No. 17-10732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,

Petitioner – Appellee,

v.

THE SOURCE FOR PUBLIC DATA, L.P.,

Respondent – Appellant

On Appeal from the United States District Court, Northern District of Texas,
No. 3:17-MC-00016-G, Honorable David L. Horan, Presiding

BRIEF OF APPELLANT THE SOURCE FOR PUBLIC DATA, L.P.

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No. 17-10732

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant The Source for Public Data, L.P., certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant:

- The Source for Public Data, L.P.
- Harlington-Straker Studio, Inc., General Partner of The Source for Public Data, L.P.
- Dale Bruce Stringfellow, Limited Partner of The Source for Public Data, L.P.
- Mike Mitchell, Limited Partner of The Source for Public Data, L.P.
- Paul Jordan, Limited Partner of The Source for Public Data, L.P.
- John E. Collins, Burleson, Pate & Gibson, counsel for The Source for Public Data, L.P.
- Ronald I. Raether, Jr., Troutman Sanders LLP, counsel for The Source for Public Data, L.P.
- Keith J. Barnett, Troutman Sanders LLP, counsel for The Source for Public Data, L.P.

Appellee:

- Consumer Financial Protection Bureau

- Mary McLeod, General Counsel for the Consumer Financial Protection Bureau

- John R. Coleman, Deputy General Counsel for the Consumer Financial Protection Bureau

- Steven Y. Bressler, Assistant General Counsel for the Consumer Financial Protection Bureau

- Kevin E. Friedl, counsel for the Consumer Financial Protection Bureau

/s/ Ronald I. Raether

Counsel for Appellant The Source for Public Data, L.P.

STATEMENT REGARDING ORAL ARGUMENT

The Source for Public Data, L.P. (Public Data) seeks to uphold the limits that the U.S. Congress placed on the Consumer Financial Protection Bureau's investigatory powers. Given the complexity of the issues presented, and their profound importance to companies, like Public Data, that should not be burdened by roving and unauthorized government investigations, Public Data respectfully submits that oral argument is warranted and would aid the Court's deliberations.

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Texas had jurisdiction over the Consumer Financial Protection Bureau's (CFPB) petition to enforce its civil investigative demand (CID) under 12 U.S.C. § 5562(h)(1). The district court entered a final order granting the CFPB's petition on June 6, 2017, ROA.5, 256-78, and entered a supplemental order requiring The Source for Public Data, L.P. (Public Data) to comply with the CFPB's CID by June 28, 2017 or a later date established by the CFPB on June 7, 2017, ROA.5, 305-06. On June 26, 2017, Public Data filed a timely notice of appeal of both orders, which were subsequently stayed pending appeal. ROA.5, 279-306, 375; *see* Fed. R. App. P. 4(a)(1)(A) & (B)(ii). This Court has jurisdiction under 12 U.S.C. § 5562(h)(2) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES

With this appeal, Public Data – a company that provides the public with low-cost access to public records via a convenient internet-based search engine – seeks to uphold the limits that the U.S. Congress placed on the CFPB's investigatory powers. Congress did not authorize the CFPB to conduct roving, open-ended investigations untethered from any specific and viable allegation of misconduct. Instead, fully aware of the dangers of unchecked governmental

power, Congress carefully limited the CFPB's investigatory powers. Two of those limits are in issue here:

(1) To ensure that the CFPB investigates only viable theories of misconduct and does not conduct roving and unauthorized government investigations, Congress provided in 12 U.S.C. § 5562(c)(2) that each CID issued by the CFPB must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." The first issue presented is whether that congressionally mandated limit on the CFPB's investigatory powers has any purchase – that is, whether it is satisfied where, as here, the CFPB merely references a statute that it has authority to enforce.

(2) In addition, Congress limited the CFPB's jurisdiction, such that some companies are necessarily improper investigation targets. The second issue presented is whether the CFPB can ignore that congressionally mandated limit on its investigatory powers by issuing and enforcing CIDs against companies, like Public Data, that plainly do not offer or provide any product or service that implicates the CFPB's jurisdictional grant.

STATEMENT OF THE CASE

A. Factual Background

1. The CFPB's Investigatory Powers

When it created the CFPB, Congress limited the agency's jurisdiction and investigatory powers. It created the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). And it defined the phrase "Federal consumer financial laws" to include the provisions of the Consumer Financial Protection Act and eighteen other enumerated consumers laws. 12 U.S.C. § 5481(12), (14). Congress then limited the CFPB's investigatory powers to fall within the boundaries of that limited jurisdictional grant. Congress authorized the CFPB to conduct investigations only "for the purpose of ascertaining whether any person is or has been engaged in conduct that is a violation." 12 U.S.C. § 5561(1). And it defined the term "violation" to include only those acts or omissions "that, if proved, would constitute a violation of any provision of Federal consumer financial law." 12 U.S.C. § 5561(5).

Consistent with those limits on its jurisdiction and investigatory powers, the CFPB is authorized to issue CIDs only if it has "reason to believe" that a person has documents or information relevant to a "violation." 12 U.S.C. § 5562(c)(1). Moreover, and important here, in authorizing the CFPB to issue CIDs, Congress

provided that each CID issued by the agency must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2). Thus, in authorizing the CFPB to issue CIDs, Congress directed the agency to include a statement – generally called a "notification of purpose" – in each of its CIDs that would provide the recipient of the CID, and any court asked to enforce the CID, with fair notice of a viable law violation within the CFPB's jurisdictional grant.

According to several recently issued government reports, however, the CFPB has inappropriately attempted to expand its jurisdiction and investigatory powers beyond the clear and express limits established by Congress. For instance, only a few days after the district court entered a final order granting the CFPB's petition in this case, the United States Department of the Treasury issued a report that chastised the CFPB for ignoring the congressionally imposed limits on its jurisdiction and investigatory powers. *See* U.S. Dep't of Treasury, *A Financial System that Creates Economic Opportunities* (June 12, 2017), available at: https://goo.gl/nmtU2e. The Department of Treasury's report noted that the CFPB had "sought to expand its jurisdiction to persons and businesses either not covered or even specifically excluded from its jurisdiction." *Id*. at 85. It also noted that the "CFPB's process for issuing CIDs . . . is fraught with risks for abuse" and "should be reformed to ensure subjects of an investigation receive the benefits of existing

statutory protections." *Id.* at 86, 91. Addressing those risks for abuse, the Department of Treasury's report specifically urged the CFPB to adopt "guidance [that] would ensure that subjects being investigated . . . receive clear notice of the conduct at issue, along with a description of the specific laws the CFPB believes may have been violated." *Id.* at 91.

A few months later, the Office of Inspector General (OIG) for the Federal Reserve System and the CFPB issued a report that struck a similar note. *See* Off. of the Inspector Gen., 2017-SC-C-015, *Evaluation Report* (Sept. 20, 2017), available at: https://goo.gl/ZRecPi. The OIG's report noted that the CFPB "can improve its guidance for crafting notifications of purpose associated with CIDs." *Id.* at 7. Addressing that concern, the report noted that the CFPB's manual of policies and procedures "calls for a broad" notification of purpose but does not "remind enforcement attorneys of the need . . . to be compliant with relevant case law on notifications of purpose." *Id.* at 7. That failing, according to the OIG, "might increase the risk that the language in the . . . notification of purpose does not comply with that case law." *Id.* at 8.

2. Public Data's Record Retrieval Service

Founded in 1993, Public Data provides the public with low-cost access to public records via a convenient internet-based search engine, www.publicdata.com. ROA.176 at ¶ 5.

Working with a third-party vendor, Public Data retrieves public records from various government agencies and then stores those records in raw form. ROA.176-77 at ¶¶ 6-9. It is undisputed that neither Public Data nor its third-party vendor ever manipulates, modifies, or otherwise alters any of the public records that are made available to the public – *i.e.*, a record appears exactly as it would if retrieved directly from the government source. *Id*. It is also undisputed that neither Public Data nor its third-party vendor ever collects or creates a file about any specific person or otherwise represents that any public record it makes available to the public relates to any specific person. *Id.*

Instead, Public Data enables members of the public to search through the public records stored in the databases in raw form. ROA.176-77 at ¶ 6-10. Like Google's website (or Yahoo!'s or Bing's or PACER's), Public Data's website responds to user-selected search terms by providing a list of search results that match the user's search terms. *Id.* And as with the search results provided by Google (or Yahoo! or Bing or PACER), users must review each search result provided by Public Data to determine whether it includes accurate information or information that relates to any specific person. *Id.*

Thus, and particularly important here, it is undisputed that the search results provided by Public Data's website generally include public records relating to multiple individuals and that users are made aware of that fact. *Id.*; *see Wilson v.*

Source for Pub. Data, L.P., No. H-12-0185, 2013 WL 12106128, at *3 (S.D. Tex. Apr. 30, 2013) ("It is clear and undisputed that customers such as Dean's are advised that the result of a search of [Public Data's] website is likely to include information concerning multiple individuals with the same name.").

B. Procedural Background

1. The CFPB's CID

In January 2017, the CFPB issued a CID to Public Data. ROA.30. Consistent with the concerns raised in the Department of Treasury and OIG reports discussed above (*see*, *supra*, at pp. 4-5), the CFPB's CID includes a broad and generic notification of purpose. The notification, in its entirety, states:

> The purpose of this investigation is to determine whether consumer reporting agencies, persons using consumer reports, *or other persons* have engaged or are engaging in *unlawful acts and practices in connection with the provision or use of public records information* in violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., Regulation V, 12 C.F.R. Part 1022, or *any other federal consumer financial law*. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

ROA.30 (emphasis added). Read literally, the notification indicates that the CFPB is investigating all "persons" to determine whether any "federal consumer financial law" has been violated by any "unlawful acts or practices in connection with the provision or use of public records information." *Id.*

Shortly after receiving the CID, Public Data's counsel met and conferred with the CFPB. ROA.137-38 at ¶ 3. Counsel advised the CFPB that it lacks jurisdiction over Public Data, that the CID's notification of purpose is generic and inadequate, and that the CID is grossly overbroad, especially as Public Data is plainly not a consumer reporting agency. *Id.* Those discussions proved fruitless, however. *Id.*

Public Data then petitioned the CFPB to set aside or modify its CID. ROA.140-59. But the CFPB's Director, Richard Cordray, denied Public Data's petition. ROA.75-78. Then, in March 2017, the CFPB filed a petition to enforce the CID in the United States District Court for the Northern District of Texas. ROA.7-24

2. The District Court's Orders

In June 2017, the district court entered a final order granting the CFPB's petition to enforce its CID and a separate, supplemental order directing Public Data to comply with the CID by a date certain. ROA.5, 256-78, 305-06.

In granting the CFPB's petition, the district court first rejected Public Data's argument that the CID's notification of purpose fails to provide fair notice of a viable law violation, as required by 12 U.S.C. § 5562(c)(2). ROA.268-75. The district court did not dispute that, read literally, the notification indicates that the CFPB is investigating all "persons" to determine whether any "federal consumer

financial law" has been violated by any "acts or practices in connection with the provision or use of public records information." *Id.* Instead, the district court held that the notification's invocation of the Fair Credit Reporting Act (FCRA), which the CFPB has authority to enforce in limited circumstances,[1] and its related reference to "consumer reporting agencies" together provide "fair notice of an investigation with generally defined boundaries and a purpose articulated in broad terms that complies with the requirements" of § 5562(c)(2). ROA.273-75

The district court also rejected Public Data's argument that the CFPB lacks jurisdiction because Public Data does not offer or provide any product or service that implicates the CFPB's jurisdictional grant. ROA.275-78. As an initial matter, the district court held that, when an agency's jurisdiction to issue an administrative subpoena is challenged, the "inquiry focuses on whether the agency has jurisdiction to investigate the subject of the investigation [*i.e.*, the alleged law

[1] The CFPB only has jurisdiction with respect to consumer reports used in connection with offering consumer financial products or services, such as loans and deposit accounts, while the FTC retains authority over consumer reporting agencies that do not provide consumer reports in connection with consumer credit or deposit transactions; for example, consumer reporting agencies that provide employment background reports, insurance underwriting reports, tenant screening reports, and reports used in connection with government licensing or benefits decisions. *See* 15 U.S.C. § 1681s(b)(1)(H); 12 U.S.C. § 5512(a); 12 U.S.C. § 5514; 12 C.F.R. § 1090.104(a). Accordingly, not only does the CFPB not have jurisdiction over Public Data because it is not a credit reporting agency, but even if it were a credit reporting agency, the CFPB would still need to explain how it could exercise jurisdiction over Public Data since it would not be a credit reporting agency in connection with "consumer financial products or services."

violation], not the subject of the subpoena [*i.e.*, the target of the investigation]." ROA.268. Consistent with that legal conclusion, the district court held that whether the CFPB has "any authority to undertake an enforcement action against" Public Data was "not the issue before the Court on this petition." ROA.277-78. Moreover, although Public Data offered *undisputed* evidence that it is not subject to the CFPB's jurisdiction, ROA.160-63, 175-79, the district court held that the question "invites a fact-intensive inquiry into whether Public Data is a consumer reporting agency" and it would therefore be "premature . . . to decide whether Public Data is a consumer reporting agency at this stage," ROA.276-77. The district court then held that the CFPB has jurisdiction to investigate violations of the FCRA or any other federal consumer financial law. ROA.273-74. In that respect, the district court concluded that the CFPB's "jurisdiction for issuing the CID is not plainly lacking because . . . Public Data may have information related to a violation of the FCRA" or otherwise "relevant to a violation of federal consumer financial law." ROA.277.

STANDARD OF REVIEW

When reviewing a decision on a petition to enforce an administrative subpoena, this Court reviews factual findings for clear error and legal conclusions *de novo*. *See Burlington N. R. Co. v. Office of Inspector Gen., R.R. Ret. Bd.*, 983

F.2d 631, 638, 641 (5th Cir. 1993); *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 489 (5th Cir. 2014).

SUMMARY OF ARGUMENT

Public Data raises two legal challenges to the district court's order granting the CFPB's petition to enforce its CID.

First, the CID issued to Public Data fails to comply with § 5562(c)(2), which provides that each CID issued by the CFPB must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." Section 5562(c)(2) is intended to ensure that the recipient of a CID, and any court asked to enforce a CID, has fair notice of a viable law violation within the CFPB's jurisdictional grant. But, here, the CID fails to inform Public Data as to how offering access to public records in the same manner and form as courts and other government institutions concerns the offering and provision of consumer financial products or services, let alone provide fair notice of a viable law violation within the CFPB's jurisdictional grant. In fact, the notification of purpose included in the CID broadly states that the CFPB is investigating all "persons" to determine whether any "federal consumer financial law" has been violated by any "unlawful acts or practices in connection with the provision or use of public records information." Section 5562(c)(2)'s purposes are

thus wholly frustrated here because the CID's notification of purpose lacks reasonable specificity.

In holding otherwise, the district court did not dispute that, read literally, the notification indicates that the CFPB is investigating all "persons" to determine whether any "federal consumer financial law" has been violated by any "acts or practices in connection with the provision or use of public records information." Instead, the district court rewrote and thus narrowed the language used by the CFPB in the notification by holding that the notification's invocation of the FCRA, which the CFPB has authority to enforce in limited circumstances, and its related reference to "consumer reporting agencies" together provide "fair notice of an investigation with generally defined boundaries and a purpose articulated in broad terms that complies with the requirements" of § 5562(c)(2). ROA.273-75. The district court did not explain, however, why it was proper to narrow the language used by the CFPB, especially when the CFPB itself has refused to narrow that language or otherwise clarify the nature and scope of its investigation. It was not proper for the district court to rewrite the CFPB's CID or to hold that § 5562(c)(2)'s congressionally mandated limit on the CFPB's investigatory powers is satisfied where, as here, the CFPB merely references a statute that it has authority to enforce.

Second, the CID issued to Public Data should not be enforced because the CFPB failed to make a prima facia showing establishing its jurisdiction or establishing that the jurisdictional inquiry is premature. It is well established that a court should not enforce an administrative subpoena if the agency that issued it plainly lacks jurisdiction. *See Burlington*, 983 F.2d at 638 (noting that courts will only enforce an administrative subpoena if it is "within the statutory authority of the agency"); *see also Transocean*, 767 F.3d at 497 (Jones, J., dissenting) ("The standard for challenging an administrative subpoena is strict: courts may only interfere with the process in a limited number of circumstances, one of which arises when the agency plainly lacks jurisdiction.") Moreover, in determining whether an agency lacks jurisdiction, courts can and should consider not only whether the agency has jurisdiction over the alleged law violation, which is a pure question of law, but also whether it has jurisdiction over the target of the investigation. *See Transocean*, 767 F.3d at 489-92. Here, while Public Data offered undisputed evidence it is not a "consumer reporting agency" and therefore is not subject to the FCRA, the CFPB failed to make even a prima facia showing establishing its jurisdiction or establishing that the jurisdictional inquiry is premature. Thus, the CFPB plainly lacks jurisdiction over Public Data, and its CID is therefore unenforceable.

In holding otherwise, the district court refused to decide whether the CFPB has jurisdiction over Public Data and instead limited its jurisdictional inquiry to whether the CFPB has authority to enforce the FCRA or any of the other Federal consumer financial laws. *See*, *supra*, at pp. 9-10. But neither of the district court's rationales for limiting its jurisdictional inquiry in that way withstand scrutiny. Indeed, contrary to the district court's assertions, determining whether Public Data is subject to the CFPB' jurisdiction would not require a fact-intensive inquiry. The CFPB failed to offer any evidence regarding its jurisdiction over Public Data. Instead, the only evidence was submitted by Public Data in an attempt to understand the basis for the CFPB's claim of jurisdiction given the absence of any guiding language in the notification of purpose. In addition, and again contrary to the district court's assertions, when an agency's jurisdiction to issue an administrative subpoena is challenged, the inquiry is not limited to whether the agency has jurisdiction to investigate and enforce the statutory regime that has been brought into issue, as this Court's precedents plainly establish. *See Transocean,* 767 F.3d at 489-92. Instead, a court can and should decide whether the agency's jurisdiction over the target of the investigation is plainly lacking.

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT 12 U.S.C. § 5562(C)(2) IS SATISFIED WHEN THE CFPB DOES NOTHING MORE THAN REFERENCE A STATUTE THAT IT HAS AUTHORITY TO ENFORCE.

A. Section 5562(c)(2) requires the CFPB to include a statement in each of its CIDs that identifies with reasonable specificity the nature of the alleged violation it is investigating and the pertinent statutory provisions.

Although the requirements for judicial enforcement of an administrative subpoena are "minimal," there are true and judicially enforceable limits on every administrative agency's investigatory powers. *See Burlington*, 983 F.2d at 637-38; *Transocean*, 767 F.3d at 488-89. Chief among those limits, as this Court has recognized, are those imposed by Congress, because "[a]n administrative agency's authority is necessarily derived from the statute it administers and may not be exercised in a manner that is inconsistent with the administrative structure that Congress has enacted." *Transocean*, 767 F.3d at 489.

With § 5562(c)(2), Congress limited the CFPB's investigatory powers. Section 5562(c)(2) provides that each CID issued by the CFPB must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2). That notification of purpose requirement "ensures that the recipient of a CID is provided with fair notice of the nature of the [CFPB's] investigation." *CFPB v.*

Accrediting Council for Indep. Colleges & Sch. (ACICS), 854 F.3d 683, 690 (D.C. Cir. 2017). It also ensures that a court tasked with deciding whether to enforce a CID has an adequate means of testing the CID's validity. After all, "the validity of a CID is measured by the purposes stated in the notification of purpose." *Id.*

Section 5562(c)(2) purposes are, of course, necessarily frustrated when a CID's notification of purpose lacks reasonable specificity. For instance, when "broad language" is used in a notification of purpose, a court will find that it "is impossible" to test the CID's validity. *Id.* Indeed, a court presented with an overly broad notification of purpose will not be able to "accurately determine whether the inquiry is within the authority of the agency" or "whether the information sought is reasonably relevant." *Id.* at 691.

B. The CID issued to Public Data does not identify with reasonable specificity the nature of the alleged violation the CFPB is investigating or the pertinent statutory provisions.

The CID issued to Public Data fails to comply with § 5562(c)(2). Its notification of purpose, in its entirety, states:

> The purpose of this investigation is to determine whether consumer reporting agencies, persons using consumer reports, *or other persons* have engaged or are engaging in *unlawful acts and practices in connection with the provision or use of public records information* in violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., Regulation V, 12 C.F.R. Part 1022, or *any other federal consumer financial law*. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

ROA.30 (emphasis added). Read literally, the notification indicates that the CFPB is investigating all "persons" to determine whether any "federal consumer financial law" has been violated by any "unlawful acts or practices in connection with the provision or use of public records information." *Id.* The notification thus fails to provide fair notice on every level.

As an initial matter, the notification does not provide any notice, much less fair notice, of "the nature of the conduct constituting the alleged violation." 12 U.S.C. § 5562(c)(2). According to the notification, the CFPB's investigation is an attempt to ascertain whether "credit reporting agencies, persons using consumer reports, or other persons have engaged or are engaged in unlawful acts and practices in connection with the provision or use of public records information." ROA.30. That description does not provide any specificity about the target(s) of the CFPB's investigation. In fact, according to the notification, the CFPB is investigating everyone – that is, all "persons." Nor does the description provide any specificity about what acts or practices are being investigated. In fact, it does not, in any manner, explain what the broad and non-specific phrase "unlawful acts and practices" means. The only thing apparent from the notification is that the "unlawful acts and practices" are "in connection with the provision or use of public records information." But one is hard pressed to find any specificity there; almost

every conceivable law violation could be committed "in connection with the provision or use of public records information."

In addition, the notification does not provide fair notice of "the provision of law applicable" to the alleged violation. 12 U.S.C. § 5562(c)(2). While the notification references the FCRA, it does not provide any specificity with that reference. The reference to the FCRA is instead subsumed within the notification's reference to "any other federal consumer financial law." In other words, the reference to "any other federal consumer financial law" necessarily washes out any specificity that would otherwise have been provided by the reference to the FCRA. But even setting aside the invocation of "any other federal consumer financial law," the notification's reference to the FCRA is not accompanied by any language that clarifies or defines what conduct allegedly violates the FCRA.

Moreover, the notification here is essentially identical to one recently found inadequate by the D.C. Circuit in *CFPB v. Accrediting Council for Independent Colleges & Schools (ACICS)*, 854 F.3d 683 (D.C. Cir. 2017). The notification rejected in *ACICS* provided:

> The purpose of this investigation is to determine whether any entity or person has engaged or is engaging in unlawful acts and practices in connection with accrediting for-profit colleges, in violation of sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536, or any other Federal consumer financial protection law. The purpose of this investigation is also to determine

> whether Bureau action to obtain legal or equitable relief would be in the public interest.

Id. at 690. In reviewing the ACICS notification, the D.C. Circuit first held that it failed to adequately state the nature of the conduct constituting the alleged violation because, as with the notification in issue here, it "never explains what the broad and non-specific term 'unlawful acts and practices' means." *Id.* The D.C. Circuit then held that the ACICS notification failed to adequately state the provisions of law applicable to the alleged violation because, again, as with the notification in issue here, the cited statutory provisions stood "broadly alone" – that is, they were not accompanied by any language that clarified or defined what conduct allegedly violated the cited provisions. *Id.* at 691-92. In addition, the D.C. Circuit expressed frustration with the CFPB's invocation of "any other Federal consumer financial protection law." It noted that the broad invocation was wholly inconsistent with § 5562(c)(2): "Congress limited the Bureau's CID authority with § 5562(c)(2)'s notice requirements, and framing the applicable law in such a broad manner does not satisfy Congress's clear directive." *Id.* at 692. So too here.

C. The district court's interpretation of Section 5562(c)(2) writes out of the statute all of the notice requirements that Congress put in.

In holding that the CFPB's CID to Public Data complies with § 5562(c)(2), the district court improperly narrowed the language in the CID's notification and, most troubling, misinterpreted and improperly narrowed § 5562(c)(2).

As noted above, the district court held that the notification's reference to the FCRA, which the CFPB has authority to enforce in limited circumstances, and its related reference to "consumer reporting agencies" together provide "fair notice of an investigation with generally defined boundaries and a purpose articulated in broad terms that complies with the requirements" of § 5562(c)(2). ROA.273-75. The fundamental flaw in that analysis is plain: It improperly narrows the language used by the CFPB in the notification. As explained above, when read literally, the notification indicates that the CFPB is investigating all "persons" to determine whether any "federal consumer financial law" has been violated by any "unlawful acts or practices in connection with the provision or use of public records information." ROA.30. In other words, when the notification is read as written, the "generally defined boundaries and purpose" referenced by the district court do not exist. Moreover, the district court did not explain – and could not explain – why it was proper to narrow the language used by the CFPB, especially when the CFPB itself has refused to narrow that language or otherwise clarify the nature and scope of its investigation.

But more troubling here, the district court's analysis upends the limits Congress imposed on the CFPB's investigatory powers with § 5562(c)(2). Under the district court's interpretation and application of § 5562(c)(2), the requirements of that statutory provision are satisfied whenever a notification of purpose references a statute that the CFPB has authority to enforce. But that cannot and should not be the rule. As the D.C. Circuit noted in *ACICS*, because "the validity of a CID is measured by the purpose stated in the notification of purpose, the adequacy of the notification of purpose is an important statutory requirement." *ACICS*, 854 F.3d at 690 (citation omitted). Section 5562(c)(2), in other words, demands much more than a perfunctory reference to an enforceable statute.

* * *

Because the CID issued to Public Data fails to comply with § 5562(c)(2), the Court, for that reason alone, should reverse the district court and direct it to enter an order quashing the CFPB's CID. *See Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd.*, 878 F.2d 875, 881 (5th Cir. 1989) ("When the 'record permits only one resolution of' an issue presented for appeal, we need not waste precious resources remanding the case.").

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO DECIDE WHETHER THE CFPB HAS JURISDICTION OVER PUBLIC DATA.

A. A court should not enforce a CID when an agency plainly lacks jurisdiction over the target of the investigation.

A court should not enforce an administrative subpoena if the agency that issued it plainly lacks jurisdiction. *See Burlington*, 983 F.2d at 638 (noting that courts will only enforce an administrative subpoena if it is "within the statutory authority of the agency"); *see also Transocean*, 767 F.3d at 497 (Jones, J., dissenting) ("The standard for challenging an administrative subpoena is strict: courts may only interfere with the process in a limited number of circumstances, one of which arises when the agency plainly lacks jurisdiction.").

In determining whether an agency lacks jurisdiction, courts can and should consider not only whether the agency has jurisdiction over the alleged law violation, which is a pure question of law, but also whether it has jurisdiction over the target of the investigation. For instance, in *United States v. Transocean Deepwater Drilling, Inc.*, this Court reviewed Transocean's challenge to an administrative subpoena issued by the Chemical Safety Board (CSB) "in connection with an investigation following the disaster on *Deepwater Horizon* drilling unit in the Gulf of Mexico." 767 F.3d 485, 487 (5th Cir. 2014). Among other things, Transocean argued that the CSB "lacked jurisdiction to investigate the incident . . . because the *Deepwater Horizon* is not a 'stationary source' as that

term is contemplated by the statute." *Id.* at 489. Although the Court ultimately rejected Transocean's argument, it carefully reviewed the evidence that Transocean offered regarding whether the *Deepwater Horizon* was in fact a "stationary source" before finding that the "drilling installation here satisfied [the statute's] definition." *Id.* at 489-92. In other words, the Court stepped beyond a pure question of law and made fact findings about whether the target of the investigation – the *Deepwater Horizon* – was within the CSB's jurisdictional grant.

B. The CFPB plainly lacks jurisdiction under the FCRA, as Public Data is not a "consumer reporting agency" and therefore not subject to the FCRA.

Because the CID issued to Public Data does not provide fair notice of "the provision of law applicable" to the alleged violation as required by § 5562(c)(2), it is nearly impossible to determine whether the CFPB lacks jurisdiction over Public Data. *See ACICS*, 854 F.3d at 691 (noting that a court presented with an overly broad notification of purpose will not be able to "accurately determine whether the inquiry is within the authority of the agency") After all, that would require separate legal and factual analysis of each of the nineteen "Federal consumer financial laws" that the CFPB has authority to enforce. *See* 12 U.S.C. § 5481(12), (14) (defining and enumerating the Federal consumer financial laws). Even so, if we adopt the district court's (improper) tack and (wrongly) interpret the CFPB's

CID to invoke only the FCRA, it is plain that the CFPB lacks jurisdiction over Public Data.

The CFPB does not have jurisdiction over Public Data under the FCRA because Public Data does not furnish "consumer reports" and therefore is not a "consumer reporting agency." Under the FCRA, a "consumer reporting agency" is any person who for a fee "engages in whole or in part in the practice of *assembling or evaluating* consumer credit information or other information on consumers for the purpose of furnishing *consumer reports* to third parties." 15 U.S.C. § 1681a(f) (emphasis added). A "consumer report," in turn, is a "communication of information by a consumer reporting agency bearing on *a consumer's* credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is used or expected to be used for certain enumerated purposes. 15 U.S.C. § 1681a(d) (emphasis added). Accordingly, an entity is a "consumer reporting agency" only if it *assembles* or *evaluates* consumer credit or other information and does so for the purpose of producing a report bearing on *a consumer's* credit – *i.e.*, a report bearing on a specific person's credit.

But Public Data does not assemble or evaluate consumer credit or other information, and does not produce any reports relating to any specific person. *See, supra*, at pp. 5-7. In fact, Public Data offered undisputed evidence that it stores the public records that it collects in raw form; does not manipulate, modify, or

otherwise alter any records made available to the public on its website; and does not collect or creates files on specific individuals. *See id.* Moreover, Public Data offered undisputed evidence that the search results provided on its website generally include public records relating to multiple individuals and – important here – that users of its website are made aware of that fact. *See id.* Accordingly, as Public Data's undisputed evidence demonstrates and as any user of its website can independently confirm, Public Data is not a "consumer reporting agency" and thus is not subject to the FCRA.

Indeed, the Southern District of Texas has held that Public Data is not subject to the FCRA. In *Wilson v. The Source for Public Data, L.P.*, the Southern District dismissed the plaintiff's FCRA claims against Public Data, holding that the "uncontroverted evidence" demonstrated that the plaintiff's prospective employer "did not purchase a [consumer] report, but instead purchased access to [Public Data's] website in order to conduct its own search." No. CV H-12-0185, 2013 WL 12106128, at *3 (S.D. Tex. Apr. 30, 2013). In the same vein, the Southern District noted that it was "clear and undisputed that" users "are advised that the result of a search of [Public Data's] website is likely to include information concerning multiple individuals with the same name." *Id.* In other words, it was clear and undisputed that Public Data does not produce consumer reports.

Moreover, consistent with the Southern District's holding in *Wilson*, other courts have also held that public record retrieval firms, like Public Data, are not subject to the FCRA. For instance, the Eastern District of Virginia held that Intelius is not subject to the FCRA in *Fiscella v. Intelius, Inc* No. 3:10-CV-186, 2010 WL 2405650, at *4 (E.D. Va. June 10, 2010). In that case, the Eastern District noted that Intelius offers a website "where consumers can obtain public records" by "submit[ting] search terms, allowing the website to return any public records that contain the search terms in the form of a search report." *Id.* at *1. And it also noted that the "search often yields multiple individuals with the same name that live in the same state." *Id.* Based upon those facts, which are essentially identical to the undisputed facts Public Data offered here, the Eastern District dismissed the FCRA claims filed against Intelius, holding that Intelius's search results did not, as a matter of law, constitute an actionable consumer "file" under the FCRA. *Id.* at *8-*11.

C. The district court erred by limiting its jurisdictional inquiry to whether the CFPB has authority to enforce the Federal consumer financial laws.

The district court refused to decide whether the CFPB has jurisdiction over Public Data, and instead limited its jurisdictional inquiry to whether the CFPB has authority to enforce the FCRA or any of the other Federal consumer financial laws.

See, supra, at pp. 9-10. But neither of the district court's rationales for limiting its jurisdictional inquiry in that way withstand scrutiny.

First, the district court held that determining whether the CFPB has jurisdiction over Public Data would involve a "fact-intensive inquiry" and, accordingly, that it "would be premature . . . to decide whether Public Data is a consumer reporting agency at this stage." ROA.276. But Public Data did not invite a fact-intensive jurisdictional inquiry. In the absence of any guidance from the CFPB's statement of purpose, Public Data offered *undisputed* evidence that it is not a "consumer reporting agency" and therefore is not subject to the FCRA. *See, supra*, at pp. 5-7, 20-22. In other words, the district court did not need to resolve any disputed factual issues.

Moreover, the CFPB cannot merely *assert* that the jurisdictional inquiry is premature because its CID seeks evidence to establish its jurisdiction over Public Data. The CFPB was required to make "a prima facia showing" establishing its jurisdiction, or establishing that it could not determine whether it has jurisdiction over Public Data unless its CID is first enforced. *United States v. Zadeh*, 820 F.3d 746, 757 (5th Cir. 2016). That minimal burden might have been "fulfilled by a simple affidavit." *Id.* at 758 (citation and quotation marks omitted). But the CFPB offered no evidence establishing its jurisdiction. And the CFPB offered no evidence establishing that it could not determine whether it has jurisdiction over

Public Data unless its CID is first enforced. Indeed, Public Data's undisputed evidence demonstrates that the CFPB can determine whether it has jurisdiction without burdening Public Data with an onerous investigation; after all, the CFPB only needs to review Public Data's publicly available website to confirm the finding of the *Wilson* court. *See Wilson, supra*, at pp. 5-7, 20-22.

Second, the district court held that, when an agency's jurisdiction to issue an administrative subpoena is challenged, the "inquiry focuses on whether the agency has jurisdiction to investigate the subject of the investigation [*i.e.*, the alleged law violation], not the subject of the subpoena [*i.e.*, the target of the investigation]." ROA.268. But that is not the law and is not reasonable. As demonstrated above, in determining whether an agency lacks jurisdiction, courts consider not only whether the agency has jurisdiction over the alleged law violation, but also whether it has jurisdiction over the target of the investigation. *See, e.g.*, *Transocean*, 767 F.3d at 487-92. Indeed, any other rule would leave every administrative agency free to roam far outside of its jurisdictional grant (and plainly frustrate the clear intent of § 5562(c)(2), which is intended to ensure, among other things, that the recipient of a CID receives fair notice of *viable* allegation of misconduct).

* * *

Although the jurisdictional inquiry is complicated by the CFPB's failure to comply with § 5562(c)(2)'s notice requirement, Public Data was forced to assume

that the CFPB is suggesting that Public Data is a "consumer reporting agency." Public Data therefore offered undisputed evidence that it is not a "consumer reporting agency" and thus not subject to the FCRA. The CFPB came forward with no showing that the FCRA applies here or that any other basis exists for it to exercise jurisdiction over Public Data. The CFPB therefore plainly lacks jurisdiction over Public Data, and, for that reason alone, the Court should reverse the district court and direct it to enter an order quashing the CFPB's CID. *See Sandsend*, 878 F.2d at 881 ("When the 'record permits only one resolution of' an issue presented for appeal, we need not waste precious resources remanding the case.")

CONCLUSION

For the foregoing reasons, Public Data respectfully requests that the Court reverse the district court and direct it to enter an order quashing the CFPB's CID.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the January 10, 2018, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Ronald I. Raether

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,656 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Ronald I. Raether