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The Federal General Counsel, Law, and Our Democracy at a Crossroads

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Thank you, Jeremy. It's such an honor to be introduced by one of the leading thinkers in the country on banking law and systemic risk.

More than twenty years ago, I was a student sitting in an auditorium just like this here at the University of Michigan. If back then you had told me that one day I would be the General Counsel of a government agency, I would have encouraged you to check your crystal ball for defects. To be honest, if you had told me that four years ago, I probably would have said the same. I owe a debt of gratitude to CFPB Director Rohit Chopra for many things, but almost certainly at the top of that list is the way he thought differently about what kind of lawyer should be General Counsel at a government agency. And not for the first time, I have come to deeply appreciate his vision.

The topic that I wish to discuss with you is a big one, which cuts to the heart of our democratic values and the discontent that so many people feel today. Having been the General Counsel and a Senior Advisor to the Director at the Consumer Financial Protection Bureau for the last three years, I would like to share some lessons about how lawyers can help ensure that the government actually delivers on the promise and intent of the law. My job has been to ensure that the CFPB is thinking about how to faithfully administer the laws passed by our elected representatives, so that the organization can meet the challenges that people face today. We are very proud of the work that the CFPB has done to ensure that the consumer financial marketplace works for every American, especially in light of the rapid "digital transformation" of the economy that has affected so much of our lives. Yet I can also tell you with confidence that the frustration so many people feel with so many aspects of our society reflects real failings in our institutions: the law, the legal system, and even our democracy itself.

I believe that the challenges with our institutions have a few fairly straightforward questions at their core:

- Can the federal government plan and effectuate meaningful policy?
- Can the laws that Congress passed to address economic pain and instability be implemented as our elected representatives intended?
- Do our institutions work for working people, instead of just for the rich and powerful?

From my experience, the answers to these questions today are too often “no.” Helping to run a government agency and leading a top-notch legal team through many battles, I have seen first-hand these questions being asked in earnest each and every day. And while we have had plenty of success, I am nonetheless consistently left with the gnawing sense that the answers are undermining our democratic self-governance.

The CFPB has over the past three years achieved much to address the issues and concerns and practices that so many people are facing. But I am speaking to you now because I am not sure enough people realize how hard-fought our successes have been – and how much harder it may be across policy areas in the future.

I think it’s fair to say that, at most organizations of any size, the General Counsel’s office is involved in nearly everything that the organization does. At the CFPB, I have sought to make the General Counsel’s office more than where the people who are trying to get stuff done make a quick stop, hoping to check a box. I have worked to ensure that all of the unbelievably talented staff at the CFPB are thinking about what can and must be done to address the challenges people are facing in their everyday lives so that our government actually makes a difference. And to fight back against the undemocratic forces that today have rigged the law to serve as a sword and shield for the rich and powerful.

As many of you know, the CFPB was created after the Great Financial Crisis so that the government would never again fail to protect Americans’ fundamental financial security.¹ The work of the CFPB is to help ensure everyday people get a shot at a good life – to provide for their own futures, and that of their families.² Our mission is to ensure that the market for consumer financial products and services is “fair, transparent, and competitive.”³

To the average person, that translates into things like: “When I borrow money to buy a car to get to work, will the loan set me up to fail?”⁴ “When I pursue an education and a chance for a better life, will I be scammed into taking out loans for a worthless credential and a lifetime of debt⁵ – targeted because I’m a woman, or because I’m Black?”⁶ “If I lose my job and need to talk to someone at a financial institution, will they answer, or will a ‘chatbot’ give me the run-around?”⁷ “When I sell my house, will I be able to get a fair price, or will I need to ‘whitewash’ the photos on the wall so that the appraiser doesn’t know who I am?”⁸

I could go on. These are issues that affect hundreds of millions of people,⁹ and they especially affect those with the least resources in our society who are often the ones most easily taken advantage of.¹⁰

I believe that we in the government – including and indeed especially the lawyers – have the awesome responsibility of making sure that what we do actually makes a difference for the American people. That’s the test: whether the pages and pages of laws and regulations – the words and the footnotes and the citations – are improving people’s lives.

I want to be clear. I am not saying that we at the CFPB have been perfect. But by trying to make our government work for working people, we have learned some important lessons about how the government should administer the law, as well as the state of the law and legal system today.

The first lesson I want to share is that making the law work to actually address people's concerns, as Congress intended, necessarily requires thinking about how the law applies to modern circumstances and contemporary problems. Our job as lawyers is not simply to know the ins and outs of the laws we administer, but to understand what is happening in society around us.

The CFPB was created in the wake of the 2008 financial crisis when subprime mortgages blew up entire communities and took down the global economy with it. Before that crisis, consumer financial protection was spread around a diffuse set of regulators, none of which had consumer protection as their number one priority.¹¹ These regulators ignored signs that banks and other financial institutions were setting people up to fail with loans that they could not possibly pay back, pursuing profits in the Wall Street flavor of that day – “mortgage-backed securities.”¹² Whole business models were built on the premise that big business could get rich even if consumers failed.¹³ Although some state regulators recognized and tried to combat these trends, federal regulators did little to protect consumers from abusive practices and even stepped in to block state efforts.¹⁴ And when the housing market collapsed, not only did individual people suffer, but the global economy was thrown into turmoil.¹⁵

In its wake, Congress undertook the most significant rewriting of the nation's financial laws in generations. The Dodd–Frank Wall Street Reform and Consumer Protection Act, passed in 2010 and signed by President Obama, made wholesale changes to the federal framework for consumer financial protection.¹⁶ This included the creation of the CFPB, concentrating the formerly diffuse regulation of consumer finance in one agency,¹⁷ and also creating a new body of law, the Consumer Financial Protection Act.¹⁸ Congress intentionally gave the CFPB powerful and, crucially, flexible tools to address the problems confronting Americans in their financial lives.¹⁹ We are entrusted with administering the Consumer Financial Protection Act and eighteen other federal statutes and their implementing regulations – both laws and rules that existed before the financial crisis and new ones that Congress created based on the lessons learned.²⁰ We update, build upon, and defend those rules, examine companies to ensure they follow them, and bring enforcement actions in court to hold people and corporations accountable when they don't.

Fast forward to today.

The marketplace for consumer financial products and services has evolved markedly since the days when subprime mortgages and foreclosure statistics led the nightly news.²¹ Yet Americans are still facing real challenges, risks, and harm in their financial lives, with often devastating consequences for working people. To give the most obvious example, the technology industry has come crashing into consumer finance.²² Anyone who has paid for groceries with their phone knows that the world has changed. And that vastly understates the impact that the rise of the digital economy has had on people's financial lives. The issue dominating the day is no longer subprime mortgages, but there is no shortage of exploding financial products. Technology

platforms and other large players have leveraged and abused their centrality in the economy.²³ Data is now harvested, bought, and sold every time someone pays for something.²⁴ Firms across the economy rely on detailed and invasive datasets to power algorithmic decision-making that too often exacerbates existing disparities and distress.²⁵ Fraud runs rampant on platforms that facilitate “peer-to-peer” money transfers.²⁶ And rapid changes in the labor market have affected everything from the surveillance of people at work²⁷ to how they get paid.²⁸

Yet, before Director Chopra took the helm, the CFPB had done very little to think about or confront the changes in the consumer financial marketplace. The CFPB had taken virtually no action in response to Big Tech’s stampede into the consumer financial marketplace, let alone address the broader challenges of the economy’s digital transformation.

That is no longer the case.

Congress created the CFPB “to reduce the chance that another generation will have to go through a crisis of similar magnitude.”²⁹ A key aspect of that reform was creating powerful, generalized tools for the agency to use to prevent consumer harm.³⁰ As the Senate report for the Dodd-Frank Act said: “The CFPB will have enough flexibility to address future problems as they arise. Creating an agency that only had the authority to address the problems of the past, such as mortgages, would be too short-sighted. Experience has shown that consumer protections must adapt to new practices and new industries.”³¹

Beyond the legislative history, this can be clearly seen in countless examples in the text of the many laws passed from 1968 to 2010 that the CFPB is responsible for implementing and enforcing. Title Fifteen of the U.S. Code is filled with flexible language³² that is intended to be durable, designed by Congress to apply to practices in the market as they evolve.³³ To give a central example, the Consumer Financial Protection Act prohibits financial institutions from engaging in unfair, deceptive, or abusive acts or practices.³⁴ This authority builds on a Federal Trade Commission Act provision from nearly a hundred years ago that is general enough to adapt to changing circumstances.³⁵ As the legislative history of the FTC Act says, and as the Supreme Court has acknowledged,³⁶ “there were too many unfair practices to define, and after writing 20 of them into the law, it would be quite possible to invent others.”³⁷ The same is true for many of the other federal consumer financial protection laws.³⁸

Under the law, then, if the CFPB is not addressing emerging risks and harm to consumers, we are not doing our job. You simply cannot enforce the federal consumer financial laws without understanding the larger changes in the economy, many of them driven by new technology. As General Counsel of the CFPB, my role has been to make certain that the lawyers and the agency as a whole are always interrogating whether we are complying with the words and intent of Congress – that the agency not just respond to the last crisis, but take action to prevent the next one.³⁹ This has meant a drive across the CFPB to use every tool that Congress entrusted us with – enforcement, supervision, regulations, guidance documents, amicus briefs, market monitoring, resolving complaints from individual consumers, and more – to address new risks as well as old ones.

The CFPB has taken action to supervise Big Tech and providers of other widely used digital payment apps.⁴⁰ But that is just the beginning. The CFPB has made clear that, in the modern consumer protection framework that Congress envisioned, states are full partners with the federal government, rather than adversaries, in identifying and addressing harmful, cutting-edge practices.⁴¹ We have used our authority to monitor markets for emerging risks, including in the payment system, where there has been an explosion in financial companies racing to capture and monetize data as a new path to profits.⁴² We have shined a light on how rules imposed by mobile operating systems like Apple and Google can have a significant impact on innovation, consumer choice, and the growth of open and decentralized banking and payments.⁴³ We have focused on how Congress anticipated that marketing and advertising practices from financial institutions and their service providers could harm consumers.⁴⁴

And across many markets, we have explained how existing law has continued relevance to new and evolving practices. For example, the CFPB has noted that the law stops financial firms from engaging in shady kickback arrangements, whether they were inked across a table in a conference room or through an online comparison tool.⁴⁵ We have made clear that there is not, and has never been, a “technology exception” to our nation’s fair lending laws.⁴⁶ The federal consumer financial laws apply in the massive online economies where people use real money to buy fake money, and to the words spat out by “chatbots” that have increasingly replaced human customer service representatives.⁴⁷ The CFPB has explained that targeting consumers who are least able to protect themselves is unlawful in any consumer financial market, not just the mortgage market that prompted the 2008 crisis,⁴⁸ and that the Truth in Lending Act applies to “Buy Now, Pay Later” practices that have expanded rapidly in the last few years.⁴⁹ And we have articulated how the consumer reporting laws provide much-needed transparency for workers regarding the black box algorithms that increasingly dictate every aspect of their working lives.⁵⁰

The CFPB has also applied the prohibition on unfair, deceptive, or abusive acts or practices to the many ways that people are being deceived, ripped off, or otherwise taken advantage of today. With the New York Attorney General’s office, the CFPB sued a major subprime auto lender that abusively manipulated the prices of vehicles based on how borrowers were projected to perform in an algorithmic model.⁵¹ We brought actions against companies that trick and trap people into paying fees using digital “dark patterns” and other forms of sophisticated user interface design.⁵² The CFPB sued a company that abused its market dominance to charge consumers unavoidable fees for prepaid cards used to return money to consumers.⁵³ And as so much financial activity moves online to marketplaces and other platforms, we have made clear that manipulating reviews to trick or confuse consumers can be unfair.⁵⁴

The CFPB has been thinking about how people’s lives have changed in the past decade, how that makes them susceptible to illegal practices, and, crucially, how we need to apply our laws and authorities in light of that evolution – in short, exactly what Congress instructed us to do.

The same applies to many other laws that protect consumers, workers, and people as they go about their day. I know it’s fashionable to criticize Washington, DC, and some of those critiques have merit. But DC is, in fact, where our elected representatives come together to reach compromise on our nation’s laws. And the reality is that hundreds of representatives and their

hard-working staffs are not obtuse. Members of Congress do not intend to pass laws that will be irrelevant the moment that the ink dries.⁵⁵

Yet for the last four years, this bedrock proposition – that most laws are written to be durable, and relevant in people’s lives – has been relentlessly attacked. In the case of the CFPB, we are talking about laws like the Dodd-Frank Act and the Credit Card Accountability, Responsibility, and Disclosure (CARD) Act, which were passed by the 2009-2010 Congress and signed by President Obama.⁵⁶ It is abundantly obvious that these lawmakers, of all people – keenly aware of the existing framework’s failure to prevent the last catastrophe – drafted these laws to address evolving problems. The core provisions of these statutes have *not* been amended in any meaningful way by Congress – which means that, under the principles of our Constitutional system, their words are still the law.⁵⁷ Yet too many efforts simply to apply the law to modern circumstances have been blocked in courts – outside of the democratic process – as part of a larger ideological crusade.

Take the judge-made legal doctrine known as “major questions.” Rooted in a few statutory interpretation opinions from prior decades, the doctrine has now been weaponized to disempower Congress from writing statutes with enduring relevance.⁵⁸ The Supreme Court began to routinely invoke this doctrine a few years ago, to much criticism from the bar and legal academia.⁵⁹ And now the doctrine has metastasized through the lower courts as a basis to strike down any government action that can be characterized (or mischaracterized) as “new” and “major” – even where the agency is simply applying the text and intent of the law to the world as it exists today.⁶⁰

For example, in 2022, the CFPB’s Office of Supervision updated its “examination manual”⁶¹ to include the common sense notion that racial, religious, or other insidious forms of discrimination could, depending on the circumstances, violate the Consumer Financial Protection Act’s prohibition on unfairness.⁶² In other words, we said that discrimination can be unfair. There is a history of agencies making similar claims,⁶³ and especially in an age of algorithmic bias and concern over fair access to the banking system, this hardly seemed to us like a major “question of vast economic or political significance.”⁶⁴

Moreover, the 2010 Congress didn’t write anything into the text of the statute that suggests that discrimination is *not* unfair. As a textual matter, a discriminatory act or practice could certainly satisfy the statutory standard for unfairness.⁶⁵ And, of course, there is no carve-out in the law’s text for discrimination.⁶⁶

Yet when the big banks sued us – in Texas – a district judge ruled that discrimination is actually *not* unfair.⁶⁷ The judge wrote an exception into the law, relying on the major questions doctrine to override the United States Congress and the 237 Representatives and 60 Senators who voted for the unfairness provision.⁶⁸ Apparently, there are actually secret words in the statute – written in invisible ink that only corporate lawyers and certain judges can see. The case is, as they say, now on appeal.⁶⁹

Unfortunately, that case is not an outlier. In lower courts across the country, judges have repeatedly struck down agency action under statutes that Congress clearly drafted to apply to

evolving circumstances simply because the agency was doing just that.⁷⁰ As Justice Kagan has put it, after decades of lectures about the need to be “textualist,” the major questions doctrine is now being used as a “get-out-of-text-free card.”⁷¹

More importantly, the major questions doctrine is just one tactic used to twist or altogether rewrite the law to protect the powerful from any government action.⁷² We have repeatedly seen judicial decisions overturn the clear consensus that our elected representatives from across the country reached in Washington. The CFPB had a federal judge rule that the Equal Credit Opportunity Act only allows the agency to address discrimination *after* someone submits a loan application – meaning that Congress gave the agency no power to prohibit “whites only” or “women need not apply” signs.⁷³ Fortunately, the appeals court overturned that one.⁷⁴

After more than three years on the front lines, I have no qualms about saying that nearly any question, no matter how small, can now be “major,” and there is virtually no mousehole that can’t hide an elephant.⁷⁵

I do not want to give the impression that we have not had many successes in protecting people from very real harm. Far from it. Industry may think they have an ace-in-the-hole with well-funded forum-shopping litigation, but the CFPB has tenaciously stuck to its mission of protecting the American people. In enforcement action after enforcement action, the CFPB has held the largest financial institutions accountable,⁷⁶ driven individual accountability as well,⁷⁷ and tried to ensure that repeat offenders do not see fines and penalties as a cost of doing business.⁷⁸ We have also been ambitious about what visionary supervision can accomplish, addressing issues like bias in algorithmic lending⁷⁹ and exotic contract clauses that deny people their rights,⁸⁰ and driving hundreds of millions of dollars in illegal junk fees back to consumers.⁸¹

I am proud of how much the CFPB has accomplished for working people. But the undemocratic campaign against applying the law to the world as it is today is a real obstacle to addressing the tremendous changes happening across the economy – with even more on the horizon – that are causing financial pain for so many.

As part of ensuring that our implementation of the federal consumer financial laws keeps up with the world as it evolves, the CFPB has also revisited existing applications of the law to make sure they still make sense. This is really very simple: if the world changes but interpretations of the law do not, then the law is not being applied appropriately to the facts as they exist now. So in the last few years, the CFPB has closely examined the laws and regulations that we administer, many of which we inherited from other agencies, including how those documents have been interpreted by courts and deployed by litigants and others at the state and federal level.

One of the things the CFPB has done is to examine *all* the laws and regulations under our authority to make sure we are complying with Congress’s mandates. We have instructed our lawyers to inspect every line of those laws and rules – literally page by page. We found that there are important provisions extremely relevant to the world as it exists now that had never been addressed by the agency. I should note that the CFPB is hardly unique in this regard. Too often

federal agencies let their authorities languish, or worse treat them as polite suggestions from the legislative branch.⁸² Then inertia builds up, and, ironically, the very agency that failed to implement the statute succumbs to the idea that, because the provision was not treated as consequential before, it is controversial or even legally dubious to rely on it now.⁸³ Yet if Congress wrote a statutory provision that applies to something happening right now, we should not make excuses for failing to apply the law that way. And so part of our job as agency lawyers is to know each and every legal provision and ensure that they are being applied appropriately.

We have taken this task seriously. You can see this in the CFPB's advisory opinion highlighting a critical, but essentially ignored, provision ensuring that people have access to basic information from their bank without roadblocks or fees.⁸⁴ The CFPB also, for the first time, made use of statutory authority to supervise financial institutions that present risks to consumers.⁸⁵ This is crucially important to ensure that – unlike the regulatory agencies in the lead-up to the financial crisis – we do not have any blind spots in the oversight of financial markets.⁸⁶ We also wrote regulations making the first use of authority to register nonbank participants in consumer financial markets to ensure better transparency about repeat violators of the law,⁸⁷ and finalized long-languishing rules regarding small business lending transparency⁸⁸ and people's rights regarding their financial data.⁸⁹

Being faithful to the law also means reviewing existing regulations and other interpretations to ensure they are still, as the world evolves, consistent with the statute that Congress passed. Many agencies sit back and see how the law develops over years or decades – or worse, treat the process as “one and done.” But as the agency charged with administering the federal consumer financial laws, we have been aware that courts may be pulled by eager litigants away from the text of statutes and regulations. So it is our job to monitor litigation to see where parties have tried to twist the law or create loopholes that do not exist, and to file amicus briefs to ensure the law is correctly interpreted.⁹⁰ We countered a false premise – with no basis whatsoever in the statute – that people aren't entitled to accountability for mistakes on their credit report that can be characterized as “legal” in nature;⁹¹ we vindicated the idea that our nation's fair lending laws protect existing customers from discrimination;⁹² and we defeated efforts to bless unauthorized and illegal junk fees for people simply making payments on their mortgage or finding how much they owe to pay it off.⁹³

Another area of focus – especially given the dismal role of federal regulators in the lead-up to the 2008 crisis, which Congress expressly reproached in Dodd-Frank⁹⁴ – has been to ensure that the laws we administer aren't inappropriately used to block, or “preempt,” states from protecting consumers from harmful practices.⁹⁵ The CFPB made clear that states and localities have the ability to limit dubious data on their resident's credit reports, including information about medical or rental debt that is often riddled with errors and has little predictive value.⁹⁶ We responded to an industry request to cut back state laws providing crucial disclosures about small business lending by issuing a determination that, no, there is not a conflict between laws that protect consumers and laws that protect small businesses.⁹⁷ And we supported the Solicitor General's position – contrary to the view that the Office of the Comptroller of the Currency had expressed⁹⁸ – against a sweeping preemption standard that Congress explicitly rejected.⁹⁹ The Solicitor General's position was ultimately adopted by the Supreme Court, 9-0.¹⁰⁰

Ensuring the relevance of our regulations has also entailed taking on some of industry's sacred cows. We often hear about the need to delete old rules. And if existing regulations do not make sense in the modern world, they should be reformed. But that should not be a one-way ratchet. If administrative law means anything, then the safe harbors, carve-outs, and liability shields that well-paid industry lobbyists and lawyers fought to create must be treated with the same level of scrutiny as provisions that protect consumers. And the CFPB is responsible for reams of regulations promulgated by other agencies in earlier eras¹⁰¹ – both with respect to the factual circumstances of how financial markets work and also with respect to what the courts, as a matter of administrative law, have found it appropriate for a federal agency to do.

Much of the CFPB's recent regulatory agenda has focused on ensuring that these existing regulations are consistent with the laws that Congress actually wrote. In the credit card market, the CFPB updated a decade-old regulation implementing a statutory provision of the 2009 CARD Act.¹⁰² This provision on its face should protect people from predatory credit card fee practices.¹⁰³ Yet with scant justification, the Federal Reserve Board, shortly before the CFPB was created, issued an industry-friendly "safe harbor"¹⁰⁴ that is now nothing more than a \$14 billion a year boondoggle borne by the worst-off borrowers.¹⁰⁵ The CFPB also recently finalized a regulation on overdraft fees updating a 55-year-old carve-out from the Truth in Lending Act.¹⁰⁶ This revision reflects that the dominance of checks – the circumstances underlying the old rule – has long passed, and would ensure competition among similar credit products by applying statutory protections consistently under the law.¹⁰⁷ These reforms are similar in that both would help consumers by cutting back outdated safe harbors that the largest financial institutions in the world have relied on to shield themselves from market forces and charge consumers hundreds of billions of dollars in junk fees.¹⁰⁸

Not surprisingly, our efforts have been relentlessly challenged by trade associations, revolving-door lawyers, and their allies who file in favored venues where they think the outcomes are preordained while rhapsodizing like they are the second coming of Clarence Darrow.¹⁰⁹ Why do they do it? Because time and time again, it works. The CFPB's credit card late fee rule explained in painstaking detail that Congress intended such fees to be "reasonable and proportional" and expressly provided the agency with rulemaking authority to establish standards implementing this provision.¹¹⁰ The CFPB relied on extensive research to find that, "[a] decade on from the [Federal Reserve] Board's implementation" of that provision, "the more robust data now available indicate that the late fee amounts charged by larger card issuers have again ballooned out of proportion" – "exactly the situation Congress intended to avert with the CARD Act."¹¹¹ Yet trade groups got the rule blocked by convincing a Texas district court that, actually, the 2009 Congress and President Obama *required* the agency to allow banks to punish consumers with punitive fees.¹¹² Our overdraft rule has also been challenged – in a lawsuit filed the very day that we issued the regulation – because industry evidently believes it is illegal for an agency ever to narrow an exemption that makes them a lot of money.¹¹³

Administrative law has become a sword to strike down any attempt to reign in corporate abuse as well as a shield to protect the loopholes and safe harbors that allow the well-off and well-connected to capitalize on rules and regulations rigged in their favor.

One significant question we should be asking is whether the law's hostility to agencies and their expertise will be applied fairly. Has the dog caught the car? The Federal Register is littered with billion-dollar industry boondoggles, promulgated over generations with little or even no justification, backed by administrative records long lost in a far-off warehouse. When these provisions are challenged, how will purportedly neutral legal principles be applied – when the outcome would favor consumers, and workers, and those without power? Will industry sacred cows be held to the same exacting standards?

If that sounds naïve – if, of course, consumers and people will not receive the same protections from “government overreach” as corporations and industry – then I think we need to recognize that administrative law is just another place where we have one legal system for the powerful, and another for everybody else.

After hundreds of days of being the CFPB General Counsel, I could make a list a mile long of “takeaways.” But tying these lessons together is a larger theme: how the law and our legal system today is undermining our democracy. We must not overlook the debilitating effect that the legal system – whose only guiding principle too often seems to be power and protecting those with it – is having on real people's lives, and our democracy itself.

Over the past few years, legal challenges killed or left languishing countless efforts across the federal government to provide meaningful improvement to the household finances and economic stability of hundreds of millions of Americans. That list includes ensuring the freedom to switch to a different job,¹¹⁴ protecting people from being ripped off by credit card¹¹⁵ and airline junk fees,¹¹⁶ protecting servicemembers and others from unscrupulous practices at the car dealership,¹¹⁷ providing relief for students ripped off by predatory schools,¹¹⁸ ensuring overtime pay for workers,¹¹⁹ lowering student loan payments,¹²⁰ and ensuring that contract and franchise workers are treated fairly.¹²¹ I could go on and on.

These are not obscure issues, or ones only of interest to people in DC, or at think tanks and universities. These are matters that affect most people on most days. And they are issues that are talked about and debated in presidential and Congressional campaigns, that people vote on – implicitly and even explicitly.

Despite that, the American people's voice and vote has grown increasingly irrelevant to the change our government is able to deliver. That's because the actual laws that are passed have grown increasingly irrelevant to the legal system.

Much of our job as government lawyers has become trying to manage the dubious direction that much of the law has taken: venue and standing decisions blessing increasingly audacious forum-shopping;¹²² nationwide injunctions and vacatur handed out like candy;¹²³ administrative law that makes anything the government says judicially reviewable;¹²⁴ and completely undemocratic statutory interpretation.¹²⁵ The law itself has become broken – and the cumulative effect is making it harder and harder to deliver on the laws that our citizens, through their elected

representatives, chose to enact for the benefit of anyone other than the powerful and well connected.

Despite all this, the CFPB still has had significant success. In 2022, the Fifth Circuit ruled that the CFPB's funding mechanism was unconstitutional, calling into question every single CFPB action (not to mention the financing of much of the federal government).¹²⁶ Yet the CFPB went on to win the case at the Supreme Court, 7-2, in an opinion authored by Justice Thomas.¹²⁷ In an age where the administrative state has lost case after case for so many years, upholding the CFPB's funding was a seminal victory for the agency's independence as well as for consumers. Just last month, a federal judge in Washington, DC appointed by President Trump flatly rejected a request for an injunction against our advisory opinion restating the widely accepted principle that debt collectors should not demand amounts that people do not actually owe.¹²⁸ The CFPB prevailed in Texas on a challenge to our regulation to ensure critical transparency in the small business lending market.¹²⁹ We also successfully defended our authority to enforce the law against Wall Street trusts that bizarrely claimed that, even though they file lawsuits against human beings to collect on loans, they somehow are not "debt collectors."¹³⁰

But the challenges and setbacks we faced at the CFPB are a frankly frightening window into the larger challenges our country faces now, and will in the future. Although we prevailed at the Supreme Court, unspoken in the Court's opinion was the damage the ordeal did to the government's enforcement and administration of the law, staying over a dozen enforcement actions and giving Wall Street a chance to run out the clock on significant rules that were stayed for more than a year.¹³¹ And there have been many more cynical legal actions propped up by some judges. The national banking trade associations joined the Longview Chamber of Commerce to file a lawsuit in Tyler, Texas challenging the update to our examination manual indicating that discrimination could be unfair.¹³² A federal judge found venue and standing based on a few anonymous affidavits that did not name a single affected financial institution.¹³³ In a case filed about a year later, Synchrony bank, headquartered in Utah, brazenly bought a membership in the Fort Worth Chamber of Commerce to try to establish venue for a challenge to the CFPB's credit card late fee rule in perhaps the only jurisdiction they thought they could win in.¹³⁴ A Trump-appointed judge tried twice to transfer the case from his courtroom but was mandamus'd each time by the Fifth Circuit and ultimately enjoined the rule.¹³⁵

That's just the top of our list, and that's just one agency. But in no way are these abuses limited to cases involving the CFPB. The banking regulators were blocked from updating the nation's anti-redlining rules because the definition of "community" was deemed a major question.¹³⁶ The Department of Education had an injunction granted against it on a proposal they had yet to even finalize.¹³⁷ The Department of Health and Human Services had a tweet about humans taking horse pills deemed judicially reviewable agency action.¹³⁸ The FTC rule on non-competes was blocked on the theory that the FTC is prohibited from writing any unfair competition rules.¹³⁹ The Department of Transportation was blocked from requiring airlines to disclose their fees because to do so would "irreparably harm" the airlines by requiring them to "expend significant resources reengineering their websites."¹⁴⁰

In addition to the difficulty of litigating these cases, we government lawyers have also been trying to give sensible legal advice to clients – policymakers, enforcement attorneys – attempting

to administer the laws they raised their hands and faithfully swore to execute. The way things are going, it may eventually become hard to tell government officials that anything written in the U.S. Code or F.3d even matters. I worry we may reach a point where policymakers feel that following the law – and their lawyers’ advice – is a game for suckers.

In light of all this heads-I-win, tails-you-lose legal nonsense, it is hard to blame the millions upon millions of Americans who have given up on the system, and on legal institutions that increasingly pretend they are predicated on principle. If over the course of a presidential administration, a federal agency is unable to change a regulation based on a raft of new data, or to update a 55-year-old rule rooted in the days when everyone routinely used checks, it may be time to unsparingly and unequivocally state that much of the system is rigged, and many of our institutions are broken.

So we must ask ourselves: what is the fall out? Memo after memo, brief after brief, opinion after opinion, I find myself with the gnawing question: at this moment in time, can our government effectuate national policymaking that tries to help those without power? Far too often, the answer is no.

And that necessarily leads to the next and even more troubling question: given the extent that our legal system is deployed to block the legitimate action of the elected branches, what does that say about the state of our democracy? It is hard not to see this as a coordinated and ruthlessly effective effort to render the voters’ and their representatives’ decisions meaningless – to try to nullify the decisions actually made in the halls of Congress, not to mention the debate we had in the national campaign four years ago. We often hear complaints that people in only a handful of swing states decide nationwide policy. If only that were the case. It is increasingly apparent that some number of unelected judges have appointed themselves our nation’s decisionmakers.¹⁴¹ Those who care about the law have allowed it to get hijacked, and it is no surprise that Americans have the lowest opinion of the judiciary in recent memory.¹⁴²

And let me say one thing that is often unstated. Does anybody think that if the Biden Administration had just clipped its wings a little, moderated around the edges here or there, that somehow these opinions would be different? Of course not.

So we’ll now get yet another test of whether the law is based on principle. Will policy questions affecting millions of people and billions of dollars still be “major” when a different administration makes those decisions?¹⁴³ Or do doctrines like major questions, standing, venue, and vacatur depend on the political party of the plaintiffs, or whether they are special interests protecting corporate power instead of everyday citizens?

This is not just about what happened these past few years. If future Presidents can’t do what they promise because lawyers in robes block them, will that be worth cheering for? If the law instead now bends to suit their will, what does that say about the rule of law? Is the fate of our country – how people are treated as consumers and workers and human beings – going to be decided by national debates and elections, or by a handful of attorneys pushing their own political agenda?

In closing, we are now at a crossroads. I am proud of the work we have done at the CFPB these last few years, thinking about how the law should be implemented to address the challenges of working people. We pushed the boulder a little bit of the way up the hill. But, clearly, it was not enough. And while I appreciate the temptation to believe that things will get better soon – the darkest moment is before the dawn, and all that – I’m not so sure. Some very smart people are thinking about how we can make a real, noticeable difference in Americans’ day-to-day economic lives. I don’t think enough people realize how challenging this will be, given the state of the law and the legal system, including where we expect the judiciary to go in the next few years.

We at the CFPB have proudly been part of a broader effort across the government – including herculean work at places like the Federal Trade Commission, National Labor Relations Board, the Department of Justice’s Antitrust Division, and the Department of Transportation – to try to end the days when those charged with administering the law not only go along with a system that favors those with money and power, but actively facilitate it.¹⁴⁴ As Director Chopra has put it, we have tried to “close[] the chapter of the 40 years . . . where law has really been weaponized to make the powerful people in our society more powerful.”¹⁴⁵ I am so grateful to have had the opportunity to contribute to that project.

Yet over the past three years, it was hard not to realize – in the face of the massive, multi-million-dollar effort against everything we did – how little cavalry there was. We have some wonderful friends and supporters, but not nearly enough. There are simply not that many lawyers who get to wake up every day thinking about how to use the law to help everyday people. Legal aid attorneys, consumer and worker advocates, government lawyers – these are my heroes. But they are vastly outnumbered by the battalions of attorneys working the system in favor of the powerful.¹⁴⁶ There are too many lawyers pushing the boulder further and further back down the hill – the zealots and extremists who weaponize the law in support of their political ideology, and the many more lawyers who enable them.

I began by asking whether the federal government can plan and effectuate meaningful policy, whether the laws that Congress passed to address economic pain and uncertainty can be implemented as our elected representatives intended, and whether our institutions work for working people. We should all be concerned not only about what the answers are today, but about where we will be tomorrow if the law, legal system, and legal profession do not fundamentally change course.

We need to confront the threats brought on by tech giants and a “platform-driven” economy, the attacks on our privacy, the increasing control of big business over workers and consumers alike, and all the ways that people are struggling. Yet we won’t be able to have an Economy for All or a Care Agenda or an Abundance Agenda – or any other prescription for a given problem or for the country writ large – if we do not confront the obstacles standing in the way of the government’s ability to deliver. All the policy ideas in the world – all the proposed regulations and model bills and campaign promises – won’t make a difference if the legal system blocks our democracy.

We are at a crossroads in our country today because nothing is ever going to change if we do not fix what is broken with our institutions. We need real solutions, and we need them now. We need to address the crisis of lawbreaking that is devastating working people. We need real reform of the legal system, to make changes that will last. And we need government lawyers thinking more about the laws that they administer, helping lead their agencies to meet the challenges of the moment, and never being satisfied with how things have always been done.

Let's get to work.

¹ See *Wall Street Reform: The Dodd-Frank Act*, Obama White House (last visited Dec. 16, 2024), <https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform> (“In the fall of 2008, a financial crisis of a scale and severity not seen in generations left millions of Americans unemployed and resulted in trillions in lost wealth. Our broken financial regulatory system was a principal cause of that crisis. It was fragmented, antiquated, and allowed large parts of the financial system to operate with little or no oversight. And it allowed some irresponsible lenders to use hidden fees and fine print to take advantage of consumers. To make sure that a crisis like this never happens again, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law.”); see also Elizabeth Warren, *Unsafe at Any Rate*, *Democracy: A Journal of Ideas* (Summer 2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/>.

² See *Testimony of Seth Frotman Before the House Financial Services Committee* (Mar. 7, 2019), <https://democrats-financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-frotmans-20190307.pdf> (“At stake is the answer to whether the American dream—a house to raise our family, a car to get to work, a college education to earn a better life—will be the province of only a select few, while the rest have their money stolen at every turn, or worse, face denials and discrimination based on factors like race or sex. That is why the CFPB matters.”).

³ 12 U.S.C. § 5511(a).

⁴ See, e.g., Complaint, *CFPB v. Credit Acceptance Corp.*, No. 1:23-cv-00038 (S.D.N.Y. Jan. 4, 2023).

⁵ See, e.g., *In re Prehired, LLC*, No. 23-50438-JTD (Bankr. D. Del. Nov. 20, 2023) (order); *In re BloomTech Inc.*, No. 2024-CFPB-0001 (Apr. 17, 2024) (order); *CFPB v. Climb Credit*, No. 1:24-cv-07868-JLR (S.D.N.Y. filed Dec. 5, 2024) (proposed stipulated final judgment and order).

⁶ See, e.g., Second Amended Complaint, *Roberson v. Health Career Inst.*, No. 9:22-cv-81883-RAR (S.D. Fla. filed Aug. 31, 2023); Statement of Interest of the CFPB in Support of Plaintiffs, *Roberson v. Health Career Inst., LLC*, No. 9:22-cv-81883-RAR (S.D. Fla. filed Apr. 14, 2023); see also *Roberson v. Health Career Inst.*, No. 9:22-cv-81883-RAR (S.D. Fla. Jan. 14, 2024) (order denying motion to dismiss); CFPB, Seth Frotman, *Protecting people from discriminatory targeting* (Apr. 14, 2023), <https://www.consumerfinance.gov/about-us/blog/protecting-people-from-discriminatory-targeting/>.

⁷ See CFPB, *Chatbots in consumer finance* (June 6, 2023), <https://www.consumerfinance.gov/data-research/research-reports/chatbots-in-consumer-finance/chatbots-in-consumer-finance/>.

⁸ See Statement of Interest of the U.S.A., *Connolly v. Lanham*, 685 F. Supp. 3d 312 (D. Md. 2023) (No. 1:22-cv-2048-SAG); *Connolly v. Lanham*, 685 F. Supp. 3d 312 (D. Md. 2023); see also CFPB, Seth Frotman, Zixta Q. Martinez, and Jon Seward, *Protecting homeowners from discriminatory home appraisals* (Mar. 13, 2023), <https://www.consumerfinance.gov/about-us/blog/protecting-homeowners-from-discriminatory-home-appraisals/>.

⁹ See, e.g., CFPB, *Fast Facts: CFPB by the Numbers*, <https://www.consumerfinance.gov/about-us/the-bureau/> (estimating the “number of consumers or consumer accounts eligible to receive relief from the CFPB’s enforcement and supervisory work” at more than 205 million).

¹⁰ See CFPB, *Prepared Remarks of Seth Frotman at the Poverty Law Conference* (Sept. 13, 2024), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-seth-frotman-at-the-poverty-law-conference/>.

¹¹ See H.R. Rep. No. 111-367, at 91 (2009) (“Consumer protection in the financial arena is governed by various agencies with different jurisdictions and regulatory approaches. This disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis, such as subprime and nontraditional mortgages.”).

¹² See Fin. Crisis Inquiry Comm’n (FCIC), *The Financial Crisis Inquiry Report*, at 102–126 (2011).

¹³ See *Statement of Policy Regarding Prohibition on Abusive Acts or Practices*, 88 Fed. Reg. 21883, 21883 (Apr. 12, 2023) (“The financial crisis was set in motion by a set of avoidable interlocking forces—but at its core were mortgage lenders profiting (by immediately selling on the secondary market) on loans that set people up to fail because they could not repay.” (referencing FCIC *supra* note 12 at 104-111, 113-18)); see also Rohit Chopra, *Enforcing the Post-Financial Crisis Ban on Abusive Conduct*, 14 U.C. Irvine L. Rev. 625, 638 (May 2024).

¹⁴ See FCIC *supra* note 12 at 125-26 (“The Commission concludes that . . . the Office of the Comptroller of the Currency and the Office of Thrift Supervision preempted the applicability of state laws and regulatory efforts to national banks and thrifts, thus preventing adequate protection for borrowers and weakening constraints on this segment of the mortgage market.”); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act’s Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. Corp. L. 893, 909-919 (2011); see also 61 Fed. Reg. 50951 (Oct. 30, 1996) and 61 Fed. Reg. 66561, 66563 (Dec. 18, 1996) (rules by the Office of Thrift Supervision preempting state laws that addressed predatory lending by federally chartered thrifts and their subsidiaries); 68 Fed. Reg. 46264 (Aug. 5, 2003) and 69 Fed. Reg. 1904 (Feb. 12, 2004) (orders and rules by the Office of the Comptroller of the Currency preempting state laws that addressed predatory lending by nationally chartered banks); Kathleen Engel and Patricia McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps*, Suffolk University Law School Research Paper No. 11-13 (Feb. 18, 2011).

¹⁵ See S. Rep. No. 111-176, at 11 (2010) (“Th[e] financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures.”); see also FCIC *supra* note 12, at 230 (“The Commission concludes that the collapse of the housing bubble began the chain of events that led to the financial crisis.”).

¹⁶ Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, Pub. L. No. 111-203 (July 21, 2010).

¹⁷ See H.R. Rep. No. 111-367, at 90 (describing how the Consumer Financial Protection Act would consolidate “all consumer protection functions related to financial products, including rulemaking, supervision and examination, and enforcement” in the CFPB, and how the Bureau would “have its own authority to issue rules prohibiting unfair, deceptive, and abusive acts.”); H.R. Rep. No. 111-517, at 874 (2009) (stating that “the Bureau will have authority to issue rules applicable to all financial institutions, including depository institutions that offer financial products and services to consumers”); Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321 (Spring 2013) (“The CFPB has rulemaking, supervision, and enforcement authority over an extremely broad swath of the consumer financial services industry.”).

¹⁸ See Pub. L. No. 111-203, §§ 1001–1100H (codified at 12 U.S.C. §§ 5301–5641).

¹⁹ See *infra* notes 30-38 and accompanying text.

²⁰ The CFPB administers the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.), Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.), Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.), Fair Credit Billing Act (15 U.S.C. 1666 et seq.), Home Owners Protection Act of 1998 (12 U.S.C. 4901 et seq.), Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.), Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.), Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note), Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.), S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.), Truth in Lending Act (15 U.S.C. 1601 et seq.), Truth in Savings Act (12 U.S.C. 4301 et seq.), Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701), and portions of the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), Federal Deposit Insurance Act (12 U.S.C. 1831t(c)(b)–(f)), Gramm-Leach-Bliley Act (15 U.S.C. 6802–6809), and Omnibus Appropriations Act of 2009, Section 626 (Pub. L. 111–8) [12 U.S.C. 5538]. In addition to these enumerated consumer laws, the CFPB has authority to enforce certain other laws, such as the Military Lending Act, and supervise institutions for compliance with these laws. See 10 U.S.C. § 987 (Military Lending Act); *Examinations for Risks to Active-Duty Servicemembers and Their Covered Dependents*, 86 Fed. Reg. 32723 (June 23, 2021).

²¹ See *infra* notes 22-28 and accompanying text; see also, e.g., CFPB, *Prepared Remarks of CFPB Director Rohit Chopra at the Brookings Institution Event on Payments in a Digital Century* (Oct. 6, 2023), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-brookings-institution-event-on-payments-in-a-digital-century/> (on how “new private gatekeepers have emerged” within electronic payment networks, and “some are mobile payment apps [and o]thers are Big Tech firms”).

²² See, e.g., CFPB *Comment on Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector* (Aug. 12, 2024), <https://www.regulations.gov/comment/TREAS-DO-2024-0011-0069>; Paul Tierno, *Big Tech in Financial Services*, Congressional Research Service (July 29, 2022), <https://crsreports.congress.gov/product/pdf/R/R47104>; Christopher Odinet, *Predatory Fintech and the Politics of Banking*, 106 Iowa L. Rev. 1739 (2021).

²³ See, e.g., Matthew Bruckner, Christopher K. Odinet, & Todd Phillips, *Social Media’s Financial Turn: Privacy and Consumer Protection in X’s Payment Platform*, Yale Journal on Regulation (Jan. 4, 2025), <https://www.yalejreg.com/nc/social-medias-financial-turn-privacy-and-consumer-protection-in-xs-payment-platform-by-matthew-bruckner-christopher-k-odinet-todd-phillips/>.

²⁴ See CFPB, *The Convergence of Payments and Commerce: Implications for Consumers* (Aug. 4, 2022), <https://www.consumerfinance.gov/data-research/research-reports/the-convergence-of-payments-and-commerce-implications-for-consumers/>; CFPB, *State Consumer Privacy Laws and the Monetization of Consumer Financial Data* (Nov. 12, 2024), <https://www.consumerfinance.gov/data-research/research-reports/state-consumer-privacy-laws-and-the-monetization-of-consumer-financial-data/>; CFPB, *Opening Statement of Director Rohit Chopra before the Senate Committee on Banking, Housing, and Urban Affairs* (June 12, 2024), <https://www.consumerfinance.gov/about-us/newsroom/opening-statement-of-director-rohit-chopra-before-the-senate-committee-on-banking-housing-and-urban-affairs-2024/> (“[L]arge financial firms like PayPal and JPMorgan Chase are planning to use sensitive data about people’s income and spending to fuel surveillance-based targeting and advertising.”).

²⁵ See CFPB *Issues Guidance on Credit Denials by Lenders Using Artificial Intelligence* (Sept. 19, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-on-credit-denials-by-lenders-using-artificial-intelligence/>. See generally Relman Colfax PLLC, *Fair Lending Monitorship of Upstart Network’s Lending Model* (Mar. 27, 2024), <https://www.reلمانlaw.com/assets/htmldocuments/Upstart%20Final%20Report.pdf>; CFPB *Comment on Request for Information on Uses, Opportunities, and Risks of Artificial Intelligence in the Financial Services Sector* (Aug. 12, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-comment-on-request-for-information-on-uses-opportunities-and-risks-of-artificial-intelligence-in-the-financial-services-sector/>.

²⁶ See Statement of Interest of the CFPB in Support of Plaintiff, *New York v. Citibank, N.A.*, No. 1:24-cv-00659-JPO (S.D.N.Y. May 28, 2024); Complaint, *CFPB v. Early Warning Services, LLC*, No. 2:24-cv-03652-SMB (D. Az. filed Dec. 20, 2024).

²⁷ See Consumer Financial Protection Circular 2024-06: *Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions*, 89 Fed. Reg. 88875 (Nov. 12, 2024).

²⁸ See Complaint, *CFPB v. Walmart Inc.*, No. 24-cv-4610 (D. Minn. filed Dec. 23, 2024); CFPB, *Prepared Remarks of General Counsel and Senior Advisor to the Director Seth Frotman at the Innovative Payments Conference* (May 9, 2023), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-general-counsel-and-senior-advisor-director-seth-frotman-at-innovative-payments-conference/>; see also Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. Chi. L. Rev. 623 (Mar. 2023).

²⁹ Treasury Deputy Secretary Neal Wolin Written Testimony before the Senate Banking Committee on “Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act” (Sept. 30, 2010), <https://home.treasury.gov/news/press-releases/tg881>; see also *id.* (“The Act builds a stronger financial system by addressing major gaps and weaknesses in regulation that helped cause the financial crisis that led to the recession. It puts in place buffers and safeguards to reduce the chance that another generation will have to go through a crisis of similar magnitude.”).

³⁰ See S. Rep. No. 111-176, at 18 (stating that the CFPB will be “a dedicated consumer entity that can respond quickly and effectively to . . . new threats to consumers”); *Wall Street Reform: The Dodd-Frank Act*, Obama White House (last visited Dec. 26, 2024), <https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform> (“The most far reaching Wall Street reform in history, Dodd-Frank will prevent the excessive risk-taking that led to the financial crisis. The law also provides common-sense protections for American families, creating new consumer watchdog to prevent mortgage companies and pay-day lenders from exploiting consumers. These new rules will build a safer, more stable financial system—one that provides a robust foundation for lasting economic growth and job creation.”); Rohit Chopra, *Enforcing the Post-Financial Crisis Ban on Abusive Conduct*, 14 U.C. Irvine L. Rev. 625, 637 (2024).

³¹ S. Rep. No. 111-176, at 11 (2010).

³² See, e.g., Pub. L. 90-321 (May 29, 1968) (creating the Truth in Lending Act, including § 121, a “[g]eneral requirement of disclosure” for “each creditor . . . to whom consumer credit is extended and upon whom a finance charge is or may be imposed”).

³³ See, e.g., *Real Estate Settlement Procedures Act (Regulation X)*; *Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators*, 88 Fed. Reg. 9162 (Feb. 13, 2023) (noting that RESPA section 8, which prohibits certain referral fees for real estate settlement service providers involving federally related mortgage loans, “applies broadly”); *Rider v. Uphold HQ Inc.*, 657 F. Supp. 3d 491, 498-99 (S.D.N.Y. 2023) (holding that cryptocurrencies qualify as “funds” under the Electronic Fund Transfer Act).

³⁴ 12 U.S.C. § 5531.

³⁵ See FTC, Samuel Levine, Keynote Remarks at the Cleveland-Marshall College of Law Cybersecurity and Privacy Protection Conference, 1, 9 (May 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Samuel-Levine-Cleveland-Marshall-College-of-Law.pdf (“Today, we live in a world in which vast numbers of products and services are connected and able to collect enormous amounts of personal data about every conceivable aspect of our lives You can expect that the Commission’s unfairness authority will be a key tool as we work to curb harmful commercial surveillance practices.”).

³⁶ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) (Congress “explicitly considered, and rejected . . . enumerating the particular practices to which [unfairness] was intended to apply.”); see also *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (“the standard of ‘unfairness’ under the [FTC] Act is, by necessity, an elusive one”).

³⁷ S. Rep. No. 63–597, at 13 (1914).

³⁸ See *supra* notes 32-33 and accompanying text.

³⁹ See CFPB, Rohit Chopra, *The CFPB is looking out for families, workers, and communities* (Oct. 12, 2021), <https://www.consumerfinance.gov/about-us/blog/the-cfpb-is-looking-out-for-families-workers-and-communities/> (“[W]e must anticipate emerging risks so we can act before a crisis, rather than acting after it is too late.”); *Testimony of Seth Frotman Before the United States Congress House Financial Services Committee* (Sept. 10, 2019), <https://www.congress.gov/116/meeting/house/109897/witnesses/HHRG-116-BA00-Wstate-FrotmanS-20190910.pdf> (“We must put aside the notion that simply because investment bankers are not lining the sidewalks of 7th Avenue while holding the contents of their desks in a box, . . . that somehow our nation does not need to act.”).

⁴⁰ See, e.g., *Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications*, 89 Fed. Reg. 99582 (Dec. 10, 2024); CFPB *Orders Federal Supervision of Google Following Contested Designation* (Dec. 6, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-federal-supervision-of-google-following-contested-designation/>.

⁴¹ See *Authority of States To Enforce the Consumer Financial Protection Act of 2010*, 87 Fed. Reg. 31940 (May 26, 2022); see also Rohit Chopra & Seth Frotman, *State Enforcement As A Federal Legislative Tool*, Harv. J. on Legis. (Jan. 15, 2025), <https://journals.law.harvard.edu/jol/2025/01/15/state-enforcement-as-a-federal-legislative-tool/>.

⁴² See CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans (Oct. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>.

⁴³ See CFPB, *Big Tech's Role in Contactless Payments: Analysis of Mobile Device Operating Systems and Tap-to-Pay Practices* (Sept. 7, 2023), <https://www.consumerfinance.gov/data-research/research-reports/big-techs-role-in-contactless-payments-analysis-of-mobile-device-operating-systems-and-tap-to-pay-practices/full-report/>; see also Paige Smith, *Apple Pay, Other Tech Firms Come Under CFPB Oversight*, Bloomberg Law (Nov. 21, 2024), <https://news.bloomberglaw.com/banking-law/apple-pay-other-tech-firms-come-under-cfpb-regulatory-oversight> (“Since the CFPB proposed the rule last year, Apple opened up use of its near-field communication payment chip, changing its long-held practice of limiting banks or other payment firms’ use of the technology.”).

⁴⁴ See *Limited Applicability of Consumer Financial Protection Act's “Time or Space” Exception With Respect to Digital Marketing Providers*, 87 Fed. Reg. 50556 (Aug. 17, 2022).

⁴⁵ See *Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators*, 88 Fed. Reg. 9162 (Feb. 13, 2023); *Consumer Financial Protection Circular 2024-01: Preferencing and Steering Practices by Digital Intermediaries for Consumer Financial Products or Services*, 89 Fed. Reg. 17706 (Mar. 12, 2024).

⁴⁶ See *Consumer Financial Protection Circular 2022-03: Adverse Action Notification Requirements in Connection with Credit Decisions Based on Complex Algorithms*, 87 Fed. Reg. 35864 (June 14, 2022); *Consumer Financial Protection Circular 2023-03: Adverse Action Notification Requirements and Proper Use of Sample Forms*, 89 Fed. Reg. 27361 (Apr. 17, 2024).

⁴⁷ See CFPB, *Banking in video games and virtual worlds* (Apr. 4, 2024), <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-video-games/>; CFPB, *Chatbots in consumer finance* (June 6, 2023), <https://www.consumerfinance.gov/data-research/research-reports/chatbots-in-consumer-finance/chatbots-in-consumer-finance/>.

⁴⁸ See *Statement of Policy Regarding Prohibition on Abusive Acts or Practices*, 88 Fed. Reg. 21883 (Apr. 12, 2023); see also Rohit Chopra, *Enforcing the Post-Financial Crisis Ban on Abusive Conduct*, 14 U.C. Irvine L. Rev. 625 (2024).

⁴⁹ See *Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans*, 89 Fed. Reg. 1026 (May 31, 2024); see also CFPB, *Buy Now, Pay Later: Market trends and consumer impacts* (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

⁵⁰ See *Consumer Financial Protection Circular 2024-06: Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions*, 89 Fed. Reg. 88875 (Nov. 12, 2024).

⁵¹ See Complaint, *CFPB v. Credit Acceptance Corp.*, No. 1:23-cv-00038, at 2 (S.D.N.Y. filed Jan. 4, 2023).

⁵² See CFPB Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order (Apr. 12, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order/> (“TransUnion used an array of dark patterns to trick people into recurring payments and to make it difficult to cancel them.”); CFPB Sues Payment Platform Used by YMCA Camps and Charity Race Organizers for Illegally Cramming Consumers With Junk Membership Fees (Oct. 18, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-payment-platform-used-by-ymca-camps-race-organizers-for-junk-fee/> (“ACTIVE has driven up enrollments in Active Advantage through the use of dark patterns.”); see also CFPB, *Supervisory Highlights, Issue 37*, at 15-16 (Winter 2024), https://files.consumerfinance.gov/f/documents/cfpb_Supervisory-Highlights-Issue-37_Winter-2024.pdf (“Examiners found that lenders designed consumer interfaces for paycheck advance products . . . to include statements and illustrations representing that if consumers paid tips, the tips would help specific numbers of customers and were a way to help other borrowers. In fact, lenders added tips to general revenues.”).

⁵³ See *In re JPay, LLC*, No. 2021-CFPB-0006 (Oct. 19, 2021); see also *Statement of CFPB Director Rohit Chopra on the JPay Enforcement Action* (Oct. 19, 2021), <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-the-jpay-enforcement-action/#footnote-3> (“The Consumer Financial Protection Act prohibits abusive acts or practices in the offering of consumer financial products or services. The Bureau determined that JPay’s practices met the statutory test outlined in 12 U.S.C. 5531(d)(2)(B) (prohibiting taking ‘unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service’). Specifically, the fact that JPay was able to accumulate market power through its single-source contracts gave JPay a captive customer base. Consumers had little to no ability to protect their interests given this market structure.”).

⁵⁴ See *Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews*, 87 Fed. Reg. 17143 (Mar. 28, 2022).

⁵⁵ See, e.g., Brief of U.S. Senator Sheldon Whitehouse, et al., as Amici Curiae in Support of Respondents, *West Virginia v. EPA*, 597 U.S. 697 (2022) (Regarding legislation curbing the emission of specific pollutants compared to pollutants generally responsible for climate change, “Congress is well-within its power to pass a specific law about a single category of air pollutants

while also maintaining a broad, forward-looking regulatory authority to address air pollutants generally, in a way consistent with evolving science and technology.”).

⁵⁶ Pub. L. 111-203, *Dodd-Frank Wall Street Reform and Consumer Protection Act* (July 21, 2010) (which passed in the Senate by a vote of 60-39 (Roll Call Vote 111th Congress, Vote No. 207 (July 15, 2010)) and the House by a vote of 237-192 (Roll Call No. 413, H.R. 4173 (June 30, 2010))); Pub. L. 111-24, *Credit Card Accountability Responsibility and Disclosure Act of 2009* (May 22, 2009) (which passed in the Senate by a vote of 90-5 (Roll Call Vote 111th Congress, Vote No. 194 (May 19, 2009)) and the House by a vote of 357-70 (Roll Call No. 228, H.R. 627 (Apr. 30, 2009))); see also Carl Hulse, *With Support, Congress Seizes on Credit Cards*, *The New York Times* (May 12, 2009), <https://www.nytimes.com/2009/05/13/us/politics/13cong.html> (“Just how unhappy the public is was reflected on the Senate floor. In nearly two days of Senate debate so far this week, not one senator has stepped forward to defend the card companies or blame consumers who have run up substantial credit card debt for causing some of their own problems.”).

⁵⁷ See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 778 (2022) (Kagan, J., dissenting) (“contra the majority, it is [the enacting] Congress’s choice which counts, not any later one’s”).

⁵⁸ See, e.g., Daniel Deacon and Leah Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1010 (Sept. 8, 2023) (“[The Major Questions Doctrine] supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. What’s more, it invites politically infused judgments by the federal courts, further eroding democratic control of policy.”).

⁵⁹ See, e.g., Ronald Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 Cal. L. Rev. 899 (2024); Alan Morrison, *As Compared to What?*, 13 *The Reg. Rev. in Depth* 29 (Dec. 2024); Beau J. Baumann, *Americana Administrative Law*, 111 Geo. L.J. 465 (Apr. 19, 2023); Mila Sohoni, *The Major Questions Quartet*, 136 *Harvard L. Rev.* 262 (Nov. 15, 2022); Lisa Heinzerling, *The Major Answers Doctrine*, 16 N.Y.U. J. L. & Lib. 506 (2023); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 *Minn. L. Rev.* 2018 (Jan. 9, 2017); Natasha Brunstein and Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 *Wm. & Mary Env’t L. & Pol’y Rev.* 47 (2022), <https://scholarship.law.wm.edu/wmelpr/vol47/iss1/3>; Josh Chafetz, *The New Judicial Power Grab*, 67 *St. Louis U. L.J.* (2023); Jed H. Shugerman & Jodi L. Short, *Major Questions About Presidentialism: Untangling the “Chain of Dependence” Across Administrative Law*, 65 *B. C. L. Rev.* 511 (2024); Michael Coenen and Seth Davis, *Minor Courts, Major Questions*, 70 *Vand. L. Rev.* 777 (2017); Max Sarinsky, *This Is How To Rebut Major Questions Arguments*, *Yale Journal on Regulation* (Mar. 25, 2024), <https://www.yalejreg.com/nc/this-is-how-to-rebut-major-questions-arguments-by-max-sarinsky/>; David Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 *U. Ill. L. Rev.* 1177 (2024); Jody Freeman & Matthew Stephenson, *The Anti-democratic Major Questions Doctrine*, *Harvard Public Law Working Paper No.* 23-29 (Dec. 7, 2023); Warren Grimes, *The Major Questions Doctrine: Judicial Activism That Undermines Democracy*, 54 *Loy. U. Chi. L. J.* 825 (2023); Thomas McGarity, *The Major Questions Wrecking Ball*, *Va. Environ. L. J.* (2023); Kevin Tobia, et al., *Major Questions, Common Sense?*, 97 *S. Cal. L. R.* 1152 (2024); see also Chris Geidner, *The Supreme Court’s conservatives have a flexible new ‘doctrine,’* *MSNBC* (Mar. 1, 2023), <https://www.msnbc.com/opinion/msnbc-opinion/student-loan-case-supreme-court-conservatives-wield-flimsy-doctrine-rcna72769>.

⁶⁰ See generally Natasha Brunstein, *Major Questions in Lower Courts*, 75 *Admin. L. Rev.* 661 (Jan. 25, 2024).

⁶¹ See Brief of Appellants, *Chamber of Commerce of United States v. CFPB*, No. 23-40650, at 9 (5th Cir. filed Aug. 7, 2024) (“The CFPB is authorized to conduct examinations of the entities it supervises. Over the course of an exam, the CFPB collects information from the supervised entity, assesses the adequacy of the entity’s compliance management systems, identifies practices that may violate federal law, and consults with the entity regarding potential follow-up actions No exam covers all topics To assist its examiners, the CFPB issues a Supervision and Examination Manual.”).

⁶² See *CFPB Targets Unfair Discrimination in Consumer Finance* (Mar. 16, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/>.

⁶³ See Jeff Sovern, *Is Discrimination Unfair?*, *U. of Md. Legal Studies Research Paper No.* 2024-02, at 36-43, *Ga. St. L. Rev.* (forthcoming 2025) (“For many decades, administrative agencies, including the FTC, have seen discrimination as unfair within the meaning of the UDAA statutes they enforce.”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4712271.

⁶⁴ See Brief of Appellants, *Chamber of Commerce of United States v. CFPB*, No. 23-40650, at 55-64 (5th Cir. filed Aug. 7, 2024); see also Brief of Professors of Consumer Law as Amici Curiae in Support of Appellants, *Chamber of Commerce of United States v. CFPB*, No. 23-40650 (5th Cir. filed Aug. 14, 2024).

⁶⁵ See Brief of Appellants, *Chamber of Commerce of United States v. CFPB*, No. 23-40650, at 43-45 (5th Cir. filed Aug. 7, 2024) (“Without the gloss of the major questions doctrine (which does not apply anyway, see below), discriminatory acts and practices can clearly satisfy § 5531’s standard for unfairness.... Section 5531 provides that the Bureau can declare an act or practice unfair if it satisfies three criteria: 1) ‘the act or practice causes or is likely to cause substantial injury to consumers’; 2) the injury is not ‘reasonably avoidable by consumers’; and 3) the ‘injury is not outweighed by countervailing benefits to consumers or to competition.’ 12 U.S.C. § 5531(a), (b). . . . As a textual matter, a discriminatory act or practice could satisfy the standard for unfairness.”).

⁶⁶ See 12 U.S.C. § 5531.

⁶⁷ *Chamber of Commerce of United States v. CFPB*, 691 F. Supp. 3d 730 (E.D. Tex. 2023).

⁶⁸ Pub. L. 111-203, *Dodd-Frank Wall Street Reform and Consumer Protection Act* (July 21, 2010) (which passed in the Senate by a vote of 60-39 (Roll Call Vote 111th Congress, Vote No. 207 (July 15, 2010)) and the House by a vote of 237-192 (Roll Call No. 413, H.R. 4173 (June 30, 2010)).

⁶⁹ See Notice of Appeal, *Chamber of Commerce of United States v. CFPB*, No. 6:22cv381JCB (E.D. Tex. filed Nov. 6, 2023).

⁷⁰ See, e.g., *Texas Bankers Ass’n v. Office of the Comptroller*, 728 F. Supp. 3d 412 (N.D. Tex. 2024). See generally Natasha Brunstein, *Major Questions in Lower Courts*, 75 Admin. L. Rev. 661 (Jan. 25, 2024).

⁷¹ *West Virginia v. EPA*, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting).

⁷² See David Tatel, *The Supreme Court vs. the Administrative State*, *The American Academy in Berlin* (Mar. 12, 2024), <https://www.americanacademy.de/videoaudio/the-supreme-court-vs-the-administrative-state/> (describing “the tools — especially the so-called major questions doctrine — that the Supreme Court is using to limit the authority of [government] agencies, and the threat it poses to the American people and American democracy”); see also Judge David Tatel on *Vision- A Memoir of Blindness and Justice*, National Constitution Center (July 18, 2024), <https://constitutioncenter.org/media/files/Judge-David-Tatel-on-Vision-A-Memoir-of-Blindness-and-Justice-WTP.pdf>.

⁷³ See *CFPB v. Townstone Fin., Inc.*, 2023 WL 1766484 (N.D. Ill. Feb. 3, 2023), *rev’d and rem’d* by *CFPB v. Townstone Fin., Inc.*, 107 F.4th 768 (7th Cir. 2024); David Dayen, *The Return of ‘Whites Only’ Signs?*, *The American Prospect* (Aug. 23, 2023), <https://prospect.org/justice/2023-08-23-return-of-whites-only-signs-lending/>.

⁷⁴ *CFPB v. Townstone Fin., Inc.*, 107 F.4th 768 (7th Cir. 2024).

⁷⁵ See *supra* notes 58-60, 72.

⁷⁶ See, e.g., CFPB, *Prepared Press Call Remarks of CFPB Director Rohit Chopra on the Zelle Lawsuit Announcement* (Dec. 20, 2024), <https://www.consumerfinance.gov/about-us/newsroom/prepared-press-call-remarks-of-cfpb-director-rohit-chopra-on-the-zelle-lawsuit-announcement/>; CFPB, *Federal Regulators Fine Bank of America \$225 Million Over Botched Disbursement of State Unemployment Benefits at Height of Pandemic* (July 14, 2022), <https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-fine-bank-of-america-225-million-over-botched-disbursement-of-state-unemployment-benefits-at-height-of-pandemic/>; see also *The CFPB’s enforcement work in 2023 and what lies ahead* (Jan. 29, 2024), <https://www.consumerfinance.gov/about-us/blog/the-cfpbs-enforcement-work-in-2023-and-what-lies-ahead/>.

⁷⁷ See, e.g., CFPB *Takes Action Against Coding Boot Camp BloomTech and CEO Austen Allred for Deceiving Students and Hiding Loan Costs* (Apr. 17, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-coding-boot-camp-bloomtech-and-ceo-austen-allred-for-deceiving-students-and-hiding-loan-costs/>; CFPB *Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order* (Apr. 12, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order/>; CFPB *Takes Action Against Credit Repair Cloud and CEO Daniel Rosen for Enabling Credit Repair Companies that Harvest Illegal Fees* (Aug. 8, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-credit-repair-cloud-and-ceo-daniel-rosen-for-enabling-credit-repair-companies-that-harvest-illegal-fees/>; CFPB *Sues Horizon Card Services and CEO Robert Kane for Illegally Baiting, Gouging, and Trapping Families in High-Fee Credit Cards* (Sept. 13, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-horizon-card-services-and-ceo-robert-kane-for-illegally-baiting-gouging-and-trapping-families-in-high-fee-credit-cards/>.

⁷⁸ See, e.g., CFPB *Bans Navient from Federal Student Loan Servicing and Orders the Company to Pay \$120 Million for Wide-Ranging Student Lending Failures* (Sept. 12, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bans-navient-from-federal-student-loan-servicing-and-orders-the-company-to-pay-120-million-for-wide-ranging-student-lending-failures/>; CFPB *Shutters Lending by VC-Backed Fintech for Violating Agency Order* (Dec. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-shutters-lending-by-vc-backed-fintech-for-violating-agency-order/>.

⁷⁹ See CFPB, *Fair Lending Report of the Consumer Financial Protection Bureau 2023*, at 8 (June 26, 2024), https://files.consumerfinance.gov/f/documents/cfpb_fair-lending-report_fy-2023.pdf.

⁸⁰ See CFPB, *Supervisory Highlights, Issue 28*, at 21 (Fall 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf (Finding “[d]eceptive waiver[s] of borrowers’ rights in loan security agreements.”); CFPB, *Supervisory Highlights, Issue 24*, at 27-28 (Summer 2021), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf (Finding “[d]eceptive waivers of borrowers’ rights in security deed riders and loan security agreements.”); see also CFPB, Seth Frotman and Lorelei Salas, *New tactics from companies trying to charge illegal junk fees* (Dec. 19, 2024), <https://www.consumerfinance.gov/about-us/blog/new-tactics-from-companies-trying-to-charge-illegal-junk-fees/>; CFPB, Seth Frotman & Lorelei Salas, *Protecting you from unlawful debt collection at work* (Jan. 2, 2025), <https://www.consumerfinance.gov/about-us/blog/protecting-you-from-unlawful-debt-collection-at-work/>.

⁸¹ See CFPB, *Supervisory Highlights, Issue 37*, at 2-5 (Winter 2024), https://files.consumerfinance.gov/f/documents/cfpb_Supervisory-Highlights-Issue-37_Winter-2024.pdf (“[M]ortgage originators and servicers have also recently reported issuing refunds related to unfair, deceptive, or otherwise unlawful fees and charges. . . . In short, mortgage servicers have reported issuing \$4,251,815 in refunds for 91,931 affected loans. Mortgage originators reported issuing \$115,605,024 in refunds for 134,912 affected loans. . . . Since the CFPB heightened its supervisory attention on overdraft and [insufficient funds] fees in 2022, financial institutions have agreed to refund nearly \$250 million to consumers.”).

⁸² See, e.g., Electronic Privacy Information Center, *What the FTC Could Be Doing (But Isn’t) To Protect Privacy: The FTC’s Unused Authorities* (June 2021), <https://epic.org/wp-content/uploads/privacy/consumer/EPIC-FTC-Unused-Authorities-Report-June2021.pdf>; David Seligman, *Protecting Worker Power with Antitrust*, OnLabor (Feb. 19, 2019), <https://onlabor.org/protecting-worker-power-with-antitrust/>.

⁸³ Director Rohit Chopra has spoken at some length about how this went on at the FTC. See, e.g., FTC, *Statement of Commissioner Rohit Chopra Regarding the Report to Congress on the FTC’s Use of Its Authorities to Protect Consumer Privacy and Security*, Commission File No. p065404 (June 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577067/p065404dpipchoprastatement.pdf; Rohit Chopra & Samuel A. Levine, *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, 170 U. Pa. L. Rev. 71 (2021).

⁸⁴ *Consumer Information Requests to Large Banks and Credit Unions*, 88 Fed. Reg. 71279 (Oct. 16, 2023).

⁸⁵ See, e.g., CFPB *Orders Federal Supervision for Installment Lender Following Contested Designation* (Feb. 23, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-federal-supervision-for-installment-lender-following-contested-designation/>; CFPB *Orders Federal Supervision of Google Following Contested Designation* (Dec. 6, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-federal-supervision-of-google-following-contested-designation/>.

⁸⁶ See *Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders*, 87 Fed. Reg. 70703, 70704 (Nov. 21, 2022) (“The Bureau’s risk-designation authority gives the Bureau’s supervision program the ability to move as quickly as the marketplace. For instance, fast-growing companies in nontraditional areas of the consumer finance market may be engaged in novel activities that warrant supervisory attention because of their risks to consumers. And there can also be supervisory gaps in more traditional areas of the market that ought to be filled. Through the supervisory process, CFPB examiners can work with the company in question to fully understand and manage its risks. This preferably would occur before there has been any violation of law or consumer harm, rather than after.”).

⁸⁷ See *Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders*, 89 Fed. Reg. 56028 (July 8, 2024).

⁸⁸ See *Small Business Lending Under the Equal Credit Opportunity Act (Regulation B)*, 88 Fed. Reg. 35150 (May 31, 2023).

⁸⁹ See *Required Rulemaking on Personal Financial Data Rights*, 89 Fed. Reg. 90838 (Nov. 18, 2024).

⁹⁰ See, e.g., Statement of Interest of the CFPB, *Roberson v. Health Career Inst.*, No. 9:22-cv-81883-RAR (S.D. Fla. filed Apr. 14, 2023); Statement of Interest of the U.S.A., *Connolly v. Lanham*, 685 F. Supp. 3d 312 (D. Md. 2023) (No. 1:22cv2048).

⁹¹ See, e.g., Brief for the CFPB and the FTC as Amici Curiae in Support of Plaintiff-Appellant and Reversal, *Sessa v. Trans Union, LLC*, 74 F.4th 38 (2d Cir. 2022) (No. 22-87); see also Seth Frotman, *Credit reporting companies and furnishers have obligations to assure accuracy in consumer reports* (May 6, 2022), <https://www.consumerfinance.gov/about-us/blog/credit-reporting-companies-and-furnishers-have-obligations-to-assure-accuracy-in-consumer-reports/>; FTC Joins Amicus Brief Opposing Liability Shield for Sloppy Credit Reports (May 6, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-joins-amicus-brief-opposing-liability-shield-sloppy-credit-reports>.

⁹² See Brief for the Consumer Financial Protection Bureau, et al., as Amici Curiae in Support of Appellant and Reversal, *Fralish v. Bank of America, N.A.*, No. 21-2846 (7th Cir. filed Dec. 16, 2021); see also Seth Frotman, *CFPB is standing up for civil rights protections* (Dec. 17, 2021), <https://www.consumerfinance.gov/about-us/blog/cfpb-standing-up-civil-rights-protections/>.

⁹³ See CFPB, Seth Frotman, *Unlawful fees in the mortgage market* (Feb. 27, 2024), <https://www.consumerfinance.gov/about-us/blog/unlawful-fees-in-the-mortgage-market/#:~:text=As%20the%20CFPB%20has%20advised,a%20law%20affirmatively%20allowing%20them>; Brief for the CFPB and the FTC as Amici Curiae in Support of Plaintiffs-Appellees, *Booze v. Ocwen Loan Servicing, LLC*, No. 23-12578 (11th Cir. filed Feb. 27, 2024); CFPB, Seth Frotman, *Junk fees that harm competition* (Aug. 6, 2024), <https://www.consumerfinance.gov/about-us/blog/junk-fees-that-harm-competition/>; Brief for the CFPB as Amici Curiae in Support of Plaintiffs, *Salom v. Nationstar Mortgage LLC*, No. 2:24-cv-00444-BJR (W.D. Wa. filed Aug. 8, 2024); Brief for the CFPB as Amici Curiae in Support of Plaintiffs-Appellants, *Thomas-Lawson v. Carrington Mortgage Services, LLC*, No. 21-55459 (9th Cir. filed Oct. 21, 2021).

⁹⁴ Pub. L. No. 111-203, § 1044 (codified at 12 U.S.C. § 25b).

⁹⁵ See CFPB, *Director Rohit Chopra Remarks – December NAAG Meeting* (Dec. 7, 2021), <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-december-naag-meeting/>.

⁹⁶ *The Fair Credit Reporting Act's Limited Preemption of State Laws*, 87 Fed. Reg. 41042 (July 11, 2022); see also CFPB Affirms Ability for States to Police Credit Reporting Markets (June 28, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-affirms-ability-for-states-to-police-credit-reporting-markets/>.

⁹⁷ *Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia)*, 88 Fed. Reg. 19214 (Mar. 31, 2023); see CFPB Issues Determination that State Disclosure Laws on Business Lending are Consistent with the Truth in Lending Act (Mar. 28, 2023), <https://www.consumerfinance.gov/about-us/newsroom/state-disclosure-laws-business-lending-consistent-with-truth-in-lending-act/>.

⁹⁸ Brief for the Office of the Comptroller of the Currency's Brief as Amicus Curiae in Support of Defendant-Appellant, *Cantero v. Bank of Am., N.A.*, 49 F.4th 121 (2nd Cir. 2022) (No. 21-400).

⁹⁹ See Brief for the United States as Amicus Curiae in Support of Vacatur, *Cantero v. Bank of Am., N.A.*, 602 U.S. 205 (2024) (No. 22-529).

¹⁰⁰ *Cantero v. Bank of Am., N.A.*, 602 U.S. 205 (2024).

¹⁰¹ See *Identification of Enforceable Rules and Orders*, 76 Fed. Reg. 43569 (July 21, 2011).

¹⁰² *Credit Card Penalty Fees (Regulation Z)*, 89 Fed. Reg. 19128 (Mar. 15, 2024).

¹⁰³ Pub. L. 111-24, 123 Stat. 1734, § 102 (2009).

¹⁰⁴ See *Credit Card Penalty Fees (Regulation Z)*, 89 Fed. Reg. 19128, 19129 (Mar. 15, 2024); see also *Truth in Lending*, 75 Fed. Reg. 37526, 37527 (June 29, 2010).

¹⁰⁵ CFPB Bans Excessive Credit Card Late Fees, Lowers Typical Fee from \$32 to \$8 (Mar. 5, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bans-excessive-credit-card-late-fees-lowers-typical-fee-from-32-to-8/> ("The rule will curb fees that cost American families more than \$14 billion a year."); see, e.g., Katharina Buchholz, 2022 Credit Card Late Fees Cost Consumers Record \$15 Billion [Infographic], *Forbes* (Mar. 6, 2024), <https://www.forbes.com/sites/katharinabuchholz/2024/03/06/2022-credit-card-late-fees-cost-consumers-record-15-billion-infographic/>.

¹⁰⁶ *Overdraft Lending: Very Large Financial Institutions*, 89 Fed. Reg. 106768 (Dec. 30, 2024).

¹⁰⁷ See CFPB Closes Overdraft Loophole to Save Americans Billions in Fees (Dec. 12, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-closes-overdraft-loophole-to-save-americans-billions-in-fees/> ("In 1969, the Federal Reserve Board exempted banks from TILA protections for infrequent cases where a bank was honoring a check that had not cleared and subjected the customer to overdraft fees.").

¹⁰⁸ See Lilith Fellowes-Granda and David Correa, *The CFPB is Cleaning Up Junk Fees*, Center for American Progress (Apr. 9, 2024), <https://www.americanprogress.org/article/the-cfpb-is-cleaning-up-junk-fees/>.

¹⁰⁹ See, e.g., Christopher Connelly, *Looking to push back Biden's consumer protections, industry groups flock to Texas courts*, Kera News (June 6, 2024), <https://www.keranews.org/news/2024-06-06/looking-to-push-back-bidens-consumer-protections-industry-groups-flock-to-texas-courts>.

¹¹⁰ *Credit Card Penalty Fees (Regulation Z)*, 89 Fed. Reg. 19128, 19129-31, 19131-33, 19133-34, 19134-41 (Mar. 15, 2024) (explaining background, rulemaking process, legal authority, and data considered for rulemaking).

¹¹¹ Brief in Support of Defendants' Motion to Dissolve Preliminary Injunction, *Chamber of Commerce of United States v. CFPB*, No. 4:24-cv-00213, at 5 (N.D. Tex. July 18, 2024).

¹¹² *Chamber of Commerce of United States v. CFPB*, 733 F. Supp. 3d 558 (N.D. Tex. 2024).

¹¹³ See Complaint for Declaratory and Injunctive Relief, *Mississippi Bankers Ass'n v. CFPB* (S.D. Miss. filed Dec. 12, 2024).

¹¹⁴ See *Ryan LLC v. FTC*, 2024 U.S. Dist. LEXIS 148488, No. 3:24-CV-00986-E (N.D. Tex. Aug. 20, 2024); see also Danielle Kaye, *Judge Blocks F.T.C.'s Noncompete Rule*, *The New York Times* (Aug. 20, 2024), <https://www.nytimes.com/2024/08/20/business/economy/noncompete-ban-ftc-texas.html>.

¹¹⁵ See *Chamber of Commerce of United States v. CFPB*, 733 F. Supp. 3d 558 (N.D. Tex. 2024). see also Nate Raymond, *US judge won't revive rule capping credit card late fees at \$8*, *Reuters* (Dec. 6, 2024), <https://www.reuters.com/legal/us-judge-wont-lift-block-rule-capping-credit-card-late-fees-8-2024-12-06/>.

¹¹⁶ See *Airlines for Am. v. DOT*, 110 F.4th 672 (5th Cir. 2024); see also Lori Aratani, *Airlines sued to block fee disclosures. They just won the first round.*, *The Washington Post* (July 30, 2024), <https://www.washingtonpost.com/transportation/2024/07/30/airline-fees-disclosure-transparency-court-ruling/>.

¹¹⁷ See *FTC Pauses CARS Rule Effective Date* (Jan. 18, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-pauses-cars-rule-effective-date> ("The Federal Trade Commission has issued an order postponing the effective date of the Combatting Auto Retail Scams (CARS) Rule while a legal challenge against the rule is pending."); see also Brief for the Consumer Federation of America, et al., as Amici Curiae in Support of Respondent, *Nat'l Auto. Dealers Ass'n v. FTC*, No. 24-60013 (5th Cir. filed May 21, 2024) ("After receiving more than 27,000 comments, the FTC issued the CARS Rule in January 2024. The Rule is simple and common-sense: It creates transparency, thereby helping consumers to make informed choices and promoting a competitive marketplace for honest dealers. It is a measured regulatory action to limit material misrepresentations, bait-and-switch tactics, hidden charges, and charges for useless add-on products or services....").

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- ¹¹⁸ See *Career Colls. & Schs. of Tex. v. United States Dep't of Educ.*, 98 F.4th 220 (5th Cir. 2024); see also Ben Unglesbee, *Federal court blocks borrower defense rules, says legal challenge will likely succeed*, Higher Ed Dive (Apr. 8, 2024), <https://www.highereddive.com/news/5th-circuit-blocks-borrower-defense-education-department-for-profit-colleges/712583/>.
- ¹¹⁹ See *State Plano Chamber of Commerce v. United States DOL*, No. 4:24-CV-499-SDJ, 2024 U.S. Dist. LEXIS 207864 (E.D. Tex. Nov. 15, 2024); see also Daniel Wiessner, *US judge strikes down Biden overtime pay rule*, Reuters (Nov. 15, 2024), <https://www.reuters.com/world/us/us-judge-strikes-down-biden-overtime-pay-rule-2024-11-15/>.
- ¹²⁰ See *Missouri v. Biden*, No:24-2332, 2024 U.S. App. LEXIS 17971 (8th Cir. 2024); see also Adam S. Minsky, *In Major Order, Appeals Court Blocks Student Loan Forgiveness and Lower Payments for 8 Million Borrowers*, Forbes (July 18, 2024), <https://www.forbes.com/sites/adamminsky/2024/07/18/in-major-ruling-appeals-court-blocks-student-loan-forgiveness-and-lower-payments-for-8-million-borrowers/>.
- ¹²¹ See *Chamber of Commerce of United States v. NLRB*, 723 F. Supp. 3d 498 (E.D. Tex. 2024); see also Daniel Wiessner, *Judge blocks US labor board rule on contract and franchise workers*, Reuters (Mar. 11, 2024), <https://www.reuters.com/legal/us-judge-blocks-us-labor-boards-rule-involving-contract-franchise-workers-2024-03-09/>.
- ¹²² See, e.g., Stephen Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, The New York Times (Feb. 5, 2023), <https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html>.
- ¹²³ See, e.g., *District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701 (Apr. 2024), <https://harvardlawreview.org/print/vol-137/district-court-reform-nationwide-injunctions/>.
- ¹²⁴ See, e.g., *supra* note 61, *infra* notes 137-138, and accompanying text.
- ¹²⁵ See *supra* notes 58-75 and accompanying text.
- ¹²⁶ *Cnty. Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616 (5th Cir. 2022); see Mekela Panditharatne, *How a Supreme Court Case Could Upend the Consumer Financial Protection Bureau*, Brennan Ctr. For Justice (Oct. 3, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/how-supreme-court-case-could-upend-consumer-financial-protection-bureau>.
- ¹²⁷ *CFPB v. Community Fin. Services Ass'n*, 601 U.S. 416 (2024).
- ¹²⁸ *ACA Int'l Inc. v. CFPB*, No. 1:24-cv-03118 (D.D.C. Dec. 16, 2024) (order denying preliminary injunction and temporary restraining order because plaintiffs were “unlikely to succeed on the merits” of their claims).
- ¹²⁹ *Texas Bankers Ass'n v. CFPB*, No. 7:23-CV-144 (S.D. Tex. Aug. 26, 2024).
- ¹³⁰ *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, 96 F.4th 499 (3d Cir. 2024).
- ¹³¹ See, e.g., Rachel Rodman, Keith Gerver, and Kathleen Comerford, *CFPB Enforcement Lags in Federal Court Due to Supreme Court Case*, Bloomberg Law (July 20, 2023), <https://news.bloomberglaw.com/us-law-week/cfpb-enforcement-lags-in-federal-court-due-to-supreme-court-case>.
- ¹³² See Complaint, *Chamber of Commerce of United States v. CFPB*, No. 6:22-CV-381 (E.D. Tex. filed Sept. 28, 2022).
- ¹³³ See Brief of Appellants, *Chamber of Commerce of United States v. CFPB*, No. 23-40650, at 35 (5th Cir. filed Aug. 7, 2024) (“[W]hile the Plaintiff associations are identified by name, their members—the real parties in interest—are not.”). The “major question” decision described above was also based on these affidavits. See *supra* notes 67-68 and accompanying text.
- ¹³⁴ See *Chamber of Commerce of United States v. CFPB*, No. 4:24-cv-00213-P (N.D. Tex. Mar. 18, 2024) (order for expedited briefing regarding venue “given only one plaintiff of the six in this matter has even a remote tie to the Fort Worth Division”).
- ¹³⁵ See *Chamber of Commerce of United States v. CFPB*, No. 4:24-cv-00213-P (N.D. Tex. Dec. 6, 2024) (order denying motion to dissolve preliminary injunction and concluding that the Fort Worth Chamber has standing because their “mission to promote a ‘thriving business climate’ in Fort Worth will be affected if card issuers belonging to its organization are subjected to the Final Rule’s changes”).
- ¹³⁶ See *Tex. Bankers Ass'n v. Off. of the Comptroller*, 2024 U.S. Dist. LEXIS 57568, No. 2:24-CV-025-Z-BR (N.D. Tex. Mar. 29, 2024); see also Evan Weinberger, *Anti-Redlining Overhaul for Banks Paused by Texas Federal Judge*, Bloomberg Law (Mar. 30, 2024), <https://news.bloomberglaw.com/banking-law/anti-redlining-overhaul-for-banks-paused-by-texas-federal-judge>.
- ¹³⁷ See *Missouri v. United States Dep't of Educ.*, 2024 U.S. Dist. LEXIS 159802, No. CV 224-103 (S.D. Ga. Sept. 5, 2024); see also Katherine Knott, *Federal Judge Halts Biden's Debt Relief Plan Before It's Finalized*, Inside Higher Ed (Sept. 6, 2024), <https://www.insidehighered.com/news/quick-takes/2024/09/06/federal-judge-halts-bidens-new-debt-relief-plan>.
- ¹³⁸ See *Apter v. Dep't of Health & Human Svc.*, No. 22-40802 (5th Cir. Dec. 13, 2022); see also Ufonobong Umanah, *FDA's 'Not a Horse' Covid-19 Twitter Posts Are Agency Actions*, Bloomberg Law (Sept. 5, 2023), <https://news.bloomberglaw.com/us-law-week/fdas-not-a-horse-covid-19-twitter-posts-are-agency-actions>.
- ¹³⁹ See *Ryan, LLC v. Federal Trade Commission*, No. 3:24-cv-986 (N.D. Tex. Aug. 20, 2024); see also Robert Freedman, *FTC exceeded its authority with noncompete ban, judge says*, Legal Dive (Aug. 21, 2024), <https://www.legaldive.com/news/ftc-exceeded-authority-noncompete-ban-judge-ada-brown/724871/>. But see Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. Chi. L. Rev. 357 (2020), https://scholarship.law.columbia.edu/faculty_scholarship/2986; Lev Menand & Tim Wu, *On the FTC's Authority to Promulgate*

Trade Regulation Rules, Yale J. on Reg. (June 6, 2024), <https://www.yalejreg.com/nc/on-the-ftcs-authority-to-promulgate-trade-regulation-rules-by-lev-menand/>.

¹⁴⁰ See *Airlines for Am. v. DOT*, 110 F.4th 672, 674, 677 (5th Cir. 2024); see also Lori Aratani, *Airlines sued to block fee disclosures. They just won the first round.*, The Washington Post (July 30, 2024), <https://www.washingtonpost.com/transportation/2024/07/30/airline-fees-disclosure-transparency-court-ruling/>.

¹⁴¹ See generally Samuel Moyn, *Resisting the Juristocracy*, Boston Review (Oct. 5, 2018), <https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/>; Domenic Powell, *Court-Proofing the Administrative State*, The Regulatory Review (Dec. 30, 2024), <https://www.theregreview.org/2024/12/30/powell-court-proofing-the-administrative-state/>.

¹⁴² See, e.g., Benedict Vigers and Lydia Saad, *Americans Pass Judgment on Their Courts: Sharp decline in confidence in judiciary is among the largest Gallup has ever measured* (Dec. 17, 2024), <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx> (since 2020, confidence in U.S. courts has dropped 24 percentage points).

¹⁴³ See generally Governing for Impact, *Deploying the Major Questions Doctrine to Thwart Project 2025* (Dec. 2024), https://governingforimpact.org/wp-content/uploads/2024/12/MQD-Claims-Primer-Templated-Major-Questions-final-11_26_2024s-2.pdf; Daniel Farber, *Donald Trump vs. the Major Questions Doctrine*, Center for Progressive Reform (July 31, 2023), <https://progressivereform.org/cpr-blog/donald-trump-vs-the-major-questions-doctrine/>.

¹⁴⁴ See, e.g., Callum Jones, *'She's going to prevail': FTC head Lina Khan is fighting for an anti-monopoly America*, The Guardian (Mar. 9, 2024), <https://www.theguardian.com/us-news/2024/mar/09/lina-khan-federal-trade-commission-antitrust-monopolies>; Factsheet: *The FTC is Holding Corporate Actors Accountable, Protecting Small Businesses, Workers, and Consumers*, Am. Econ. Liberties Project (Nov. 4, 2024), <https://www.economicliberties.us/our-work/factsheet-the-ftc-is-holding-corporate-actors-accountable-protecting-small-businesses-workers-and-consumers-2/>; Assistant Attorney General Jonathan Kanter, *Farewell Address* (Dec. 17, 2024), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address>; DOJ, *Principal Deputy Assistant Attorney General Doha Mekki Delivers Remarks for the Annual Dinner of the Committee to Support the Antitrust Laws* (Oct. 29, 2024), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-delivers-remarks-annual-dinner>; Timothy Noah, *Jennifer Abruzzo Has Become One of the Quiet Heroes of the Biden Administration*, The New Republic (Apr. 20, 2022), <https://newrepublic.com/article/166143/jennifer-abruzzo-nlrq-quiet-hero-biden-administration>; Lauren Kaori Gurley, *The lawyer who could deliver on Biden's wish to be the most pro-union president*, The Washington Post (Oct. 17, 2022), <https://www.washingtonpost.com/business/2022/10/15/jennifer-abruzzo-union-biden-nlrq/>; David Dayen, *The Transportation Department's New Path*, The American Prospect (Apr. 25, 2024), <https://prospect.org/infrastructure/transportation/2024-04-25-transportation-departments-new-path/>; David Shephardson, *US to 'beat up' airlines when necessary for passengers, Buttigieg says*, Reuters (July 20, 2023), <https://www.reuters.com/business/aerospace-defense/us-beat-up-airlines-when-necessary-passengers-transport-chief-2023-07-21/>.

¹⁴⁵ See Hal Singer, *Protecting the Consumer: A Conference at the University of Utah with CFPB Director Rohit Chopra*, New Economic Thinking (Dec. 9, 2024), <https://www.ineteconomics.org/perspectives/blog/keynote-fireside-chat-with-rohit-chopra-director-of-the-cfpb>.

¹⁴⁶ See generally Caroline Fredrickson, *What I Most Regret About My Decades of Legal Activism*, The Atlantic (Sept. 18, 2023), <https://www.theatlantic.com/ideas/archive/2023/09/federal-judiciary-biden-court-appointments/675336/>.