UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and
KIMBERLY A. PISINSKI,

Plaintiffs,

v.

CONSUMER FINANCIAL
PROTECTION BUREAU,

Defendant.

Civil Action No. 13cv-01112 (CKK)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF CITATIONS iii

INTRODUCTION 1

BACKGROUND 3

A. The Bureau's Structure, Jurisdiction, and Powers 3

B. The Bureau's Investigation of Morgan Drexen 7

C. Kimberly Pisinski 9

ARGUMENT 10

I. The Legal Standard 10

II. The Court Should Dismiss the Complaint Without Addressing the Merits 11

A. Morgan Drexen Is Not Entitled to Injunctive or Declaratory Relief 11

1. Morgan Drexen is not entitled to injunctive relief because it has an adequate remedy at law and will not suffer irreparable harm 11

a. Morgan Drexen is not entitled to an order enjoining the Bureau's enforcement action 12

b. Morgan Drexen is not entitled to an order enjoining the Bureau's now-completed investigation 14

2. Morgan Drexen is not entitled to declaratory relief 17

3. The first-to-file rule does not entitle Morgan Drexen to declaratory or injunctive relief 21

B. Pisinski Lacks Standing to Challenge the Bureau's Constitutionality 22

III. The Bureau's Structure Is Constitutional 24

A. The Dodd-Frank Act Preserves Each Branch's Ability to Oversee the Bureau, Consistent with Well-Established Separation-of-Powers Requirements 25

1. The President's power to remove the Bureau Director for cause gives him constitutionally sufficient means to oversee the Bureau 25

a. Longstanding precedent makes clear that for-cause removal gives the President ample authority to oversee independent agencies 25

b. Neither the Bureau's single-director leadership nor any other Bureau feature makes the President's for-cause removal power constitutionally inadequate 27

2. Congress retains its constitutional prerogative to oversee the Bureau, including through its power of the purse 30

a. Congress's control over the Bureau's funding satisfies separation-of-powers requirements ... 30

b. Congress has other tools for overseeing the Bureau ... 33

3. The Bureau is subject to ordinary judicial review ... 34

B. The Bureau Does Not Have Any Unusual Features that Justify Plaintiffs' Request for Novel Constitutional Restrictions ... 35

1. The scope of the Bureau's authority does not render the well-established checks on the Bureau constitutionally insufficient ... 36

2. The Bureau is not uniquely required to have a multimember commission ... 37

CONCLUSION ... 41

TABLE OF CITATIONS

Cases

AINS, Inc. v. United States, 56 Fed. Cl. 522 (Fed. Cl. 2003).. 31, 32

Am. Fed. of Gov't Emps. Local 1 v. Stone, 502 F.3d 1027 (9th Cir. 2007) 13

Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Labor Relations Auth.,
388 F.3d 405 (3d Cir. 2004).. 31

Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946)... 33

AmSouth Bank v. Dale, 386 F.3d 763 (6th Cir. 2004) 19, 20, 22

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10

Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936) 13

Atlantic Richfield Co. v. FTC, 546 F.2d 646 (5th Cir. 1977).. 16

Blodgett v. Holden, 275 U.S. 142 (1927).. 20, 21

Bowsher v. Synar, 478 U.S. 714 (1986).. 27

Buckley v. Valeo, 424 U.S. 1 (1976) 24

Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.,
511 F.3d 535 (6th Cir. 2007).. 21, 22

Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937) 31

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 14, 16

Coal. for Mercury-Free Drugs v. Sebelius, 671 F.3d 1275 (D.C. Cir. 2012).............................. 14

Coal. for Underground Expansion v. Mineta, 333 F.3d 193 (D.C. Cir. 2003)............................ 10

Columbia Plaza Corp. v. Sec. Nat'l Bank, 525 F.2d 620 (D.C. Cir. 1975)............................ 21, 22

Cuomo v. The Clearing House Ass'n, LLC, 557 U.S. 519 (2009) 6

Daskalea v. Wash. Humane Soc'y, 577 F. Supp. 2d. 82 (D.D.C. 2008) 11

David B. Lilly Co. v. United States, 571 F.2d 546 (Ct. Cl. 1978).. 39

Dearth v. Holder, 641 F.3d 499 (D.C. Cir. 2011).. 23

* *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987) 12, 13, 21

DeNaples v. OCC,, 706 F.3d 481 (D.C. Cir. 2013) 35

EEOC v. Univ. of Penn., 850 F.2d 969 (3d Cir. 1988) 21

Escambia Cnty. v. McMillan, 466 U.S. 48 (1984) 21

Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978) 22

FTC v. O'Connell Assoc., Inc., 828 F. Supp. 165 (E.D.N.Y. 1993) 15

* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*,
-U.S.-, 130 S. Ct. 3138 (2010) 17, 25, 26

Gen. Fin. Co. v. FTC, 700 F.2d 366 (7th Cir. 1983) 16

Golden v. Zwickler, 394 U.S. 103 (1969) 21

Gov't Emps. Ins. Co. v. Rivas, 573 F. Supp. 2d 12 (D.D.C. 2008) 20

Hanes Corp. v. Millard, 531 F.2d 585 (D.C. Cir. 1976).......... 18, 19, 20

Hollingsworth v. Perry, -U.S.-, 133 S. Ct. 2652 (2013) 22

* *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).......... 25, 27, 28

I.N.S. v. Chadha, 462 U.S. 919 (1983) 33, 34

In re Aiken Cnty., -- F.3d --, 2013 WL 4054877 (D.C. Cir. 2013) 31

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 33

Japan Gas Lighter Assoc. v. Ronson Corp., 257 F. Supp. 219 (D.N.J. 1966).......... 19

Jerry T. O'Brien v. SEC, 704 F.2d 1065 (9th Cir. 1983), ... 16

Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952) 22

Leitner v. United States, 725 F. Supp. 2d 36 (D.D.C. 2010) 10

Loving v. United States, 517 U.S. 748 (1996) 38, 40

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 22, 23

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 36

Matter of Appletree Mkts., Inc., 19 F.3d 969 (5th Cir. 1994) 35

McGinn, Smith & Co., Inc. v. Fin. Indus. Regulatory Auth.,
786 F. Supp. 2d 139 (D.D.C. 2011) 12

Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270 (1941) 21

MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118 (2007) 17

Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 32, 38

Mistretta v. United States, 488 U.S. 361 (1989) 24, 39

Monsanto v. Geertson Seed Farms, 561 U.S. -, 130 S. Ct. 2743 (2010) 11

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 11

Morrison v. Olson, 487 U.S. 654 (1988) 26, 27

Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) 33

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) 20

O'Shea v. Littleton, 414 U.S. 488 (1974) 11, 14, 16

OTS v. Dobbs, 931 F.2d 956 (D.C. Cir. 1991) 16, 23

Phoenix Mut. Life Ins. Co. v. Bailey, 80 U.S. 616 (1871) 11

POM Wonderful LLC v. FTC, 894 F. Supp. 2d 40 (D.D.C. 2012) 19

Rayco Mfg. Co. v. Chicopee Mfg. Corp., 148 F. Supp. 588 (S.D.N.Y. 1957) 21

Reisman v. Caplin, 375 U.S. 440 (1964) 16

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974) 12

Sackett v. EPA, -U.S.-, 132 S. Ct. 1367 (2012) 17

Salleh v. Christopher, 85 F.3d 689 (D.C. Cir. 1996) 35

SEC v. Jerry T. O'Brien, 467 U.S. 735 (1984) 16

Shea v. OTS, 934 F.2d 41 (3d Cir. 1991) 16

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976) 23

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 35

* *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72 (D.D.C. 2009) 17, 19, 20

Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746 (7th Cir. 1987) 21, 22

Touby v. United States, 500 U.S. 160 (1991) 33

U.S. Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339 (D.C. Cir. 2012).................... 31

United States v. Mead Corp., 533 U.S. 218 (2001) 35

Wearly v. FTC, 616 F.2d 662 (3d Cir. 1980).. 16

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 11

Wilton v. Seven Falls, 515 U.S. 277 (1995).. 17, 18

XYZ Law Firm v. FTC, 525 F. Supp. 1235 (N.D. Ga. 1981) 15

Yakus v. United States, 321 U.S. 414 (1944) 33

Younger v. Harris, 401 U.S. 37 (1971).. 13

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 24

Statutes

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010)...... 3

5 U.S.C. § 104.. 29

5 U.S.C. § 105.. 29

5 U.S.C. § 553.. 5

5 U.S.C. §§ 701-706 34

5 U.S.C. § 706(2)(A).. 3

5 U.S.C. §§ 801-808 .... 5, 33

5 U.S.C. § 1211.. 39

12 U.S.C. § 16.. 32

12 U.S.C. § 243.. 32

12 U.S.C. § 481.. 36

12 U.S.C. § 483.. 36

12 U.S.C. § 1462a(i) 32

12 U.S.C. § 1755.. 32

12 U.S.C. § 1817(b) 32

12 U.S.C. § 1820 36

12 U.S.C. § 1844(c) 36

12 U.S.C. § 4512(b)(2) 39

12 U.S.C. § 4516 32

12 U.S.C. § 4517 36

12 U.S.C. § 5481(6) 4

12 U.S.C. § 5481(12) 4

12 U.S.C. § 5481(14) 4

12 U.S.C. § 5491(a) 3, 29, 34, 36

12 U.S.C. § 5491(b) 3

12 U.S.C. § 5491(c) 3

12 U.S.C. § 5491(c)(3) 2, 3, 27

12 U.S.C. § 5492 3

12 U.S.C. § 5492(c) 29

12 U.S.C. § 5493(a)(1) 3

12 U.S.C. § 5493(b)(3)(C) 34

12 U.S.C. § 5493(c)(2)(D) 34

12 U.S.C. § 5493(d)(4) 34

12 U.S.C. § 5496 32

12 U.S.C. § 5496(b) 34

12 U.S.C. § 5496(b)(3)(C) 34

12 U.S.C. § 5497(a) 30

12 U.S.C. § 5497(a)(1) 4

12 U.S.C. § 5497(a)(2) 4

12 U.S.C. § 5497(a)(2)(C) 32

12 U.S.C. § 5497(a)(5) 32

12 U.S.C. § 5497(e) 4

12 U.S.C. § 5511(a) 3, 4

12 U.S.C. § 5511(c)(4) 29

12 U.S.C. § 5511(c)(5) 29

12 U.S.C. § 5512(b)(1) 5

12 U.S.C. § 5512(b)(4)(B) 34

12 U.S.C. § 5514 36

12 U.S.C. § 5514(a) 6

12 U.S.C. § 5514(b) 6

12 U.S.C. § 5515(a) 6

12 U.S.C. § 5515(b) 6

12 U.S.C. § 5516 36

12 U.S.C. § 5517(e) 8

12 U.S.C. § 5531(a) 4

12 U.S.C. § 5531(c) 33

12 U.S.C. § 5531(d) 33

12 U.S.C. § 5532 5

12 U.S.C. § 5536(a)(1) 4

12 U.S.C. § 5562 .... 14, 15

12 U.S.C. § 5562(c) 6

12 U.S.C. § 5562(d) 6

12 U.S.C. § 5562(e) 6, 15

12 U.S.C. § 5562(f) 6

12 U.S.C. § 5563 6

12 U.S.C. § 5564 6

12 U.S.C. § 5564(a) 8

12 U.S.C. § 5564(f) 8

12 U.S.C. § 5581(b) 4

12 U.S.C. § 5581(b)(5)(B)(ii) 4

15 U.S.C. § 41 25

15 U.S.C. § 45 37

15 U.S.C. § 57b-1 15

15 U.S.C. § 57b-1(f)(1) 15

15 U.S.C. § 6102(a)(1) 5

15 U.S.C. § 6102(c)(2) 5, 8

15 U.S.C. § 6105(d) 5, 8

15 U.S.C. § 7219 32

28 U.S.C. § 2201(a) 17

42 U.S.C. § 902(a) 28

42 U.S.C. § 902(a)(1) 39

42 U.S.C. § 902(a)(3) 39

Regulations

12 C.F.R. pt. 1081 6

12 C.F.R. § 1080.8(a) 6, 15

12 C.F.R. § 1080.10 15

12 C.F.R. § 1080.10(b)(2) 15

16 C.F.R. § 2.7(d) 15

16 C.F.R. pt. 310 .... 5, 9

75 Fed. Reg. 48,458 (Aug. 10, 2010) 9

Rules

Fed. R. Civ. P. 12(b)(1) 10, 11

Fed. R. Civ. P. 12(b)(6) 10, 11, 12, 13

Fed. R. Civ. P. 26 17

Fed. R. Civ. P. 56(a) 10

Fed. R. Evid. 201 7

Other Authorities

3 J. Stein, G. Mitchel & B. Mezines, Administrative Law § 21.01[1] 16

10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) 18, 19

S. Rep. No. 103-221 (1994) 28

S. Rep. No. 111-176 (2010) 3

The Federalist No. 48 (J. Cooke ed. 1961) 38

U.S. Const. art. III, § 2 22

INTRODUCTION

After the Consumer Financial Protection Bureau (CFPB or Bureau) advised Morgan Drexen that it was considering filing an enforcement action against the company, Morgan Drexen, joined by Kimberly Pisinski, filed this action against the Bureau for declaratory and injunctive relief. Plaintiffs raise a single constitutional claim—that the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that establish the Bureau violate the separation of powers.

This Court should decline to exercise jurisdiction in this case. On August 20, 2013, the Bureau filed an enforcement action against Morgan Drexen in the U.S. District Court for the Central District of California. *CFPB v. Morgan Drexen*, No. 8:13-cv-1267. Notwithstanding Morgan Drexen's efforts to beat the Bureau to the courthouse, it is in the enforcement action that Morgan Drexen should be required to present its constitutional claims. Morgan Drexen can obtain complete relief on its constitutional challenge by seeking dismissal of that action. Moreover, that court can consider Morgan Drexen's non-constitutional defenses to the Bureau's action (which are not presented here), and, if it finds them to be meritorious, can grant Morgan Drexen relief without needing to rule on the separation-of-powers question. Nor does the Bureau's now-completed investigation justify this Court's exercise of equity powers, because the Bureau's civil investigative demands—enforceable only through court actions—cannot cause the type of irreparable harm that equitable or declaratory relief is designed to redress. For these reasons, and because Plaintiffs have made no effort to demonstrate Pisinski's standing to maintain this action, the Court should dismiss the complaint without reaching the merits of Plaintiffs' constitutional claim.

If the Court decides to reach the merits, it should nonetheless grant the Bureau's motion because the provisions of the Dodd-Frank Act establishing the Bureau comply with the constitutional separation of powers. Plaintiffs' constitutional claim rests on the Bureau's supposed lack of adequate accountability to the three branches of government. In reality, however, the Dodd-Frank Act preserves each branch's constitutional role in overseeing the Bureau's work. For starters, the Act preserves the President's authority to remove the head of the Bureau for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This broad "for-cause" removal power has consistently been held to preserve the President's executive authority over independent agencies like the Bureau. That authority is in no way diminished by Congress's decision to make the head of the Bureau a single director rather than a multimember commission.

Similarly, the Act does not impinge Congress's "power of the purse" by providing the Bureau a funding source outside of the annual appropriations process (just as other financial regulators have). And Congress retains the full panoply of legislative and oversight authorities through which it can hold the Bureau accountable for its actions.

The Bureau's final actions are also subject to judicial review under the Administrative Procedure Act. Federal courts thus have authority to review and, if necessary, set aside the Bureau's actions to the same extent, and on the same terms, as virtually every other federal regulatory agency.

Finally, Plaintiffs' request that this Court find a new separation-of-powers restriction that is tailored uniquely to the Bureau's structure and authorities has no basis. Plaintiffs complain about the Bureau's broad powers, but even if the scope of the Bureau's powers were relevant to the separation-of-powers inquiry, Plaintiffs utterly fail to show that the Bureau's authority is out

of step with that exercised by other federal regulatory agencies. Plaintiffs' other claim—that the Constitution *compels* a commission or board structure for the Bureau—is completely unmoored not only from precedent, but also from any separation-of-powers principle. Indeed, if anything, the separation of powers suggests that the policymaking judgment as to how the leadership of the Bureau should be structured falls squarely within Congress's ken.

BACKGROUND

A. The Bureau's Structure, Jurisdiction, and Powers

The Bureau is the principal federal agency charged with "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). Before the Bureau's creation, these laws were administered by "seven different federal regulators," a situation that Congress believed "undermine[d] accountability" and produced regulatory gaps that contributed to the recent financial crisis. S. Rep. No. 111-176, at 9-10 (2010). To address that problem, Congress passed and the President signed the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Title X of that Act establishes the Bureau as an "independent bureau" within the Federal Reserve System, 12 U.S.C. § 5491(a), with the responsibility for "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive," *id.* § 5511(a).

The Bureau's Structure and Funding. The Bureau is headed by a Director, who is appointed for a five-year term by the President with the advice and consent of the Senate. *Id.* § 5491(b), (c). The President has the authority to remove the Director for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). The Director is responsible for conducting the Bureau's affairs and managing its employees. *Id.* §§ 5492; 5493(a)(1).

The Dodd-Frank Act funds the Bureau's operations by authorizing the Bureau to receive an allocation from the Federal Reserve System's earnings. *Id.* § 5497(a)(1). By statute, that allocation is limited to 12 percent of the total 2009 operating expenses of the Federal Reserve System—or $597.6 million in the current fiscal year—subject to an annual adjustment for inflation. *Id.* § 5497(a)(2); Semi-Annual Report of the Consumer Financial Protection Bureau, July 1, 2012–December 31, 2012 77 (Mar. 2013) ("March 2013 Semi-Annual Report"), *available at* http://files.consumerfinance.gov/f/201303_CFPB_SemiAnnualReport_March 2013.pdf. If additional funds are needed "to carry out the authorities of the Bureau," the Director must seek appropriations from Congress. 12 U.S.C. § 5497(e).

The Bureau's Jurisdiction. The Dodd-Frank Act transferred to the Bureau certain consumer financial protection functions previously exercised by one or more of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the former Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Trade Commission (FTC), the National Credit Union Administration, and the Department of Housing and Urban Development. *See id.* §5581(b). The Bureau is now responsible for implementing "Federal consumer financial law." *See Id.* § 5511(a). This body of law includes 18 pre-existing statutes, collectively known as "enumerated consumer laws." *Id.* § 5481(12), (14).

Federal consumer financial law also includes Title X itself. *See id.* § 5481(14). Title X prohibits "covered persons" (in the main, providers of consumer financial products and services, *see id.* § 5481(6)) and their "service provider[s]" from "engag[ing] in any unfair, deceptive, or abusive act or practice" in violation of Title X or from violating, or offering or providing consumers with a financial product or service not in conformity with, Federal consumer financial

law. *Id.* §§ 5531(a), 5536(a)(1). Title X also authorizes the Bureau to adopt rules requiring "full[], accurate[], and effective[]" disclosures to consumers, *id.* § 5532, and ensuring consumers' access to other information in covered persons' control or possession, *id.* § 5533.

The Bureau also has the authority to enforce certain FTC rules. Specifically, the Bureau may enforce FTC rules concerning "unfair or deceptive act[s] or practice[s] to the extent that such rule[s] appl[y] to a covered person or service provider with respect to the offering or provision of a consumer financial product or service." *Id.* § 5581(b)(5)(B)(ii). The Bureau also may enforce the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act) "with respect to the offering or provision of a consumer financial product or service." 15 U.S.C. § 6105(d). The Telemarketing Act generally prohibits "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," *id.* § 6102(a)(1), and has been implemented by the FTC through the Telemarketing Sales Rule (TSR), 16 C.F.R. part 310, which the Bureau is also authorized to enforce, 15 U.S.C. § 6102(c)(2).

The Bureau's Powers. Title X grants the Bureau rulemaking, supervision, and enforcement powers.

Rulemaking. The Bureau has the authority to adopt regulations to administer Federal consumer financial law. 12 U.S.C. § 5512(b)(1). In issuing rules, the Bureau must comply with the same rulemaking procedures that generally apply to federal agencies under the Administrative Procedure Act (APA), *see* 5 U.S.C. § 553, as well as other statutes governing agency rulemaking activities, such as the Congressional Review Act, *id.* §§ 801-808. The Bureau's rules are subject to APA review in federal district courts, and may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

Supervision. Supervision, a common tool in financial regulation, refers generally to a "sovereign's supervisory powers over corporations" and includes "any form of administrative oversight that allows a sovereign to inspect books and records on demand." *Cuomo v. The Clearing House Ass'n, LLC*, 557 U.S. 519, 535 (2009). The Bureau has "exclusive authority" to supervise very large depository institutions and credit unions (*i.e.*, those with assets of over $10 billion), as well as their affiliates, for assessing compliance with Federal consumer financial law and for related purposes. 12 U.S.C. § 5515(a), (b). The Bureau also has authority to supervise certain nondepository covered persons. *Id.* § 5514(a), (b).

Enforcement. The Bureau also may conduct investigations and bring enforcement actions. When conducting investigations, the Bureau may issue civil investigative demands (CIDs), a form of administrative subpoena that may direct the recipient to produce documents or other materials or to provide information or oral testimony. *Id.* § 5562(c). A CID recipient may petition the Director to modify or set aside the CID, and the CID is unenforceable while such a petition is pending. *Id.* § 5562(f). Materials submitted in response to a CID are considered confidential, *id.* § 5562(d), and a recipient may withhold responsive material based on a "claim of privilege," 12 C.F.R. § 1080.8(a). Title X does not impose a fine or penalty for failure to comply with a CID. Rather, in the event of noncompliance, the Bureau may file a petition in federal district court seeking enforcement of the CID. 12 U.S.C. § 5562(e).

The Bureau may bring an enforcement action in either of two forums. First, the Bureau may bring an administrative proceeding before an administrative law judge. *Id.* § 5563; *see also* 12 C.F.R. part 1081. The administrative law judge's recommended decision in the proceeding is subject to review by the Director, whose final decision is subject to judicial review. *Id.* § 5563.

Second, the Bureau may bring an enforcement action by filing a civil action in federal district court. *Id.* § 5564.

B. The Bureau's Investigation of Morgan Drexen

In early 2012, the Bureau began investigating Morgan Drexen for possible violations of the TSR, the Dodd-Frank Act, and other laws. *See* Morgan Drexen Complaint, Dckt. #1 (Compl.) ¶¶ 39, 44. On March 13, 2012, the Bureau issued a CID to Morgan Drexen, seeking records related to its debt settlement business. Compl. ¶¶ 39, 40; Declaration of Randal M. Shaheen, Dckt. #3-5, (Shaheen Decl.) Ex. 1. Over the course of its investigation, the CFPB sought records from third parties and "deposed various officers of Morgan Drexen, including its Chief Executive Officer, Walter Ledda."[1] Compl. ¶ 41; *see also* Shaheen Decl. ¶¶ 34-37.

On April 22, 2013, consistent with Bureau practice, the Bureau advised Morgan Drexen that it was "considering enforcement action" against the company and Ledda.[2] On May 8, 2013, Morgan Drexen responded with a written submission making factual, statutory, and First Amendment arguments for why the Bureau should not file an enforcement action against it. Compl. ¶¶ 46-47; *see also* Shaheen Decl. ¶ 39 & Ex. 33.

On July 23, 2013, Morgan Drexen, joined by Pisinski, (together, "Plaintiffs") filed this lawsuit, claiming that "Title X of the Dodd-Frank Act violates the Constitution's separation of powers." Compl. ¶ 120. Plaintiffs seek a declaration that "the provisions of the Dodd-Frank Act

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[1] In 2005, Mr. Ledda, who previously ran a debt relief company called National Consumer Council, Inc., entered into a settlement agreement with the FTC, whereby he consented to be permanently enjoined from violating the TSR, including any amendments to the TSR. *See Federal Trade Commission v. National Consumer Council, Inc.*, 8:04-cv-474 (C.D. Cal. Mar. 30, 2005) (Dckt. #197). The Bureau requests that the Court take judicial notice of this final order pursuant to Federal Rule of Evidence 201.

[2] Compl. ¶ 43; Shaheen Decl. ¶ 38 & Ex. 32. The Bureau advised Morgan Drexen pursuant to its "Notice and Opportunity to Respond and Advise" process. *See* CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise (NORA), *available at* http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf.

creating and empowering the CFPB" are unconstitutional, as well as injunctive relief. Compl. at 20. They also purport to reserve certain arguments, "in the event that the CFPB is found to be constitutional," including the arguments that applying "the TSR to attorneys engaged in the practice of law violates the Tenth Amendment and [12 U.S.C. § 5517(e)]"; that the CFPB has acted in excess of its statutory jurisdiction; and that the CFPB is acting in an arbitrary and capricious manner. Compl. at 20.

On August 20, 2013, acting pursuant to its authority under 12 U.S.C. § 5564(a) and 15 U.S.C. §§ 6102(c)(2) and 6105(d), the Bureau filed a complaint (CFPB Complaint) against Morgan Drexen and Ledda in the U.S. District Court for the Central District of California, the "district in which [Morgan Drexen] is located."[3] 12 U.S.C. § 5564(f). The CFPB Complaint brings claims for violations of the TSR and the Dodd-Frank Act's prohibition on deceptive acts or practices and seeks injunctive relief, consumer redress, and civil money penalties. CFPB Complaint ¶¶ 74-100.

The CFPB Complaint alleges the following: In 2007, Mr. Ledda founded Morgan Drexen. CFPB Complaint ¶ 7. At the time, many state laws regulating debt relief services provided an exemption for attorneys. *Id.* To take advantage of these exemptions, Morgan Drexen began employing the "Attorney Model" of debt relief services, whereby consumers contracted directly with attorneys affiliated with Morgan Drexen ("Network Attorneys") for debt relief services and paid those attorneys up-front fees in advance of any debt settlement. *Id.* ¶ 8. Morgan Drexen actually performed the work on behalf of the consumers, however, and most of the up-front fees paid to the attorneys were transferred to Morgan Drexen. *Id.* ¶¶ 9-10.

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[3] *See Consumer Financial Protection Bureau v. Morgan Drexen, Inc. et al.*, 8:13-cv-01267 (C.D. Cal.) (Dckt #1) (attached to the Notice filed by the CFPB on August 20, 2013, Dckt. #14-1). Defendant requests that the Court take judicial notice of the CFPB Complaint pursuant to Federal Rule of Evidence 201(b)(2).

In October 2010, the FTC amended the TSR to, among other things, prohibit debt relief companies engaged in telemarketing from requesting or receiving up-front fees "before renegotiating, settling, reducing, or otherwise altering the terms of a least one of a consumer's debts."[4] *Id.* ¶ 11. The amended TSR does not exempt attorneys from this prohibition. *Id.*

The CFPB Complaint alleges that at about the time these amendments became effective, Morgan Drexen changed its business model again, adopting the "Dual Contract Model," which the CFPB Complaint alleges "is designed to disguise consumers' up-front payments for debt relief services provided by Morgan Drexen as payments for bankruptcy-related work purportedly performed by Network Attorneys." *Id.* ¶ 13-14. In particular, the CFPB Complaint alleges that consumers are charged significant up-front fees after signing up for Morgan Drexen's debt relief program. Although these fees are purportedly for bankruptcy related services, the Bureau alleges, "[b]y the bankruptcy contract's own limited scope, little to no bankruptcy work is performed for consumers." *Id.* ¶¶ 42-53.

The CFPB Complaint further alleges that Morgan Drexen, in advertising its debt relief services, tells consumers that they can "[e]liminate [their] debt" without paying any up-front fees. *Id.* ¶¶ 17, 19. But in reality, the CFPB Complaint alleges, Morgan Drexen not only charged up-front fees but also failed to renegotiate, settle, reduce, or otherwise alter even a single debt for the "vast majority of consumers." *Id.* ¶ 59.

C. Kimberly Pisinski

Plaintiff Kimberly Pisinski is an attorney admitted to practice law in Connecticut. Declaration of Kimberly A. Pisinki, Dckt. #3-3, (Pisinski Decl.) ¶ 1. According to Pisinski, Morgan Drexen has notified her that the Bureau sought documents from it relating to Pisinski's

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[4] *See* 75 Fed. Reg. 48,458 (Aug. 10, 2010) (codified at 16 C.F.R. part 310).

clients. *Id.* ¶ 4. Pisinski asserts she has not authorized Morgan Drexen to produce these documents, which she believes are subject to the attorney-client privilege. *Id.* ¶ 5.

ARGUMENT

I. The Legal Standard

A court must dismiss a case pursuant to Federal Rule of Civil Procedure 12(b)(1) when it lacks subject matter jurisdiction. In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). Although factual allegations must be "construed with sufficient liberality to afford all possible inferences favorable to the pleader[,] . . . it remains the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence." *Leitner v. United States*, 725 F. Supp. 2d 36, 41 (D.D.C. 2010) (internal citations and quotations omitted).

A court must dismiss a case pursuant to Federal Rule of Civil Procedure 12(b)(6) when the complaint "fail[s] to state a claim upon which relief can be granted." When a plaintiff seeking declaratory and injunctive relief has an "adequate remedy at law for the asserted violation of his constitutional rights," the claim must be "dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Leitner*, 725 F. Supp. 2d at 43.

A court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facial challenges,

such as Plaintiffs' challenge here, do not normally depend upon factual findings. *See Daskalea v. Wash. Humane Soc'y*, 577 F. Supp. 2d. 82, 87 (D.D.C. 2008).

II. The Court Should Dismiss the Complaint Without Addressing the Merits

This litigation should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) without addressing the merits of Plaintiffs' claim because neither Plaintiff has demonstrated—nor could demonstrate—the right to have this Court grant injunctive or declaratory relief. Morgan Drexen should raise its arguments as a defense to the pending enforcement action against it, and Pisinski has not satisfied her burden of showing that she has standing to maintain this action.

A. Morgan Drexen Is Not Entitled to Injunctive or Declaratory Relief

1. Morgan Drexen is not entitled to injunctive relief because it has an adequate remedy at law and will not suffer irreparable harm

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto v. Geertson Seed Farms*, 561 U.S. —, 130 S. Ct. 2743, 2761 (2010) (citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 311-312 (1982)). "It is a 'basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)) (internal alteration omitted); *see also Monsanto*, 130 S. Ct. at 2756. Indeed, the Supreme Court has long recognized that "[w]here a party, if his theory of the controversy is correct, has a good defence at law to 'a purely legal demand,' he should be left to that means of defence, as he has no occasion to resort to a court of equity for relief." *Phoenix Mut. Life Ins. Co. v. Bailey*, 80 U.S. 616, 623 (1871); *see also O'Shea*, 414 U.S. at 502.

Neither the Bureau's enforcement action nor its (now-completed) investigation threatens Morgan Drexen with irreparable harm that would entitle it to injunctive relief.

a. Morgan Drexen is not entitled to an order enjoining the Bureau's enforcement action

Morgan Drexen has an adequate remedy at law for any injury caused by the Bureau's enforcement action: It can move to dismiss the Bureau's lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(6). Furthermore, requiring Morgan Drexen to raise its constitutional challenge as a defense to the pending enforcement action will not cause it irreparable harm. "[C]ourts have uniformly recognized that '[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *McGinn, Smith & Co., Inc. v. Fin. Indus. Regulatory Auth.*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)). Accordingly, Morgan Drexen's request to enjoin the Bureau's enforcement of the law should be denied.

The D.C. Circuit's decision in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), is instructive in this regard. In that case, an independent counsel appointed under the Ethics in Government Act was investigating a former White House official, Michael Deaver, for possibly illegal lobbying activities. Before any indictment issued, Deaver filed a civil complaint challenging the independent counsel provisions of the Ethics in Government Act on separation-of-powers grounds. *Id.* at 66-67. Deaver sought a declaratory judgment and an injunction barring the independent counsel from obtaining an indictment, alleging that without such relief he would suffer irreparable harm in the form of "'continuing destruction of his business,' 'injury to his reputation and dignity,' and 'the expenditure of substantial resources in his defense.'" *Id.* at 67-68. The D.C. Circuit directed dismissal of the complaint, reasoning that Deaver could raise his constitutional claims through a motion to dismiss any eventual criminal prosecution. He

could not, however, "by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *Id.* at 71; *see also id.* at 71-73 (Ginsburg, D.H., concurring) (relying on the principle that "'courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief'" (quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971))).

The court's holding was based on two principal considerations, both of which apply equally in the civil context. First, the court observed that permitting Deaver to bring as a separate action what was, in effect, an anticipatory affirmative defense to the prosecution would frustrate the "final judgment rule" by permitting Deaver to appeal an adverse decision directly in the ancillary equitable proceeding, instead of awaiting a trial and conviction on the merits in the primary proceeding before seeking review. *Id.* at 70. This concern is equally applicable here, where Morgan Drexen likely would not be able to immediately appeal the denial of any motion to dismiss the Bureau's enforcement action.[5]

Second, the Court reasoned that permitting Deaver to litigate his constitutional defense in a separate action would contravene the well-established principle that courts should "avoid constitutional questions if at all possible"; because Deaver could be "acquitted of the charges brought against him," the court might be able to avoid "decid[ing] th[e] constitutional issue." *Id.* at 71 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936)). Again, the concern is equally applicable here. Should Morgan Drexen successfully move to dismiss the action pending in the U.S. District Court for the Central District of California based on one of the defenses its purports to reserve (or any other available defense), that court would be able to avoid

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[5] *See Am. Fed. of Gov't Emps. Local 1 v. Stone,* 502 F.3d 1027, 1039-40 (9th Cir. 2007) (citing the "general rule that defendants are not entitled to interlocutory appellate review of a district court's denial of a Rule 12(b)(6) motion").

the constitutional issue raised in this litigation. Accordingly, Morgan Drexen's complaint for injunctive relief should be dismissed for the same reasons the D.C. Circuit directed dismissal of Deaver's constitutional challenge.

b. Morgan Drexen is not entitled to an order enjoining the Bureau's now-completed investigation

Morgan Drexen's claim that the Bureau's issuance of CIDs to its business partners caused it harm, *see* Plaintiffs' Mem. of Points and Authorities in Support of Mot. for Summary Judgment, Dckt. #13-2 (Pl. Mem.) at 7, likewise cannot serve as a basis for granting equitable relief. "Even if a plaintiff has suffered past harm from the kind of conduct the suit seeks to enjoin, the plaintiff must 'establish a real and immediate threat' that the harm-producing conduct will recur." *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1280 (D.C. Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). There is no prospect that the Bureau will issue any further CIDs to any of Morgan Drexen's business partners: The Bureau may issue CIDs related to the subject of an investigation only "*before* the institution of any proceedings under Federal consumer financial law." 12 U.S.C. § 5562 (emphasis added). Morgan Drexen also has not shown that an injunction would redress any past harm it claims to have suffered, or that it could not obtain such redress by pressing its constitutional challenge as a defense to the Bureau's enforcement action. Accordingly, the Bureau's issuance of CIDs does not entitle Morgan Drexen to the equitable relief it seeks.

Likewise, Morgan Drexen's assertion that the Bureau has "substantially burdened [its] business by demanding that it produce documents that are protected by the attorney-client privilege," Pl. Mem. at 7, does not "'establish the basic requisites of the issuance of equitable relief . . .—the likelihood of substantial and immediate irreparable injury.'" *Lyons*, 461 U.S. at 103 (quoting *O'Shea*, 414 U.S. at 502). As an initial matter, recipients of Bureau CIDs may

assert any applicable privilege, including the attorney-client privilege, in response to any such demand. *See* 12 C.F.R. § 1080.8(a). Indeed, Instruction D of the CID that the Bureau sent Morgan Drexen advised the company of its right to assert any applicable privilege. *See* Shaheen Decl. Ex. 1 at 3. More fundamentally, Bureau CIDs can never impose irreparable harm because they are not self-enforcing. The Bureau may not impose sanctions for failing to comply with a CID, but instead must petition a district court for an order enforcing the CID. *See* 12 U.S.C. § 5562(e); 12 C.F.R. § 1080.10. The CID recipient faces sanctions only if it fails to comply with the court's order. *See* 12 C.F.R. § 1080.10(b)(2).

Indeed, the Bureau's authority to issue CIDs is modeled on that of the FTC, *compare* 12 U.S.C. § 5562 *with* 15 U.S.C. § 57b-1, and courts have repeatedly recognized that FTC "CIDs are not self-enforcing. Having received a CID, a respondent may either petition the FTC for an order modifying or setting aside the demand, or simply decline to respond." *FTC v. O'Connell Assoc., Inc.*, 828 F. Supp. 165, 168 (E.D.N.Y. 1993) (citing 15 U.S.C. § 57b–1(f)(1); 16 C.F.R. § 2.7(d)). If the party declines to respond, "the [FTC] must bring suit in federal court for enforcement. There, the CID defendant may raise such objections and defenses to enforcement as it may have." *XYZ Law Firm v. FTC*, 525 F. Supp. 1235, 1236 (N.D. Ga. 1981) (internal citations omitted). The Bureau's CIDs operate in the same way.[6]

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[6] Contrary to Plaintiffs' contention (Pl. Mem. at 5), words like "demand," "[a]ction [r]equired," and "must" in the March 2012 CID do not suggest otherwise. The CID sets forth what the Bureau "demand[s]" and "require[s]"; it does not indicate that the Bureau may enforce those demands and requirements without going to court. Likewise, the statement in the CID that noncompliance "may" subject recipients to a "penalty imposed by law" is simply a reference to the Bureau's regulation on this subject, which provides that the Bureau may "[s]eek civil contempt or other appropriate relief in cases where a court order enforcing a civil investigative demand has been violated." 12 C.F.R. § 1080.10(b)(2). Indeed, the FTC CIDs contain similar language. *See, e.g.,* Exhibit 1 to FTC Denial of Petition to Quash CID issued to Countrywide Periodicals, LLC, *available at* http://www.ftc.gov/os/quash/X080036countrywideorderdenyingpetitiontoquash.pdf.

Given the nature of the Bureau's CIDs, Morgan Drexen would not be entitled to an injunction of the Bureau's investigation even if it were still ongoing. Courts have routinely rejected attempts to bring pre-enforcement challenges to agency subpoenas or civil investigative demands that are not self-enforcing. Demonstrating the truth of the Supreme Court's observation that "case or controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief,'"[7] some courts have dismissed such suits for lack of jurisdiction,[8] while others have done so for lack of equity.[9] However framed, the law is clear that the mere receipt of a CID does not entitle the recipient (or any other interested third party)[10] to injunctive relief because the CID enforcement action would provide a "full opportunity for judicial review before any coercive sanction may be imposed." *Reisman*, 375 U.S. at 450.

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[7] *Lyons*, 461 U.S. at 103 (quoting *O'Shea*, 414 U.S. at 499).

[8] *See OTS v. Dobbs*, 931 F.2d 956, 958 (D.C. Cir. 1991) ("What Dobbs is requesting in this case is protection from future attempts to enforce the subpoena—attempts that may not even occur and, if they do, will provide their own opportunity for review. Thus, no live controversy exists."); *Shea v. OTS*, 934 F.2d 41, 45 (3d Cir. 1991) ("'Since agencies lack the power to enforce their own subpoenas, they must apply to the district courts for enforcement. Only then may substantive or procedural objections to the subpoena be raised for judicial determination.'" (quoting 3 J. Stein, G. Mitchell, & B. Mezines, Administrative Law § 21.01[1] at 21-4.)); *Gen. Fin. Co. v. FTC*, 700 F.2d 366, 372 (7th Cir. 1983) (dismissing pre-enforcement challenge to FTC civil investigative demands for lack of subject matter jurisdiction); *Wearly v. FTC*, 616 F.2d 662, 667-68 (3d Cir. 1980) (dismissing pre-enforcement challenge to FTC subpoena on ripeness grounds).

[9] *See Reisman v. Caplin*, 375 U.S. 440, 450 (1964) (dismissing suit for declaratory or injunctive relief challenging agency subpoenas that could only be enforced by district courts on the ground that the action for enforcement of the subpoena would provide a "full opportunity for judicial review before any coercive sanction may be imposed"); *Jerry T. O'Brien v. SEC,* 704 F.2d 1065, 1069 (9th Cir. 1983), *rev'd on other grounds SEC v. Jerry T. O'Brien,* 467 U.S. 735, (1984); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 648-50 (5th Cir. 1977).

[10] Objections to a CID may be made by the recipient or by any interested intervenor. *See Reisman*, 375 U.S. at 449 (noting that third parties may seek to intervene in summons enforcement actions to protect their interests); *Jerry T. O'Brien*, 467 U.S. at 748 & n.19 (same).

Of course, here, the Bureau has not sought enforcement of any civil investigative demand, but instead has filed a lawsuit to enforce the TSR and the Dodd-Frank Act's prohibition of deceptive acts or practices. And, to the extent the CFPB seeks further records through civil discovery in that action, Morgan Drexen will be able to raise any objections in that court. *See* Fed. R. Civ. P. 26. In these circumstances, Morgan Drexen cannot rely on the existence of outstanding civil investigative demands to demonstrate its entitlement to injunctive relief.[11]

2. Morgan Drexen is not entitled to declaratory relief

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). As the emphasized language suggests, "[t]his language is permissive, not mandatory: even when a suit otherwise satisfies subject matter jurisdictional prerequisites, the Act gives courts discretion to determine 'whether and when to entertain an action.'" *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 76 (D.D.C. 2009) (quoting *Wilton v. Seven Falls,* 515 U.S. 277, 282 (1995)); *see also MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 136 (2007) (stating that the use of the permissive "may" in the Declaratory Judgment Act "has long been understood 'to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants'" (quoting *Wilton*, 515 U.S. at 286)).

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[11] Unlike Morgan Drexen, the plaintiffs in both *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, —U.S.—, 130 S. Ct. 3138 (2010), and *Sackett v. EPA*, —U.S.—, 132 S. Ct. 1367 (2012), were subject to sanctions for their failure to comply with agency orders, and they had no other adequate avenue for judicial review of their claims. *See Free Enter. Fund,* 130 S. Ct. at 3150-51 (noting that the plaintiff accounting firm would have "incur[red] a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony" while awaiting enforcement of the requests); *Sackett*, 132 S. Ct. at 1372 ("[T]he Sacketts cannot initiate [the enforcement action], and each day they wait for the agency to drop the hammer, they accrue, by the government's telling, an additional $75,000 in potential liability."). Accordingly, these cases do not support Morgan Drexen's entitlement to injunctive relief.

The key consideration for courts exercising their discretion under the Declaratory Judgment Act is the practical utility of declaratory relief. Thus, "[i]f a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, [the court need not] proceed to the merits before . . . dismissing the action." *Wilton*, 515 U.S. at 288; *see also Hanes Corp. v. Millard*, 531 F.2d 585, 592 (D.C. Cir. 1976) ("'[T]he declaration is an instrument of practical relief and will not be issued where it does not serve a useful purpose.'" (quoting E. Borchard, *Declaratory Judgments* 307 (2d ed. 1941))).

Providing declaratory relief here would "serve no useful purpose." *Wilton*, 515 U.S. at 288. The purpose of declaratory relief is to allow one potentially liable for a violation of law "to know in advance [of the adverse party's affirmative litigation] whether he may legally pursue a particular course of conduct." *Hanes*, 531 F.2d at 592; *see also* 10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) ("The remedy made available by the Declaratory Judgment Act . . . is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued."). Morgan Drexen is not seeking to determine the legality of a course of conduct so that it may, depending on the court's resolution of the issue, either proceed with confidence that damages are not accruing, or change its behavior. *Hanes*, 531 F.2d at 592. Indeed, it has specifically asked the Court *not* to decide whether its conduct is legal. *See* Compl. at 20. As a result, granting the requested declaration would tell Morgan Drexen nothing about whether its conduct violates the law. "The classic and most persuasive reason for granting a declaration . . . is therefore absent from this case." *Hanes*, 531 F.2d at 592.

Further, even if the requested declaration did relate to Morgan Drexen's potential liability, it would still not be "useful" to provide declaratory relief here because any issues

relating to the legality of Morgan Drexen's conduct may be resolved in the litigation now pending in the U.S. District Court for the Central District of California. This is not a case where declaratory relief would "relieve[] potential defendants 'from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never.'" 10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) (quoting *Japan Gas Lighter Assoc. v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966)). The thread has been severed; the suit has been filed; and all of the legal issues that bear on Morgan Drexen's liability, including the constitutional issue that Plaintiffs raise here, can be resolved (if necessary) in that litigation.

Indeed, the events leading up to this case reveal that the only conceivable purpose for bringing this action is an inappropriate one. After being advised of possible enforcement action by the Bureau, Morgan Drexen brought suit seeking "an anticipatory adjudication, at the time and place of its choice, of the validity of the defenses it expect[ed] to raise against . . . claims it expect[ed] to be pressed against it." *Hanes*, 531 F.2d at 592. But "[t]he anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse." *Id.* at 592-93; *see also Swish Mktg.*, 669 F. Supp. 2d at 77; *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44-45 (D.D.C. 2012). Indeed, "'[c]ourts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum.'" *Swish Mktg.*, 669 F. Supp. 2d at 78 (quoting *AmSouth Bank v. Dale*, 386 F.3d 763, 788 (6th Cir. 2004)). As the Court in *Swish Marketing* put it: "Where a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff [its] choice of forum—a

guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act." *Swish Mktg.*, 669 F. Supp. 2d at 79 (quoting *Gov't Emps. Ins. Co. v. Rivas*, 573 F. Supp. 2d 12, 15 (D.D.C. 2008)). The absence of any reason to entertain Morgan Drexen's request for declaratory relief is a sufficient basis to deny the request.

Declaratory relief should also be denied because granting the requested declaration would not "finally settle the controversy between the parties." *Hanes,* 531 F.2d at 592 n.4. The Court cannot assume, in applying this factor, "that it will resolve the merits of [Morgan Drexen's] complaint in the company's favor." *Swish Mktg.*, 669 F. Supp. 2d at 77. If the Bureau were to prevail on the constitutional issue, the parties would still have to litigate whether Morgan Drexen violated the law, as well as all of the affirmative defenses it purports to reserve. *See* Compl. at p.20. Accordingly, "[t]his factor . . . cuts against the exercise of jurisdiction." *Swish Mktg.*, 669 F. Supp. 2d at 78.

Furthermore, courts must consider "whether other remedies are available or other proceedings pending" in which the claims may be resolved. *Hanes*, 531 F.2d at 592 n.4. Here,

> [Morgan Drexen] will be able to raise in the [Central] District of California the same arguments it has pursued in this action. 'Where a pending coercive action, filed by the natural plaintiff, would encompass all the issues in the declaratory judgment action, the policy reasons underlying the creation of the extraordinary remedy of declaratory judgment are not present, and the use of that remedy is unjustified.' Such is the case here.

Swish Mktg., 669 F. Supp. 2d at 80 (quoting *AmSouth Bank*, 386 F.3d at 787).

Finally, courts exercising their discretion under the Declaratory Judgment Act must be "keenly mindful . . . that judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty [the courts are] called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). Generally, courts "'will not decide a constitutional question if there is

some other ground upon which to dispose of the case.'" *Id.* (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984)). Requiring Morgan Drexen to raise its constitutional arguments as a defense to the Bureau's enforcement action may, if Morgan Drexen prevails on some statutory ground, obviate the need to address the constitutional question. Accordingly, because the controversy between the parties may be resolved on other grounds, the constitutional issue presented here is not of "sufficient immediacy" to warrant declaratory relief. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

3. *The first-to-file rule does not entitle Morgan Drexen to declaratory or injunctive relief*

That Morgan Drexen won the "race to the courthouse" by filing its complaint first does not entitle it to declaratory or equitable relief. *See Deaver*, 822 F.2d at 71 (dismissing for lack of equity a suit filed before the government initiated its prosecution). The D.C. Circuit has warned against the "mechanical application" of the so-called "first-filed rule," cautioning that "countervailing equitable considerations, where present, cannot be ignored." *Columbia Plaza Corp. v. Sec. Nat'l Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975). Accordingly, courts have rejected similar attempts to use this principle "to preempt an imminent . . . enforcement action," noting that such conduct "create[s] 'a lamentable spectacle' [that is] 'tantamount to the blowing of a starter's whistle in a foot race.'" *EEOC v. Univ. of Penn.*, 850 F.2d 969, 978 (3d Cir. 1988) (quoting *Rayco Mfg. Co. v. Chicopee Mfg. Corp.*, 148 F. Supp. 588, 592 (S.D.N.Y. 1957)); *accord Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 551-52 (6th Cir. 2007) (reversing district court's application of the first-to-file rule in favor of an "anticipatory suit"); *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 (7th

Cir. 1987) ("The federal declaratory judgment is not a prize to the winner of the race to the courthouse.") (quoting *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2d Cir. 1978)).

Indeed, "'[c]ases construing the interplay between declaratory judgment actions and suits based on the merits of underlying substantive claims create, in practical effect, a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit.'" *Certified Restoration Dry Cleaning Network*, 511 F.3d at 552 (quoting *AmSouth Bank*, 386 F.3d at 791 n.8). Rewarding Plaintiffs' conduct with an adjudication on the merits would not be consistent with the equitable principles that govern "wise judicial administration." *Columbia Plaza*, 525 F.2d at 627 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). Rather, it would result in piecemeal litigation of this case, delay the complete resolution of the parties' dispute, and encourage "an unseemly race to the courthouse, and quite likely, numerous unnecessary suits." *Tempco*, 819 F.2d at 750.

B. Pisinski Lacks Standing to Challenge the Bureau's Constitutionality

For the reasons discussed above, Plaintiff Morgan Drexen has no right to the relief sought in this lawsuit. Plaintiff Pisinski's claims should be dismissed not only for lack of equity, but also for the more foundational reason that she lacks standing to bring this case.

Article III of the Constitution limits federal courts' authority to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2. "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have 'standing.'" *Hollingsworth v. Perry*, —U.S.—, 133 S. Ct. 2652, 2659 (2013). To establish standing, plaintiffs must first show that they have suffered an "injury in fact," that is, the violation of a legally protected interest that is "(a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted). Second, "there must be a causal

connection between the injury and the conduct complained of." *Id.* Third, it must be "likely" that the injury would be "redressed by a favorable decision." *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Where a plaintiff is seeking declaratory or injunctive relief, she "must show [s]he is suffering an ongoing injury or faces an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011).

Plaintiffs' memorandum makes no argument in support of Pisinski's standing, *see* Pl. Mem. at 4-7, nor is there any ground for finding that she has standing. She states in her declaration that she would suffer injury if Morgan Drexen were forced to comply fully with the Bureau's CIDs, which she claims seek information subject to the attorney-client privilege. Pisinski Decl. ¶¶ 4, 10. But the Bureau itself informed Morgan Drexen of its right to assert any applicable privilege in response to the CID. *See* Shaheen Decl. Ex. 1 at 3, Ex. 2 at 2 (letter from the Bureau's Chief of Enforcement stating that "Morgan Drexen may withhold information based on privilege"). Moreover, any CID enforcement action would provide Piskinski a full opportunity to raise any argument that her information should be protected from disclosure. *See supra* page 17 n.11. In any event, now that the Bureau has brought an enforcement action against Morgan Drexen, the Bureau has no reason to seek to compel Morgan Drexen to produce the allegedly privileged information by petitioning a court to enforce its CID. In effect, "[w]hat [Pisinski] is requesting in this case is protection from future attempts to enforce the [civil investigative demands]—attempts that may not even occur and, even if they do, will provide their own opportunity for review." *Dobbs*, 931 F.2d at 958. Because "no live controversy exists" between Pisinski and the Bureau, Pisinski lacks standing to challenge the Bureau's constitutionality. *Id.*

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For all of these reasons, Plaintiffs' request for declaratory and injunctive relief should be denied without reaching the merits of Plaintiffs' constitutional claim.

III. The Bureau's Structure Is Constitutional

If this Court reaches the merits, it should grant the Bureau's motion because Plaintiffs' single claim fails: The Bureau's structure complies with the Constitution's separation-of-powers requirements.

The doctrine of separation of powers reflects "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). But "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Thus, while the Supreme Court has struck down "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch," it has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Mistretta*, 488 U.S. at 382.

The Dodd-Frank Act provisions that establish the Bureau comply with these principles. In creating the Bureau, Congress did not aggrandize or abdicate its own powers or encroach on another branch's. The President, Congress, and the courts all maintain their traditional constitutional authorities with regard to the Bureau, and well-established precedent confirms that those authorities are constitutionally sufficient. Moreover, contrary to Plaintiffs' contention,

there is nothing unique about the Bureau that would call the application of that precedent into question or give rise to new constitutional requirements specially tailored for the Bureau.

A. The Dodd-Frank Act Preserves Each Branch's Ability to Oversee the Bureau, Consistent with Well-Established Separation-of-Powers Requirements

The President, Congress, and the judiciary all exercise traditional checks on the Bureau, consistent with well-established separation-of-powers principles.

1. The President's power to remove the Bureau Director for cause gives him constitutionally sufficient means to oversee the Bureau

Plaintiffs contend that Congress has unconstitutionally diminished the President's control over the Bureau by making the Bureau Director removable only for cause. Longstanding precedent is clear, however, that the power to remove an officer for cause gives the President constitutionally adequate means to supervise an independent agency. Contrary to Plaintiffs' suggestions, that precedent applies with equal force to the Bureau.

a. Longstanding precedent makes clear that for-cause removal gives the President ample authority to oversee independent agencies

The Supreme Court has long recognized that Congress may create independent agencies run by officers "whom the President may not remove at will but only for good cause." *Free Enter. Fund*, 130 S. Ct. at 3143 (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). In *Humphrey's Executor*, the Supreme Court upheld an FTC Act provision preventing the President from removing FTC commissioners except for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620 (quoting 15 U.S.C. § 41). As the Court explained, the "authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime." *Id.* at 629. As the

Court later observed, it is "not essential to the President's proper execution of his Article II powers that [independent] agencies be headed up by individuals who were removable at will." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). So long as the official "may be terminated for 'good cause,'" the President "retains ample authority to assure that the [official] is competently performing his or her statutory responsibilities in a manner that comports" with the statute, *id.* at 692, and "to ensure that the laws are 'faithfully executed,'" *id.* at 696.

The Supreme Court recently reaffirmed these principles in *Free Enterprise Fund*, 130 S. Ct. 3138. That case concerned removal protections for members of the Public Company Accounting Oversight Board (PCAOB), a government entity "with expansive powers to govern [the] entire [accounting] industry." *Id*. at 3147. The PCAOB's members were removable only for cause by the Securities and Exchange Commission (SEC), whose members themselves were understood to be removable by the President only "under the *Humphrey's Executor* standard of inefficiency, neglect of duty, or malfeasance in office." *Id.* at 3148 (internal quotation marks omitted). The Supreme Court concluded that having these two layers of for-cause removal "subvert[ed] the President's ability to ensure that the laws are faithfully executed" and thus violated the separation of powers. *Id.* at 3155. In remediating that violation, however, the Court simply made the PCAOB members removable at will by the SEC, explaining that "leav[ing] the President separated from [PCAOB] members by only a single level of good-cause tenure" guaranteed adequate presidential oversight. *Id.* at 3161. Thus, *Free Enterprise Fund* makes clear the President had constitutionally sufficient ability to oversee this agency—a "regulator of first resort and the primary law enforcement authority for a vital sector of our economy"—even though he lacked the power to remove its leaders directly, much less at will. *Id.*

In this case, the President has the direct authority to remove the Bureau Director "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This "very broad" removal standard, *Bowsher v. Synar*, 478 U.S. 714, 729 (1986), preserves the President's constitutional ability "to ensure that the laws are 'faithfully executed'" and is wholly consistent with the separation of powers. *Morrison*, 487 U.S. at 696.

b. Neither the Bureau's single-director leadership nor any other Bureau feature makes the President's for-cause removal power constitutionally inadequate

Plaintiffs argue that this Court should not apply the longstanding precedent approving for-cause removal restrictions for three reasons. None has merit.

i. Plaintiffs first contend that for-cause removal restrictions are not constitutionally appropriate for an agency led by a single director. This argument finds no support in case law or in general separation-of-powers principles.

As the Supreme Court's cases make clear, it is the nature of an agency's statutory responsibilities—not the structure of its leadership—that determines whether for-cause removal restrictions are constitutionally permissible. In *Humphrey's Executor*, for example, the Supreme Court held that the constitutionality of for-cause removal protections "depend[ed] on the character of the office." 295 U.S. at 631. In particular, because the FTC acted "in part quasi legislatively and in part quasi judicially," protecting the FTC commissioners from removal except for cause passed constitutional muster. *Id.* at 628. In the same vein, the Court explained in *Morrison* that whether a for-cause removal restriction unconstitutionally "impede[d] the President's ability to perform his constitutional duty" required analysis of "the functions of the officials in question." *Morrison*, 487 U.S. at 691.

No court has ever held that otherwise-permissible for-cause removal restrictions become unconstitutional if applied to an agency headed by a single individual. Contrary to Plaintiffs'

contention (Pl. Mem. at 19), *Humphrey's Executor* offers no support for that proposition. To be sure, the Court in that case noted that the FTC was to be a non-partisan body of experts—but only as evidence that Congress intended for-cause removal to be the exclusive avenue for removing commissioners. *Humphrey's Executor*, 295 U.S. at 624. The FTC's status as a multimember body had no bearing on the Court's conclusion that for-cause removal was consistent with the Constitution. *See id.* at 626-32.

Indeed, there is no reason why the structure of an agency's leadership would affect the constitutionality of a for-cause removal restriction. The removal power serves separation-of-powers purposes by ensuring that the President can oversee the agency. Structuring an agency to be headed by a single director does not diminish the President's oversight capability. The President can just as easily remove a single agency head for "inefficiency, neglect of duty, or malfeasance" as he could remove members of a commission for the same reasons. The Bureau therefore is no less accountable to the President than it would be if led by a multimember commission.[12] The logic of *Humphrey's Executor* applies to the Bureau with equal force as it would to any multimember independent agency.

ii. Finding no support in separation-of-powers principles or the precedent applying them, Plaintiffs next contend that the Constitution does not permit for-cause removal here because the Dodd-Frank Act "calls CFPB an executive agency and gives CFPB executive authority." Pl.

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[12] Indeed, in some cases Congress may conclude that giving an agency a single head better promotes accountability. For example, in deciding that the head of the Social Security Administration should be a single person (with tenure protection) rather than a board, Congress relied on studies concluding that "single administrators are far more effective and accountable than multi-person boards or commissions, bipartisan or otherwise." S. Rep. No. 103-221, at 3 (1994); *see also* Social Security: Leadership Structure for an Independent Social Security Administration, GAO/HRD-89-154, at 2 (Sept. 1989) (1989 GAO Report) (observing that a "single administrator form of organization . . . offers the advantage of allowing for a clear delineation of authority and responsibility"); 42 U.S.C. § 902(a).

Mem. at 15-16. To be sure, the Act does denominate the Bureau an "executive agency" in a provision that subjects the Bureau to generally applicable rules on government administration. 12 U.S.C. § 5491(a). But an agency's functions, not its label, determine the level of presidential control required. And the Bureau's functions—including rulemaking, adjudicatory, enforcement, and other authorities—are the same as those of other independent agencies. *See id.* § 5511(c)(4), (5). In any event, the term "executive agency" cannot carry the weight Plaintiffs put on it, because it is explicitly defined to include "independent establishments." 5 U.S.C. § 105; *see also id.* § 104 (defining "independent establishment").

iii. Finally, Plaintiffs contend that for-cause removal is not constitutionally compatible with the Bureau because the Bureau is an "independent agency housed inside another independent agency." Pl. Mem. at 15. This is both factually incorrect and legally irrelevant. The Federal Reserve *System*, in which the Bureau is located, 12 U.S.C. § 5491(a), is not an agency at all, but rather a network of various entities.[13] The *Board of Governors* of the Federal Reserve System (Federal Reserve Board) is an independent agency, but the Bureau is not "housed" within the Federal Reserve Board. Indeed, Congress expressly provided for the Bureau's "autonomy" from the Federal Reserve Board. *See* 12 U.S.C. § 5492(c) (formatting altered). In any event, where the Bureau is "housed" is irrelevant because, consistent with

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[13] The U.S. Government Manual describes the Federal Reserve System as including the "Board of Governors; the 12 Federal Reserve Banks and their 25 branches and other facilities; the Federal Open Market Committee; the Federal Advisory Council; the Consumer Advisory Council; the Thrift Institutions Advisory Council; and the Nation's financial institutions, including commercial banks, savings and loan associations, mutual savings banks, and credit unions." Office of the Fed. Register, THE UNITED STATES GOVERNMENT MANUAL 2012 366 (2012), *available at* http://www.gpo.gov/fdsys/pkg/GOVMAN-2012-12-07/pdf/GOVMAN-2012-12-07.pdf.

Humphrey's Executor, the President retains his constitutional authority to appoint the Bureau's Director and to remove him for cause. This satisfies any separation-of-powers requirements.[14]

2. Congress retains its constitutional prerogative to oversee the Bureau, including through its power of the purse

Plaintiffs are also wrong to suggest that Congress has unconstitutionally abdicated its "ability to check the CFPB's power." Pl. Mem. at 17. Congress retains its constitutional authority to oversee the Bureau, both through its power of the purse and through other traditional legislative and oversight authorities.

a. Congress's control over the Bureau's funding satisfies separation-of-powers requirements

Plaintiffs argue that, by funding the Bureau outside of the annual appropriations process, Congress unconstitutionally relinquished its "power of the purse." Pl. Mem. at 16-17. This argument ignores the fundamental fact that Congress established, and maintains full legislative authority over, the Bureau's funding mechanism. It is well established that separation-of-powers principles do not require anything more.

At the outset, Plaintiffs are wrong to assert that the Bureau "unilaterally" funds itself "without congressional approval." Pl. Mem. at 16. By statute, Congress authorized the Bureau to obtain from the Federal Reserve Board the funds "reasonably necessary to carry out" its mission, up to annual limits. 12 U.S.C. § 5497(a). Thus, when the Bureau requests those funds, it acts in accordance with the process, and subject to the limits, approved by Congress. To the

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[14] The Plaintiffs also object that the Bureau is not subject to control by the Federal Reserve Board. Pl. Mem. at 15. There is, however, no constitutional law principle that would require an administrative agency to be subject to another agency's control. Plaintiffs perhaps mean to suggest that Federal Reserve Board control is needed as a substitute for direct presidential control. But no such substitute is needed, as the President exercises direct control over the Bureau through his appointment and removal powers.

extent that Congress wishes to change the Bureau's funding, it retains full power to do so pursuant to the ordinary legislative process.

Plaintiffs' argument boils down to a complaint that Congress chose to fund the Bureau outside of the annual appropriations process. *See* Pl. Mem. at 16-17. But no separation-of-powers principle requires Congress to fund agencies through annual appropriations. To be sure, Congress's "exclusive power over the federal purse"—which the Appropriations Clause guarantees—is "a bulwark of the Constitution's separation of powers." *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012) (internal quotations omitted). But nothing in the Appropriations Clause restricts the ways in which Congress may exercise that power. On the contrary, "[i]t has long been held that the Appropriations Clause is not a restriction on Congress, but on the Executive Branch." *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (Fed. Cl. 2003). The Appropriations Clause effectively ensures that the Executive cannot expend funds except as authorized by Congress. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Labor Relations Auth.*, 388 F.3d 405, 409 (3d Cir. 2004); *AINS, Inc.*, 56 Fed. Cl. at 539; *accord In re Aiken Cnty.*, -- F.3d --, 2013 WL 4054877, at *9 n.3 (D.C. Cir. 2013). This purpose is served regardless of whether Congress provides funding through an annual appropriation or through some other funding mechanism.

Consistent with these principles, courts have made clear that providing funding outside of the annual appropriations process passes constitutional muster. *See Am. Fed'n of Gov't Emps.*, 388 F.3d at 409 (explaining that "Congress may . . . decide not to finance a federal entity with appropriations," but rather through some other funding mechanism); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 313 (1937); *AINS, Inc.*, 56 Fed. Cl. at 539. Most relevantly here, Congress may create "self-financing programs" by authorizing an agency to obtain and use

funds from a specified source "without first appropriating the funds as it does in typical appropriation and supplemental appropriation acts." *AINS, Inc.*, 56 Fed. Cl. at 539 (noting that Congress complied with the Appropriations Clause in authorizing the Federal Reserve Board and Federal Housing Finance Board to levy assessments on banks to fund their operations). Indeed, Congress has chosen to fund most financial regulators in this way. *See* 12 U.S.C. § 16 (Office of the Comptroller of the Currency); *id.* § 243 (Federal Reserve Board); *id.* § 1755 (National Credit Union Administration); *id.* § 1817(b) (Federal Deposit Insurance Corporation); *id.* § 4516 (Federal Housing Finance Agency); 12 U.S.C. § 1462a(i) (2010) (Office of Thrift Supervision); 15 U.S.C. § 7219 (Public Company Accounting Oversight Board).

Congress followed this well-established model for the Bureau. As with these other agencies, Congress authorized the Bureau to obtain and use funds from a specified source "pursuant to an authorizing or enabling statute without a separate appropriation act." *AINS, Inc.*, 56 Fed. Cl. at 539. This funding mechanism—like the other ways in which Congress provides funding outside of the annual appropriations process—does not unconstitutionally diminish Congress's power of the purse.[15]

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[15] The Constitution gives Congress—not congressional appropriations committees—the power of the purse. Thus, it is constitutionally irrelevant that the Bureau's funding is "not subject to review" by the House and Senate Appropriations Committees. *See* 12 U.S.C. § 5497(a)(2)(C). Indeed, the appropriations committees are creatures of Congress, not the Constitution, and did not even come into existence until the 1860's. U.S. Senate Comm. on Appropriations, *Committee History*, http://www.appropriations.senate.gov/about-history.cfm; U.S. House of Representatives Comm. on Appropriations, *About the Committee*, http://appropriations.house.gov/about/. In any event, congressional committees do oversee the Bureau's funds. The Bureau must provide the Senate Committee on Banking, Housing, and Urban Affairs and House Financial Services and Energy and Commerce Committees with semi-annual reports and testimony that cover, among other things, "a justification of the budget request of the previous year." 12 U.S.C. § 5496. Moreover, Congress's agent, the Comptroller General, must annually audit and report to Congress on the Bureau's financial transactions. *Id.* § 5497(a)(5); *see also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991) (noting that Comptroller General is "an agent of Congress").

b. Congress has other tools for overseeing the Bureau

Congress also retains other traditional legislative and oversight authorities vis-à-vis the Bureau. As an initial matter, Congress controls the Bureau, like all administrative agencies, "in the legislation that creates [it]." *I.N.S. v. Chadha*, 462 U.S. 919, 955 n.19 (1983). In particular, the Bureau's exercise of delegated authority "is always subject to check by the terms of the legislation that authorized it."[16] *Id.* at 953 n.16. "[I]f that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *Id.*

Beyond that basic fact, Congress has the power to overturn Bureau regulations legislatively, and it may review certain regulations pursuant to expedited procedures under the Congressional Review Act. *See* 5 U.S.C. §§ 801–808. Congress also may use—and in fact

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[16] To the extent that Plaintiffs argue that the Dodd-Frank Act is too vague to provide this check, their argument is unavailing. The Supreme Court has made clear that legislation sufficiently controls an agency exercising delegated power so long as it sets forth an "intelligible principle" to which the agency must conform. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Plaintiffs appear to suggest that the Dodd-Frank Act fails to establish such an intelligible principle in granting the Bureau authority to regulate "unfair" and "abusive" acts and practices in the consumer financial marketplace. *See* Pl. Mem. at 10, 11; Compl. ¶ 65.

This argument is a non-starter. The Dodd-Frank Act contains multi-pronged provisions setting forth what each of those terms means. 12 U.S.C. § 5531(c), (d). An act or practice cannot be considered "unfair" unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and that injury "is not outweighed by countervailing benefits to consumers or to competition." *Id.* § 5531(c). An act or practice cannot be considered "abusive" unless it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or it "takes unreasonable advantage of" one of three statutorily enumerated circumstances. *Id.* § 5531(d). The Supreme Court has approved far-less-detailed principles in the past, including instructions for agencies to fix "fair and equitable" commodities prices, *Yakus v. United States*, 321 U.S. 414, 426–27 (1944); to regulate broadcast licensing as "public interest, convenience, or necessity" requires, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); to take action to "avoid an imminent hazard to the public safety," *Touby v. United States*, 500 U.S. 160, 165-66 (1991); and to modify corporate structures so that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders," *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). In light of these precedents, there can be no doubt that the Dodd-Frank Act lays down "intelligible principles" for the Bureau to follow.

frequently uses—ordinary oversight tools, including holding oversight hearings and requesting GAO investigations, to oversee Bureau activities. *See* March 2013 Semi-Annual Report at 104. And Congress requires the Bureau to submit regular reports on its activities. For example, the Bureau is required by statute to submit comprehensive semi-annual reports on various subjects, 12 U.S.C. § 5496(b), as well as annual reports on specific topics, including complaints it receives from consumers on consumer financial products and services, *id.* § 5493(b)(3)(C); its fair lending efforts, *id.* § 5493(c)(2)(D); and its financial literacy activities, *id.* § 5493(d)(4). The Supreme Court has recognized that these kinds of "formal reporting requirements" are one means by which Congress can "oversee and control its administrative creatures." *Chadha*, 462 U.S. at 955 n.19.

Through all these checks and others, Congress maintains control over the Bureau, and the Bureau remains accountable to Congress.

3. The Bureau is subject to ordinary judicial review

Contrary to Plaintiffs' contention, the Dodd-Frank Act does not insulate the Bureau's activities from judicial review. As with essentially all other administrative agencies, the Bureau's final actions are subject to review under the APA, according to ordinary administrative law principles. 12 U.S.C. § 5491(a); 5 U.S.C. §§ 701-706.

The statutory provision on judicial review to which Plaintiffs object does not provide otherwise. That provision simply directs courts to defer to Bureau interpretations of Federal consumer financial law "as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B). Far from "insulat[ing]" the Bureau from judicial review (Pl. Mem. at 22), this provision merely clarifies that courts should review Bureau interpretations under well-

established principles of agency deference, regardless of whether other agencies share authority to administer the laws that the Bureau has interpreted.[17]

In any event, Plaintiffs have not cited any authority suggesting that this presents a separation-of-powers problem—or even articulated the nature of the problem they perceive. Nor can they. *Chevron* deference, for example, does not violate separation-of-powers principles. It serves them. *See, e.g.*, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996); *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (explaining that *Chevron* is "important to the division of powers between the Second and Third Branches"); *Matter of Appletree Mkts., Inc.*, 19 F.3d 969, 973 (5th Cir. 1994) ("The *Chevron* doctrine is based upon separation of powers.").

B. The Bureau Does Not Have Any Unusual Features that Justify Plaintiffs' Request for Novel Constitutional Restrictions

As discussed above, Congress made the Bureau subject to ordinary checks by the three branches of government, consistent with well-established separation-of-powers norms. In particular, the President, who appoints the Director, retains the ability to remove him for cause; Congress maintains the power of the purse as well as other checks; and courts subject the Bureau's actions to ordinary judicial review. There is nothing unique about the Bureau that would make these well-established checks constitutionally insufficient, or that would give rise to a new constitutional requirement for a multimember commission.

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[17] When multiple agencies share authority to administer a statute, courts have sometimes refused to defer to an interpretation offered by only one of those agencies. *See, e.g.*, *DeNaples v. OCC*, 706 F.3d 481, 488 (D.C. Cir. 2013); *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996). That refusal is based not on any constitutional concern, but on a presumption that, when Congress grants multiple agencies the authority to interpret the same statute, "it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities or to fill gaps." *Salleh*, 85 F.3d at 692. Here, Congress has simply displaced that presumption by expressing clearly its intent to delegate such interpretive authority to the Bureau.

1. The scope of the Bureau's authority does not render the well-established checks on the Bureau constitutionally insufficient

Contrary to Plaintiffs' contention (Pl. Mem. at 20-21), the scope of the Bureau's authority does not make the well-established checks on the Bureau constitutionally inadequate. Even if the scope of an agency's authority could give rise to new constitutional requirements, Plaintiffs utterly fail to show that the Bureau's authority is out of the ordinary. Indeed, the Bureau's authority is comparable to that of other federal regulatory agencies, particularly those operating in the financial sector.

For instance, Plaintiffs complain that the Bureau has "rulemaking, adjudicatory, and enforcement powers." Pl. Mem. at 21. But those powers are common among regulatory agencies. As the Supreme Court has observed, "[u]nder most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (citing the FTC, Securities and Exchange Commission, and Federal Communications Commission as examples). Likewise, the Bureau may examine certain financial institutions for compliance with the law, 12 U.S.C. §§ 5514, 5516, but that too is a power common among financial regulators, *see* 12 U.S.C. §§ 481 (OCC), 483 (Federal Reserve), 1820 (FDIC), 1844(c) (Federal Reserve), 4517 (FHFA).

Plaintiffs similarly fall short in characterizing the Bureau's substantive jurisdiction as unusually far-reaching so as to justify idiosyncratic constitutional treatment. *See* Pl. Mem. at 21. All federal agencies have jurisdiction to regulate particular subject areas. Just as the Federal Communications Commission regulates communications, or the Securities and Exchange Commission regulates securities, Congress authorized the Bureau to regulate "consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a).

Plaintiffs contend that this gives the Bureau "unprecedented breadth and scope," but they provide no evidence to support that claim. They note, for example, that the Bureau now enforces "forty-nine (49) pre-existing consumer financial product rules." Pl. Mem. at 22. But, by way of comparison, the FTC enforces or administers more than 70 laws. See Federal Trade Commission, Statutes Enforced or Administered by the Commission, http://ftc.gov/ogc/stats.shtm. In any event, Plaintiffs offer no basis for concluding that the mere counting of laws enforced has any constitutional relevance.

Finally, Plaintiffs complain about the "level of regulatory discretion" the Bureau has in implementing Federal consumer financial law. *See* Pl. Mem. at 20. Although not entirely clear, Plaintiffs appear to take particular issue with the Bureau's authority to take action to prevent "unfair," "deceptive," or "abusive" acts and practices. But the FTC has long had very similar authority to prevent "unfair" and "deceptive" acts and practices, as well as additional authority to prevent "unfair methods of competition." 15 U.S.C. § 45. Further, as discussed above, the Dodd-Frank Act provides a detailed definition of "abusive," and other agencies exercise far greater "regulatory discretion" to implement far less concrete standards. *See supra* page 33 n.16. The level of regulatory discretion enjoyed by the Bureau does not justify Plaintiffs' request that the Court depart from established separation-of-powers principles.

2. The Bureau is not uniquely required to have a multimember commission

Plaintiffs next contend that the Constitution requires the Bureau to have a multimember commission given its lack of accountability and the scope of its powers. Pl. Mem. at 17. This novel constitutional argument is wholly unmoored from any separation-of-powers principle.

As an initial matter, Plaintiffs' contention that the Bureau lacks accountability or has an extraordinary scope of power has already been refuted. As explained above, the Bureau is fully accountable to the President and Congress; its actions are subject to ordinary review by the

judiciary; and its powers are comparable to the powers exercised by other regulatory agencies. The Bureau therefore lacks any unique qualities that could somehow trigger a new constitutional requirement for a multimember commission.

More fundamentally, Plaintiffs fail to explain how a multimember commission is required by the separation of powers. Separation of powers' "basic principle" is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). A branch may not "arrogate power to itself" or "impair another in the performance of its constitutional duties." *Id.* Plaintiffs do not explain how the Bureau's single-director leadership impairs any branch's powers or otherwise violates these principles.

The only constitutional argument that Plaintiffs manage to muster is that a multimember commission would be "consistent" with separation of powers because, they contend, it would avoid "the concentration of legislative, executive, and judicial power in a single unelected individual." Pl. Mem. at 20. But the legislative, executive, and judicial powers of government are not concentrated in the Bureau Director. They are dispersed among the three branches, each of which exercises checks on the Bureau. More generally, the separation-of-powers doctrine disapproves of "concentrated" power regardless of whether it is exercised by single individuals or multimember bodies. *See Metro. Wash. Airports Auth.*, 501 U.S. at 273 ("'[L]egislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.'") (quoting The Federalist No. 48, pp. 332-34 (J. Cooke ed. 1961)). Thus, even if the Plaintiffs were correct that the Bureau's structure otherwise

violates separation of powers (which it does not, for the reasons given above), replacing the Director with a commission or board would not cure the violation.[18]

Plaintiffs also suggest, without citation to authority, that Congress must follow the "perva[sive]" practice of structuring independent agencies as multimember bodies. *See* Pl. Mem. at 17. The Bureau, however, is not the first single-head independent agency that Congress ever created. Indeed, the Federal Housing Finance Agency, Social Security Administration, and Office of Special Counsel are all headed by single leaders removable only for cause. *See* 12 U.S.C. 4512(b)(2) (Federal Housing Finance Agency); 42 U.S.C. § 902(a)(1), (3) (Social Security Administration); 5 U.S.C. § 1211 (Office of Special Counsel). And even if the Bureau's single-director leadership were truly anomalous, that would not affect the constitutional analysis, for "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta*, 488 U.S. at 385.

Rather than rely on separation-of-powers principles, Plaintiffs emphasize the policy benefits that they contend a multimember commission could produce, like encouraging "collective deliberation among persons with diverse views, expertise, and backgrounds." Pl. Mem. at 20. As an initial matter, Plaintiffs' view of the benefits of commissions is debatable. See 1989 GAO Report at 1 ("[T]he board form of organization has not proven effective in providing stable leadership, in insulating decisions from political pressures, and in assuring that diverse viewpoints are considered in the decision-making process."). More to the point,

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[18] Plaintiffs' reliance (Pl. Mem. at 19) on *David B. Lilly Co. v. United States*, 571 F.2d 546 (Ct. Cl. 1978), is misplaced. Contrary to Plaintiffs' assertion, that case did not hold that a "multimember agency structure safeguards fairness and individual liberty." Pl. Mem. at 19. Rather, that case addressed whether the agency order became "final" before the resignation of three members of the Renegotiation Board caused that agency to lose a quorum. *David B. Lilly*, 571 F.2d at 548-49. That fact that a multimember board must act through a quorum says nothing about whether a multimember structure for independent agencies is constitutionally required.

Plaintiffs' arguments about the desirability of a commission structure are about policy, not the Constitution. Indeed, assessing the benefits of a commission structure calls for a quintessential policy judgment that is for Congress to make.

* * *

Plaintiffs have failed to demonstrate how the Bureau's features, whether considered individually or in combination, violate the "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving*, 517 U.S. at 757. Nor could they. The President, Congress, and the courts all exercise checks over the Bureau that comply with well-established constitutional norms, and there is nothing unique about the Bureau that would trigger new constitutional requirements. The Bureau's structure accordingly does not violate the separation of powers.

CONCLUSION

For these reasons, the Bureau respectfully requests that this Court grant the Bureau's motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted,

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