Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

October 26, 2022

Molly C. Dwyer, Clerk of Court
Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Consumer Financial Protection Bureau v. Nationwide Biweekly Admin., Inc.*, Nos. 18-15431, 18-15887 – Letter pursuant to Federal Rule of Appellate Procedure 28(j)

Dear Ms. Dwyer:

This letter responds to Defendants' notice concerning *CFSA v. CFPB*, 2022 WL 11054082 (5th Cir. Oct. 19, 2022).

To begin, *CFSA* confirms the Bureau's position that under *Collins v. Yellen*, 141 S. Ct. 1761 (2021), Defendants cannot obtain dismissal based on the invalid removal provision because they cannot show that "but for the removal restriction, President Trump would have removed Cordray *and* that the Bureau would have acted differently." *CFSA*, at *10; *see* ECF No. 122, at 1-7.

The *CFSA* panel's treatment of the Appropriations Clause was, however, mistaken. While the Supreme Court has interpreted the Clause to mean that "the payment of money from the Treasury must be authorized by a statute," *OPM v. Richmond*, 496 U.S. 414, 424 (1990), the panel disagreed. It said that, actually, the Appropriations Clause requires something more than a statute authorizing the Executive to spend money. *CFSA*, at *16. The panel didn't say what those additional "requirements" are, only that the Bureau's statutory funding crossed the line. *Id.* at *14-15 & 4.

None of the panel's objections to the Bureau's statute persuades. For example, the panel said that the Bureau's funding suffered from "unprecedented" "double insulation" because it is (1) not set through annual spending bills and (2) "drawn from a source that is itself outside the appropriations process"—the Federal Reserve System. *Id.* at *14. But Congress has funded the Federal Reserve Board exactly this way for decades. *See* 38 Stat. 251, 261 (1913); ECF No. 115, at 7-8, 12. Likewise, Congress's direction that the Bureau's funds "not be construed" as "appropriated monies," *CFSA*, at *15, mirrors other longstanding provisions concerning the applicability of various *statutory* funds restrictions, *see* 12 U.S.C. § 244 (Federal Reserve Board); § 16 (OCC).

As to remedy, the panel failed to heed its own understanding of *Collins*. The court didn't consider whether "the Bureau would have acted differently" "but for" its statutory funding mechanism. Here, applying *Collins* yields a straightforward answer: the case should not be dismissed because there is no evidence the Bureau "would have acted differently" with different funding. *See* ECF No. 115, at 13-15.

Respectfully submitted,

/s/ Christopher Deal
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cc: Counsel of Record (via CM/ECF)