade Commission and charged it with preventing "unfair and deceptive acts and practices," it provided for five commissioners appointed for staggered seven-year terms.[29] Thus, no individual commissioner could dictate the Commission's conduct and, after the Commission's initial establishment, no individual President could appoint all its members (at least not until late in the President's second term). Congress provided no such diffusion of authority in the Bureau. One director heads the Bureau[30] and, with a five-year term,[31] a Director appointed by one President may serve well into the term of a succeeding President — even if the Director's views are at odds with the new administration's economic policy. And if for some reason the new President's nomination of a successor Director stalls in the Senate — a not

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[28]CFPB, "Final rules," *online at* https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/ (accessed Mar. 9, 2017).

[29]15 U.S.C. § 41.

[30]12 U.S.C. § 5491(b)(1).

[31]*Id.* (c)(1).

inconceivable scenario — then the incumbent Director continues in office, even after his or her five-year term has expired.[32]

II. The Bureau's insulation from Presidential and Congressional oversight deprives its work of democratic accountability.

The CFPB Director holds more individual power over domestic affairs than any individual governmental officer in American history other than a President. But a President depends on the voters in order to get elected, and on the elected Congress in order to pay for and run the government. An unelected CFPB Director need answer neither to the voters, nor to the President or to Congress.

A. The limitations on the President's ability to direct or remove the CFPB Director unconstitutionally insulate the Director from Presidential oversight.

The Constitution's article II provides, in the article's first sentence, that "[t]he executive power shall be vested in a President of the United States of America."[33] Since the President cannot personally "'perform all the

[32]*Id.* (c)(2) ("An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.").

[33]U.S. Const., art. II, § 1.

great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'"[34] Since the Constitution went into force, it "has been understood to empower the President to keep these officers accountable — by removing them from office, if necessary."[35] This power of removal is essential to the democratic accountability on which a republic depends.[36]

Congress can limit the President's removal power in the case of a multi-member body (such as the Federal Trade Commission) whose "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative," and whose "members are called upon to exercise the trained judgment of a body of experts."[37] That exception does not apply to the Bureau, whose Director is not a multi-member body, and whose duties include "political" and "executive" functions.

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[34] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (quoting 30 *Writings of George Washington* 334 (J. Fitzpatrick ed. 1939)).

[35] *Id.* (citing *Myers v. United States*, 272 U.S. 52 (1926).)

[36] *Id.* at 497–98.

[37] *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935).

The Consumer Financial Protection Act vests broad "executive and administrative powers" in the Bureau,[38] including "the use and expenditure of funds"[39] and "implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions."[40] The Bureau is also charged with "the appointment and supervision of personnel employed by the Bureau"[41] — and "[a]s Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'"[42]

The Consumer Financial Protection Act provides that the CFPB Director may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office"[43] — not because the Director disagrees with the President over policy, or over the manner in which the financial-services

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[38] 12 U.S.C. § 5492 (executive and administrative powers).

[39] *Id.* (a)(9).

[40] *Id.* (a)(10).

[41] *Id.* (a)(7).

[42] 1 Annals of Cong. 463 (1789), *quoted in Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

[43] 12 U.S.C. § 5491(c)(3) (removal for cause).

laws are being executed. That limitation is unconstitutional because, even when the Director exercises executive power, that power is concentrated in a single individual who need not fear removal by the one officer who constitutionally must "take care that the laws be faithfully executed."[44]

But even if the limitation on the removal power passed constitutional muster, the Act vests the Director with executive power in competition with the President, in whom the Constitution unqualifiedly deposits "[t]he executive power." The Bureau need not consult the President's administration in its recommendations or communications to Congress.[45] The Bureau can regulate the consumer-finance field without regard to the

[44]U.S. Const., art. II, § 3.

[45]12 U.S.C. § 5492(c)(4) (autonomy of the Bureau — recommendations and testimony) ("No officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress, if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the Director or such officer, and do not necessarily reflect the views of the Board of Governors or the President.").

administration's views.[46] And even the courts must defer to the Bureau's "exclusive rulemaking authority."[47]

The limitations on the President's ability to direct or remove the CFPB Director unconstitutionally insulate the Director from Presidential oversight.

B. The Bureau's independence from Congressional appropriations insulates the Bureau from accountability to Congress.

The Constitution provides that "[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law."[48] The

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[46] 12 U.S.C. § 5512(b)(4)(A) (exclusive rulemaking authority — in general) ("Notwithstanding any other provisions of Federal law and except as provided in section 5581(b)(5) of this title, to the extent that a provision of Federal consumer financial law authorizes the Bureau and another Federal agency to issue regulations under that provision of law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to prescribe rules subject to those provisions of law.").

[47] *Id.* (b)(4)(B) (exclusive rulemaking authority — deference) ("Notwithstanding any power granted to any Federal agency or to the Council under this title, and subject to section 5581(b)(5)(E) of this title, the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.").

Consumer Financial Protection Act bypassed the appropriations process for which the Constitution provides,[49] and instead created a unique funding mechanism for the Bureau, which lets the Director requisition funds directly from the Federal Reserve System's earnings:

> (a) **Transfer of funds from Board Of Governors**
>
> (1) **In general**
>
> Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).
>
> (2) **Funding cap**
>
> (A) **In general** Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to . . . 12 percent

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[48]U.S. Const., art. I, § 9.

[49]*See* 12 U.S.C. § 5497(c)(2) (funds that are not government funds) ("Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.").

> of such expenses in fiscal year 2013, and in each year thereafter.[50]

Not only did the Consumer Financial Protection Act bypass the appropriations process, it affirmatively insulated the Bureau's finances from Congressional oversight: "Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."[51] The funds "shall be immediately available to the Bureau and under the control of the Director, and shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities"[52] — that is, the funds carry over from fiscal year to fiscal year, and accumulate if not spent.

III. The Civil Penalty Fund creates a perverse incentive for the Bureau to use enforcement actions as a funding mechanism, where the Bureau is both prosecutor and beneficiary.

The Bureau's unique funding mechanism, in addition to being insulated from accountability, also raises an unusual conflict of interest: The

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[50] *Id.* (a).

[51] *Id.* (a)(2)(c) (reviewability).

[52] *Id.* (c)(1).

Civil Penalty Fund creates a perverse incentive for the Bureau to use enforcement actions as a funding mechanism, where the Bureau is both prosecutor and beneficiary. A civil penalty that the Bureau obtains may benefit the victims of the penalized conduct, but may also fund "consumer education and financial literacy programs"[53] for which the Bureau would otherwise need to pay from its own dedicated funding.

The Consumer Financial Protection Act recognizes that the funding available from the Federal Reserve System's earnings may "not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year," in which case "[t]he Director is authorized to [so] determine" and seek appropriated funds from Congress.[54] But if the Director seeks an appropriation, then he or she must "prepare a report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the [funds from the Federal Reserve System's earnings]," and must "submit the report to the President and to the

[53]12 U.S.C. § 5497(d)(2).

[54]12 U.S.C. § 5497(e)(1) (determination regarding need for appropriated funds — in general).

Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives"[55] — that is, must behave just as every other department and agency in the federal government behaves in the budgeting process. Furthermore, if Congress does appropriate additional funds, then those funds are "subject to apportionment . . . and restrictions that generally apply to the use of appropriated funds in title 31 and other laws."[56] Such appropriated funds generally do not carry over from fiscal year to fiscal year.

Thus, to avoid going through the appropriation process, the Bureau has an incentive to maximize its income from other sources — including, but not limited to, fines and penalties. And the final determination of a civil penalty in an administrative enforcement action rests with the Director, the same person who must determine whether the unappropriated "sums available to the Bureau under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the

[55] *Id.* (e)(1)(B) (report required).

[56] *Id.* (e)(3) (apportionment).

upcoming year."[57] If the remedy that the Bureau sought in this case had been a civil penalty rather than disgorgement, then that penalty may have flowed into the Bureau's coffers.

IV. The Bureau's conduct in practice has evaded traditional, transparent mechanisms of administrative procedure in favor of back-door policymaking through litigation and enforcement.

The Bureau's structure and function —wielding power over a broad swath of Americans' lives, concentrating power in the hands of a single Director, insulated from democratic accountability —is ripe for the arbitrary and unrestrained exercise of power in disregard for due process, and for the constitutional rights of the objects upon whom that power is exercised. This case illustrates the unconstitutional consequences that can result.

The Bureau is subject to the Administrative Procedure Act, and has engaged in extensive rulemaking. But the traditional, transparent mechanisms of administrative procedure are cumbersome and time-consuming, which results in a great temptation to make policy through back-door means such as litigation and enforcement.

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[57] *Id.* (e)(1)(A).

The Director succumbed to that temptation in this case: he used a decision in an administrative action to announce a significant departure from precedent in the interpretation of the Real Estate Settlement Procedures Act. The Petitioners have addressed that issue in their brief, so this brief will not replow that ground. But the Bureau's structure leaves the door open to similar back-door policymaking in any other area as well, and regulated actors — such as the credit grantors, collection agencies, attorneys, and asset buyers who comprise ACA's membership — should not learn that the ground rules have changed only when they are facing an enforcement action that the Bureau has brought.

The credit-and-collection industry operates in a nationwide market, so both public policy and due process favor consistent and predictable application of the consumer-finance laws. Congress recognized the effects upon interstate commerce of debt-collection practices in the Fair Debt Collection Practices Act,[58] and stated explicitly in that statute that one of its purposes was "to insure that those debt collectors who refrain from using

[58]Fair Debt Collection Practices Act § 802(d), 15 U.S.C. § 1692(d) (Congressional findings and declaration of purpose — interstate commerce).

abusive debt collection practices are not competitively disadvantaged."[59] Congress has thus evinced an intent not to weave a regulatory web so tangled that it snares legitimate, compliant, law-abiding actors along with the abusive actors at whose unfair and deceptive conduct the statute is aimed.

But for the credit-and-collection industry and other financial-services actors to comply with the Fair Debt Collection Practices Act and other consumer-finance laws, those laws must be consistently and predictably applied — that is, a debt collector or other actors must know what the law prohibits and what it allows: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[60] In a nationwide market, that outcome requires consistent and predictable nationwide direction on which a debt collector can rely. A change of course that gets announced in an enforcement action raises an issue of constitutional dimension because it deprives the

[59]Fair Debt Collection Practices Act § 802(e), 15 U.S.C. § 1692(e) (purposes).

[60]*FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 132 S. Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

enforcement action's target of fair notice of what the law requires and what it prohibits. The Supreme Court of the United States, in the closing weeks of its 2011–12 Term, decided two cases relevant to the fair-notice issue: *Christopher v. SmithKline Beecham Corp.*, ___ U.S. ___, 132 S. Ct. 2156 (2012), and *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 132 S. Ct. 2307 (2012).

Christopher was an action by pharmaceutical sales representatives (also known as "detailers") against a prescription-drug manufacturer for overtime compensation, to which the detailers' entitlement turned on whether they were "outside salesmen" within the applicable statute's meaning,[61] which turned on how the Department of Labor interpreted its own regulations: "Petitioners invoke the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced."[62] The Supreme Court held that such liability would violate due process: "To defer to the agency's interpretation in this circumstance would seriously undermine the

[61] 132 S. Ct. at 2164–65.

[62] *Id.* at 2167.

principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.' Indeed, it would result in precisely the kind of 'unfair surprise' against which our cases have long warned."[63] The *Christopher* Court explained that, until the Department of Labor announced its interpretation in 2009, "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations certainly do not provide clear notice of this."[64] The Court found it significant that "despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully."[65] The Court concluded that "where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute": "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces

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[63] *Id.* (internal citations and footnote omitted).

[64] *Id.*

[65] *Id.* at 2168.

them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable" down the road.[66]

FCC v. Fox Television was an enforcement action by the Federal Communications Commission where, "[e]ven though the incidents at issue took place before [the applicable order], the Commission applied its new policy regarding fleeting expletives and fleeting nudity" and "found the broadcasts by respondents . . . to be in violation of this standard."[67] The Supreme Court rejected the liability that the agency had imposed because "[t]he Commission failed to give [the respondents] fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent."[68] The Court clearly articulated the applicable rule:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so

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[66] *Id.*

[67] 132 S. Ct. at 2315.

[68] *Id.* at 2320.

> standardless that it authorizes or encourages seriously discriminatory enforcement."[69]

The principles of *Christopher* and *Fox Television* are squarely in play here. The Petitioners are being subject to liability for *following* well-established precedents of which they had fair notice. To impose liability under these circumstances would violate due process.

[69] *Id.* at 2317 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

Conclusion

Therefore, Amicus Curiae ACA International respectfully asks that this Court grant the petition for review and vacate the Bureau's decision and order.

March 10, 2017.

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