No. 16-5174

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner – Appellant,

v.

ACCREDITING COUNCIL FOR INDEPENDENT COLLEGES AND SCHOOLS,
Respondent – Appellee.

ON APPEAL FROM A FINAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(Case 1:15-cv-01838-RJL)

REPLY BRIEF OF APPELLANT CONSUMER FINANCIAL PROTECTION BUREAU

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GLOSSARY

ACCET	Accrediting Council for Continuing Education and Training, Inc.
ACCET Br.	Brief of Amici Curiae Accrediting Council for Continuing Education and Training, Inc., Accrediting Bureau of Health Education Schools, Inc., Council on Occupational Education, National Accrediting Commission of Career Arts and Sciences, and Council for Higher Education Accreditation
ACICS	Accrediting Council for Independent Colleges and Schools
ACICS Br.	Brief of Appellee Accrediting Council for Independent Colleges and Schools
CFPA	Consumer Financial Protection Act
CFPB	Consumer Financial Protection Bureau
CFPB Br.	Opening Brief of Appellant Consumer Financial Protection Bureau
CID	Civil Investigative Demand
CC	Chamber of Commerce of the United States Of America
CC Br.	Brief of Amicus Curiae Chamber of Commerce of the United States of America
JA	Joint Appendix

SUMMARY AND INTRODUCTION

The Bureau filed this appeal because the district court refused to enforce the Civil Investigative Demand (CID) directed to ACICS. This appeal presents only three questions: Does the Bureau have authority to issue the CID? Has ACICS shown that the information sought by the CID is irrelevant to the stated purpose of the investigation? And, has ACICS shown that it would be unduly burdened by compliance with the CID? The district court answered the first question incorrectly and stopped there. Nothing in ACICS's brief rehabilitates the district court's faulty reasoning, and it falls short on the second and third questions as well.

The Bureau has authority to issue this CID. Assessing authority begins with an identification of the scope of the investigation, and ends with a determination of whether the laws the Bureau enforces apply to conduct within that scope. Identifying the scope of the investigation is easy because scope is defined solely by the CID's Notification of Purpose. Here, the Notification of Purpose states that the Bureau is investigating potential unlawful conduct committed by "any entity or person . . . in connection with accrediting for-profit colleges." But the district court misread the Notification of Purpose in ACICS's CID, omitting the critical words "in connection with," which would effectively narrow the scope of the

investigation. And ACICS makes a different sort of error, urging this Court to assess the scope based not just on the Notification of Purpose but also on the specifications of the CID. No case supports ACICS's approach, which confuses relevance and authority.

The next step in assessing authority is determining whether the Bureau patently lacks authority to regulate conduct within the scope of its investigation. The district court got the standard wrong – instead of assessing whether the Bureau *clearly lacked* authority, it refused to enforce the CID because it was unable to conclude that the Bureau *clearly had* authority. ACICS's arguments are even further divorced from this Court's precedent. It contends the CID is unenforceable because the Bureau has not demonstrated that ACICS could have violated any of the laws the Bureau enforces. But when the Bureau investigates, it may seek information from any person, not just from possible law violators. And how can the Bureau know who has violated the law before it concludes its investigation?

The district court's misapplication of the standard was compounded by another error: it made findings of fact, relying on ACICS's statements as to what evidence the Bureau would uncover if ACICS were to comply with the CID. But this Court has explained that an agency's investigation should not be limited by a forecast of its possible result, a result that cannot

possibly be known at the outset of an investigation. The Bureau doesn't clearly lack authority to investigate potential violations of law that may have been committed in connection with the accreditation of for-profit schools, and the district court, which contorted the law to conclude otherwise, should be reversed.

The second issue is relevance. If ACICS had wanted to raise the issue, it would have had to show that the CID seeks information that is plainly irrelevant to the Bureau's investigation, as that investigation is described in the CID's Notification of Purpose. But ACICS made no such showing before the district court. Accordingly, it waived any challenge to relevance. Now, ACICS wants to resurrect the issue and urges this Court to remand. Even if this Court concludes that ACICS has not waived its challenge to relevance, no remand is necessary, or appropriate, because this Court has the discretion to address the issue. And in this case relevance is easily determined because the CID seeks basic information that would form the foundation of the investigation defined by the CID's Notification of Purpose.

The third issue is burden. To prevail here, ACICS must show that it would be unduly burdened by compliance with the CID, *i.e.*, that compliance would seriously disrupt its normal operations. The district

court never addressed burden, but again, this Court can resolve the issue without a remand. ACICS had an opportunity to present evidence regarding burden before the district court, and it did so. But the only evidence it presented consisted of four sentences in a single declaration. ACICS argues that this evidence somehow shows that compliance would effectively shut down ACICS, but ACICS's evidence makes no such showing. At best, it indicates that evaluators who participate in accreditations would rather not have their identities disclosed to the Bureau. This hardly justifies blocking the Bureau's law enforcement investigation.

ARGUMENT

I. ACICS FAILS TO REHABILITATE THE DISTRICT COURT'S FLAWED ANALYSIS OF THE BUREAU'S AUTHORITY

The purpose of a pre-complaint investigation is to gather facts that may bear on whether laws enforced by the agency have been violated. Logically, therefore, an agency is not required to prove or even posit a specific violation of law before its compulsory process is enforced. Rather, those challenging an agency's authority to issue a CID must show, based solely on the face of the CID itself, that "there is 'a patent lack of jurisdiction' in an agency to regulate or investigate." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001), *see* CFPB Br. at 19. ACICS makes no such showing, but instead repeatedly seeks to litigate the merits of some

hypothetical future enforcement action brought against it. This is a red herring. The Bureau may serve its CIDs on any person who may have information relevant to whether a violation has occurred, no matter if the person is ultimately shown to be a law violator. CID enforcement proceedings are supposed to be summary in nature, and any challenge to an agency's authority is confined to two simple questions: what is the agency investigating, and is that investigation within the Bureau's authority? The district court's analysis of these two points fell short, and ACICS does nothing to bring it up to measure.

1. When the Bureau issues a CID, it must describe the scope of its investigation. 12 U.S.C. 5562(c)(2). The Bureau does this by including a Notification of Purpose in every CID it issues. *See* 12 C.F.R. 1080.5. And the boundaries of the Bureau's investigation, as described in the Notification of Purpose, may be "defined quite generally." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992). The Notification of Purpose in the CID the Bureau issued to ACICS explained that the Bureau was investigating to determine whether "any entity or person" had violated any of the laws it enforces, including its authority to prohibit unfair, deceptive, or abusive acts or practices, "in connection with accrediting for-profit colleges." JA024.

Although the Bureau framed its investigation broadly, the district court reframed it narrowly. Initially, the court quoted the Notification of Purpose verbatim, JA010, but when it subsequently referred to the scope of the investigation, it omitted the "in connection with" phrase and described the Bureau's investigation as limited to "the process for accrediting for-profit schools," JA013. "In connection with" makes a difference – the scope of the investigation the Bureau is actually conducting (*i.e.*, into "acts and practices in connection with accrediting for-profit colleges") is broader than the one the district court mistakenly thought it was conducting (*i.e.*, into "accreditation of for-profit schools"). *See* JA011.

ACICS contends that the court gave "thorough consideration" to the Notification of Purpose before concluding that the Bureau lacked authority to conduct an investigation of potential law violations "in connection with accreditation." ACICS Br. at 17. But that's not what happened. The district court started, "at first blush," JA 011, not from the CID's Notification of Purpose, but from ACICS's statement that "none of these laws [enforced by the Bureau] address, regulate, or even tangentially implicate the accrediting process of for-profit colleges," *id*. That is, ACICS distracted the district court, as it now tries to distract this Court, into focusing on whether ACICS had violated the law instead of on whether the Bureau's investigation (into

conduct "in connection with accrediting for-profit colleges") might identify a law violation. Blinkered into assuming that the Bureau was investigating the process of accrediting for-profit colleges, the district court's analysis never got back on track.

Another error in ACICS's brief: it commends the district court for incorporating into its analysis a review of the material requested by the Bureau. *See* ACICS Br. at 18. In fact, in an action to enforce a CID, the court should assess the scope of the Bureau's investigation based *solely* on the CID's Notification of Purpose. *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315 (D.C. Cir. 2011) ("[t]he validity of [agency] subpoenas is to be measured against the purposes stated in the resolution" (internal quotation marks omitted)). If the Notification of Purpose describes an investigation that is not patently outside the Bureau's authority, then the court should proceed to an examination of relevance and burden. It is only at the relevance stage that the court examines individual specifications and compares them to the Notification of Purpose. *See infra*. That is, an agency does not lack authority for its investigation merely because specifications in the CID seek information that does not bear directly on a potential violation of a law the agency enforces. Rather, when assessing whether the Bureau patently lacked authority, the court must focus on, and confine its analysis

to, the Notification of Purpose. Here, the Notification of Purpose demonstrates that the Bureau's investigation is not, as the district court incorrectly held, limited to the process for accrediting for-profit colleges.

2. Once the court identifies the scope of the Bureau's investigation (through an examination of the CID's Notification of Purpose), only one question remains: does the Bureau patently lack authority to investigate what it has described in its Notification of Purpose? Thus, in this case, this Court should assess whether the Bureau patently lacks authority to investigate "acts and practices in connection with accrediting for-profit colleges," taking account of all the laws the Bureau listed in the Notification of Purpose (*i.e.*, 12 U.S.C. 5531, 12 U.S.C. 5536, and any of the statutes referred to in 12 U.S.C. 5481(14) (defining Federal consumer financial law)). As the Bureau explained, that was not the analysis the district court conducted. CFPB Br. at 20. Instead of assessing whether there was a patent lack of authority for the Bureau's investigation, the court faulted the Bureau for "plow[ing] head long into fields not clearly ceded to [it] by Congress," JA013, and for failing to show "a clear nexus between the consumer financial laws it is tasked with enforcing and its purported investigation," JA011. That is, instead of giving the Bureau the benefit of the doubt as to its authority, the court gave that benefit to ACICS.

Despite these statements in the district court's opinion (statements that ACICS ignores), ACICS claims that the district court "started with the presumption that the Bureau ... had authority to pursue an investigation." ACICS Br. at 2; *see also id.* at 14. In fact, that is what the district court should have done, and any number of cases identify this as the correct approach. *See, e.g.*, *Ken Roberts*, 276 F.3d at 586, and cases cited therein (courts should defer to the agency's determination of its authority). But in arguing that the district court started with a presumption of the Bureau's authority, ACICS never cites to the district court's opinion, and there is a good reason for the omission – the district court allowed the Bureau no such presumption. Again, as explained above, the district court took the opposite approach – it was unwilling to allow the Bureau's investigation to go forward absent a "clear nexus" linking the Bureau's authority and the subject of the investigation.

ACICS is simply mistaken when it contends that the Bureau never identified any law that it enforces that could be implicated by conduct "in connection with accrediting for-profit colleges."[1] *See* ACICS Br. at 17. The

[1] ACICS also repeats the district court's mistaken belief that the Bureau had somehow conceded that no law it enforces "even tangentially implicate[s] the accrediting process of for-profit colleges." *See* ACICS Br. at 18, quoting JA011. But as the Bureau explained, although it has no interest in accreditation as such, it is quite interested in the intersection between

Bureau explained how conduct "in connection with accrediting for-profit colleges" could violate the laws enforced by the Bureau. The Bureau described to the district court how accreditors, such as ACICS, might gain information regarding the admissions process of for-profit colleges, and how that information could relate to student lending, which has become inextricably linked to the admissions process. *See* JA109-112 (explaining that ACICS could have information regarding the debt collection and credit reporting process for student loans, which are regulated by the Fair Debt Collection Practices Act and the Fair Credit Reporting Act, both of which are enforced by the Bureau, 12 U.S.C. 5481(12)). And in its opening brief to this Court, the Bureau explained how deception regarding accreditation has been used to deceive students at for-profit colleges.[2] *See* CFPB Br. at 20-23 & n.9, n.10.

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accreditation and lending, debt relief, debt collection, etc. CFPB Br. at 22 n.8. Further, the mere fact that the Department of Education evaluates whether ACICS does an adequate job of accrediting schools (and has determined that it does not, *see* Decision of the Secretary, Docket no. 14-44-O, at 9, http://www.ed.gov/acics?src=search (December 12, 2016) (Decision of the Secretary)) in no way deprives the Bureau of its authority to seek information from ACICS.

[2] Further, when the Department of Education withdrew recognition from ACICS, it noted that, during ACICS's accreditation of one for-profit school, it obtained "unmistakable evidence" of fraud committed by the school in connection with its financial aid program. Decision of the Secretary, at 9.

ACICS contends that the Bureau's explanation of possible deception by accreditors constitutes a "new argument on appeal," which it urges this Court to ignore. In particular, ACICS claims that the Bureau has never explained that it was investigating misrepresentations to students regarding accreditation. ACICS Br. at 20-23. But the Bureau didn't have to. To repeat: the Bureau's Notification of Purpose describes an investigation into "unlawful acts and practices in connection with accrediting for-profit colleges." The Notification of Purpose may describe the scope of the Bureau's investigation "quite generally." *Church & Dwight*, 665 F.3d at 1316. Thus, the Bureau does not have to speculate as to the specific violations it might uncover as its investigation goes forward. *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1517 (D.C. Cir. 1993) ("the precise character of possible violations cannot be known in advance"). Nonetheless, the Bureau has explained the sorts of violations it might find, not because it is required to do so, but because the district court had such difficulty conceiving how conduct connected to accreditation could violate any of the laws enforced by the Bureau.[3] *See* JA011. These explanations are not at all new arguments.

[3] It is mysterious why ACICS complains that "[n]ow, the Bureau has made

Even the district court recognized that in a proceeding to enforce compulsory process, the court should "not consider the ultimate question of 'whether the [targeted entity's] activities [are] covered by the statute.'" JA010 n.2, quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*). But again, that is the central focus of ACICS's brief. *See* ACICS Br. at 23-25. ACICS urges this Court to conclude that it could not be held liable under any of the laws the Bureau enforces, arguing, *inter alia*, that, because it is a non-profit, it would have no incentive to participate in fraud. *Id.* at 24. Even if it were true that non-profits never violate the laws, *but see, e.g.*, *United States v. Pratt*, 728 F.3d 463 (5th Cir. 2013) (prosecution of non-profit entities for mail fraud), this has nothing to do with whether the Bureau may obtain information from ACICS regarding an investigation the Bureau is authorized to conduct. Indeed, the Consumer Financial Protection Act (CFPA) authorizes the Bureau to serve its CIDs on "any person" that the Bureau believes "may be in possession" of information relevant to its investigation, not just on those who would be subject to the

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clear that this investigation has a *different* purpose, namely investigating conduct "*in connection with accrediting* for-profit colleges." *See* ACICS Br. at 22 (emphasis in original). Had ACICS looked to the CID's Notification of Purpose, it would see that this is what the Bureau has been investigating all along.

Bureau's enforcement authority.[4] 12 U.S.C. 5562(c)(1). Moreover, the CFPA provides that even those who are specifically excluded from the Bureau's enforcement authority may still be required to comply with the Bureau's CIDs.[5] 12 U.S.C. 5517(n)(2). Thus, as this Court has explained, in a proceeding to enforce a CID, the court is not "free to speculate about the possible charges that might be included in a future complaint," *FTC v.*

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[4] Amici Accrediting Council for Continuing Education and Training, Inc. (ACCET), *et al.*, make the same mistake – they assume the Bureau is investigating accreditation. *See* ACCET Br. at 4 (referring to the Bureau's "probe into accreditation"). But the amici never deny that an accreditor might have relevant information regarding violations, perhaps committed by a for-profit college, "in connection with accrediting." Indeed, they concede that, as part of the accreditation process, accreditors review complaints received by the colleges they accredit, ACCET Br. at 3. Complaints are often a source of information that is relevant to an agency's investigation. *See FTC v. Invention Submission*, 965 F.2d at 1087 (FTC's investigation spurred by consumer complaints).

[5] The first part of the brief of amicus Chamber of Commerce can be summed up as follows: the accreditation process cannot violate any law enforced by the Bureau, and therefore, the Bureau cannot serve a CID on an accreditor. *See, e.g.*, Brief of the Chamber of Commerce (CC Br.) at 9 ("ACICS's accreditation business is thus outside the Bureau's purview, and an improper subject for a CID"); *see also id.* at 12 (ACICS cannot be required to comply with a CID unless the Bureau can show that it "'knowingly or recklessly' provided '*substantial* assistance'" to a lender (emphasis in original)). But as explained above, the Bureau may serve its CIDs on any *person* who may have information relevant to a violation, regardless of whether that person is even within the Bureau's law enforcement authority. Thus, in a CID enforcement proceeding, it simply does not matter whether ACICS's accreditation business is, in the Chamber's words, "outside the Bureau's purview."

Carter, 636 F.2d 781, 786 (D.C. Cir. 1980) (internal quotation marks omitted), and it should reject ACICS's invitation to do so.[6]

3. The district court's analysis of the Bureau's authority also went astray because, instead of focusing solely on the Bureau's statutory authority, the court based its holding on its findings as to what information the Bureau would obtain if ACICS were to comply with the CID. *See* CFPB Br. at 23-25. And the court based these findings on statements in memos filed by ACICS. *See* CFPB Br. at 24. But as the Bureau explained, and as this Court has recognized, in an action to enforce compulsory process where, *a fortiori,* facts will be unavailable to the agency, the court should not base its holding on findings of fact. CFPB Br. at 23, citing *FTC v. Texaco*, 555 F.2d at 879, and *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979).

ACICS cites two cases that it contends support the district court's reliance on fact-finding, *see* ACICS Br. at 15-16, but neither case does. In

[6] ACICS contends that the Bureau's authority to conduct its investigation should be "viewed with skepticism" because a panel of this Court held unconstitutional the provision of the CFPA that makes the Bureau's director removable only for cause. *See* ACICS Br. at 27, citing *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *petition for reh'g filed* Oct. 18, 2016. ACICS provides no explanation as to how the constitutionality of the CFPA's for-cause removal provision has anything to do with whether the Bureau has statutory authority to investigate "practices in connection with accrediting for-profit colleges." In any event, even if ACICS could dream up such an argument, that argument is waived because it was not raised below. *Huron v. Cobert*, 809 F3d 1274, 1280 (D.C. Cir. 2016).

Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Ret. Bd., 983 F.2d 631 (5th Cir. 1993), the inspector general of the Railroad Retirement Board served a subpoena on the Burlington Northern Railroad to audit whether it was complying with its statutory obligation to make contributions to certain railroad retirement and employment accounts. By statute, an inspector general is prohibited from taking on an agency's program operating responsibilities. 5 U.S.C. App. 3, sec. 9(a)(2). That is, although the inspector general may conduct an audit to identify fraud or abuse committed by the Railroad Retirement Board, it may not conduct an audit to determine tax compliance by a railroad. The court held that limited discovery would be appropriate to determine whether, in serving the subpoena on Burlington Northern, the inspector general was conducting an audit that it was specifically prohibited by statute from conducting. 983 F.2d at 637. If there were a provision of the CFPA that specifically prohibited the Bureau from investigating the acts or practices of an accreditor, it might have been appropriate for the court to permit fact-finding to determine if ACICS was an accreditor.[7] But there is no such limitation in the CFPA.

[7] *See also FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977). The FTC issued a subpoena to Morgan Drive Away, Inc., a common carrier. The court refused to enforce the subpoena because the FTC's subpoena authority, 15 U.S.C. 46(b), specifically precluded the FTC from issuing subpoenas to common carriers. The parties conceded that Morgan Drive Away was a common

In *ITC v. ASAT, Inc.*, 411 F.3d 245 (D.C. Cir. 2005), the ITC issued a subpoena to ASAT as part of an investigation to determine whether certain imported products infringed three United States patents. ASAT objected – it contended that the requested documents were not in its control. In the subpoena enforcement proceeding, this Court reviewed the evidence regarding ASAT's control of the documents. *Id.* at 254. This fact-finding was appropriate because ITC regulations permitted it to subpoena only documents that were in the custody or control of the subpoena recipient. 19 C.F.R. 210.32(b). Thus, in a sense, this Court relied on fact-finding to determine whether the agency had authority for its subpoena. ACICS's situation might have been similar to ASAT's if the Bureau's CID had sought documents that ACICS had contended were outside its control. But that is not what happened here. ACICS's argument is quite different. It argues that none of the laws cited in the CID's Notification of Purpose authorize an investigation into "acts and practices in connection with accrediting for-profit colleges." No case authorizes fact-finding into the reach of the Bureau's laws.

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carrier, but, presumably, if there had been a dispute as to Morgan Drive Away's status, discovery would have been appropriate.

ACICS urges this Court to make the same sorts of errors that the district court made. It argues that individual CID specifications are relevant to determining the scope of the Bureau's investigation. It mistakenly contends that the district court properly gave the Bureau the benefit of the doubt when assessing whether the Bureau patently lacked authority to conduct its investigation. And it touts the benefits of fact-finding as part of the court's analysis in what is supposed to be an expedited proceeding to enforce an agency's investigative compulsory process. This Court should reject all these arguments.

II. ACICS HAS WAIVED ANY CHALLENGE TO RELEVANCE

As the Bureau explained in its opening brief, the district court made no more than a passing reference to relevance.[8] CFPB Br. 25-28; *see* JA013 n.4. Properly assessed, "[t]he relevance of the material sought by the [agency] must be measured against the scope and purpose of the [agency's] investigation, as set forth in the [agency's] resolution." *Texaco*, 555 F.2d at 874. CFPB Br. at 27. That is, a court should:

[8] The district court held that, even if the Bureau had provided a Notification of Purpose more to its liking, the Bureau's requests might still not be relevant. Most peculiar, however, during oral argument, the district court warned the Bureau that it might issue an order precluding the Bureau from ever reissuing a CID to ACICS. *See* JA126; ACICS Br. at 25. The court issued no such order, which, in any event, would have been inappropriate in a proceeding to enforce a CID.

> compar[e] the specifications of the subpoenas with the resolutions of the [agency], which announced the purpose and scope of the inquiry. ... If the comparison establishes that the specified requests 'may be relevant' to the legitimate inquiry of the [agency], compliance must be ordered....

FTC v. Rockefeller, 441 F. Supp. 234, 240-41 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979); *see also FTC v. Invention Submission*, 965 F.2d at 1089 (court should assess whether the requested information is "not plainly incompetent or irrelevant to any lawful purpose of the agency" (internal quotation marks omitted)).

ACICS has never even attempted to explain how the information sought by the Bureau fails this test.[9] In the district court, it argued that the Bureau lacked authority for its investigation, and that, as a result, "its CID cannot seek 'reasonably relevant' information." JA077. But that is a challenge to authority, not relevance. Its arguments to this Court are equally far afield – again, it uses the relevance section of its brief to rehash its challenge to the Bureau's authority. *See, e.g.*, ACICS Br. at 28 ("the Bureau's CID seeks information that concerns conduct that the consumer

[9] ACICS repeatedly refers to the "documents" sought by the CID. *See* ACICS Br. at 3, 12, 13, 18, 28. In fact, the CID seeks only responses to two interrogatories, and oral testimony at an investigational hearing. *See* JA025-026.

financial laws do not reach").[10] Because "it is essentially the respondent's burden to show that the information is irrelevant," *Invention Submission*, 965 F.2d at 1090, and because ACICS never made such a showing either to the district court or to this Court, it waived the challenge.

Since ACICS has waived any proper challenge to relevance, this Court should not consider ACICS's request for a remand to the district court.[11] *See* ACICS Br. at 27. But if this Court determines that relevance needs to be addressed, this Court has the discretion to do so itself, and it should exercise that discretion. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals"). This is particularly appropriate "where the proper resolution is beyond any doubt," and where "injustice might otherwise result." *Id.*; *see Taylor v. Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009) (quoting *Singleton v.*

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[10] It also complains that the CID seeks the identities of individuals who want their confidence maintained. ACICS Br. at 28-30. This argument relates to the burden that ACICS claims the CID imposes, but it has nothing to do with relevance.

[11] In a CID enforcement proceeding, a court may also assess whether the CID's requests for information are too indefinite, *i.e.*, the CID does not specify the requested information with reasonable particularity. *Oklahoma Press Pub. Co. v. Walling*, 327 US. 186, 207 & n.40 (1946). The Bureau's CID is quite specific, and, although ACICS urges this Court to conclude that "the CID is indefinite," ACICS Br. at 13, it has never argued that it cannot identify the responsive information.

Wulff). Here, this Court can easily resolve the issue by comparing the CID's specifications with its Notification of Purpose, both of which are in the record before this Court, *see* JA024 (Notification of Purpose), and JA025-026 (CID specifications). Thus, ACICS is mistaken when it contends that an analysis of relevance requires the development of additional facts. *See* ACICS Br. at 27.

CID Interrogatory 1 is relevant. It seeks the identity of "all post-secondary educational institutions that [ACICS] has accredited since January 1, 2010." JA025. Because the Bureau is seeking information from ACICS regarding "acts and practices in connection with accrediting for-profit colleges," the names of the colleges that ACICS has recently accredited would be relevant. The Bureau could not conduct an investigation of practices in connection with accrediting of for-profit colleges without knowing the identities of those for-profit colleges. Interrogatory 2 requests that ACICS "[i]dentify all individuals affiliated with [ACICS] who conducted any accreditation reviews since January 1, 2010 of" 21 designated schools.[12] JA025. These are the individuals who

[12] When it filed a copy of the CID in the district court, the Bureau redacted the names of the 21 schools. The Bureau offered to provide an unredacted CID to the court, JA022, but the court never asked to see it. If this Court wants to know the names of the schools, the Bureau will gladly provide an unredacted copy of the CID.

have information about practices in connection with the accrediting of the 21 colleges, so this request is also not plainly irrelevant. CIDs frequently seek the names of potential witnesses.[13] *See*, *e.g.*, *FTC v. Invention Submission Corp.*, 1991 WL 47104 (D.D.C. Feb. 14, 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992) (enforcing a CID that sought the names of a company's clients and employees). ACICS argues that "there is no plausible connection between the identities of the evaluators that the CID has sought and the consumer financial laws that the Bureau enforces." ACICS Br. at 30. But again, that is not a proper challenge to the relevance of interrogatory 2. The correct question is whether evaluators who participate in the accreditation of for-profit colleges have information relevant to acts or practices in connection with accrediting those schools. They certainly

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[13] ACICS cites *Resolution Trust Corp. v. Feffer*, 793 F. Supp. 11 (D.D.C. 1992), and *Resolution Trust Corp. v. Walde*, 18 F.3d 943 (D.C. Cir. 1994), *see* ACICS Br. at 29, but these cases have nothing to do with the relevance of the information requested by the Bureau's CID. Both cases held that, in connection with an investigation into the possible liability of the directors of failed savings and loan associations, the RTC could not subpoena information regarding the personal finances of the directors. The RTC sought the information, not to determine whether there had been a violation, but solely to determine whether the directors would have assets sufficient to pay any judgment that RTC might ultimately obtain. *See Walde*, 18 F.3d at 949 ("the agency is attempting to subpoena information relevant to wealth rather than liability"). The Bureau's CIDs do not seek any information regarding assets.

would. Thus, interrogatory 2 is not plainly irrelevant to the Bureau's investigation.

Finally, the Bureau seeks to take the sworn oral testimony of an ACICS representative who can testify regarding ACICS's "policies, procedures, and practices relating to the accreditation of" seven designated schools. JA026. Again, information regarding ACICS's policies, procedures, and practices "relating" to accreditation is not plainly irrelevant to an investigation of practices committed in connection with accreditation. Because the Bureau's CID seeks such basic information, the analysis of relevance here is particularly simple, and, assuming this Court concludes that ACICS has not waived the issue, there is no need to remand to the district court.[14]

[14] ACICS cites two EEOC cases in support of its attempt to cabin the Bureau's CID. *See* ACICS Br. at 28, 29, citing *EEOC v. Royal Carib. Cruise, Ltd.*, 771 F.3d 757 (11th Cir. 2014), *EEOC v. United Air Lines, Inc.*, 287 F.3d 643 (7th Cir. 2002). But the holdings of those cases do not apply here because, by statute, EEOC may only use its compulsory process to investigate contested issues regarding a specific sworn charge of discrimination. *See* 42 U.S.C. 2008e-8(a). That is, EEOC's authority to investigate is far narrower than the Bureau's. On the other hand, the Bureau "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *See United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

III. THIS COURT SHOULD HOLD THAT ACICS FAILED TO SHOW IT WOULD BE UNDULY BURDENED BY COMPLIANCE WITH THE CID

If ACICS had wanted to challenge the burden imposed by the CID, it would have had to demonstrate that compliance would threaten to disrupt or seriously hinder its normal business operations.[15] *See* CFPB Br. at 29-30, citing *FTC v. Texaco, Inc.*, 555 F.2d at 882. Although ACICS presented evidence regarding burden and briefed the issue, *see* JA077-078, 084, the district court did not address the subject.[16] Nonetheless, this Court has the discretion to resolve the issue of burden *de novo*, and it should do so because resolution is beyond doubt, and because it would be unjust to delay compliance with the CID even further. *See* CFPB Br. at 29, 31-32 and cases cited therein.

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[15] The Chamber of Commerce styles its second argument as a challenge to burden, *see* CC Br. at 16-22, but it makes no attempt to show that the Bureau's CID would somehow unduly disrupt ACICS's business. Instead, it devotes this section of its brief to its contentions that "the Bureau's CID clearly invades the jurisdiction properly assigned to another federal agency," and that the Bureau should not be permitted "to pry into whether accrediting agencies such as ACICS are abiding by the law." *See* CC Br. at 18. And it goes even further, speculating that Bureau "CIDs like this one [are] likely to lead to higher prices for consumers and reduced choice in consumer financial products." *Id.* at 17. This argument has nothing to do with whether the Bureau has authority for its investigation, or whether the CID seeks information relevant to that investigation.

[16] ACICS suggests that the district court concluded that the CID posed "burdensome requests." *See* ACICS Br. at 19. The district court said nothing of the sort.

ACICS, however, urges this Court to remand the issue to the district court because "we do not know what additional factual record might be developed that further supports the evidence adduced by ACICS."[17] ACICS Br. at 31. That is, ACICS wants another chance to present evidence regarding burden. But it already had that chance, and it has not argued that the district court somehow precluded it from presenting any relevant evidence regarding the issue. Proceedings to enforce an agency's investigatory compulsory process are summary in nature.[18] *See FTC v. Invention Submission*, 965 F.2d at 1091. Thus, it would be inappropriate to allow ACICS a second chance to present evidence regarding burden.

ACICS also argues that if this Court does address burden, it should conclude that the Bureau's investigation "would effectively shut down

[17] It is hard to fathom why ACICS "do[es] not know what additional factual record might be developed" before the district court, *see* ACICS Br. at 31, since it would be the source of that factual record.

[18] Amicus Chamber of Commerce cites one provision of a proposal to amend the Bureau's rules regarding Disclosure of Records and Information, and contends that this provision could limit CID recipients from disclosing any CIDs they received, thus making judicial review "particularly vital." CC Br. at 5 n.1. The provision the Chamber refers to is merely a proposal that has not been adopted by the Bureau. In any event, ACICS has never argued that it was precluded from disclosing its CID.

ACICS's operations."[19] The only evidence that ACICS has presented regarding burden consists of four sentences in the declaration of Albert C. Gray, ACICS's president, *see* JA084, at ¶¶ 17-18, and these sentences come nowhere close to suggesting that compliance with the CID would somehow shut down ACICS.[20] Mr. Gray merely states that, after ACICS received the CID, "a number of evaluators" "expressed their concerns" about continuing to participate as evaluators. *Id.* Why were the evaluators concerned? ACICS speculates that the evaluators want to protect "the anonymity and confidentiality of the accreditation process."[21] ACICS Br. at 32, citing JAo78 (ACICS's Opposition filed in the district court). But Mr. Gray's declaration says nothing whatsoever about protecting the confidentiality of the

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[19] As explained above, the Department of Education has withdrew recognition from ACICS. *See supra* pp. 9 n.1, 10 n.2. As a result, ACICS can no longer provide schools with the accreditation that they need to participate in federal student loan programs.

[20] It is unclear why ACICS cites *Commodity Trend Serv., Inc. v. CFTC*, 233 F.3d 981 (7th Cir. 2000), *see* ACICS Br. at 32. Commodity Trend Service presented evidence showing that the CFTC's investigation had caused its business to drop by 25%. Nonetheless, the court affirmed an order enforcing the agency's subpoenas.

[21] Even if there were evidence to support ACICS's speculation, not only would it be insufficient to show that interrogatory 2 unduly burdens ACICS, but also it has nothing to do with CID Interrogatory 1, which seeks the names of educational institutions that ACICS has accredited, or the CID's request for a witness to testify regarding ACICS's policies and procedures.

accrediting process, nor does he state anything to support ACICS's contention that the evaluators have a "legitimate expectation that ACICS will maintain their confidences," *see* ACICS Br. at 28. Instead, according to Mr. Gray, he "understand[s] that these evaluators are concerned because the CID seeks information about the individual identities of evaluators who have participated in the accrediting process for certain schools." JA084, at ¶ 18. That is, the evaluators are apparently concerned because they do not want to be involved in an investigation. This sort of argument could be raised in connection with any CID that seeks the names of individuals who might possess relevant information, and is hardly the sort of burden that is sufficient to justify a failure to comply.[22] *See FTC v. Invention Submission Corp.*, 1991 WL 47104 at *3 (if speculative concerns regarding damage to corporate reputation were sufficient to shield the names of corporate employees, agency investigations would be a futile exercise).

ACICS had an opportunity to present evidence regarding burden, it presented evidence, and that evidence comes nowhere

[22] *Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of N.Y. Harbor*, 512 F. Supp. 781 (S.D.N.Y. 1981), *aff'd* 667 F.2d 267 (2d Cir. 1981), *see* ACICS Br. at 29, has nothing to do with this case. The court refused to compel disclosure of the names of union members because disclosure could infringe the member's First Amendment right of free association. ACICS has never claimed that compliance with the CID would infringe any First Amendment rights.

close to demonstrating undue burden.[23] This Court has discretion to address burden *de novo*, and it should do so because resolution of the issue is apparent, and because remand, which would further delay the Bureau's investigation, would result in injustice. *See* CFPB Br. at 31-32.

[23] ACICS has never argued that it would be unduly burdened by locating the information sought by the CID. Its claim that the CID seeks "three broad categories of information," ACICS Br. at 7, or "broad swaths of information," *id.* at 18, and its reference to the "sweeping scope" of the CID, *id.* at 13, are simply hyperbole.

CONCLUSION

For the reasons set forth both above and in the Bureau's opening brief, this Court should reverse the district court's Order, and remand with instructions to order ACICS to comply in full with the Bureau's CID.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(e) and this Court's November 3, 2016, Notice of Implementation of Amendments to the Federal Rules of Appellate Procedure because it contains 6593 words, as determined by the word count function of the Microsoft Word 2010 word processing program, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This is consistent with the word limits that applied when the briefing schedule in this case commenced.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2010 word processing program in 14-point Georgia font.

/s/Lawrence DeMille-Wagman
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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed Reply Brief of Appellant Consumer Financial Protection with the Clerk of the Court of the United States Court of Appeals for the District Columbia Circuit by using the appellate CM/ECF system. I certify that counsel for Appellee in the case (listed below) are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, pursuant to this Court's Rule 31, eight paper copies of this Brief will be filed with the Clerk of this Court.

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