18-2743(L)

18-3033(Con), 18-2860 (XAP), 18-3156 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellant-Cross-Appellee,

PEOPLE OF THE STATE OF NEW YORK,
by Letitia James, Attorney General for the State of New York,
Plaintiff-Appellant-Cross-Appellee,

v.

RD LEGAL FUNDING, LLC; RD LEGAL FUNDING PARTNERS, LP; RD LEGAL FINANCE, LLC; and RONI DERSOVITZ,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE AND REPLY BRIEF OF THE CONSUMER FINANCIAL PROTECTION BUREAU

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INTRODUCTION

This case is about a deceptive deal that RD Legal Funding, LLC; RD Legal Finance, LLC; and RD Legal Funding Partners, LLP (collectively, RD) offered to disabled September 11 first responders and former National Football League (NFL) players who suffered brain injuries. The consumers that RD targeted had been awarded compensation for their injuries from either the federal government's September 11 Victim Compensation Fund or a fund established by the NFL concussion litigation settlement (collectively, the Funds), but were still waiting for payment. RD offered these consumers immediate cash in exchange for a much larger amount once the consumers received their awards.

RD tried to structure the transactions as assignments of the consumers' awards. But, as RD suspected all along, these "assignments" were invalid. That meant that RD's transactions actually resulted in RD's advancing consumers money in exchange for the consumers' promise to repay RD more money in the future. A lot more money—sometimes well over double the amount that RD advanced.

RD, in other words, offered consumers expensive credit transactions that were disguised as assignments. In the process, RD violated the federal consumer financial laws. RD misrepresented that the agreements were

assignments, not loans, making it that much harder for already vulnerable consumers to compare RD's offer with alternatives. And RD told consumers that they were obligated to pay RD large amounts when, in fact, consumers had no such obligation because RD's transactions far exceeded state-law interest-rate limits. To address this (and other) unlawful conduct, the Consumer Financial Protection Bureau and the New York Attorney General brought this suit against RD and its owner (collectively, Defendants) under the Consumer Financial Protection Act (CFPA).

Defendants attempt to escape liability for their unlawful conduct by, first, challenging the constitutionality of the Bureau and its organic statute. But, as the Ninth and D.C. Circuits have held, that challenge is foreclosed by controlling Supreme Court precedent. Defendants also claim that their transactions do not fall within the CFPA's ambit because they are "assignments," not "credit." But—as Defendants no longer dispute—RD's transactions could not effect true assignments. Rather, to the extent they could function at all, they could function only as agreements under which RD gave consumers cash in exchange for consumers' promise to give RD a larger amount in the future—quintessential credit.

STATEMENT OF THE ISSUES

The Bureau's opening brief sets forth the issues presented in the Bureau's appeal. Bureau Opening Br. 3. Defendants' "cross-appeal" presents the following issues:

1. RD advanced consumers funds in exchange for the consumers' "assigning" RD a portion of awards that the consumers had been granted but had not yet received. As RD suspected, those awards were not assignable. RD's agreements nevertheless obligated consumers to give RD a portion of their award payments in the future. Did these transactions grant consumers a right to defer payment of a debt, and therefore qualify as "credit" within the meaning of the Consumer Financial Protection Act?

2. Does the Complaint state claims for violations of the CFPA's prohibitions on deceptive or abusive practices by alleging that RD made various misrepresentations to consumers?

SUMMARY OF ARGUMENT

The Bureau's Appeal

1. a. The district court concluded that Congress transgressed the separation of powers when it gave the Bureau's Director the exact same removal protection that the Supreme Court approved for commissioners at the Federal Trade Commission (FTC) in *Humphrey's Executor v. United*

States, 295 U.S. 602 (1935). That conclusion was wrong, as both the Ninth Circuit and the en banc D.C. Circuit have held. The reason? Under the test that the Supreme Court announced in *Morrison v. Olson*, 487 U.S. 654 (1988), and applied in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the constitutionality of a removal restriction depends on whether it impedes the President's ability to take care the laws are faithfully executed. The removal restriction that applies to the Bureau's Director does not impede the President's constitutional authority any more than the comparable restrictions that have long been held constitutional for similar independent agencies, including the FTC.

Defendants barely contest that the removal restriction that applies to the Bureau's Director is constitutional under the Supreme Court's test. While Defendants try to distinguish the removal restrictions at multi-member agencies, they do not explain how the Bureau's single-director structure makes it harder for the President to use his removal power to hold the Bureau's Director accountable for the execution of the consumer laws. Defendants' various arguments suffer from a common defect: They conflict with the Supreme Court's removal precedent. But while Defendants are free to disagree with that precedent, this Court is bound by it. Under

Humphrey's Executor, *Morrison*, and *Free Enterprise*, the for-cause removal restriction is constitutional.

b. Defendants also challenge Congress's decision to enact a law that authorizes the Bureau to obtain and spend money up to a specified funding cap. Defendants claim that this statutory authorization violates the Appropriations Clause. This argument makes no sense. The Appropriations Clause requires that "the payment of money from the Treasury … be authorized by a statute." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). So Congress does not violate the Appropriations Clause by passing a law that authorizes spending. Nor does such a law interfere with the President's constitutional powers. Consistent with the Presentment Clause, the law authorizing the Bureau's funding was presented to and signed by the President. And while Defendants rely on the dissent in *Free Enterprise* to claim that control over the Bureau's budget requests and funding is critical to the President's ability to execute the laws, they ignore that the majority opinion in that case expressly rejected this claim.

c. Finally, Defendants mount a brand-new constitutional challenge against a provision that has nothing to do with this case. Under 12 U.S.C. § 5513(a), the Financial Stability Oversight Council may set aside Bureau rules under narrow circumstances. Defendants claim that this arrangement

unconstitutionally interferes with the President's oversight over the Bureau. Here's the problem: Defendants' challenge is forfeited (Defendants didn't raise it below), irrelevant (this case doesn't involve any Bureau rules), and baseless (the President can oversee the Bureau and the Council because he can remove–either at will or for cause–the Bureau's Director and each voting member of the Council).

2. Even if there were a constitutional defect in the Bureau's statute (and there is not), holding the for-cause removal provision severable from the remainder of the CFPA would resolve the problem—and the Bureau and the New York Attorney General could continue with this case.

The severability analysis in this case is straightforward. Congress included an express severability clause that says that if any provision of the CFPA is held unconstitutional, the rest of the statute should not be affected. To rebut the presumption created by this clause, there must be strong evidence that Congress would have preferred no Bureau and no CFPA than have the agency and the statute continue without the offending provision. No such evidence exists here—and Defendants do not claim otherwise.

The Supreme Court's decision in *Free Enterprise* confirms that finding the for-cause provision severable would resolve any constitutional problem here. There, even without the benefit of an express severability

clause, the Court found that severance of the offending removal restrictions, not invalidation of the agency's organic statute, was the required remedy.

Defendants' Cross-Appeal

1. Defendants cross-appeal the district court's conclusion that the Complaint states valid claims under the CFPA. But that interlocutory determination is not appealable, so the cross-appeal is improper. The Court therefore need not consider Defendants' challenges to the merits of the Bureau's claims.

2. If the Court nonetheless chooses to address those challenges as alternative grounds for affirmance, it should reject them. The Complaint states valid claims that Defendants violated the CFPA's provision barring "covered persons"—a term defined to include those who offer "credit"—from engaging in deceptive and abusive practices.

a. RD is a "covered person" because it extended "credit" to consumers when it gave consumers cash in exchange for consumers' agreement to give RD a larger amount once they received a promised payment in the future. Defendants protest that their transactions were assignments, not credit, but they are mistaken.

Defendants no longer dispute that the assignments in RD's agreements were invalid, at least to the extent that they purported to assign consumers' rights to collect payment from the Funds. This is fatal to RD's attempts to avoid the CFPA's definition of "credit." The CFPA defines "credit" to include "the right granted by a person to a consumer to defer payment of a debt." 12 U.S.C. § 5481(7). RD granted consumers that right because, without the invalid assignments, all that remained of the transactions was an agreement under which RD advanced consumers money and gave consumers the right to defer repaying RD until they received payment from the Funds.

Defendants insist that their agreements still involved an "assignment," not credit. But in a true assignment—unlike in a credit transaction—there is no right to defer payment: The consumer satisfies his obligation immediately because the assignment itself conveys a present interest to the assignee. Here, consumers could not satisfy their obligation to RD immediately because the only present interest that consumers had was the right to collect payment from the Funds, and that interest was not assignable (as RD now concedes). While Defendants insist that consumers also "assigned" their interest in the future *payments* they would receive, that "assignment" could not convey any present interest to RD as a matter

of law. Rather, such an "assignment" functions only as an agreement to transfer the payment when the consumer receives it in the future. Those "assignments" therefore gave consumers the "right … to defer payment" of their debt. They were, in other words, credit.

That conclusion is consistent with a long line of cases that treat similar transaction as loans under state law. In particular, courts have regularly recognized that purported wage assignments were, in substance, loans where the "assignee" company does not collect the assigned wages from the employer directly, but rather allows the consumer to collect his wages and then pay the company himself. That is just like the situation here.

Defendants attempt to avoid the conclusion that the transactions are credit by relying on a different set of state-law cases. According to Defendants, these state-law cases hold that a transaction cannot be a loan wherever the putative lender takes on any risk that a third party (like the Funds here) will not pay. Defendants, however, do not explain how the state law they cite can overcome the CFPA's definition of credit. Regardless, Defendants misstate state law. Although a transaction may not be a loan under state law where the company that advances funds bears a *meaningful* risk that a third party will not pay, RD bore no such meaningful

risk here. At the time it entered into its agreements, the consumers had already received letters approving their awards—and all that remained was for the Funds to make the promised payments. The risk that the Funds would not pay at that point was far too minor to make RD's transactions anything other than credit. And, beyond that, RD's contracts actually attempted to shield RD from even that nominal risk—so the transactions would be credit even under RD's own (flawed) view of the law.

b. The Complaint also alleges that Defendants engaged in deceptive and abusive conduct. The various misrepresentations that Defendants made straightforwardly violate the CFPA.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss *de novo*. *Dettelis v. Sharbaugh*, 919 F.3d 161, 163 (2d Cir. 2019). In determining whether a complaint states a claim, the Court "accept[s] all factual allegations as true and draw[s] all reasonable inferences in favor of the plaintiff." *Id.*

ARGUMENT IN REPLY ON THE BUREAU'S APPEAL

I. The Bureau's Statutory Structure Is Constitutional.

Nearly every court to consider the question—including the Ninth Circuit and the en banc D.C. Circuit—has held that the Bureau's statutory structure is constitutional under controlling Supreme Court precedent. This

is because Congress did not impede the President's ability to perform his constitutional duty to ensure that the laws are faithfully executed when it provided the Bureau's Director for-cause removal protection. Nor did Congress run afoul of any constitutional principle when it established the Bureau's funding or when it gave another government body veto power over certain Bureau regulations. Defendants' contrary arguments are mistaken.

A. The for-cause removal provision is constitutional.

The test for whether restrictions on the President's removal authority violate the constitutional separation of powers is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty" to faithfully execute the laws. *Morrison*, 487 U.S. at 691. To answer this question, courts consider the nature of the removal restriction and the functions of the agency or official to which it applies. *See id.* at 690-92; *PHH Corp. v. CFPB*, 881 F.3d 75, 78 (D.C. Cir. 2018) (en banc); *CFPB v. Seila Law LLC*, 923 F.3d 680, 683-84 (9th Cir. 2019), *petition for cert. filed*, No. 19-7 (U.S. June 28, 2019).

Under this controlling test, the Bureau's structure is constitutional. The analysis is straightforward: (1) the removal restriction that applies to the Bureau's Director is identical to the restriction that the Supreme Court upheld for FTC commissioners in *Humphrey's Executor*, *see* Bureau

Opening Br. 21-22; (2) the Bureau exercises functions that are materially similar to those of the FTC, and that the Supreme Court has long recognized as appropriate for regulators with for-cause removal protection, *see id.* at 23-25; and (3) to the extent it is relevant, the Bureau's single-director structure only increases the President's ability to execute the laws as compared to the multi-member structure at independent agencies like the FTC and the Securities and Exchange Commission (SEC), *see id.* at 27-34. The conclusion is likewise clear: Under the Supreme Court's precedents, "the for-cause removal restriction protecting the CFPB's Director does not 'impede the President's ability to perform his constitutional duty' to ensure that the laws are faithfully executed." *Seila Law*, 923 F.3d at 684 (quoting *Morrison*, 487 U.S. at 691).

Defendants attempt to avoid this inevitable result in three ways. Each fails. First, Defendants attempt to resist the conclusion that the Bureau's structure passes muster under the *Morrison* test, but their arguments are inconsistent with the Supreme Court's application of that test in *Morrison* and *Free Enterprise*. Second, Defendants try to claim that the *Morrison* test is no test at all, but rather some words that the Bureau plucked from the opinion. *Morrison* and *Free Enterprise* say otherwise. Finally, Defendants appear to suggest that the real question here is whether the

Bureau's structure and functions are different from the FTC at the time of *Humphrey's Executor* or the independent counsel at the time of *Morrison*. But that isn't the law.

1. Defendants offer little resistance to the conclusion that the Bureau's for-cause removal provision passes the test that the Supreme Court set forth in *Morrison*. To the extent Defendants make arguments relevant to the Supreme Court's test, their arguments cannot withstand scrutiny.

First, Defendants assert that the difference between single- and multi-member structures for independent agencies is constitutionally significant because multi-member agencies often have staggered terms and so-called bipartisanship requirements. According to Defendants, these features enable the President to appoint at least some members and make it more likely that at least some members will share the President's views. Defs. Br. 19. But Defendants do not explain how this distinction makes any difference for the President's ability to take care that the laws are faithfully executed. After all, the Supreme Court has made clear that when it comes to the President's ability to execute the laws, removal—not appointment—is what matters. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (explaining that once appointed, an officer is beholden "only [to] the authority that can

remove, and not [to] the authority that appointed him." (quotation marks omitted)).

To the extent that appointment is nevertheless relevant, the President is more likely to be able to appoint the Bureau's Director in a single term than he is to appoint a controlling majority of multi-member agencies like the FTC or the Federal Reserve Board, *see* Bureau Opening Br. 34—and Defendants do not explain how having the chance to appoint a non-controlling minority makes a constitutional difference. And the so-called bipartisanship requirements at multi-member commissions that Defendants tout are actually *restrictions* on the President's ability to appoint the commissioners of his choosing. The absence of such restrictions cannot possibly impede the President's ability to fulfill his constitutional duties. In any event, any objection to the limits on the President's power to appoint the Bureau's Director has no application to the Bureau's present ability to prosecute this case, because the sitting President appointed the Bureau's current Director.

Next, Defendants claim that the CFPA's for-cause removal restriction leaves the President unable to faithfully execute the laws because the President cannot do anything if he "disapproves of action taken or authorized by the Director." Defs. Br. 22. But the FTC Act contains an

identical removal restriction for FTC commissioners, and the Supreme Court has made clear that that restriction does not impermissibly interfere with the President's ability to faithfully execute the laws. *See Morrison*, 487 U.S. at 691 (explaining that *Humphrey's Executor* reflected the "judgment that it was not essential to the President's proper execution of his Article II powers that [the FTC] be headed up by individuals who were removable at will"). Defendants do not explain how the same removal restriction unconstitutionally impedes the President's power with respect to the Bureau but not the FTC. Nor could they. The Bureau's functions are materially the same as the FTC's—both agencies can issue rules, conduct administrative enforcement proceedings, file suit in federal court, and seek civil penalties. *See* Bureau Opening Br. 25. So, as with the FTC, the President's ability to remove the Bureau's Director for cause preserves for the President "ample authority to assure that the [officer] is" faithfully executing the law, *Morrison*, 487 U.S. at 692.

And while Defendants resist the argument that the President can hold accountable those officials he can remove for cause, Defs. Br. 22, Defendants' quarrel is with the Supreme Court, not the Bureau. Defendants evidently believe that for-cause protection makes any principal officer—whether a member of a multi-member commission or not—insufficiently

accountable to the President. *Id.* at 22-23. To the extent this view could somehow survive *Humphrey's Executor* (which it cannot), *Free Enterprise* would foreclose it. There, the Supreme Court explained that while two layers of tenure protection impermissibly impairs the President's ability to hold his subordinates accountable for their conduct, the President *can* control and hold accountable officials whom he can directly remove for cause (like FTC and SEC commissioners). *Free Enterprise*, 561 U.S. at 495-98; *see also* Bureau Opening Br. 29-31.

2. Because Defendants cannot show that the removal restriction is unconstitutional under the test that the Supreme Court established in *Morrison* and applied in *Free Enterprise*, they claim that there is no such test. They say that *Morrison*'s inquiry into whether removal restrictions impede the President's ability to perform his constitutional duty is just a "line" the Bureau "pluck[ed]" from the decision. Defs. Br. 21; *see also id.* at 23. Defendants are wrong.

In *Morrison*, the Supreme Court said the inquiry into "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty" was "*the real question*" in a constitutional challenge to a removal restriction. *Morrison*, 487 U.S. at 691 (emphasis added). The Court then relied on that analysis to hold that the

removal provision applicable to the independent counsel was constitutional (both on its own and in conjunction with other statutory provisions). *See id.* at 691-96.

Later in *Free Enterprise*, "the Supreme Court applied *Morrison*'s test to strike down a particularly restrictive removal scheme." *PHH*, 881 F.3d at 125 (Griffith, J., concurring in the judgment). The Court concluded that the statute was unconstitutional because it "subvert[ed] the President's ability to ensure that the laws are faithfully executed." *Free Enterprise*, 561 U.S. at 498.

So when the en banc D.C. Circuit in *PHH* and the Ninth Circuit in *Seila Law* were presented with constitutional challenges to the removal restriction in the Bureau's statute, each court followed the test that the Supreme Court set forth in *Morrison* and applied in *Free Enterprise*. Over and again, the en banc court in *PHH* repeated that the central constitutional inquiry was whether the removal restriction impeded the President's ability to perform his constitutional duties. *See, e.g.*, *PHH*, 881 F.3d at 79 (describing this test as "[t]he ultimate purpose of our constitutional inquiry"); *see also id* at 84, 87, 90, 97; *id.* at 124-26 (Griffith, J., concurring in the judgment). And in *Seila Law*, the Ninth Circuit followed suit, basing its conclusion that the Bureau's structure is

constitutional on precisely the test that Defendants now deride. *See Seila Law*, 923 F.3d at 684.

3. In place of the Supreme Court's test for removal restrictions, Defendants appear to suggest that for-cause protection is unconstitutional for the Bureau's Director because the Bureau's structure and functions are not identical to those of the FTC in 1935 (approved by *Humphrey's Executor*) or the independent counsel in 1988 (approved by *Morrison*). *See* Defs. Br. 19, 21, 23. That logic is inconsistent with basic principles of *stare decisis* and the separation of powers.

First, *stare decisis*. When the Supreme Court decides a case, "it is not only the result but also those portions of the opinion necessary to that result by which [courts] are bound." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996). So where, as in *Morrison*, the Supreme Court announces a test that "explains why the [C]ourt ruled in favor of the winning party, the explanation is part of the [C]ourt's holding, to which [this] Court is expected to adhere under the principle of *stare decisis*." *United States v. McGee*, 564 F.3d 136, 140 n.2 (2d Cir. 2009).

Second, the separation of powers. As Defendants otherwise recognize, Defs. Br. 23, "[t]he analysis contained in [the Supreme Court's] removal cases is designed not to define rigid categories of those officials who may or

may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty 'to take care that the laws be faithfully executed' under Article II," *Morrison*, 487 U.S. at 689-90. Yet Defendants ask this Court to find that the Supreme Court has implicitly established a bright line rule against for-cause protection for independent regulators led by a single director. No such rule exists.

Nor is there support for Defendants' suggestion that applying the reasoning from the Supreme Court's decisions and upholding the Bureau's structure "would upend the general rule against restraining the President's removal power." Defs. Br. 20. First, there is no general rule that Congress cannot place limitations on the President's removal power. *See Morrison*, 487 U.S. at 687 ("In *Humphrey's Executor,* we found it 'plain' that the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies." (quoting *Humphrey's Executor*, 295 U.S. at 629)). Second, Congress gave the Bureau's Director precisely the kind of "ordinary for-cause protection" that the Supreme Court has consistently upheld. *PHH*, 881 F.3d at 93. This "limited restriction[] on the President's removal power" is entirely consistent with the principle that the President "must have *some* 'power of removing those for whom he cannot

continue to be responsible.'" *Free Enterprise*, 561 U.S. at 493, 495 (quoting *Myers v. United States*, 272 U.S. 52 (1926)) (emphasis added); *see also id.* at 501 (declining to take issue with for-cause restrictions in general).

Not only does the blinkered alternative approach that Defendants appear to suggest flout *stare decisis* and the separation of powers, it would also cast unwarranted doubt on the constitutionality of every modern independent agency. No agency precisely mimics the structure and functions of the 1935 FTC or the 1988 independent counsel—not the SEC, not the FCC, and not the Federal Reserve Board. Not even the current FTC. But the Supreme Court has made clear that Congress can create independent agencies that do not exactly replicate the structures that the Court has previously upheld. *Morrison*, for instance, recognized that in the years since *Humphrey's Executor*, Congress had authorized "various federal agencies whose officers are covered by 'good cause' removal restrictions [to] exercise civil enforcement powers," including the FTC. *Morrison*, 487 U.S. at 692 n.31. And *Free Enterprise* found no constitutional problem with one layer of for-cause protection for an agency that serves as "the regulator of first resort and primary law enforcement authority for a vital sector of our economy." *Free Enterprise*, 561 U.S. at 508.

B. Congress did not violate the separation of powers by passing a law that authorizes the Bureau to spend money.

Congress followed a long tradition of funding financial regulators outside the annual appropriations process when it established funding for the Bureau: In the Consumer Financial Protection Act, Congress authorized the Bureau to obtain money up to a specified funding cap from the Federal Reserve, and to spend that money to execute the Bureau's statutory functions. 12 U.S.C. § 5497(a)(1)-(2); *see also PHH*, 881 F.3d at 95. This commonplace method of funding does not violate the Appropriations Clause or impede the President's powers.

1. Under the Appropriations Clause, "[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. This "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *accord Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (explaining that the Appropriations Clause requires only that "the payment of money from the Treasury … be authorized by a statute"). The Appropriations Clause thus restricts "the disbursing authority of the Executive department," *Cincinnati Soap*, 301 U.S. at 321, while giving Congress "absolute" "control over federal expenditures," *U.S. Dep't of Navy v. Fed.*

Labor Relations Auth., 665 F.3d 1339, 1348 (D.C. Cir. 2012) (quotation marks omitted). Here, Congress exercised its power under the Appropriations Clause by enacting a law that authorizes the Bureau to obtain a capped amount from the Federal Reserve each year.[1]

Defendants object to Congress's choice. But while they survey various policy arguments favoring annual appropriations, Defs. Br. 29, they are unable to cite any case that says that Congress is required to fund government activities through the annual appropriations process. Why not? Because the Constitution leaves it to Congress to authorize federal government spending by enacting the laws it sees fit. *See Hart's Case*, 16 Ct. Cl. 459, 484 (1880) ("The absolute control of the moneys of the United

[1] Defendants contend that Congress did not actually exercise its appropriations power when it established funding for the Bureau because the statute states that the Bureau's funds "shall not be construed to be Government funds or appropriated monies," 12 U.S.C. § 5497(c)(2). Defs. Br. 27. Defendants are mistaken. That clause, like similar provisions applicable to the Farm Credit Administration, 12 U.S.C. § 2250(b)(2), the Federal Reserve Board, *id.* § 244, and the Office of the Comptroller of the Currency, *id.* §§ 16, 481, determines the degree to which various *statutory* restrictions apply to the Bureau's use of the funds it obtains from the Federal Reserve. *See, e.g.*, GAO, Principles of Federal Appropriations Law, 3d. ed., at 14-43 (2008) (explaining that statutory restriction on using general operating funds to pay judgments does not apply where statute provides that agency's funds "shall not be construed to be Federal Government funds or appropriated moneys"). It has nothing to do with the constitutional requirement (satisfied here) that Congress pass a law to authorize the Executive branch to spend money.

States is in Congress, and Congress is responsible for its exercise of this great power only to the people."), *aff'd*, 118 U.S. 62 (1886).

Defendants' challenges to the Bureau's funding rest on the premise that the annual appropriations process is "mandated by the Constitution." Defs. Br. 31. That premise is badly mistaken. Congress's power under the Appropriations Clause is "plenary." *Harrington v. Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977). It is accordingly well settled that Congress can "create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *PHH*, 881 F.3d at 95; *accord Cincinnati Soap*, 301 U.S. at 313 (finding "no valid basis for challenging" Congress's power to exercise its appropriations power by authorizing spending of however much revenue was generated by a particular tax). It is likewise well settled that Congress may "authorize appropriations that continue … for longer" than a year. *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 409 (3d Cir. 2004). Defendants' contrary suggestion that the Constitution requires Congress to renew appropriations annually cannot be reconciled with the Framers' decision to impose an express two-year limitation on the duration of appropriations for the army, but no time limit for any other appropriations. *See* U.S. Const. art. I, § 8, cl. 12.

And it has long been settled that Congress is under no obligation to specify "the particular uses to which … appropriated money [is] to be put." *Cincinnati Soap*, 301 U.S. at 321. Nor does the non-delegation doctrine (or any other principle) prevent Congress from authorizing that money be spent at the discretion of the President or other Executive officials. *See id.* at 322 ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies."). Indeed, Congress has done just that since the Founding. *See Clinton v. City of New York*, 524 U.S. 417, 466-67 (1998) (Scalia, J., concurring in part and dissenting in part) (collecting historical examples, including from the First Congress, of appropriations of "sum[s] not exceeding" specified amounts to be spent for broad purposes). Congress accordingly did not violate the Appropriations Clause when it established the Bureau's funding.

2. Congress likewise did not impinge on the President's constitutional powers by passing a law authorizing the Bureau's funding.

First, Defendants are wrong to suggest that the Bureau obtains funds "without presentment to the President." Defs. Br. 26. The Bureau obtains funds pursuant to an act that was passed by Congress and presented to the President. The President signed the act into law on July 21, 2010. The

Presentment Clause, U.S. Const. art I., § 7, cl. 2, does not require anything more. Nor did the President and Congress in 2010 impermissibly "bind their successors," Defs. Br. 32, when they passed a law that any future Congress and President could change pursuant to the ordinary legislative process.

Second, *Free Enterprise* forecloses Defendants' attempts to speculate about how the Bureau's funding structure might affect the President's power. *Id.* at 30-31. To be sure, Defendants are right that the *dissenting* Justices in *Free Enterprise* thought that "who controls the agency's budget requests and funding … affect[s] the President's power to get something done." *Id.*at 31 (quoting *Free Enterprise*, 561 U.S. at 524 (Breyer, J., dissenting)). The problem for Defendants is that the Court expressly rejected this approach, dismissing "who controls the agency's budget requests and funding" as "bureaucratic minutiae" irrelevant to the separation-of powers inquiry, *Free Enterprise*, 561 U.S. at 499-500; *see also PHH*, 881 F.3d at 96 ("The CFPB's independent funding source has no constitutionally salient effect on the President's power.").[2]

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[2] The *Free Enterprise* Court's dismissal of the relevance of an agency's funding is particularly instructive because the challengers in that case contended that the Public Company Accounting Oversight Board's

C. Defendants forfeited their irrelevant and baseless challenge to the CFPA provision that gives the Financial Stability Oversight Council power to set aside Bureau regulations.

For the first time on appeal, Defendants ask this Court to hold unconstitutional the CFPA provision that authorizes the Financial Stability Oversight Council (FSOC) to set aside certain Bureau regulations, 12 U.S.C. § 5513(a). Defs. Br. 25-26. Because Defendants did not raise this argument below, it is forfeited, and the Court need not address it here. *See Katel Ltd. Liability Co. v. AT&T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010).

Even if not forfeited, Defendants newfound constitutional objection to section 5513(a) has nothing to do with this enforcement action. Defendants cannot claim to have been injured by any defect in section 5513(a) because this enforcement action does not involve any regulations prescribed by the Bureau.[3] Defendants therefore cannot challenge section 5513(a) in this case.

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permanent funding contributed to the separation-of-powers problem. Br. for Petitioners at 9, 29, *Free Enterprise*, 561 U.S. 477 (2010) (No. 08-861). Yet the Court's remedy allowed the Board to keep its permanent funding even as it remained separated from the President by one layer of for-cause removal.

[3] Nor can they claim that the alleged problem with section 5513(a) makes the entire CFPA invalid because that provision is plainly severable. *See infra* pp. 30-31.

In any event, Defendants' challenge to section 5513(a) is wholly without merit. Defendants complain that the voting members of the FSOC exercise oversight over the Bureau, but the President can remove some of those members only for cause. Defs. Br. 25-26. *Free Enterprise* makes clear that this is not a problem. The President's power to remove an official (either directly or through a subordinate he can remove at will) gives him the ability to oversee the official's execution of the laws. *See Free Enterprise*, 561 U.S. at 496. That is true whether the official acts alone (as the Bureau's Director generally does) or as part of a multi-member commission (like FTC commissioners). And it remains true if the official's actions are subject to a veto by other for-cause protected officials. *Id.* at 509-10 (explaining that Congress was permitted to restructure the Public Company Accounting Oversight Board—whose actions were subject to veto by an independent agency, the SEC—so that Board members were directly "removable by the President, for good cause").

II. Severance Would Remedy Any Constitutional Defect.

Section 3 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (of which the Consumer Financial Protection Act is one part) provides that "[i]f any provision of this Act … is held to be unconstitutional, the remainder of this Act … shall not be affected thereby." 12 U.S.C. § 5302.

So even if there were a constitutional defect in the Bureau's statutory structure (which there is not), the rest of the statute would not be affected. Instead, consistent with the Supreme Court's decision in *Free Enterprise*, the Court should resolve any constitutional defect by holding that the for-cause removal provision, *id.* § 5491(c)(3), is severable from the remainder of the Act. The Court could then remand this case to the district court to permit the Bureau to continue this action.

1. *Free Enterprise* and the statutory severability clause compel the conclusion that severance of the for-cause removal provision—not invalidation of the entire CFPA—would be the appropriate remedy for any constitutional problem here. Just as in *Free Enterprise*, the Bureau, along with the remainder of the CFPA, is "fully operative" without the for-cause provision. (Indeed, the Bureau functioned for more than a year with an Acting Director who was not subject to the provision. *See* Bureau Opening Br. 6 n.2.) Because Congress chose to include a severability clause, this Court must sustain the CFPA's remaining provisions unless there is strong evidence in the statute's text or history that if Congress knew the for-cause removal provision was unconstitutional it would have preferred no Bureau at all (and no CFPA) to a Bureau whose Director is removable at will. *Free*

Enterprise, 561 U.S. at 509; *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *see also* Bureau Opening Br. 43-45.

There is no evidence—let alone strong evidence—that Congress would have preferred that the Bureau not exist. Bureau Opening Br. 45-53. Defendants do not disagree. They claim instead that it is impossible to know what Congress would have preferred. *See* Defs. Br. 37. ("The statutory history of [the CFPA] offers no assurance that Congress would have adopted a leadership structure for the CFPB in a form other than the unconstitutional one actually enacted."). Defendants' concession ends the severability inquiry: In the absence of strong evidence that Congress would have wanted the continued validity of the Bureau to depend on the for-cause removal provision, this Court must "follow Congress's explicit textual instruction to leave unaffected" the rest of the CFPA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 586 (2012); *see also PHH*, 881 F.3d at 199 (Kavanaugh, J., dissenting) ("It will be the rare case when a court may ignore a severability provision set forth in the text of the relevant statute." (citation omitted)).

Defendants nevertheless attempt to avoid this necessary conclusion by devising their own test for severability. Defendants say that "absent clear legislative intent," this Court cannot sever the for-cause provision because

"there were other paths Congress plausibly might have taken." Defs. Br. 37. This turns the law of severability on its head. There is no presumption *against* severability, let alone one rebuttable only by "clear legislative intent." Just the opposite, particularly where Congress has seen fit to include a severability clause. *See Alaska Airlines*, 480 U.S. at 686-87; *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 297 (2d Cir. 1995). And the fact that Congress could have dealt with a constitutional defect in other ways is a truism, not a barrier to severability. *See Free Enterprise*, 561 U.S. at 509-10 (holding for-cause removal provision severable and noting that Congress had other options for fixing the constitutional problem); *United States v. Booker*, 543 U.S. 220, 265 (2005) (severing two provisions while noting that Congress could devise other remedies).

2. Defendants fare no better by relying on the fact that the Bureau is funded outside of the annual appropriations process and that Bureau regulations are subject to veto by the Financial Stability Oversight Council. First, contrary to Defendants' suggestion, Defs. Br. 37-38, these statutory features provide no basis for distinguishing *Free Enterprise*. As explained above, the agency in *Free Enterprise*, the Public Company Accounting Oversight Board, was also funded outside the annual appropriations process. And the Board's rules were also subject to veto by a separate

independent regulator, the SEC. Yet, the Supreme Court refused to invalidate the Board's entire statute, and held instead that the removal restrictions were severable from the remainder of the statute notwithstanding the funding and veto provisions. So too here.

Second, the provision that gives the FSOC a veto over Bureau regulations and the provisions authorizing the Bureau's funding through the Federal Reserve are themselves severable. The CFPA could continue to function without the provisions, and Defendants have not identified strong evidence that Congress would have preferred that the Bureau and CFPA not exist if these provisions were invalid. Indeed, the evidence suggests just the opposite: Congress did not consider the FSOC veto provision necessary, *see* S. Rep. No. 111-176, 165-67 (2010), and expressly contemplated that the Bureau could obtain funding through the annual appropriations process, *see* 12 U.S.C. § 5497(e)(1). That leaves no question that the challenged veto and budget provisions are severable, just as Congress expressly provided.

ARGUMENT IN RESPONSE TO DEFENDANTS' CROSS-APPEAL

I. The Court Need Not Address Defendants' Challenges to the Merits of the Bureau's CFPA Claims Because Defendants' Cross-Appeal Is Improper.

Defendants cross-appeal the judgment dismissing the case against them in an effort to challenge the district court's interlocutory conclusion

that the Complaint stated valid claims against them under the CFPA. JA 799-800; *see* Defs. Br. 41-67. But a party has standing to appeal only if it is "aggrieved by the judicial action from which it appeals," *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 92 (2d Cir. 2014)—and Defendants are not aggrieved by the judgment dismissing the claims against them. If this Court reverses that judgment, Defendants will become aggrieved, but only by the district court's refusal to dismiss the Complaint based on the merits of the CFPA claims. That decision is not an appealable final judgment. *See Chelsea Neighborhood Ass'ns v. U.S. Postal Serv.*, 516 F.2d 378, 390 (2d Cir. 1975). Defendants' cross-appeal is therefore improper, and this Court need not consider it. *See Alvarez v. Simmons Mkt. Research Bureau, Inc.*, 839 F.2d 930, 931 (2d Cir. 1988) (declining to "address defendants' cross-appeal from … denial of their motion to dismiss because such a denial is not a final order").

The Court may, however, choose to address Defendants' merits arguments as an alternative ground for affirmance.[4] *See Swatch*, 756 F.3d

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[4] In one case, this Court reversed a final judgment in favor of a defendant and then proceeded to entertain that defendant's cross-appeal of the (interlocutory) denial of its summary judgment motion. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 341 n.7 (2d Cir. 2000). This Court later interpreted that case as having addressed the issues raised in the cross-appeal "as a possible ground for affirmance." *Tr. for Certificate Holders v. Love Funding Corp.*, 496 F.3d 171, 175 (2d Cir. 2007).

at 93. But the Court has "discretion to choose not to do so based on prudential factors and concerns." *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 78-79 (2d Cir. 2017) (quotation marks omitted). Declining to address the alternative grounds for affirmance would be entirely reasonable because they are wholly distinct from the constitutional issues presented by the main appeal. *Cf. id.* (declining to address alternative grounds for affirming dismissal where court reversed dismissal on distinct grounds). That result would be particularly appropriate if the Court believes that its review of the merits arguments could be aided by further factual development in the district court.

II. The Complaint States Valid Claims for Violations of the CFPA.

If the Court chooses, in its discretion, to address Defendants' challenges to the merits of the Bureau and New York's CFPA claims, it should reject those challenges because the Complaint states valid claims.

The Complaint alleges that RD offers to advance funds to consumers who are waiting to receive awards from a settlement or compensation fund. JA 30, 32-33, 37 (Compl. ¶¶ 8, 20, 48). As relevant here, those consumers include first responders and others harmed by the September 11 terrorist attacks and former NFL players who suffered brain injuries. JA 28 (Compl. ¶ 2). The September 11 victims had received letters awarding them

compensation from the September 11 Victim Compensation Fund, a fund established by federal statute to compensate people harmed by the attacks. JA 28-29, 32-33, 37 (Compl. ¶¶ 3, 20, 48); *see also* Bureau Opening Br. 8-9. Similarly, the NFL players whom RD targeted had been awarded compensation under a class action settlement resolving claims that the NFL had misrepresented the link between concussions and chronic brain injury. JA 32-33 (Compl. ¶ 20); *see also* Bureau Opening Br. 9-10. After the fund or settlement received final approval and the consumers received notice of the amount they would receive, but while the consumers were still awaiting distribution of the promised awards, RD offered consumers a deal: RD would advance consumers a lump sum immediately in exchange for the consumers' turning over a far larger amount—sometimes more than double the amount RD advanced—once the awards arrived. JA 28-29, 32-33 (Compl. ¶¶ 1-5, 20, 24); *see also, e.g.*, JA 56 (RD advances $267,122 in exchange for $667,806 from consumer's award); JA 229 ($200,000 in exchange for $500,000); JA 530-31 ($242,857 in exchange for $510,000).

The Complaint alleges that RD falsely markets its transactions as "assignments" of consumers' awards, thereby preventing consumers from effectively comparing RD's products to alternatives; falsely claims that it can "cut through red tape" and expedite the Funds' payment of the awards;

misrepresents when consumers will receive funds from RD; and tells consumers that they must pay amounts that the consumers in fact have no obligation to pay. JA 29, 39-44 (Compl. ¶¶ 6, 61-98).

These allegations—which must be taken as true on a motion to dismiss—state valid claims under the CFPA. As relevant here, the CFPA bars any "covered person" (a term defined to include any person who offers or provides consumer "credit") from engaging in "any unfair, deceptive, or abusive act or practice." 12 U.S.C. § 5536(a)(1)(B). Contrary to Defendants' assertions, the Complaint adequately alleges that RD is a "covered person" because it offers "credit" to the consumers described in the Complaint. And the conduct that the Complaint alleges that RD engaged in is deceptive and abusive in violation of the CFPA.[5]

A. RD is a "covered person" because it extends "credit."

Contrary to Defendants' primary contention, RD is a "covered person" subject to the CFPA's prohibition on deceptive and abusive practices. The CFPA defines "covered person" to include "any person that

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[5] The Complaint also alleges that RD's founder and owner, Roni Dersovitz, knowingly or recklessly provided substantial assistance to RD in engaging in this conduct, in violation of 12 U.S.C. § 5536(a)(3). JA 32, 40-44 (Compl. ¶¶ 18, 68-69, 76-77, 83-84, 90-91, 97-98). Dersovitz does not dispute that if the claims against RD can proceed, the claims against him can proceed as well.

engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6)(A). As relevant here, one such "financial product or service" that can make an entity a "covered person" is "extending credit." *Id.* § 5481(15)(A)(i). "Credit," in turn, is defined as "the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase." *Id.* § 5481(7).

The transactions that RD offered here—under which RD gave consumers a lump sum in exchange for consumers' agreement to give RD a much larger amount when they received their awards in the future—fit comfortably within this definition. Although RD tried to characterize the transactions as "assignments" of portions of the consumers' expected awards, that label is irrelevant. As Defendants do not dispute, a transaction's substance, not its form, controls whether it qualifies as "credit."[6]

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[6] *See Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1068 (2d Cir. 1995) (whether a transaction is a loan or a sale of accounts receivable under trust law "depends on the substance of the relationship between [the contracting parties], and not simply the label attached to the transaction"); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 90 (8th Cir. 1976) (explaining that in determining whether transaction is credit under the Truth in Lending Act, "the majority of courts have focused on the substance, rather than the form, of credit transactions").

Here, the transactions were credit in substance. The "assignments" were invalid to the extent that they purported to give RD the right to step into consumers' shoes and collect payment from the Funds directly. As a result, RD's agreements could function only as a promise by the consumers to repay RD the money RD advanced them (plus far more) once the consumers received their awards. In other words, the agreements granted consumers the right to defer payment of a debt. They fit squarely within the CFPA's definition of "credit." *See* 12 U.S.C. § 5481(7).

That conclusion is consistent with a long line of cases finding that similar purported assignments are, in substance, loans under state law. And Defendants cannot avoid the CFPA's reach by claiming that RD's transactions are not "credit" because RD takes on the risk that the third-party Funds will not pay. That is not the law, and any such risk that RD bears is far too minimal to make the transactions something other than credit.

1. RD's transactions are credit because, without the invalid assignments of consumers' awards, the agreements grant consumers the right to defer payment of a debt.

RD's transactions are credit under the CFPA because they granted consumers the right to defer payment of a debt. Although RD attempted to cast its transactions as assignments of consumers' awards, those

assignments were invalid as Defendants suspected all along.[7] In particular, as Defendants have been forced to concede on appeal, the purported assignments could not validly assign to RD the consumers' right to collect payment from the Funds. Without the invalid assignment of consumers' *awards*, all that remained of RD's agreements was the purported "assignment" of the *payments* that consumers would receive from the Funds.[8] In substance, however, those "assignments" of future payments were nothing more than an agreement by the consumers to repay RD the money RD advanced them (plus far more) once the consumers received their payments from the Funds. The transactions thus granted consumers the right to defer payment of their debt—the very definition of "credit."

a. The purported assignments of consumers' awards were invalid.

RD now concedes that consumers could not validly assign their rights to collect from the NFL concussion litigation settlement and the September

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[7] RD was so concerned that the assignments might be invalid that it included in its contracts a provision authorizing it to file a financing statement under the Uniform Commercial Code to "protect [RD's] interest" in the consumers' awards in the event that a court might deem the assignments "ineffective" or characterize the transactions "as a loan ... and not as a true sale." JA 57.

[8] An assignment of the proceeds of an award is distinct from the assignment of the award itself. *See Goldberg & Connolly v. N.Y. Cmty. Bancorp, Inc.*, 565 F.3d 66, 71-72 (2d Cir. 2009) (treating assignment of "proceeds recoverable" from judgment as assignment of a future interest, as distinct from the assignment of a present interest in a judgment itself).

11 Victim Compensation Fund. In other words, the assignments of consumers' awards were invalid.

With respect to the consumers entitled to payment from the NFL concussion litigation, the Third Circuit determined that the order approving the settlement of that case barred class members from assigning their right to payment from the settlement fund. *In re Nat'l Football League Players' Concussion Injury Litig.*, 923 F.3d 96, 109-10 (3d Cir. 2019). That decision binds Defendants under issue preclusion principles. *See* Defs. Br. 58 (acknowledging that issue is "settled"). Thus, any "true assignments" in RD's agreements with former NFL players—"that is, contractual provisions that allowed the lender to step into the shoes of the player and seek funds directly from the settlement fund—were void *ab initio*." *In re NFL Players' Concussion Injury Litig.*, 923 F.3d at 110.

The same holds true for the assignments by consumers entitled to payment from the September 11 Victim Compensation Fund. Although Defendants maintain that these "assignments" remain valid as between RD and the September 11 victims, Defendants do not dispute the district court's conclusion that those "assignments are void as against the United States" under the Anti-Assignment Act, 31 U.S.C. § 3727(b). SA 45 (Order 41); *see*

Defs. Br. 56-57. So, those assignments, too, could not give RD the right to collect payment from the Funds directly.

b. Because the assignments of the awards were invalid, the transactions could function only as agreements to pay money in the future.

Because the assignments of the awards were invalid, RD's transactions could function only as agreements under which RD advanced consumers funds in exchange for the consumers' promise to transfer a greater amount to RD in the future. That is, consumers incurred a debt to RD and had a right to defer paying it. The transactions are therefore "credit."

Defendants insist that what remained of the transactions was a different, valid "assignment" of the payments that the consumers would receive from the Funds in the future. *See* Defs. Br. 56-59. But whether that "assignment" is valid is beside the point.[9] Even if enforceable, an

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[9] As the Third Circuit noted, it is an open question whether "there remain enforceable rights under the agreement[s] after any true assignment is voided" because "it is possible" that some consumers may have "lacked the capacity to contract," or the contracts could otherwise be unenforceable due to "unconscionability, fraud, or usury." *In re NFL Players Concussion Injury Litig.*, 923 F.3d at 112. And, indeed, the Bureau and the New York Attorney General allege that the agreements are not enforceable because they violate state usury laws. JA 44 (Compl. ¶ 93). But whether the contracts are enforceable does not affect whether RD is a "covered person"

"assignment" of expected future payments gives consumers a right to defer payment of a debt. It is therefore credit—not an assignment.

Unlike the transactions here, a true assignment involves no right to defer payment of a debt. That is because an assignment, by definition, "vest[s] in the assignee a present right in the thing assigned." *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 558 (2d Cir. 1976). Where a consumer assigns some right in exchange for funds, he has no "right to defer payment of a debt" because the assignment itself conveys property to the assignee and satisfies the consumer's obligation immediately.

Here, by contrast, consumers could not immediately satisfy any obligation they owed RD because, at the time of contracting, consumers had no present right that they could convey. Although the consumers may have had a present right in the awards themselves, that right was not assignable. And the "assignment" of the award *proceeds* could not, as a matter of law, transfer a present right. That is because an "assignment" of

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subject to the CFPA's prohibition on unfair, deceptive, and abusive practices. Enforceable or not, the agreements at a minimum *purport* to create rights and obligations that are, in substance, credit. A loan is "credit" even if it is void. That is because when Congress gave the Bureau authority over consumer credit, it did not intend to create an exemption for unlawful lending. *Cf. SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) ("It would be a considerable paradox if the worse the securities fraud, the less applicable the securities laws.").

funds "to be acquired in the future does not vest title in the assignee" right away. 6A N.Y. Jur. 2d Assignments § 24. Rather, title only transfers later when the "assignor surrenders possession" of the funds (or the court enforces the agreement). *Id.* As a result, an assignment of future payments is "no more than an executory agreement to transfer such property when it shall come into existence." *In re Modell*, 71 F.2d 148, 149 (2d Cir. 1934); *accord Miller*, 540 F.2d at 558 ("[A] mere agreement to pay a debt out of a designated fund does not operate as a legal or equitable assignment since the assignor retains control over the subject matter." (quotation marks omitted)).

So, when RD required consumers to "assign" it a portion of the payments that consumers would receive pursuant to their awards, RD did not gain a present interest in anything. What it got (at most) was a future right to be paid by consumers from the amounts that consumers received from the Funds. It therefore granted consumers the right to defer payment of their debt—and accordingly offered "credit" under the CFPA's plain terms.

2. *Finding RD's transactions to be credit under the CFPA is consistent with well-established case law treating similar assignments as loans under state law.*

The CFPA does not break new ground in treating purported assignments like RD's as credit. On the contrary, recognizing these transactions to be "credit" is wholly consistent with a long line of cases concluding that similar wage "assignments"—where companies "bought," and consumers "assigned," an interest in the consumer's next paycheck—are loans under state law.

For instance, courts have concluded that purported assignments of wages were, in substance, loans under state law where the assignments were in fact void. *See State v. Salary Purchasing Co., Inc.*, 218 S.W. 2d 571, 574 (Mo. 1949) (en banc) (concluding that "taking void assignments of unearned wages … constituted the lending of money"); *State v. Central Purchasing Co.*, 225 N.W. 46, 48 (Neb. 1929) (concluding that purported assignments of wages "were not bona fide purchases," but loans, where state law rendered assignments void for failure to obtain spousal consent). As the Missouri Supreme Court explained in one such case, where a company advances funds pursuant to a void assignment, and does "not intend to donate" that money, but rather to collect repayment of it, the

transactions "could be nothing but loans." *Salary Purchasing Co.*, 218 S.W. 2d at 573.

Even where wage assignments may have been valid, courts have readily concluded that the assignments were in reality loans where the company that took the "assignment" did not actually step into the consumer's shoes and collect the wages from the third-party employer directly, but rather allowed the consumer to collect the supposedly assigned funds and then pay the company its promised share. *See, e.g.*, *Tennessee Fin. Co. v. Thompson*, 278 F. 597, 599 (6th Cir. 1922) (concluding that the "real nature" of a transaction was a loan, not an assignment of wages, where the assignor-consumer's "practice" was "to draw the money and himself pay his debts" to the putative assignee); *In re Cleapor*, 16 F. Supp. 481, 483-84 (N.D. Ga. 1936) (similar); *Parsons v. Fox*, 176 S.E. 642, 645 (Ga. 1934) (similar); *McWhite v. State*, 226 S.W. 542, 543 (Tenn. 1921) (similar); *Wilmarth v. Heine*, 137 A.D. 526, 527, 529 (N.Y. App. Div. 1910) (similar). This conclusion comports with the basic principle that, "for an assignment to be valid, the assignor must be divested of all control over the thing assigned," such that "the assignee steps into the assignor's shoes and acquires whatever rights [the assignor] had." *In re Stralem*, 303 A.D.2d 120, 123 (N.Y. App. Div. 2003) (quotation marks omitted). Where the

assignee does not step into the assignor's shoes in practice, the transaction functions as a loan in substance, not an assignment.

Here, of course, RD could not step into the consumers' shoes as a matter of law, and RD's customers could satisfy their obligation only by collecting and paying out the "assigned" awards themselves. For this reason as well, the district court was right to conclude that these transactions were not assignments in substance, but credit.

3. RD's transactions are credit despite any nominal allocation of risk to RD.

The transactions that RD offers are credit despite any nominal risk that RD takes on that the third-party Funds will not pay. Defendants claim that a putative assignment is not, in substance, credit where the "buyer" (here, RD) takes on any risk at all "(however large or small) that the purchased asset cannot be collected." Defs. Br. 50. According to Defendants, RD bears that risk because a consumer's obligation to pay RD is contingent on the consumer's actually receiving the award, and RD has no recourse against the consumer if the relevant Fund does not pay. Defs. Br. 48-51, 52-54. But Defendants' "any risk" test misstates the law. While a transaction may not be a loan under state law where the putative "buyer" takes on *meaningful* risk that a purchased asset may not materialize, the existence of a nominal risk is not enough to make a transaction something

other than a loan. And even assuming that these state-law approaches to assessing risk bear on what qualifies as "credit" under the CFPA, the risk that the Funds would not pay was far too minimal to make the transactions anything but credit. In fact, RD's contracts (stealthily) attempted to insulate RD from even that nominal risk—so RD's transactions would qualify as credit even under Defendants' own (incorrect) test.

a. On the law, Defendants are wrong for two independent reasons. First, Defendants base their proposed "any risk" test on cases that assess what qualifies as a loan under state lending laws. Defendants offer no explanation for how those cases can overcome the definition of "credit" provided by the (federal) CFPA. Whether RD's transactions are credit is, of course, governed by federal law because the "meaning of words in a federal statute is a question of federal law." *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 129 (1987). And Defendants make no attempt to tie its "any risk" test to the CFPA's text, which defines "credit" to include the "right granted by a person to a consumer to defer payment of a debt, [or] incur debt and defer its payment." 12 U.S.C. § 5481(7).

Perhaps Defendants mean to suggest that the consumers incur no "debt" within the meaning of this provision because the debts are nonrecourse and the consumers' obligation to repay RD is (supposedly)

contingent on the consumers' actually receiving their awards. But a debt is still a debt even if it is nonrecourse or contingent. *See* Debt, *Black's Law Dictionary* (11th ed. 2019) (defining "contingent debt"); *Bailey v. Comm'r of Internal Revenue*, 993 F.2d 288, 292 (2d Cir. 1993) (discussing "[n]onrecourse debt"). To categorically exclude such debts from the CFPA's reach would impermissibly "read words into the statute that are not there."[10] *Minda v. United States*, 851 F.3d 231, 236 (2d Cir. 2017); *accord Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400, 409 (Colo. 2015) (concluding that nonrecourse loans qualified as loans under state statute because to hold otherwise "would be to shoehorn the word 'recourse' into the statute's definition").

Second, Defendants also mischaracterize the state law that distinguishes between sales and loans. As an initial matter, Defendants' proposed "any risk" test cannot be squared with the long line of cases treating purported assignments of wages as loans. *See supra* pp. 43-45. Like RD, the companies that bought consumers' wages faced at least some

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[10] Defendants' view that nonrecourse transactions are not credit, Defs. Br. 48-51, would also—quite counter-intuitively—exclude a broad swath of mortgages, many of which are nonrecourse. For instance, reverse mortgages are "generally non-recourse," *Bennett v. Donovan*, 703 F.3d 582, 585 (D.C. Cir. 2013), as are purchase-money mortgages in states like California, *see Coker v. JPMorgan Chase Bank, N.A.*, 364 P.3d 176, 192 (Cal. 2016).

risk that the third-party employer would not pay—but the transactions were loans nonetheless. Indeed, Defendants' proposed "any risk" test would create an enormous loophole in the regulation of lending. For instance, a payday lender could avoid all credit regulation by making a consumer's obligation to repay contingent on whether the consumer receives her next paycheck. That is not the law.

To be sure, risk does have relevance under the state-law approaches to distinguishing between sales and loans. In particular, under many states' laws, where an agreement makes the obligation to repay subject to some contingency (as opposed to providing for "repayment absolutely"), the transaction generally constitutes a loan only if the principal is "in some way … secured as distinguished from being put in hazard." *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 449 (N.Y. App. Div. 2018). Whether the principal is "put in hazard" is a question of risk—specifically, the risk that the putative lender will have no right to recover because the relevant contingency does not occur.

So, when assessing transactions analogous to those here—where a company purports to "buy" another party's right to certain future payments (such as business receivables or proceeds from a potential judgment), such that the company's right to recover the amounts it advanced is contingent

on the "purchased" payments actually being paid—courts applying state law have considered the risk that the company takes on that the payments it "bought" will never materialize. *See, e.g.*, *K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc. 3d 807, 818 (N.Y. Sup. Ct. 2017); *Cash4Cases*, 167 A.D.3d at 449.

But, contrary to Defendants' contention, the relevant consideration is not whether any such risk exists, however slight. Rather, courts consider the *degree* of risk that the company takes on that the "purchased" asset will not materialize. If that risk puts the principal in "genuine" hazard, the agreement may not be a loan. *Provident Life & Tr. Co. v. Fletcher*, 237 F. 104, 109 (S.D.N.Y. 1916); *accord K9 Bytes*, 56 Misc. 3d at 818 (concluding that purchase of receivables was "sufficiently risky" that it could not be considered loan). But where the risk is "merely nominal," the transaction is still credit. *Colton v. Dunham & Wadsworth*, 2 Paige Ch. 267, 273 (N.Y. Ch. 1830). So too where "the risk assumed was so unsubstantial as to bear no reasonable relation to the amount charged." *Equity Serv. Corp. v. Agull*, 250 A.D. 96, 99 (N.Y. App. Div. 1937).

Consistent with this analysis, courts have concluded that transactions were sales, not loans, under state law where litigation funding companies advanced a consumer money while litigation was ongoing in exchange for a

portion of a judgment that the consumer might or might not win in the future. *See, e.g.*, *Cash4Cases*, 167 A.D.3d at 449 (concluding that assignment of pending claim was not a loan "because the repayment of principal is entirely contingent on the success of the underlying lawsuit"); *Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 35 Misc. 3d 1205(A), 2012 WL 1087341, *6 (N.Y. Sup. Ct. Mar. 29, 2012) (similar); *MoneyForLawsuits V LP v. Rowe*, No. 10-cv-11537, 2012 WL 1068760, *5 (E.D. Mich. Mar. 29, 2012) (similar); *Obermayer Rebmann Maxwell & Hippel LLP v. West*, No. 15-81, 2015 WL 9489791, *4 (W.D. Pa. Dec. 30, 2015) (similar). In these cases, courts viewed it as genuinely uncertain whether the putative buyers would recover value from the purchased asset.

By contrast, where companies take on only a minimal risk that the asset they purchased would not bear fruit, courts have deemed the transactions loans. *See, e.g.*, *Oasis Legal Fin. Grp.*, 361 P.3d at 408 (concluding that litigation finance agreements were loans where funder fully recovered 85 percent of the time); *Echeverria v. Estate of Lindner*, 7 Misc. 3d 1019(A), 2005 WL 1083704, *8 (N.Y. Sup. Ct. Mar. 2, 2005) (concluding that it was "ludicrous to consider [litigation funding] transaction anything else but a loan" where there was "low, if any risk" that the consumer would not recover in underlying suit); *Rancman v. Interim*

Settlement Funding Corp., No. 20523, 2001 WL 1339487, *3 (Ohio Ct. App. Oct. 31, 2001) (concluding that litigation funding agreement was a loan where "no real probability existed that non-payment would occur").

Thus, Defendants err in contending that the inquiry under state law "is not how much risk exists, but which party holds whatever risk does exist." Defs. Br. 46. Even under state-law approaches, a transaction escapes treatment as credit only if the putative lender bears a genuine risk that the asset it purchased will not materialize.

b. RD bore no such risk. RD entered into agreements with consumers only after the relevant compensation fund had received final approval and the consumer had received notice of the amount of the forthcoming payment. JA 32, 37 (Compl. ¶ 20, 48). At that point, any risk that the Funds would not pay was exceedingly small. Although Defendants suggest in passing that there was a real risk that the Funds would not pay the promised awards, Defs. Br. 54, that contention finds no support in the Complaint and cannot properly be considered on a motion to dismiss.[11] *See*

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[11] Defendants also claim that RD bore "duration risk" because the agreements set no fixed date by which consumers had to pay. Defs. Br. 51-52. Even if this risk were relevant to the analysis, it would not make these transactions anything but credit because this risk, too, was nominal. When RD advanced consumers funds in exchange for a portion of the consumers'

Friedl v. City of New York, 210 F.3d 79, 83-84 (2d Cir. 2000) ("matters outside the pleadings" cannot be considered on motion to dismiss). Besides, given that RD often required consumers to pay more than double what RD advanced, *see, e.g.*, JA 56, 229, 530-31, any risk that RD faced certainly bore "no reasonable relation to the amount charged," *Equity Serv. Corp.*, 250 A.D. at 99. That risk therefore could not make the transactions anything but credit—even assuming that state law governing what qualifies as a loan may have some relevance to what Congress intended for the CFPA's definition of "credit" to cover.

Beyond that, RD did not in fact take on even whatever minimal risk existed that the Funds would not pay. Defendants claim that RD bore that risk because the contracts forswore recourse against the consumers in the event that the Funds did not pay the awards. But there is a catch: The contracts (purport to) reserve the right for RD to seek payment from the

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awards, payment of those awards was relatively imminent. And, besides, RD guaranteed itself a healthy return no matter how long the awards took to arrive. For instance, it advanced one September 11 first responder $35,000 in exchange for $63,636 from his award. JA 34 (Compl. ¶ 32). The award arrived three months later, giving RD a return equivalent to a rate over 250 percent. *Id*. Moreover, in some instances, RD mitigated its (already minimal) "duration risk" even further by including in its contracts a complicated rebate scheme that effectively required consumers to pay a larger amount the longer it took for their awards to arrive. JA 35 (Compl. ¶ 33).

consumers personally in the event that the assignments are invalid—as RD suspected was likely, JA 32 (Compl. ¶ 19). In particular, the contracts required the *consumers* to warrant that the contracts were "enforceable ... in accordance with [their] terms." JA 58. If that turned out not to be true, the contracts treated that as a "breach" by the consumer that would entitle RD to seek recourse against the consumer. *See* JA 60 (providing that RD purchases portion of award "without recourse against you (other than for a Breach)"); JA 58 (defining "Breach" to include a "breach of any of the ... warranties ... of th[e] Agreement"). Whether or not that provision would be enforceable, Defendants cannot now claim that the contracts allocated to *RD* the risk that the Funds would not pay the promised awards. Thus, RD's transactions would be credit even under Defendants' "any risk" test.

B. The Complaint states claims for violations of the CFPA's prohibitions on deceptive and abusive practices.

The Complaint alleges that RD violated the CFPA by misrepresenting (1) that its contracts were for valid and enforceable assignments, JA 39-41 (Compl. ¶¶ 61-77); (2) that RD could expedite payment of consumers' awards, JA 42 (Compl. ¶¶ 78-84); (3) that consumers would receive funds from RD within "several days" or by specified dates, JA 37, 42-43 (Compl. ¶¶ 49, 85-91); and (4) that consumers were obligated to make payments that they in fact had no obligation to make, JA 43-44 (Compl. ¶¶ 92-98).

Each of these allegations states a claim for violations of the CFPA's prohibition on deceptive or abusive practices.

1. ***The allegations that RD misrepresented that its contracts were for valid assignments state claims under the CFPA's prohibitions on deceptive and abusive practices.***

The Complaint alleges that RD violated the CFPA's prohibitions on both deceptive and abusive practices by misrepresenting that its transactions were for valid assignments. JA 39-41 (Compl. ¶¶ 61-77). This states claims under both provisions.

An act or practice is deceptive in violation of the CFPA "if: (1) there is a representation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material." *CFPB v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016) (quotation marks omitted); *accord FTC v. Moses*, 913 F.3d 297, 306 (2d Cir. 2019) (stating elements of FTC Act's analogous prohibition on deceptive practices). Defendants' sole objection to this deception claim is that its representations were not untrue. Defs. Br. 63. This is just a restatement of their argument that the transactions created valid assignments rather than credit transactions. That argument fails for the reasons explained above—and the Complaint states a valid claim for deception.

The Complaint also states a valid claim that RD's conduct was abusive. As relevant to the claims here, the CFPA provides that a practice is abusive if it "takes unreasonable advantage of" either the consumer's "lack of understanding … of the material risks, costs, or conditions" of a financial product or the consumer's inability "to protect [his] interests … in selecting or using" the product, or if it "materially interferes" with the consumer's ability "to understand a term or condition" of the product. 12 U.S.C. § 5531(d)(1), (2)(A)-(B). By misrepresenting that the assignments were valid, RD took unreasonable advantage of consumers and materially interfered with their understanding in the ways the statute prohibits. To dispute that, Defendants emphasize that RD's contracts warned that the transaction was complex and that consumers should consult with an attorney. Defs. Br. 66. But these vague warnings are insufficient to defeat the Bureau's abusiveness claims, particularly at the pleading stage. Merely including a contractual proviso advising consumers to seek professional advice does not immunize a company from liability for unfair, deceptive, or abusive conduct. Indeed, it has long been settled that a company violates the law if it secures contact with the consumer by deception, even if "the true facts are made known to the buyer before he enters into the contract." *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961); *accord FTC*

v. E.M.A. Nationwide, Inc., 767 F.3d 611, 632 (6th Cir. 2014). Just as RD could not avoid liability for deceiving consumers even if it later told the consumer the "true facts" itself, RD certainly cannot avoid liability simply by telling consumers to consult someone else.

2. *The allegations that RD misrepresented that it could expedite payment from the Funds state a claim under the CFPA's prohibition on deceptive practices.*

The Complaint also states a valid claim under the CFPA's prohibition on deceptive practices when it alleges that RD misrepresented that it could "cut through red tape" and expedite disbursement of the consumers' awards. JA 42 (Compl. ¶¶ 78-84). Contrary to Defendants' contentions, Defs. Br. 64-65, this statement is both misleading and material.

Defendants claim that its promises to "cut through red tape" were not misleading because that phrase "clearly means" only that RD would provide immediate funding, not that it would make the third-party Funds pay the awards any faster. *Id.* at 64. But even if that might have been one way to understand RD's message, it was also entirely reasonable for consumers to understand RD as offering to help expedite payment of consumers' entire awards from the Funds. It is well established that where a statement "conveys more than one meaning," the maker "is liable for the misleading interpretation even if nonmisleading interpretations are possible." *Fanning*

v. FTC, 821 F.3d 164, 170-71 (1st Cir. 2016); *accord Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962).

RD's promises to expedite payment from the Funds were also material. Consumers generally contracted to give RD only a portion of their expected awards, *see, e.g.*, JA 33 (Compl. ¶ 25), so they still had a keen interest in getting payment from the Funds more quickly. The Complaint therefore adequately alleges that RD's promises to expedite funding were likely to materially mislead reasonable consumers into thinking RD would help expedite payment of their full awards.

3. The allegations that RD misrepresented how quickly RD would send consumers funds state a claim under the CFPA's prohibition on deceptive practices.

The Complaint also alleges that RD promised on its website that consumers would receive funds "within several days," and that it promised particular consumers funds by specific dates. JA 37 (Compl. ¶ 49). In many instances, however, RD did not deliver the funds when promised. JA 38, 43 (Compl. ¶¶ 50, 86-91). This, too, states a claim for deception.

Defendants do not (and could not) dispute that RD's statements about the timing of payments meet the elements of a claim for deception—those statements are both likely to mislead and highly material to consumers looking for immediate cash. Instead, Defendants claim that

RD's failure to deliver payments was a mere breach of contract that is not actionable as deception. Defs. Br. 65 (citing case applying state consumer fraud law). But it is well settled that a "failure to perform services promised … by contract can … be deceptive." *See* FTC Policy Statement on Deception, 1984 WL 565319, *46 & n.18, *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (FTC Mar. 23, 1984) (collecting cases); *see also, e.g.*, *Gordon*, 819 F.3d at 1192-94 (affirming judgment holding defendant liable under CFPA for falsely promising to provide certain services).

Here, RD advertised that it would provide funds "within several days," despite the fact that it often took longer—sometimes months longer—to send consumers their funds. JA 38 (Compl. ¶ 50). That unqualified promise was deceptive.

4. *The allegations that RD told consumers they were obligated to make payments that they had no obligation to make state a claim under the CFPA's prohibition on deceptive practices.*

Finally, the Complaint also states a claim for deception when it alleges that RD gave consumers the false impression that consumers were obligated to make payments that they, in fact, had no obligation to make. JA 43-44 (Compl. ¶¶ 92-98). Defendants' only response to this claim is to contend that consumers were obligated to pay RD the amounts that RD demanded. But just as the transactions were, in substance, "credit" under

the CFPA, they were loans under state usury law. *See supra* pp. 43-53. And RD does not dispute that if these transactions were loans, they would far exceed the applicable state usury limits, and consumers would accordingly have no obligation to pay the amounts that RD demanded. JA 44 (Compl. ¶¶ 93-95); *see generally* Defs. Br. 63, 67.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's dismissal of the Bureau's complaint and remand this action to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A) and L.R. 28.1.1(a) because it contains 13,052 words, excluding exempt material, according to the count of Microsoft Word.

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