Nos. 18-55407, 18-55479

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

CASHCALL, INC.; WS FUNDING, LLC; DELBERT SERVICES CORP.; J. PAUL REDDAM,
Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California
Hon. John F. Walter
Case No. 2:15-cv-07522

RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS-APPELLEE CONSUMER FINANCIAL PROTECTION BUREAU

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GLOSSARY

Bureau	Consumer Financial Protection Bureau
CFPA	Consumer Financial Protection Act
CFPB. Br.	Opening Brief of Consumer Financial Protection Bureau (ECF No. 20)
Def. Br.	Defendants/Appellees/Cross-Appellants' Response and Principal Cross-Appeal Brief (ECF No. 31)
Defendants	CashCall, Inc.; WS Funding, LLC; Delbert Services Corp.; and J. Paul Reddam
ER	Appellant/Cross-Appellee's Excerpts of Record (ECF No. 21)
FER	Appellant/Cross-Appellee's Further Excerpts of Record (filed concurrently)
SER	Defendants/Appellees/Cross-Appellants' Supplemental Excerpts of Record (ECF No. 32)
Subject States	States whose laws the Bureau claims rendered the loans at issue void (Arizona, Arkansas, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, and Ohio)

INTRODUCTION

For years, CashCall, Inc., and its affiliated companies and CEO (Defendants) led consumers to believe that they owed CashCall amounts that the consumers did not actually owe. This was a straightforward violation of the Consumer Financial Protection Act (CFPA), for which the Consumer Financial Protection Bureau sought a straightforward remedy: the return of all interest and fees that the companies collected that consumers did not actually owe. But although the district court correctly concluded that Defendants' "patently false" representations violated the CFPA, its judgment let Defendants keep the nearly $200 million that they deceived consumers into paying. Appellant/Cross-Appellee's Excerpts of Record ("ER") 213:13, 319:14 (ECF No. 21). This left consumers completely uncompensated while letting Defendants off virtually scot-free—a result that cannot be squared with the CFPA or with basic principles of restitution. And although the district court imposed a $10 million civil penalty, that amount did not appropriately account for Defendants' recklessness in demanding payment from consumers even though one warning sign after the other put Defendants on notice that the consumers did not actually owe those payments.

Understandably content with this windfall of a judgment, Defendants make clear that if this Court affirms the district court's decisions on remedies, they will drop their cross-appeal challenging the court's conclusion that they violated the

CFPA. Defendants/Appellees/Cross-Appellants' Response and Principal Cross-Appeal Brief (Def. Br.) at 2 n.2 (ECF No. 31). If Defendants do press their cross-appeal, however, this Court should affirm the grant of summary judgment against them. Telling consumers that they owe amounts that they do not actually owe violates the CFPA's prohibition on deceptive financial-services practices—and Defendants did just that.

STATEMENT OF ISSUES

The Bureau's opening brief sets forth the issues presented in the Bureau's appeal. Opening Brief of Consumer Financial Protection Bureau ("CFPB Br.") at 3 (ECF No. 20).

Defendants' cross-appeal presents the following issues:

(1) Does demanding payments that consumers do not actually owe violate the CFPA's prohibition on deceptive practices?

(2) Do the laws of consumers' home states apply to the loans such that consumers did not actually owe the amounts demanded?

(3) Did the district court correctly hold that CashCall's CEO was "recklessly indifferent" to whether consumers owed the money that Defendants demanded where the undisputed evidence showed that he was aware of myriad warning signs that consumers did not owe those amounts?

(4) Did Congress violate separation-of-powers principles by giving the Bureau's Director the same for-cause removal protection that the Supreme Court approved for the Federal Trade Commission? And, if so, does that render the entire CFPA invalid such that this action must be dismissed?

PERTINENT STATUTES

All pertinent statutes are set forth in the addenda to the previously-filed briefs.

SUMMARY OF ARGUMENT

Reply in the Bureau's Appeal

I. The district court committed legal error in declining to require Defendants to pay restitution of the amounts they took that consumers did not actually owe. As an initial matter, the Bureau sought legal, not equitable, restitution here, and courts lack discretion to deny legal restitution based on equitable factors. Defendants do not dispute that legal remedies are generally non-discretionary, nor do they dispute that the Bureau sought legal restitution in substance here. That ends the inquiry. Although Defendants contend that legal restitution is not actually a legal remedy, or that the CFPA makes even legal remedies discretionary, neither contention has any support.

In any event, even if the court did have discretion to consider equitable factors in deciding whether to award restitution, it abused that discretion. As this

Court and the Supreme Court have held, courts cannot deny even discretionary equitable relief for reasons that conflict with the underlying statute. The district court's reasons for denying restitution did just that for all the reasons explained in the Bureau's opening brief. Although Defendants baldly assert in response that the district court's reasons were proper, they make no effort to reconcile those reasons with the CFPA's purposes. Instead, Defendants seek to defend the denial of restitution on the ground that the Bureau did not meet its burden to prove that restitution was appropriate. But to establish that restitution was appropriate, the Bureau needed only to prove the violations and resulting harm. It met that burden—and Defendants' suggested requirement that the Bureau prove *additional* aggravating factors is created out of whole cloth.

The district court also legally erred in concluding that the Bureau had not established the proper restitution amount. The Bureau met its burden under this Court's burden-shifting framework by establishing the total amount of interest and fees that Defendants collected (less refunds already provided). Although the district court found the Bureau's evidence not "credible" (ER 319:17), that finding was based on a legally erroneous understanding of what the Bureau had to prove. Indeed, Defendants do not dispute the Bureau's evidence showing that Defendants collected and did not return over $197 million in interest and fees that consumers did not actually owe.

Defendants, moreover, did not meet their burden to show that this amount overstated their unjust gains. Defendants contend that their business expenses should be deducted, but that position finds no support in precedent. Further, allowing a deduction for expenses would undercut the CFPA's compensatory goals and seriously reduce the incentive to comply with the law—points to which Defendants offer no response.

II. The district court also clearly erred in declining to impose the higher civil penalties authorized for "reckless" violations. Recklessness includes acting in the face of risks that are so obvious they should be known. Here, Defendants acted in the face of glaring warning signs that consumers did not actually owe the amounts that Defendants demanded. Contrary to the district court's and Defendants' suggestions, counsel's advice could not erase those warning signs.

Response to Defendants' Cross-Appeal

I. For years, Defendants told consumers that they owed amounts that, under state law, the consumers did not actually owe. This violated the CFPA's prohibition on "deceptive" practices—and the federalism principles that Defendants invoke do not suggest otherwise. The Bureau's claims do not "federalize" state law; they merely rely on the fact that state law determines what amounts consumers owe. This is unremarkable, for it is of course state law that largely defines the contractual obligations and property rights that order everyday affairs. Indeed, it is entirely common, and consistent with federalism, for federal claims to be based in part on state law in just this way. The Bureau's claims, moreover, address interstate commercial activity that falls squarely within the federal government's traditional domain. And nothing in the CFPA's text or history remotely suggests that Congress intended to exclude from the CFPA's reach the undeniably deceptive conduct here.

II. Defendants likewise cannot avoid liability by claiming that consumers actually did owe the amounts that Defendants demanded. As the district court correctly held, the laws of borrowers' home states applied to the loans—and those laws voided the loans such that consumers had no obligation to pay. Although Defendants attempted to avoid those laws by partnering with a company on the Cheyenne River Sioux (CRS) Tribe's land and including in the loan agreements a provision choosing CRS Tribe law, that choice-of-law provision was invalid under basic choice-of-law principles. Defendants do not even address those choice-of-law principles and instead merely object to the district court's consideration of who the "true lender" was in concluding that the contractual choice-of-law provision was invalid. But the district court's "true lender" inquiry was wholly consistent with the well-established practice of looking to substance, not form, in identifying the parties to a transaction. The substance of the transactions here—under which CashCall bore the entire economic and regulatory risk of the loans (a fact that

Defendants do not dispute)—shows that CashCall was the "true lender" and that the provision choosing CRS Tribe law was therefore invalid. And, in any event, the provision choosing CRS Tribe law was invalid regardless of who the "true lender" was.

III. The district court correctly held CashCall's CEO, J. Paul Reddam, individually liable for the deceptive conduct here because he was recklessly indifferent to the truth or falsity of Defendants' claims that consumers owed the amounts demanded. Reddam objects that he relied in good faith on counsel's advice, but reliance on counsel is not an automatic shield to liability. Here, the undisputed evidence shows that Reddam was well aware of multiple red flags that the loans were invalid—including warnings from counsel and an onslaught of regulatory actions challenging the loans' validity. Those red flags were enough to put any reasonable person on notice that something was amiss, and Reddam acted recklessly in disregarding them.

IV. Defendants cannot escape liability by challenging the constitutionality of the for-cause removal provision that applies to the Bureau's Director. That provision is constitutional under binding Supreme Court precedent, as the only court of appeals to have considered the issue has held. And, even if it were not, that would not save Defendants from liability because the provision is severable, as the statute's express severability clause makes clear. Thus, the only relief that

Defendants could obtain would be a decision by a Director removable at will on whether to pursue the claims against them. They already received that relief because an Acting Director not subject to the removal protection approved this action.

STANDARDS OF REVIEW

The Bureau's opening brief sets forth the standards of review that apply to the Bureau's appeal. CFPB Br. 3.

Defendants cross-appeal the denial of their motion for judgment on the pleadings and the grant of summary judgment to the Bureau. Defendants/ Appellees/Cross-Appellants' Supplemental Excerpts of Record ("SER") 2 (ECF No. 32). The denial of judgment on the pleadings is reviewed de novo. *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005). This Court likewise reviews a "grant of summary judgment de novo and may affirm on any ground supported by the record." *CFPB v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016). The Court "view[s] the evidence in the light most favorable to the non-moving party and decide[s] whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1101 (9th Cir. 2014).

ARGUMENT IN REPLY ON THE BUREAU'S APPEAL

I. The District Court Erred in Denying Restitution.

The district court denied restitution because it concluded both that equitable factors made restitution inappropriate and that the Bureau had not established the proper restitution amount. Both conclusions misapplied the law.

A. The district court erred in concluding that restitution was not appropriate.

1. Legal restitution cannot be denied based on equitable factors.

As an initial matter, the district court lacked discretion to deny restitution based on equitable factors because the Bureau sought legal, not equitable, restitution. As the Bureau explained in its opening brief, legal restitution cannot be denied for equitable reasons. CFPB Br. 24-27.

a. This Court can reach this argument despite the Bureau's failure to make it below. This Court has discretion to make an exception to waiver where the issue "is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 613 n.3 (9th Cir. 2016) (quotations omitted) (reaching argument on question of law despite party's contrary concession below). This exception squarely applies here. Whether a court has discretion to deny restitution based on equitable factors is a pure question of law that does not depend on any factual record. *Cf. United States v. Truman*, 304 F.3d 586, 589 (6th Cir. 2002)

("[W]hether discretion exists at all is purely a question of law."). Further, contrary to Defendants' contention, even the *ultimate* question—whether the Bureau is entitled to restitution here—can be decided based on the existing factual record. The Bureau is entitled to recover the total unowed interest and fees that consumers paid that have not already been refunded. As the Bureau's opening brief explains (at 43-44), the evidence admitted at trial establishes that those amounts total $197,310,812. Defendants baldly assert that the Bureau did not provide "the more precise and demanding proof" required for a non-discretionary legal remedy (Def. Br. 23), but they do not explain why the (uncontested) evidence that Defendants took and failed to return over $197 million in unowed fees and interest is not enough.

Defendants nonetheless urge this Court not to address the Bureau's argument that the restitution it sought is non-discretionary, essentially because, they claim, ruling for the Bureau would require a new factual record and a new trial before a jury. But no new factual record is required because the Bureau already proved that Defendants owe consumers $197 million in legal restitution. Defendants have not suggested that they would have offered any different evidence in defense had they known that legal restitution was mandatory. Moreover, this Court's precedent forecloses Defendants' contention that the Bureau's claim for legal restitution would need to be "tried to a jury." Def. Br. 22. In *FTC v.*

Commerce Planet, Inc., this Court held that there is "no right to a jury trial" even for "legal" restitution. 815 F.3d 593, 602 (9th Cir. 2016). Defendants therefore have offered no compelling reason for this Court to decline to consider the Bureau's argument.

b. If it reaches the issue, this Court should hold that courts lack discretion to deny legal restitution under the CFPA based on equitable factors. The Bureau's opening brief explains two key points: Because the Bureau sought non-traced funds as restitution, the restitution it sought was legal, not equitable; and (2) legal remedies expressly authorized by statute generally are not subject to courts' equitable discretion. CFPB Br. 24-27. Defendants do not dispute either of those propositions. Instead, they contend (1) that by using permissive language, the CFPA makes even legal remedies discretionary; and (2) that legal restitution is not actually a legal remedy. Def. Br. 24-28. Neither contention holds water.

Congress's use of permissive language to provide what relief under the CFPA "may" include, 12 U.S.C. § 5565(a), does not override the background principle that legal relief is mandatory. In *Curtis v. Loether*, the Supreme Court held that the legal relief of damages was mandatory even though the statute there provided in similarly permissive terms that courts "may" grant such relief. 415 U.S. 189, 189-90, 187 (1974). Defendants do not explain why the CFPA's permissive language has any different effect.

Nor can Defendants show that legal restitution is not a legal remedy. To support this argument, Defendants cite cases stating that restitution is available only if the court determines, in its "sound discretion," that "equity and good conscience" require it. Def. Br. 25-26 (citing *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 874 (1st Cir. 1995); *Atl. Coast Line R.R. Co. v. Florida*, 295 U.S. 301, 309 (1935)). But those cases deal with the common law *cause of action* for restitution, not the *remedy* of restitution at issue here. *See Atl. Coast Line*, 295 U.S. at 309 (addressing "cause of action for restitution"); *Texaco Puerto Rico*, 60 F.3d at 873-74 (following *Atlantic Coast Line*); *cf. also Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Ill. Range, Inc.*, 71 F. Supp. 2d 864, 871 n.4 (N.D. Ill. 1999) (discussing distinction between restitution "cause of action" and restitution "remedy"). For the restitution *cause of action*, the defendant's unjust enrichment is the sole basis for liability. *See* Dan B. Dobbs, *Law of Remedies* § 4.1, at 377-82 (3d ed. 2018) ("Dobbs"). Defendants' discretionary "equity and good conscience" standard is used to assess "what counts as unjust enrichment" in that context. *Id.* at 377-78 n.54. That discretionary standard, however, has no application where, as here, liability derives from a statute and the claimant seeks restitution as a remedy.

Defendants' other attempts to show that legal restitution is actually equitable and discretionary are likewise misguided. Although the court in *CFTC v. JBW*

Capital, LLC, referred to the court's "discretion" to deny restitution (Def. Br. 26), that case addressed equitable, not legal, restitution under a statutory provision that, unlike the CFPA, authorizes only "equitable remedies." *See* 812 F.3d 98, 111-12 (1st Cir. 2016); 7 U.S.C. § 13a-1(d)(3). Similarly, in *Commerce Planet*, this Court referred to courts' "inherent equitable powers" to order restitution—but only to explain why restitution was available under a statutory provision that did not expressly provide for restitution at all. 815 F.3d at 598-99; 15 U.S.C. § 53(b).

Defendants cannot overcome the basic principle that legal remedies—including the legal restitution that the Bureau sought here—are non-discretionary. The district court therefore erred in making a discretionary decision to deny restitution based on equitable factors.

2. Even if the district court had discretion to deny restitution based on equitable factors, it abused that discretion.

But even if the district court did have discretion to consider equitable factors, it abused that discretion here. It is well established that a court cannot deny equitable relief for reasons that conflict with a statute's purposes—but the district court's reasons here did just that. And contrary to Defendants' contentions (Def. Br. 28-32), the denial of restitution here cannot be justified on the independent ground that the Bureau failed to meet its "burden" to show that restitution was appropriate.

a. The district court abused its discretion by denying restitution for reasons incompatible with the CFPA.

This Court and the Supreme Court have repeatedly made clear that a district court commits reversible error by denying equitable relief for reasons "contrary to the purposes" of the underlying statute. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994); *see also* CFPB Br. 28 (collecting cases). The district court denied restitution for two reasons—because (in its view) Defendants did not (1) act in bad faith or (2) deceive consumers about the terms of the loans. As the Bureau's opening brief explains (at 29-37), both of these reasons conflicted with the statute—and Defendants have not shown otherwise.[1]

1. First, even accepting the district court's finding that Defendants did not act in bad faith, it was legally erroneous to deny restitution on that basis. As the Bureau detailed in its opening brief (at 29-34), this Court and the Supreme Court have repeatedly held in the context of other statutes that denying restitution based on a defendant's lack of bad faith is improper because it undermines the compensatory remedy that Congress enacted and undermines effective

[1] Defendants object that the Bureau's argument that the statute limits courts' equitable discretion is "simply a variation" of its argument that legal restitution is not subject to courts' equitable discretion at all. Def. Br. 29-30. Not so. Even where courts do have discretion, that discretion is limited by the underlying statute. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (acknowledging that certain equitable considerations could justify denying relief, but rejecting another consideration as incompatible with the statute).

enforcement of the law. Defendants try to distinguish that precedent based on the different statutes involved, but they do not and cannot explain how the distinctions they cite are material. Def. Br. 30-32. The Supreme Court explained in *Albemarle Paper* that denying restitution merely because a defendant did not act in bad faith would make the remedy "a punishment for moral turpitude, rather than a compensation" for injury—a result that would undermine the statute's compensatory purpose, for a person's "injury is no less real simply because [the wrongdoer] did not inflict it in 'bad faith.'" 422 U.S. at 422. Defendants do not dispute that the CFPA, like the statute in that case, serves a compensatory purpose. Nor do they offer any other reason why the Court's common-sense reasoning does not apply equally to the CFPA.

Further, Defendants cannot dispute that denying restitution based on their (supposed) lack of bad faith—and allowing them to retain nearly $200 million in interest and fees that consumers did not actually owe—would leave entities with "little incentive to shun practices of dubious legality" and thereby undermine effective enforcement of the law. *See id.* at 417-18. Defendants note that they already lost that money (Def. Br. 29 n.8), but that is beside the point. Denying restitution still gives Defendants a substantial benefit—which undeniably undercuts the incentives to comply with the law.

Unable to explain how denying restitution based on a defendant's good faith comports with the CFPA, Defendants instead reiterate a statement that this Court made, in passing, that a pension plan trustee's "reliance on counsel[] … weigh[ed] against restitution" under the Employee Retirement Income Security Act (ERISA). Def. Br. 36-37 (citing *Chase v. Trs. of W. Conference of Teamsters Pension Tr. Fund*, 753 F.2d 744, 753 (9th Cir. 1985)). Defendants, however, still do not articulate why the Court's statement in an ERISA case offers any guidance when evaluating a restitution claim under the CFPA. It does not. Unlike with the CFPA, denying restitution based on a defendant's good faith does not conflict with ERISA's purposes. With ERISA, Congress promoted "the soundness and stability of [employee benefit] plans" to ensure they could "pay promised benefits." *Cann v. Carpenters' Pension Tr. Fund for N. Cal.*, 989 F.2d 313, 317 (9th Cir. 1993) (quotations omitted). Awarding restitution is in tension with that overarching goal because it depletes the plan assets available to pay benefits—and ERISA accordingly imposes statutory limits on the availability of restitution "to protect the actuarial soundness of the plan." *See Chase*, 753 F.2d at 749. In that unique context, where Congress expressly limited restitution to serve the overarching statutory goals, it may not contravene the statute's purposes to consider a defendant's good faith. Not so with the CFPA.

2. Second, the district court also erred in denying restitution on the ground that Defendants did not deceive consumers about the terms of the loans. The Bureau did not charge Defendants with misleading consumers about the loans' terms, but rather with misleading consumers about what they owed Defendants. As the Bureau's opening brief explained (at 34-36), denying restitution on the ground that Defendants did not engage in *additional* deception about the loans' terms would seriously undermine the incentives to avoid deceptive collection practices like those here.

In response, Defendants merely repeat their mantra that consumers got the benefit of their bargain. Def. Br. 38-39. But while the "benefit of the bargain" inquiry can be relevant in assessing consumers' harm from deceptive *sales* practices, it is a less natural fit for assessing the harm from deceptive *collection* practices. Not surprisingly, the "benefit of the bargain" cases that Defendants cite address deception in the selling of a product, not deception in the collection of a (purported) debt. *See, e.g.*, *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989) (deception in selling vacation certificates). Nonetheless, if Defendants insist on using a "benefit of the bargain" framework, consumers did *not* get the benefit of the relevant "bargain"—*i.e.*, the one that consumers accepted in response to Defendants' deceptive representations. When Defendants led consumers to believe that they owed Defendants money, the "bargain" that consumers struck was to make a payment in exchange for a corresponding reduction in the outstanding debt owed. Consumers did not get that benefit in return, however, because there was no outstanding debt to reduce.[2]

Because the district court's reasons for denying restitution conflict with the CFPA, that denial was legally erroneous even assuming that the restitution the Bureau sought was subject to the court's equitable discretion.

b. The Bureau does not have the burden to prove anything beyond the violations and resulting harm to show that restitution is appropriate.

Defendants also attempt to avoid liability for restitution on the independent ground that the Bureau failed to meet its "burden" to show that restitution is appropriate. Def. Br. 28, 32. But to establish that restitution was appropriate, the Bureau did not bear the burden to prove anything more than the violations and resulting harm—here, the amounts that Defendants took that consumers did not actually owe. The Bureau met that burden.

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[2] As the Bureau's opening brief explains (at 36-37), denying restitution on the ground that consumers received the benefit of their (initial) bargain also cannot be squared with common law restitution principles, which support restitution where a claimant paid money that "was not due," including where it was not due because a bargained-for contract was unenforceable. *See* Restatement (Third) of Restitution and Unjust Enrichment § 6, cmt. c & Ill. 21 (2011). Defendants offer no substantive response to this and instead merely object that the Bureau cannot make this argument "for the first time on appeal." Def. Br. 30 n.9. But "it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). Because this is just another "argument to support what has been [the Bureau's] consistent claim from the beginning"—that Defendants must pay restitution—it is not waived. *Id.*

Defendants suggest that the Bureau was also required to prove *additional* aggravating factors to recover restitution (*see* Def. Br. 28, 32)—but no such requirement exists. Indeed, Defendants cite no case suggesting that a plaintiff seeking restitution bears such a burden. Defendants instead contend that the Bureau "accepted th[e] burden" to prove aggravating factors and that it is therefore now precluded from denying that such a burden exists. Def. Br. 28-29. Defendants are mistaken. Although the Bureau (correctly) acknowledged that it "carries the burden to prove that it should be granted affirmative relief," it did not suggest that it needed to prove anything more than the violations and resulting harm to meet that burden. SER 57. To be sure, the Bureau introduced evidence of aggravating factors anyway, but it never suggested that such aggravating factors were part of its burden. Rather, proving such factors could have foreclosed Defendants from seeking to limit their liability based on equitable considerations. *Cf. Albemarle Paper*, 422 U.S. at 422 (explaining that proving a defendant's bad faith would foreclose defendant from making any "claim[] whatsoever on the Chancellor's conscience"). Because the Bureau had no burden to prove aggravating factors, its (supposed) failure to do so is of no consequence, and this Court need not address Defendants' arguments (Def. Br. 32-36) on that factual issue.

B. The district court erred in concluding that the Bureau had not established the proper restitution amount.

Defendants agree that the restitution amount in this case should be determined under the "two-step burden-shifting framework" set forth in *CFPB v. Gordon*, 819 F.3d at 1195. *See* Def. Br. 40 n.14. Under that framework, "the government bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains"—a burden it can meet by proving the "defendant's net revenues." *Gordon*, 819 F.3d at 1195 (quotations omitted). Once "the government makes this threshold showing, the burden shifts to the defendant to demonstrate that the net revenues figure overstates the defendant's unjust gains." *Id.*

The Bureau met its burden under this framework by establishing the total interest and fees that Defendants collected that consumers did not actually owe (less refunds). Defendants did not demonstrate that this figure overstated their unjust gains, so the Bureau was entitled to restitution in the amount it sought.

1. The Bureau met its burden by establishing the amounts that consumers paid that they did not actually owe.

The Bureau met its burden to establish a reasonable approximation of Defendants' unjust gains by proving the amount of unowed interest and fees that Defendants collected, less refunds they already provided. ER 264:9 (¶ 20), 280-1:3-4. Defendants, however, contend (1) that the Bureau failed to show that these amounts were "unjust" gains, and (2) that the district court properly found the Bureau's evidence deficient. Def. Br. 41-44. Defendants err on both fronts.

First, Defendants had no right to collect any amounts from consumers, so the interest and fees they collected straightforwardly represent "unjust" gains. In contending otherwise, Defendants apparently mean to suggest that the Bureau should have deducted "the loan proceeds disbursed to borrowers" from its proposed restitution amount. Def. Br. 42 n.15. But the applicable state laws barred Defendants from recovering even the principal they disbursed (CFPB Br. 39 n.9), and Defendants do not explain why they should nonetheless get to recoup that principal through an offset to their liability. Regardless, even if it were appropriate to deduct those amounts, it was Defendants' burden to prove it. *See Gordon*, 819 F.3d at 1195 (defendant bears burden to show that "net revenues figure overstates [its] gains"). They did not.

Second, Defendants fare no better in challenging the Bureau's evidence. Tellingly, with one limited exception,[3] Defendants do not contest the accuracy of

[3] Defendants dispute the Bureau's calculation on the narrow ground that it included all origination fees, including those consumers had not paid out of pocket. The Bureau acknowledges that was erroneous. But, as the Bureau's opening brief explains (at 43-44), this is a ground for excluding those fees from the restitution award, not for denying relief altogether. Defendants object that this would improperly require the district court to "assemble evidence" for the Bureau (Def. Br. 42 n.16), but that objection is misplaced. The Bureau already admitted evidence showing the total amounts collected excluding the unpaid origination fees. Trial Ex. 219 (Excel spreadsheet). As the Bureau's opening brief explains

the Bureau's calculations or the evidence (which came from Defendants' own verified interrogatory responses) that proved the interest and fees that Defendants collected. *See* ER 264:2-4 (¶¶ 4-13, 20), 280-1:3-4; Appellant/Cross-Appellee's Further Excerpts of Record ("FER") 299:2-4. Defendants nonetheless contend that the district court "did not abuse its discretion" in finding the Bureau's evidence deficient. Def. Br. 44. Defendants are mistaken, however, because all of the district court's reasons for discounting the Bureau's evidence reflected errors of law.[4]

To begin, the district court erred in faulting the Bureau's witness for failing to assess whether the total interest and fees "was appropriate for restitution" or whether that sum "approximate[d] Defendants' unjust gains." ER 319:17. Those are issues of law, not fact. *See Gayle Mfg. Co., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 910 F.2d 574, 578 (9th Cir. 1990) (treating "the correct legal standard for

(at 44), those amounts total $197,310,812—an amount Defendants have not disputed.

[4] Contrary to Defendants' misleading claim (Def. Br. 12), the district court did not find the Bureau's summary witness not "credible"; it merely found the witness's testimony insufficient for the legally erroneous reasons explained below. *See* ER 319:17. Defendants also misleadingly contend that the Bureau could not meet its burden by presenting "only a demonstrative exhibit." Def. Br. 44. Far from relying solely on a demonstrative exhibit, the Bureau introduced comprehensive evidence of all the payments that Defendants collected. ER 264:2-4 (describing spreadsheet exhibits); Trial Exs. 216(b), 218(b), 218(c), 219 (spreadsheets).

measuring" monetary relief as a question of law). For the same reason, there was no need for the Bureau's witness to "review the relevant states' usury laws." ER 319:17. The Bureau's witness likewise did not need to "perform any analysis" beyond adding up the interest and fees that consumers paid. ER 319:17. The total interest and fees that Defendants collected—all of which they had no right to receive—was the proper measure of restitution here, so no additional analysis was warranted. Nor was the Bureau's evidence deficient for failing to "account for expenses." ER 319:17. Expenses are not deducted from a restitution award. CFPB Br. 40-42. And, finally, the district court could not properly fault the Bureau for including in its calculation the amounts paid by consumers "whose payments were less in total than the amount disbursed to them." Def. Br. 43; *see* ER 319:17. As explained above, it was Defendants' burden, not the Bureau's, to establish any appropriate deduction based on the amounts disbursed to consumers.

2. Defendants did not show that the Bureau's figure overstated Defendants' unjust gains.

Because the Bureau met its burden to establish a reasonable approximation of Defendants' unjust gains—the interest and fees they collected that consumers did not actually owe—the burden shifted to Defendants to show that the Bureau's proposed amount "overstates [their] unjust gains." *Gordon*, 819 F.3d at 1195. In this appeal, Defendants claim that the Bureau's proposed amount overstates their unjust gains for a single reason: It does not account for the "expenses [they] incurred." Def. Br. 45. Expenses, however, are irrelevant to a restitution award. It is "well established" that defendants "are not entitled to deduct the costs associated with committing their illegal acts." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) (quotations omitted); *see also* CFPB Br. 40-41.

In seeking such a deduction anyway, Defendants cite a single district court case that deducted a defendant's expenses from a restitution award. Def. Br. 46. But, as the Bureau's opening brief explains (at 41-42), allowing a deduction for expenses would undermine the CFPA's compensatory goals by failing to return to consumers the full amounts unlawfully taken from them. It would also undermine effective enforcement by allowing those who violate the law to avoid bearing the full costs of their unlawful conduct. Defendants offer no response to these key points.

Instead, Defendants suggest that their expenses should be deducted because a restitution award that "exceeds Defendant's actual profits" would conflict with the CFPA's prohibition on "exemplary or punitive damages," 12 U.S.C. § 5565(a)(2). Def. Br. 45-46 n.19. But by prohibiting "exemplary or punitive damages," the statute does not prohibit restitution, damages, or any other relief that the statute authorizes from exceeding a defendant's profits—and Defendants can offer no support for the radical suggestion that it does.

II. The District Court Erred in Declining To Impose the Higher Penalties that Apply to Reckless Violations.

The district court committed clear error in denying a tier-two civil penalty on the ground that Defendants did not recklessly violate the law.[5] As the Bureau's opening brief explains (at 46), a person acts "reckless[ly]" if he acts "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Defendants agree that recklessness encompasses acting in the face of such risks. Def. Br. 47-48.

The risk that Defendants' conduct here was deceptive—*i.e.*, that Defendants were demanding payments that consumers did not actually owe—was so obvious that it should have been known, and the district court's contrary conclusion was clearly erroneous. The district court concluded that the risks here were not "obvious" because Defendants "secured multiple [legal] opinions" that approved their conduct and that counsel "never revoked" even in the face of mounting regulatory challenges. ER 319:19. Defendants, too, emphasize their reliance on counsel's advice. Def. Br. 48-50. But, to begin, as the Bureau's opening brief explains (at 47-49), counsel heavily caveated that advice with warnings about "significant" legal risk; counsel's opinions did not even address Defendants'

[5] The Bureau does not challenge the finding that Defendants did not "knowingly" violate the law, only its finding that Defendants were not "reckless."

activities in several states; and Defendants did not follow counsel's recommendations to make changes to mitigate legal risk.

Even putting all that aside, counsel's advice could not erase the glaring warning signs that the loans, in fact, were void and that consumers did not owe the amounts that Defendants demanded.[6] Despite never changing their formal opinion, counsel repeatedly, and with increasing urgency, advised that Defendants faced substantial risk that the loans were invalid. *See* CFPB Br. 47-50. To take just one example, both the district court and Defendants note that Defendants relied on an expert professor's opinion that the loans were valid. ER 319:12; Def. Br. 49-50. But that professor in fact opined that "the model should work but likely won't" because the "lower courts will shun our model and … if we reach the Supreme Court, … we will lose." ER Ex.528:1.

On top of such warnings, a wave of regulatory actions challenged the loans' validity. CFPB Br. 49, 9 n.2 (listing 23 state enforcement actions). Indeed, Defendants eventually recognized that the risks were too great to continue buying Western Sky loans. ER 314:11-12. Yet Defendants continued to *collect* on the existing loans—and to deceptively demand payments that consumers did not

[6] To be clear, the Bureau does not contend that the district court clearly erred in finding that Defendants relied on counsel's advice. Rather, the district court clearly erred in concluding that, in light of this advice, the risk of deceiving consumers was not sufficiently "obvious." ER 319:19. The myriad red flags made that risk blindingly obvious.

actually owe—for another three years. ER 314:11-13; 316:9-10. Defendants profess that they "held a continued belief" in the loans' validity despite the numerous regulatory actions and other red flags. Def. Br. 49. But that sort of wishful thinking does not save them from "recklessness" liability. Even crediting their (dubious) claim that they always believed that consumers actually owed the amounts that Defendants demanded, the risk that consumers did not owe those amounts was at a minimum "so obvious that it should [have been] known," *Farmer*, 511 U.S. at 836. *Cf. FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010) (concluding that defendants were "recklessly indifferent" where they "turn[ed] a blind eye" to "numerous warning signs").

Given the ample warning signs, the district court's contrary conclusion simply is "not plausible" and therefore is "clearly erroneous." *See United States v. Hernandez-Escobar*, 911 F.3d 952, 956 (9th Cir. 2018) (explaining that finding is "clearly erroneous" if it is "not plausible in light of the record viewed in its entirety" (quotations omitted)).

ARGUMENT IN RESPONSE TO CROSS-APPEAL

I. Demanding Payments that Consumers Do Not Actually Owe Violates the CFPA's Prohibition on Deceptive Practices.

The CFPA prohibits entities that offer consumer financial products and services from engaging in "unfair, deceptive, or abusive" practices. 12 U.S.C. § 5536(a)(1)(B). Defendants do not—and could not—dispute the unremarkable proposition that, as a general matter, representing to consumers that they owe amounts that they do not actually owe is "deceptive" under this provision. Instead, Defendants claim that the CFPA's prohibition does not reach the particular demands for unowed payments here because the fact that consumers do not owe the payments is determined by state law.[7] Def. Br. 55-62.

But, contrary to Defendants' contentions, Congress did not need to make a "clear statement" referring to state law to prohibit the conduct in this case. Nor does anything in the CFPA suggest that Congress intended to exclude from the CFPA's reach the straightforwardly deceptive conduct here.

A. Congress did not need to expressly refer to state law to prohibit demanding amounts that, under state law, consumers do not owe.

Defendants claim that Congress needed to expressly incorporate state law to prohibit the conduct here because prohibiting that conduct alters the usual "constitutional balance" between the federal government and the states. Def. Br. 55-56. Defendants' various attempts to apply that principle to this case do not withstand scrutiny, however.

1. Defendants argue that federalism demands a "clear statement" before interpreting a statute to "federaliz[e] state law." Def. Br. 59. This fundamentally

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[7] As the Bureau's opening brief explains, the Bureau's claims address Defendants' practices in 13 states whose laws rendered the loans void. CFPB Br. 4 & n.1. The Bureau's briefs refer to those states as the "Subject States."

mischaracterizes the Bureau's claims. Contrary to Defendants' contention (Def. Br. 59), the Bureau does not claim that "violating state law violates the CFPA." Rather, it claims that demanding payments that consumers do not actually owe violates the CFPA's prohibition on deceptive practices.

Of course, state law determined that consumers did not owe the amounts that Defendants demanded here. But far from "federalizing" state law, the claims' reliance on state law merely reflects the reality that state law largely defines the contractual obligations, property interests, and other rights and duties that order everyday life. It is entirely common—and consistent with federalism—for federal-law violations to be based in part on state law in this way.

Examples abound. For instance, "courts look to state property laws in defining underlying concepts of ownership for the purpose of deciding whether a defendant violated a federal criminal statute aimed at protecting property." *United States v. Taylor*, 867 F.2d 700, 703 n.2 (D.C. Cir. 1989); *accord United States v. Lequire*, 672 F.3d 724, 728 (9th Cir. 2012) ("Although federal law defines embezzlement," whether property is capable of embezzlement "is a question of state law."). Similarly, whether an employer violates federal labor law by excluding union representatives from its property "turns on whether … state law grants" a right of access, so "a violation of these state rights will also be a violation of [federal law]." *United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 962 (9th Cir. 2008). As another example, "[s]tate law defines what is and what is not property" protected by the Fourteenth Amendment. *Dorr v. Butte Cnty.*, 795 F.2d 875, 876 (9th Cir. 1986). And where a federal law gives consumers a right to rescind certain transactions for a specified period after consummation, when consummation occurs is "determined by looking to state law." *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir. 1989).

In the same vein, it is well established that the federal Fair Debt Collection Practices Act prohibits conduct just like that here—collecting amounts that, under the applicable state law, consumers do not actually owe. *See, e.g.*, *Madden v. Midland Funding, LLC*, 786 F.3d 246, 254 (2d Cir. 2015) (attempting to collect "interest in excess of that permitted by New York law" could violate FDCPA); *Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 714 (6th Cir. 2015) (demanding attorney's fees under contract would violate FDCPA if state law invalidated the contractual fee-shifting provision); *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 445 (6th Cir. 2014) (attempting to collect interest not authorized by Kentucky law violates FDCPA); *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002) (attempting to collect shoplifting penalty impermissible under Utah law violates FDCPA). So too does it violate the FDCPA to file and fail to release a judgment lien in violation of state law, *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 534-35 (6th Cir. 2014); to threaten to use a garnishment procedure not authorized under state law, *Picht v. Jon. R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001); or to threaten to sue when state law prohibits it, *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190, 1192 (11th Cir. 2010).[8]

The claims here follow this well-worn path: Federal law prohibited Defendants from telling consumers they owed amounts that they did not actually owe; state law determined that consumers did not owe those amounts. Here, as in all these other contexts, "state law may be relevant" to whether a federal violation occurred. *Currier*, 762 F.3d at 537. But that does not present a federalism problem or require a clear statement from Congress.

2. Nor does anything else about the Bureau's claims disturb the "constitutional balance" between the federal government and the states. *Contra* Def. Br. 56. In contending otherwise, Defendants rely on cases that require a clear statement before interpreting a federal statute to cover purely local conduct—conduct entirely unlike the interstate commercial activity in this case. For

[8] In the district court, Defendants argued that the FDCPA is different because it, unlike the CFPA, expressly incorporates state law. But although the FDCPA's references to things like the "legal status" of a debt are best understood as including state law, those references to state law are hardly *express*. Besides, cases recognize that state law underlies violations of FDCPA provisions that do not "incorporate" state law even to this degree. *See, e.g.*, *Stratton*, 770 F.3d at 451 (prohibition on falsely representing "the 'character' and 'amount'" of a debt); *Currier*, 762 F.3d at 535 (prohibition on using "unfair or unconscionable means" to collect debts). Moreover, as explained above, federal law violations regularly turn on state law that defines underlying contract and property rights, regardless of whether the federal law contains any (express or implied) reference to state law.

instance, in *Bond v. United States*, the Supreme Court considered whether a federal statute implementing a chemical weapons treaty applied to "an amateur attempt by a jilted wife to injure her husband's lover." 572 U.S. 844, 848 (2014). The Court concluded it did not. *Id.* at 866. Because the Constitution "leaves local criminal activity primarily to the States," the Court would not interpret the statute "to reach purely local crimes" absent a "clear indication" that Congress so intended. *Id.* at 848, 860. Similarly, in *Jones v. United States*, the Court declined to interpret a federal arson statute as covering the arson of "an owner-occupied residence that is not used for any commercial purpose" without a clear statement from Congress because, again, that is "traditionally local criminal conduct." 529 U.S. 848, 852, 858 (2000).

Defendants' conduct here "is not akin to the purely local assault in *Bond*" and thus "presents no need for [the Court] to construe [the statute] according to principles of federalism." *United States v. Le*, 902 F.3d 104, 113 (2d Cir. 2018), *cert. pet. pending*, No. 18-7385. Defendants used the internet—"an instrumentality and channel of interstate commerce"[9]—to demand and collect payments from consumers across the country. Regulating this kind of interstate commercial activity is "a matter of strong federal interest, one not traditionally left principally to the States," so *Bond*'s clear-statement rule does not apply. *Le*, 902 F.3d at 113.

[9] *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007).

3. Defendants next claim that a clear statement is required to intrude on states' traditional licensing power. Def. Br. 57. This is a red herring. The Bureau is not imposing or enforcing licensing requirements. Although licensing is traditionally left to the states, addressing the conduct here—making deceptive demands in interstate commerce for amounts that consumers do not actually owe—fits comfortably within the federal government's traditional role.

4. Next, Defendants contend that permitting the claims here would "infringe[] on the states" because that would allow state attorneys general (who are authorized to enforce the CFPA, 12 U.S.C. § 5552(a)) to enforce state law without regard to states' shorter limitations periods and less-generous remedial provisions. Def. Br. 61. This proves far too much. By authorizing state attorneys general to enforce the CFPA, the Act *necessarily* grants attorneys general authority beyond what state law gives them. If states do not want to exercise that authority, they are free to make that choice. Granting states additional power does not raise federalism concerns.

5. Finally, Defendants contend that recognizing the claims here would allow the Bureau to "effectively overrule the states' enforcement of their own laws." Def. Br. 62. This, again, rests on a fundamental mischaracterization of the Bureau's claims. The Bureau is not enforcing the states' laws, but the CFPA's

prohibition on engaging in deceptive financial-services practices, including by demanding amounts that consumers do not actually owe.

B. Nothing in the CFPA suggests that Congress did not intend to reach the kind of deceptive collection practices at issue here.

Defendants next contend that Congress affirmatively expressed its intent that the CFPA's prohibition on deceptive practices *not* extend to deceptive practices that derive from state-law violations. Def. Br. 55, 59-62. But the various CFPA provisions that Defendants cite reflect no such intent.

First, Congress's failure to "incorporate state law" in 12 U.S.C. § 5551—a provision addressing the extent to which the CFPA preempts state law—does not support Defendants' argument. *Contra* Def. Br. 58. Congress did not need to expressly "incorporate" state law for the reasons explained above, and Defendants offer no reason why its failure to do so in a preemption provision is meaningful.

The provision barring the Bureau from "establish[ing] a usury limit," 12 U.S.C. § 5517(o), likewise does not reflect any intent to preclude the claims here. *Contra* Def. Br. 61. The Bureau did not establish a usury limit; states did. The Bureau is merely enforcing the CFPA's prohibition on deceptive practices. Defendants violated that prohibition when they claimed that consumers owed money when they did not (because of state usury laws, licensing laws, or both).

That Defendants' deception in some instances involved usury limits did not give them license to mislead consumers.[10]

For similar reasons, the CFPA's instruction that the Bureau seek to "enforce Federal consumer financial law consistently," 12 U.S.C. § 5511(a), does not imply that it cannot bring the claims here. *Contra* Def. Br. 60. The Bureau is not (inconsistently) enforcing the states' differing laws, but rather consistently enforcing the CFPA's prohibition on deceptive practices by ensuring that Defendants do not demand amounts that consumers do not actually owe.

Finally, the provision authorizing the Bureau to take enforcement action to prevent covered persons from engaging in deceptive practices "under Federal law," 12 U.S.C. § 5531(a), likewise does not suggest that the Bureau may not pursue the claims here. *Contra* Def. Br. 60. The Bureau *is* bringing this enforcement action to prevent Defendants from engaging in deceptive practices "under Federal law." Demanding payments that consumers do not actually owe meets the elements of a federal claim for deception under the CFPA—a fact that Defendants do not

[10] Defendants stray even farther afield in citing Congress's rejection of an amendment that would have eliminated the authorization that current law gives *federally regulated banks* to make loans without regard to the usury limits of borrowers' home states, *Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp.*, 439 U.S. 299, 313 (1978). Def. Br. 58; SER 276-80. Non-bank lenders like CashCall and Western Sky do not enjoy that privilege under current law.

dispute. *See Gordon*, 819 F.3d at 1192 (describing elements of deception claim under CFPA).

II. Consumers Did Not Actually Owe the Amounts that Defendants Demanded.

Consumers did not actually owe the amounts that Defendants demanded. Defendants do not dispute that the laws of borrowers' home states would render the loans void—such that consumers would have no obligation to pay them.[11] ER 213:12 (concluding that "Defendants do not seriously dispute" that the "loans are void or uncollectible under the laws of the Subject States"). They contend, however, that those laws did not apply because the loans were made by a company on the CRS Tribe's land, and the loan contracts provided that the law of the CRS Tribe, not any state or federal law, would apply to the loans. Def. Br. 62. But the contracts' choice-of-law provision was invalid under basic choice-of-law principles. Indeed, the other courts that have considered these very contracts have repeatedly concluded that the choice-of-law provision was invalid.[12]

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[11] In another context, Defendants suggest that some state laws do not actually void the loans, but the cases they cite address state laws not implicated by the claims here. *See* Def. Br. 60.

[12] *MacDonald v. CashCall, Inc.*, No. 16-2781, 2017 WL 1536427, *10 (D.N.J. Apr. 28, 2017), *aff'd*, 883 F.3d 220 (3d Cir. 2018); *State ex rel. Cooper v. W. Sky Fin., LLC*, No. 13-CVS-16487, 2015 WL 5091229, *10 (N.C. Super. Ct. Aug. 27, 2015) (unpublished); *W. Sky Fin., LLC v. State ex rel. Olens*, 793 S.E.2d 357, 366 (Ga. 2016); *Inetianbor v. CashCall, Inc.*, No. 13-60066-CIV, 2015 WL 11438192, *3 (S.D. Fla. Dec. 8, 2015); *see also Jackson v. Payday Fin., LLC*, 764 F.3d 765, 775 n.23 (7th Cir. 2014) (concluding "a more-than-colorable argument can be

Defendants do not so much as mention the relevant choice-of-law principles and instead argue only that the district court should not have applied a "true lender" test in determining whether the choice-of-law provision was valid. Def. Br. 62-65. But it was entirely appropriate for the district court to look past the form of the transactions (under which the loan contracts named Western Sky as the lender) and identify the "true lender" based on the transactions' actual substance (under which, as Defendants do not dispute, CashCall, not Western Sky, bore the *entire* economic and regulatory risk of the loans). ER 213:6-8. And, besides, the provision choosing CRS Tribe law is invalid regardless of who the "true lender" was.

Defendants do not contest the district court's conclusions that "federal common law supplies the choice-of-law rules" here, and that "'[f]ederal common law follows the approach outlined in the Restatement (Second) of Conflict of Laws.'" ER 213:6 (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)).[13] Under that approach, a contractual choice-of-law provision will

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made that the loan agreements' choice of law clause should not be enforced," but declining to decide the issue). *But cf. CashCall, Inc. v. Office of Attorney General*, 173 So. 3d 1056, 1057-58 (Fla. Dist. Ct. App. 2015) (concluding that Attorney General had not established "clear legal right" to temporary injunction based on invalidity of choice-of-law provision but "express[ing] no opinion" on the ultimate merits).

[13] Below, Defendants argued that the Subject States' choice-of-law rules should govern. *See* D. Ct. ECF No. 139 at 12. They have waived that argument on appeal by failing to raise it in their opening brief. *See Alaska Ctr. for the Env't v. U.S.*

not control in two distinct circumstances: (1) where "'the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice,'" and (2) where "'application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state'" and which "'would be the state of the applicable law in the absence of an effective choice of law by the parties.'" *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 917 (9th Cir. 2003) (quoting Restatement (Second) of Conflict of Laws § 187(2) (1971) ("Restatement")). Both circumstances exist here. The district court appropriately considered the "true lender" in concluding that the choice-of-law provision was invalid under the first prong of this test. And, at any rate, the choice-of-law provision is independently invalid under the rule's second prong regardless of who the true lender was.

Forest Serv., 189 F.3d 851, 858 n.4 (9th Cir. 1999). At any rate, applying the Subject States' choice-of-law rules would not make a difference, for those states apply the same or largely similar choice-of-law rules that would produce the same result. *See Melia v. Zenhire, Inc.*, 967 N.E.2d 580, 595 (Mass. 2012) (noting that although choice-of-law doctrines "vary in emphasis and specific formulations," courts "are arriving at results broadly consistent with each other's holdings" (quotations omitted)). In addition, for Minnesota, the choice-of-law question is resolved by statute: Minnesota law expressly makes "void and unenforceable" any "provision selecting a law other than Minnesota law" in short-term loan agreements with Minnesota borrowers. Minn. Stat. § 47.601 subdiv. 2(a)(1), (b).

A. The provision choosing CRS Tribe law is invalid because there was no reasonable basis for that choice given that CashCall was the true lender.

The loans' choice-of-law provision was invalid because the CRS Tribe "has no substantial relationship to the parties or the transaction[s] and there is no other reasonable basis for the parties' choice," Restatement § 187(2). Even though the named lender, Western Sky, was located on the CRS Tribe's land, it was not actually the lender in any meaningful sense. The CRS Tribe therefore had no "substantial" relationship to the parties, nor have Defendants claimed any other "reasonable basis" for choosing CRS Tribe's law. ("A bare desire to evade a state's fundamental public policies is not a reasonable basis to choose the law of an unrelated state." *Delphi Auto. PLC v. Absmeier*, 167 F. Supp. 3d 868, 877 n.3 (E.D. Mich. 2016).) The district court correctly held that the choice-of-law provision was invalid for this reason.

Defendants do not dispute the district court's conclusion, based on the undisputed facts, that the substance of the transactions shows that CashCall, not Western Sky, was the true lender. *See* Def. Br. 62-65. Nor could they. Western Sky was formed for the express purpose of helping CashCall make loans across the country without following the laws of borrowers' home states. ER 163-3:7-8, 11 (¶¶ 24, 33, 35). Although Western Sky was formally the party to the loan agreements, "the entire monetary burden and risk of the loan program was placed on CashCall." ER 213:8. CashCall, through its wholly-owned subsidiary WS

Funding LLC, fronted the money that Western Sky used to make the loans.[14] ER 163-3:15-16 (¶ 50). And CashCall, through WS Funding, agreed to buy the loans that Western Sky made. ER 163-3:4, 14-15 (¶¶ 6, 47). CashCall bought the loans—all of them—within a few days, before any consumer made a payment. ER 163-3:15, 17, 19 (¶¶ 48, 53, 57). Once CashCall bought the loans, it bore all of the risk of default. ER 163-3:19 (¶ 58). CashCall even took on Western Sky's regulatory risk: It agreed to fully indemnify Western Sky for all expenses arising out of legal actions against it, including by paying any fines or penalties imposed. ER 163-3:21 (¶ 63). CashCall also reimbursed Western Sky for many business expenses and performed a wide range of functions, including application processing, customer support, and marketing. ER 163-3:20-22, 23-24 (¶¶ 61-62, 64, 77-78).

Unable to contest that the substance of the transactions shows that CashCall was the true lender, Defendants instead contend that it was improper for the district court to assess who the "true lender" was at all. Def. Br. 62-65. But that was

[14] In the factual background section of their brief, Defendants claim that this fact is disputed. Def. Br. 6 n.4. It is not. Defendants concede that Western Sky funded loans from an account that was funded at least in part by CashCall. FER 163-3:56 (¶ 288). At any rate, whether CashCall provided all of the money used to fund the loans upfront is irrelevant—for it is undisputed that they bought all of the loans for more than face value before any payment was ever due and therefore bore the entire risk of the program. ER 163-3:15, 17-18, 19 (¶¶ 48-49, 53-54, 57).

wholly appropriate. As the Supreme Court has recognized, it is "courts' standard practice, evident in many legal spheres" to "ignor[e] artifice when identifying the parties to a transaction." *Abramski v. United States*, 573 U.S. 169, 184 (2014) (applying "a substance-over-form approach" in identifying gun buyer for purposes of gun laws); *see also, e.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) (holding that "substance, not form," should govern under Sherman Act); *Gregory v. Helvering*, 293 U.S. 465, 469-70 (1935) (refusing to "exalt artifice above reality" in tax case).

Consistent with this standard practice, courts across the country have considered who the "true lender" is in determining which state's laws apply to a loan. *See*, *e.g.*, *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004) ("Washington courts consistently look to the substance, not the form, of an allegedly usurious transaction."); *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1260 (11th Cir. 2011) (concluding that federal banking law does not immunize bank from state usury law "if it is not the true lender of the loan"); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1201 (N.D. Cal. 2012) ("look[ing] to the real nature of the loan" to identify "de facto lender"); *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781, 787 (S.D.W. Va. 2009) ("If CashCall is found to be a de facto lender, then CashCall may be liable under West Virginia usury laws."); *Goleta Nat'l Bank v. O'Donnell*, 239 F. Supp. 2d 745, 747, 755 (S.D. Ohio 2002) (concluding that if entity were "true lender," then it would "unquestionably [be] subject to" state usury law, even though a different entity "is clearly listed as the lender on the loan documents"); *CashCall, Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300, *7, 14-15 (W. Va. 2014) (unpublished) (affirming judgment finding that CashCall "was the de facto or true lender" and thus violated state's licensing and usury laws); *People ex rel. Spitzer v. Cnty. Bank of Rehoboth Beach*, 45 A.D.3d 1136, 1138 (N.Y. App. Div. 2007) (concluding that adjudication of usury claims required determining "who is the 'true lender'"); *BankWest, Inc. v. Oxendine*, 598 S.E.2d 343, 348 (Ga. Ct. App. 2004) (considering allegation that entity was true lender, because "[t]o determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it"). Whatever the merits of these particular decisions,[15] this standard substance-over-form approach is entirely appropriate here, where the precise question is whether a state's (or tribe's) relationship to a transaction is sufficiently "substantial" to uphold a provision choosing that state's law.

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[15] Some of these cases address whether a bank or its non-bank partner is the "true lender" for purposes of an exemption that federal banking laws give federally-regulated banks (but not non-banks) from many state lending laws. Given the extensive federal oversight of banks involved in such arrangements, applying a true lender test in that context may not be warranted. The Bureau takes no position on that distinct issue.

Defendants cite no authority holding otherwise. Although Defendants cite three district court cases that disregard substance in favor of form, those cases do not address the question in this case—whether a choice-of-law provision is valid under standard choice-of-law rules. Def. Br. 63-64. Rather, those cases conclude that a true lender analysis is not warranted for purposes of statutory and constitutional provisions not at issue here. *See Hudson v. Ace Cash Express, Inc.*, No. 01-1336, 2002 WL 1205060, *6 (S.D. Ind. May 30, 2002) (finding no basis, "at least as a matter of statutory construction," to interpret National Bank Act provision that shields certain banks from most state usury laws as applying only when the covered bank is the true lender); *Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1363, 1368-69 (D. Utah 2014) (interpreting "virtually identical" provision in Federal Deposit Insurance Act); *Beechum v. Navient Sols., Inc.*, No. 15-8239, 2016 WL 5340454, *8 (C.D. Cal. Sept. 20, 2016) (interpreting exemption to usury limit in California Constitution and finding "inapposite" cases that "do not concern statutory or constitutional exemptions" to that usury limit).

Defendants nonetheless urge this Court to reject the "true lender" inquiry here to avoid "rock[ing] the lending markets." Def. Br. 63. But Defendants' warning of market disruption confuses adopting a "true lender" test with abandoning the so-called "valid-when-made" rule. Although Defendants stress the importance of the valid-when-made rule (Def. Br. 64-65), that rule is not implicated here. That rule provides that if a loan is valid when made—*e.g.*, because federal law exempts the lender from an otherwise-applicable state usury cap—the loan remains valid when the lender assigns it to a (non-exempt) third party. *See Nichols v. Fearson*, 32 U.S. 103, 109 (1833). The true lender test does not undercut this rule but instead simply informs whether the loan was, in fact, valid when made.

B. The choice-of-law provision is invalid regardless of who the "true lender" was for the independent reason that it contravenes the fundamental policy of borrowers' home states.

The provision choosing CRS Tribe law is also invalid regardless of who the "true lender" was because it contravenes the fundamental policy of borrowers' home states, which have a materially greater interest in applying their law to the transactions. Under the "fundamental policy" prong of the relevant choice-of-law rule, the contractual choice-of-law provision is invalid if: (1) applying CRS Tribe law "would be contrary to a fundamental policy" of borrowers' home states; (2) those states have "a materially greater interest" than the CRS Tribe "in the determination of the particular issue"; and (3) the laws of borrowers' home states would apply absent the choice-of-law provision. Restatement § 187(2)(b); *see also Flores*, 335 F.3d at 917. All three criteria are satisfied here.

1. Applying CRS Tribe law would contravene the "fundamental policy" of borrowers' home states. The relevant laws cap the interest rates that lenders can

charge on certain loans, require lenders to obtain a license to make loans in the state, or both.[16] FER 163-3:30-54. Those laws further provide that loans made in violation of those provisions are void. *Id.* Such "statute[s] [that] make[] one or more kinds of contracts illegal" are indicative of a "fundamental policy." Restatement § 187, cmt. g.

It therefore comes as no surprise that courts regularly find that usury and licensing laws like those in the Subject States reflect fundamental state policies. *See, e.g.*, *MacDonald*, 2017 WL 1536427, *8 (concluding that applying CRS Tribe law "would be contrary to New Jersey's fundamental interest in preventing usurious and unlicensed lending" (capitalization altered)); *W. Sky Fin.*, 2015 WL 5091229, *10 (concluding that there was "no question" that state was "seeking to protect important State interests" by enforcing usury limits); *Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130, 151 (S.D.N.Y. 2017) ("New York's usury prohibition constitutes a fundamental public policy."); *Brack v. Omni Loan Co., Ltd.*, 80 Cal. Rptr. 3d 275, 284-85 (Cal. Ct. App. 2008) (concluding that law requiring lender licensing was "fundamental and unwaivable"); *Kampfe v. Aquent, LLC*, No. 08-89, 2009 WL 10678365, *4 (D. Mont. May 5, 2009) (concluding that

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[16] As relevant here, Defendants violated both the licensing and usury laws of four states (Minnesota, New Hampshire, New York, and North Carolina); only the licensing laws in eight states (Arizona, Illinois, Indiana, Kentucky, Massachusetts, Montana, New Jersey, and Ohio); and only the usury laws in one state (Arkansas).

interest exceeding Montana usury limits "violate[s] a fundamental policy of Montana"); *see also* Restatement § 187, Reporter's Note, cmt. g (explaining that, in the "usury area[], choice-of-law provisions have not been permitted to override protective statutes of the state" whose law would otherwise apply).

2. The borrowers' home states also have a "materially greater interest" than the CRS Tribe "in the determination of the particular issue[s],"[17] *i.e.*, the applicability of licensing and usury laws—regardless of who would be considered the "true lender" in this case. CashCall and Western Sky chose the states in which they would and would not make loans (FER 141-1:5; 169-1:5), and then they purposefully directed their loan program to consumers in the states they chose. They solicited business in the Subject States through TV and online advertisements and bulk mailings (FER 203-7:2, 4; 152-1:3), and made it possible for borrows to apply for loans from those targeted states by hosting a website and toll-free number (FER 163-3:3-4 (¶¶ 73, 75)). Borrowers did not have to travel outside their home states to apply for, enter into, receive funds from, or pay the loans. FER 163-3:3, 20, 22-23 (¶¶ 74, 99, 114, 116). Meanwhile, Western Sky and CashCall performed only limited lending activities from the CRS Tribe's land. FER 163-3:3-14, 15-20, 21 (¶¶ 73-91, 94-98, 100-01).

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[17] Restatement § 187(2).

Particularly in these circumstances, there is little room to doubt that the borrowers' home states had a materially greater interest than the CRS Tribe in applying their licensing laws. As an initial matter, it is far from clear that the CRS Tribe (or any other state or tribe) can claim any substantial interest at all in exempting companies within its borders from complying with other states' licensing requirements when those companies purposefully conduct business in those other states in the way Western Sky did here. *Cf. Brack*, 80 Cal. Rptr. 3d at 287 (noting that state "has no policy which prevents its lenders from subjecting themselves to the regulatory authority of other states"). Even if the CRS Tribe did have such an interest, that interest would not trump the borrowers' home states' interest in ensuring that companies purposefully making loans in their jurisdictions follow the same licensing laws as everyone else. Indeed, it is widely accepted that nonbank lenders (like Western Sky or CashCall) generally must comply with the licensing laws of the states in which they conduct business. *See* U.S. Dep't of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* 63 (July 2018), https://go.usa.gov/xEUQ6 ("Nonbank lenders that operate in multiple states must acquire lending or credit licenses for each applicable state."); *accord* Brief of Amicus Curiae The Innovative Lending Platform Association at 16 (ECF No. 24-2).

The borrowers' home states also have a materially greater interest than the CRS Tribe in regulating the interest that can be charged on the loans here. For the reasons explained above, the borrowers' states had a much closer connection to the transactions than did the CRS Tribe, even assuming that the CRS Tribe is the home of the lender. And while some lenders' home states might claim a competing interest in ensuring access to credit on whatever terms the parties may agree to, Defendants cannot claim that *the CRS Tribe* has such an interest. The Tribe itself has criminalized making loans that exceed its 18% interest-rate cap. FER 173:5 (CRS Tribe Criminal Code § 3-4-52). Moreover, even if the Tribe did allow loans on any terms, its interest in doing so would not trump the Subject States' own interest in protecting consumers within their borders in the circumstances here. *Cf. Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086 (9th Cir. 2010) (concluding that consumers' home state had "materially greater interest" in applying its consumer protection law where affected consumers were residents of the state and the goods were provided there).

3. Finally, the laws of borrowers' home states would apply "in the absence of an effective choice of law by the parties," Restatement § 187(2). Defendants make no effort to dispute the common-sense proposition that, at least absent an effective choice-of-law provision, businesses must follow a state's laws when they purposefully conduct business in that state, as CashCall and Western Sky did here.

Thus, the lender here—whether it was CashCall or Western Sky—was required to follow the licensing and usury requirements of the states where they made the loans.

The applicable choice-of-law rules confirm this. Under the Restatement's approach, the applicable law is "the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties" under principles reflected in the Restatement. Restatement § 188(1). In conducting this analysis, a court should consider various contacts, such as the residence of the parties and the place of negotiation, contracting, and performance. *Id.* § 188(2). These contacts are "evaluated according to their relative importance with respect to the particular issue." *Id.*

Here, CashCall and Western Sky solicited business in the borrowers' home states, and engaged in transactions that did not require borrowers to leave those states. In these circumstances, the borrowers' home states have "the most significant relationship" to the transactions. For the reasons discussed above, the lender's state (whether the lender be Western Sky on the CRS Tribe's land or CashCall in California) does not have nearly as strong an interest in applying its laws to its lenders' out-of-state business activities. The "most important function of choice-of-law rules is to make the interstate … system[] work well," including by "further[ing] harmonious relations between states." *Id.* § 6, cmt. d. That function is best served by recognizing each state's dominion within its own borders.

For all these reasons, the choice-of-law provisions in the loan agreements were invalid regardless of who the "true lender" was. The laws of borrowers' home states therefore applied to the loans, and—as Defendants have not disputed—rendered the loans void such that consumers had no obligation to pay them.

III. The District Court Correctly Held Reddam Individually Liable.

On summary judgment, the district court held CashCall's CEO, J. Paul Reddam, individually liable for the deceptive practices in this case. That decision was correct because the undisputed evidence showed that Reddam was actively involved in the company's operations and was well aware of the risk that consumers did not actually owe the payments that CashCall demanded—facts that easily satisfy this Court's test for individual liability.

Under this Court's precedent, an individual is liable for a corporation's violations if "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Gordon*, 819 F.3d at 1193. Reddam does not and could not dispute that the first element is met here—he had the authority to control the corporate defendants' actions. *See, e.g.*, FER 163-3:24-29 (¶¶ 123-34).

Contesting only the second element, Reddam claims that he was not recklessly indifferent because he believed in good faith, based on counsel's advice, that the loans were valid and that it therefore was not deceptive to demand payment on them. Def. Br. 65-67. But "reliance on advice of counsel [is] not a valid defense on the question of knowledge"—because "counsel could not sanction something that [a defendant] should have known was wrong." *Amy Travel*, 875 F.2d at 575. Although (as Defendants contend) counsel's advice may indeed be *relevant* to whether a defendant was recklessly indifferent to the truth or falsity of his company's representations, it does not shield Reddam from liability because the undisputed evidence shows that, despite counsel's advice, Reddam was well aware of the significant possibility that CashCall's claims that consumers owed it money were false.

This Court has recognized that "warning signs" that conduct is deceptive can suffice to show that an individual was "recklessly indifferent" under the test for individual liability. *Network Servs. Depot*, 617 F.3d at 1141 (holding individuals liable where they disregarded "myriad red flags that would have led a reasonable person to suspect that something was amiss"); *see also Amy Travel*, 875 F.2d at 574-75 (holding individuals liable in light of "signals sent by the high volume of consumer complaints and the excessive credit card chargebacks"). It is undisputed that Reddam was well aware of serious warning signs here. As detailed in the Bureau's opening brief, counsel warned that the lending model was subject to "significant" legal risk, and two outside lawyers even advised that the model would "likely" be found unlawful. CFPB Br. 47-48. It is also undisputed that Reddam viewed "regulatory risk" as the "biggest risk" that CashCall faced. FER 169-1:3. This "regulatory risk"—*i.e.*, the risk that the loans were not actually valid—became more and more apparent over time as one state after the other took action to address these loans that they believed violated state law. *See* CFPB Br. 8-9 (citing 23 state enforcement actions). In mid-2013, CashCall itself prepared a more-than-100-page document detailing the regulatory actions against CashCall, including multiple actions in which state regulators had determined that the loans violated state law and were void. FER 169-2:2-120. Reddam was fully aware of these actions—he testified that CashCall's General Counsel updated him about the litigation "pretty much daily." FER 169-1:6-7.

Ultimately, in the face of these mounting "regulatory problems," Reddam decided to stop buying loans from Western Sky in summer 2013. FER 163-3:29 (¶ 134), 169-1:4. But, even then, he permitted CashCall to continue collecting on the existing loans—despite the glaring warning signs that consumers did not actually owe them. Particularly by that point, the red flags would have put anyone but the willfully ignorant on notice of the real possibility that the loans were invalid. Thus, "the undisputed facts admit of no other inference" than that, at least by then, Reddam was recklessly indifferent to the truth or falsity of CashCall's claims that consumers actually owed the money that CashCall demanded. *See Network Servs. Depot*, 617 F.3d at 1139. The district court therefore properly granted summary judgment to the Bureau on its claim that Reddam is individually liable for the deceptive practices here.

IV. Defendants Cannot Escape Liability by Challenging the Bureau's Constitutionality.

Finally, Defendants contend that this action must be dismissed because Congress violated the separation of powers when it headed the Bureau with a "single official removable only for cause."[18] Def. Br. 52. That challenge conflicts with governing Supreme Court precedent and cannot save Defendants from liability.[19]

A. To begin, as the en banc D.C. Circuit (and nearly every other court to have considered the question[20]) has held, the for-cause removal provision that

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[18] The CFPA permits the President to "remove the Director for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

[19] The Bureau does not take a position on whether existing Supreme Court precedent was correctly decided, or whether the President has independent authority to determine whether the Bureau's structure is constitutional.

[20] *Compare CFPB v. Think Fin., LLC*, No. 17-127, 2018 WL 3707911, *2 (D. Mont. Aug. 3, 2018) (concluding that provision is constitutional and noting that

applies to the Bureau's Director complies with constitutional separation-of-powers requirements as articulated by the Supreme Court. *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Controlling Supreme Court precedent—which Defendants all but completely ignore—makes clear that a removal provision is constitutional so long as it does not "impede the President's ability to perform his constitutional duty" to ensure that the laws are faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691-93 (1988); *accord Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010); *PHH*, 881 F.3d at 97. The removal restriction that applies to the Bureau's Director passes this test. Indeed, the Supreme Court long ago upheld an identical removal restriction for members of the Federal Trade Commission (FTC). *See Humphrey's Executor v. United States*, 295 U.S. 602, 620, 629 (1935); *compare* 15 U.S.C. § 41 (1934) (permitting removal for "inefficiency, neglect of duty, or malfeasance in office"), *with* 12 U.S.C. § 5491(c)(3) (same).

Although Defendants attempt to distinguish the FTC by pointing to that agency's "multi-member commission" structure, they do not explain how the Bureau's single-Director structure is relevant under the controlling test—that is,

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nine other district court decisions had so held, with only one district court concluding that the provision was unconstitutional); *with CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (finding provision unconstitutional).

how it leaves the President less able to faithfully execute the law. It does not. As the en banc D.C. Circuit recognized, "[i]f anything," the President may have "more efficient control over a solo head than a multi-member directorate" because if there is a problem, "he knows exactly where to turn."[21] *PHH*, 881 F.3d at 98.

Defendants also object that the Bureau's structure is "novel." Def. Br. 52. But the Bureau's structure is not particularly "novel." *See PHH*, 881 F.3d at 103-04 (describing analogues to the Bureau). And, regardless, nothing "makes novelty *itself* a source of unconstitutionality"; "[o]ther constitutional principles beyond novelty must establish why a specific regime is problematic." *Id.* at 102-03. None do here.

B. In any event, even if the Bureau's for-cause removal provision were constitutionally problematic (which it is not), Defendants could not avoid liability on that basis because the provision is severable from the remainder of the statute. Congress expressly provided that any unconstitutional provision in the CFPA should be severed and the remainder of the Act left intact, 12 U.S.C. § 5302—an

[21] Dissenting in *PHH*, then-Judge Kavanaugh reasoned that the Bureau's single-Director structure "diminishes the President's power" because at "traditional multi-member agencies," the President can at least designate who serves as chair. *PHH*, 881 F.3d at 188 (Kavanaugh, J., dissenting). But the President did not have that power over the FTC's chair when the Supreme Court unanimously approved for-cause protection for that agency's commissioners in 1935. *See Humphrey's Executor*, 295 U.S. at 620 (citing 38 Stat. 717, 717-18, § 1 (1914)). So, the ability to name a chair makes no constitutional difference under Supreme Court precedent.

instruction that can be overcome only with "strong evidence" that Congress would have preferred no Bureau (and no CFPA) at all to a Bureau led by an official removable at will. *See Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 865 (9th Cir. 2017). Defendants cannot make that showing. *Accord PHH*, 881 F.3d at 198-200 (Kavanaugh, J., dissenting) (concluding that for-cause provision is unconstitutional, but agreeing with United States as *amicus* that provision is severable). Although Defendants assert that the removal provision is "the heart" of the statute (Def. Br. 54-55), no evidence—let alone "strong evidence"—supports that bare assertion. Congress created the Bureau to consolidate the administration of the consumer financial laws in a single agency with a dedicated consumer protection mission. *See* S. Rep. No. 111-176, at 10, 166 (2010); 12 U.S.C. § 5511(a). Nothing suggests that Congress would rather sacrifice this goal—and the CFPA's important consumer protections—than expose the Bureau's Director to removal at will.

Because the removal provision is severable, dismissing this action would not be warranted even if the provision were unconstitutional. Rather, in the ordinary course, the Court would declare that provision alone inoperative and allow the agency led by a Director acting without that provision's protection to decide whether to affirm the action. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (where initial adjudication was affected by separation-of-powers problem, remanding for a "new hearing before a properly appointed official" (quotations omitted)); *see also PHH Corp. v. CFPB*, 839 F.3d 1, 8-10 (D.C. Cir. 2016) (holding removal provision unconstitutional, severing provision, and remanding case for proceedings by a reformed agency), *vacated*, 881 F.3d 75.

That second step is not necessary here, however, because this enforcement action was *already* ratified by an Acting Director who was not protected by the removal provision. In particular, on November 24, 2017, the Bureau's former Director resigned, and President Trump designated Mick Mulvaney to serve as the Bureau's Acting Director. *See* White House Statement (Nov. 24, 2017), https://go.usa.gov/xEXRs. The CFPA's for-cause removal protection did not apply to Acting Director Mulvaney. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, 2017 WL 6419154, *7 (Nov. 25, 2017) (explaining that CFPA's removal protection does not apply to an Acting Director). Acting Director Mulvaney approved the Bureau's appeal in this action, and thereby ratified the action itself. *See Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016) (explaining that ratification "can be implied" from conduct that "is necessarily an affirmation of an earlier act" (quotations omitted)); *accord Doolin Sec. Sav. Bank, FSB v. OTS*, 139 F.3d 203, 213 (D.C. Cir. 1998). Defendants have therefore already received all the relief to which they could be entitled on their constitutional claim: An official removable at will by the President has approved the action against them. *Accord FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996) (concluding that approval by properly constituted agency provided "adequate remedy" where enforcement action was initially filed by unconstitutional agency); *Gordon*, 819 F.3d at 1190-92 ("agree[ing] with the D.C. Circuit's approach" in *Legi-Tech* and concluding that ratification by properly appointed Director "cure[d] any initial [constitutional] deficiencies" arising from suit's initial approval by unconstitutionally appointed Director). Thus, even if Defendants' constitutional challenge had merit (which it does not), it would not warrant dismissing this lawsuit.

CONCLUSION

For all the foregoing reasons, this Court should affirm the district court's denial of Defendants' motion for judgment on the pleadings and the grant of summary judgment to the Bureau. In addition, it should reverse the district court's judgment on restitution and civil penalties and remand the case for the district court (1) to order Defendants to pay restitution in the amount of the interest and fees that consumers paid that they did not actually owe, and (2) to impose an appropriate civil penalty in light of the "tier two" maximum penalty amounts that the CFPA establishes for reckless violations.

Dated: February 19, 2019

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STATEMENT OF RELATED CASES

Ninth Circuit Case Nos. 18-55407, 18-55479

Pursuant to Ninth Circuit Rule 28.2-6, the Bureau states that the following cases raise the same or closely related issues regarding the constitutionality of the for-cause removal provision in the Bureau's statute:

CFPB v. Seila Law, LLC, No. 17-56324 (oral arg. held Jan. 8, 2019);

CFPB v. D & D Marketing, Inc., No. 17-55709; and

CFPB v. Nationwide Biweekly Administration, Inc., Nos. 18-15431, 18-15887.

In addition, *CFPB v. Nationwide Biweekly Administration, Inc.*, Nos. 18-15431, 18-15887, raises a related issue regarding a district court's denial of restitution.

Counsel is aware of no other case pending in this Court that is related within the meaning of Rule 28-2.6.

Dated: February 19, 2019 /s/ Kristin Bateman

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CERTIFICATE OF COMPLIANCE

Ninth Circuit Case Numbers: 18-55407, 18-55479

I am the attorney for the Appellant/Cross-Appellee Consumer Financial Protection Bureau.

This brief contains 13,965 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

I certify that this brief is a cross-appeal brief and complies with the word limit of Cir. R. 28.1-1.

Dated: February 19, 2019 /s/ Kristin Bateman

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