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. 13-cv-01112 (CKK)

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

The Plaintiffs in this action, Morgan Drexen, Inc. and Kimberly Pisinksi, have presented this Court with an extraordinary request: adopt a novel and unprecedented limitation on Congress's legislative authority to create independent agencies and enjoin a proceeding that the Consumer Financial Protection Bureau (Bureau) has brought in another federal district court to enforce laws designed to protect vulnerable consumers. They have failed, however, to offer this Court any legitimate basis for granting their request. Plaintiffs are not entitled to a ruling from this Court on the merits of their constitutional claim, let alone a ruling in their favor.

Morgan Drexen does not dispute that it may raise its constitutional argument as a defense to the Bureau's enforcement action in the United States District Court for the Central District of California, nor does it offer any reason to believe that it would suffer irreparable harm if it were required to do so. That alone is sufficient to defeat Morgan Drexen's request for injunctive relief from this Court. Likewise, Morgan Drexen has not demonstrated that a declaratory judgment here would serve any of the legitimate purposes for which the Declaratory Judgment Act was designed. In particular, Morgan Drexen is not seeking to understand whether it is acting lawfully so that it can, if necessary, conform its conduct to the law. To the contrary, the transparent purpose of this lawsuit is to prevent another court from even considering the Bureau's allegations that Morgan Drexen is violating the law. The Court should not exercise its discretion to serve such ends. Because Morgan Drexen is not entitled to the only relief it seeks—and because Pisinski has not demonstrated that she has standing to maintain this action on her own—the Court should dismiss the complaint without reaching the merits of Plaintiffs' constitutional claim.

If the Court does reach the merits, it should find that the Bureau's structure is constitutional. Plaintiffs appear to recognize that the Constitution permits each of the Bureau's features, *see* Plaintiffs' Reply in Support of Mot. for Summary Judgment, Dckt. #21 (Pl. Reply), at 1, and now rest their challenge solely on the claim that the Bureau's "combination" of features violates the separation of powers. But the Bureau is constitutional regardless of how you look at it. Plaintiffs have failed to show that any of the Bureau's features—alone or in combination—aggrandizes the power of any branch of government or violates the basic separation-of-powers principle that one branch of government may not intrude on the prerogatives of another. Absent that basic showing, Plaintiffs' vague invocations of "tradition," "democratic control of government," or their own policy preferences for a commission structure provide no basis for their request that this Court strip the Bureau of its ability to implement and enforce the consumer protection provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Congress stayed well within constitutional bounds when it created the Bureau. If the Court reaches the merits, it should reject Plaintiffs' attempt to find some "combination" of features that would undo Congress's work.

ARGUMENT

I. This Case Should Be Dismissed Without a Ruling on the Merits

The Court should dismiss Plaintiffs' complaint without reaching the merits because Morgan Drexen has failed to establish that it is entitled to injunctive or declaratory relief, and because Pisinski has failed to establish that she has standing to challenge the constitutionality of the Bureau's structure.

A. Morgan Drexen Is Not Entitled to an Injunction Barring the Bureau's Pending Enforcement Action

The Court should deny Morgan Drexen's request for injunctive relief because "'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 Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010).

Here, Morgan Drexen has an adequate remedy at law and will not suffer irreparable harm in the absence of equitable relief. *See* Mem. of Points and Authorities in Support of Defendant's Mot. to Dismiss or, in the Alternative, for Summary Judgment and in Opposition to Plaintiffs' Mot. for Summary Judgment, Dckt. #17-1 (Def. Mem.), at 12. Morgan Drexen may raise its constitutional claim as a defense to the Bureau's pending enforcement action, and, as binding precedent establishes, requiring Morgan Drexen to do so does not cause the company any irreparable harm. *See, e.g., Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1265 (D.C. Cir. 2012) (same). Indeed, Morgan Drexen does not argue that having to raise its constitutional claims in the Central District of California would constitute irreparable harm; it in fact expressly disclaims that it faces harm from "any particular action" of the Bureau. Pl. Opp. at 17. Morgan Drexen instead argues that it is harmed by the Bureau's "very existence." Pl. Opp. at 17-18. Such a philosophical objection—in the absence of any demonstration of irreparable harm—does not entitle Morgan Drexen to the injunctive relief it seeks.

In its opening brief, the Bureau relied upon the D.C. Circuit's decision in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987). In that case, the court refused to permit Deaver, who

feared prosecution for violations of the Ethics in Government Act, to pursue his separation-of-powers challenge to that Act "in an independent civil suit." *Id.* at 71. The court reasoned that because Deaver would have an adequate opportunity to raise his constitutional defense in the criminal proceeding itself, he had "no right to an injunction restraining a pending indictment in a federal court." *Id*. at 68. As the Bureau explained in its opening brief, because Morgan Drexen can raise its constitutional defense in the civil enforcement action currently pending in the Central District of California, its claim for injunctive relief should be dismissed for the same reason. *See* Def. Mem. at 12-14.

Morgan Drexen attempts to distinguish *Deaver* by arguing that it applies only to attempts to enjoin criminal prosecutions. Pl. Opp. at 15-16. But the equitable considerations underlying that decision apply equally in the context of attempts to enjoin civil enforcement proceedings. Federal Rule of Civil Procedure 12(b) provides just as adequate a remedy as Federal Rule of Criminal Procedure 12(b) for raising a constitutional separation-of-powers defense, and the D.C. Circuit's concerns for both the final judgment rule and the principle of constitutional avoidance are no less applicable in the civil context than in the criminal context. *Deaver*, 822 F.2d at 70-71. Furthermore, while the D.C. Circuit noted that requiring one accused of violating the Ethics in Government Act to submit to a criminal prosecution serves "larger societal interests," there is no basis to conclude that those interests are not also served by requiring those accused of engaging in a predatory debt-relief scheme to raise their defenses in the civil enforcement proceeding itself, and not in some "ancillary equitable proceeding." *Id.* at 69, 71.

Deaver is simply an application of the "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." *Id.* at 71 (Ginsburg, D.H., concurring)

(quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971)). This principle applies equally when the proceeding sought to be enjoined is civil in nature.[1] Indeed, "[i]t is well-established that it is improper for a district court to entertain a request for injunctive relief that would have the effect of enjoining an ongoing enforcement action. Any challenges to the propriety of agency action should be addressed in the enforcement action itself." *Direct Mktg. Concepts, Inc. v. FTC*, 581 F. Supp. 2d 115, 117 (D. Mass. 2008); *see also Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1132 (11th Cir. 2005) ("Generally, if a party will have [an] opportunity to raise its claims in the concurrent federal proceeding sought to be enjoined, that concurrent proceeding is deemed to provide an adequate remedy at law." (citing *Porto Rico Tel. Co. v. Puerto Rico Commc'n Auth.*, 189 F.2d 39, 41 (1st Cir. 1951), and 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2942)). In short, because Morgan Drexen has failed to show that it will suffer irreparable harm if required to raise its constitutional claim in the Bureau's pending enforcement action, its request for injunctive relief should be denied.

B. Morgan Drexen Is Not Entitled to Declaratory Relief

Morgan Drexen similarly fails to demonstrate why the Court should exercise its "unique and substantial" discretion under the Declaratory Judgment Act to entertain Morgan Drexen's constitutional claim. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). As the Bureau showed in its opening brief (Def. Mem. at 18-20), declaratory relief will "serve no useful purpose" in this case. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). Morgan Drexen is not seeking to determine whether it "may legally pursue a particular course of conduct," and therefore "[t]he classic and most persuasive reason for granting a declaration [is] absent from this

[1] Although *Younger* involved an attempt to enjoin a state criminal proceeding, the principles underlying it have long been held to apply in the context of attempts to restrain state civil enforcement proceedings. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

case." *Hanes Corp. v. Millard*, 531 F.2d 585, 592 (D.C. Cir. 1976). Further, although Morgan Drexen asserts that this Court has "particular expertise and experience in adjudicating constitutional questions and challenges to agency action" (Pl. Opp. at 21), it provides no basis for concluding that the Central District of California is not fully capable of resolving Morgan Drexen's constitutional claim, if necessary, in the context of the Bureau's enforcement action.

Instead, Morgan Drexen appears to argue that the Court should exercise its discretion to decide Morgan Drexen's claim solely because it is "a facial constitutional challenge to the [Bureau's] enabling statute." Pl. Opp. at 18. But Morgan Drexen provides no support for the novel proposition that federal courts should exercise their discretion to grant declaratory relief to resolve constitutional challenges to federal statutes when doing so is not necessary. Pl. Opp. at 18-19. Nor does it address the legions of cases that hold the opposite. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-06 (2009) (declining to grant a declaratory judgment regarding a constitutional issue that it did not need to reach); *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 471 (1945) ("In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions."); *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1020 (D.C. Cir. 1991) ("Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers. This is especially true where the court can avoid the premature adjudication of constitutional issues." (citations omitted)). Morgan Drexen's failure to identify any sound basis for the court's exercise of its discretion under the Declaratory Judgment Act is reason alone to deny its request for declaratory relief.

Nonetheless, the other factors relevant to the Court's exercise of discretion also support dismissal. *See* Def. Mem. at 19-21. First, unlike the typical declaratory judgment action, in which the parties' entire dispute hinges on the resolution of a single legal issue (*e.g.*, whether the declaratory judgment plaintiff is infringing the defendant's patent), a declaratory judgment here will not necessarily "settle the controversy between the parties." *Hanes*, 531 F.2d at 592 & n.4. As the Bureau explained in its opening brief, the court cannot assume, in applying this factor, "'that it will resolve the merits of [Morgan Drexen's] complaint in the company's favor'"; and if the Court were to rule for the Bureau on the merits, the parties would still have to litigate all of the remaining issues relating to Morgan Drexen's liability in another court. *See* Def. Mem. at 20 (quoting *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 77 (D.D.C. 2009)).

Second, Morgan Drexen has other remedies available to it. Because it can raise its constitutional claim as a defense in the Bureau's enforcement action, providing declaratory relief here would be "unjustified." *Id.* (quoting *Swish Mktg.*, 669 F. Supp. 2d at 80).

Third, the convenience of the parties counsels in favor of litigating the parties' dispute in a single forum (not two), and the most convenient forum is the Central District of California, where Morgan Drexen, its employees, and its records are located.

Finally, the equity of Morgan Drexen's conduct in bringing its declaratory judgment action counsels for dismissal. Though Morgan Drexen asserts that it has acted with "the utmost equity and integrity," and has not engaged in "procedural fencing" (Pl. Opp. at 20-21), the facts show otherwise. In early 2012, the Bureau began investigating Morgan Drexen and its Chief Executive Officer, Walter Ledda, to determine whether they were engaged in unlawful acts and practices in connection with the provision of debt relief services. *See* Declaration of Randall M. Shaheen, Dckt. #3-5 (Shaheen Decl.), Ex. 1. Morgan Drexen never questioned the Bureau's

authority to conduct the investigation on the ground that the Bureau's "very existence" offended the "Constitution's core principles of separation of powers and accountability to the electorate." Pl. Opp. at 18. Nor did it refuse to comply with the Bureau's civil investigative demands on this basis.

Indeed, even after the Bureau's Office of Enforcement informed Morgan Drexen that it was "considering recommending that the Bureau take legal action" and specifically asked the company to provide "any reasons of law or policy why . . . the Bureau should not take legal action[,]" Shaheen Decl. Ex. 32, Morgan Drexen did not raise any constitutional separation-of-powers arguments. *Id.* at Ex. 33. Instead, it expressed its desire "to work cooperatively with staff to reasonably amend its practices and advertising to address staff's concerns" and to resolve those concerns "through settlement." *Id.* It was only after the Bureau refused to accept settlement on Morgan Drexen's terms, *see id.* at Ex. 35, that Morgan Drexen filed the instant complaint, asking the Court to decide a single novel constitutional question, but *none* of the questions relating to the legality of its conduct. Indeed, by asking the Court to enjoin the Bureau's enforcement efforts, Morgan Drexen is seeking to ensure that *no* court will decide whether it is acting unlawfully. "'The Declaratory Judgment Act is not a tactical device.'" *Swish*, 669 F. Supp. 2d at 78 (quoting *Gov't Emps. Ins. Co. v. Rivas*, 573 F. Supp. 2d 12, 15 (D.D.C. 2008)). Morgan Drexen's request for a declaratory judgment should be denied.

C. Pisinski Lacks Standing To Challenge the Bureau's Constitutionality

It is well-established that "[t]he party invoking federal jurisdiction bears the burden of establishing [the standing] elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In the context of cross-motions for summary judgment, a plaintiff cannot demonstrate standing with "mere allegations, but must set forth by affidavit or other evidence specific facts." *Id.*

(internal quotations omitted). In addition, when, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else," standing is "'substantially more difficult' to establish." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). And because (as demonstrated above) Morgan Drexen's claims should be dismissed on other grounds, Pisinski cannot rely on the proposition that where "constitutional and prudential standing can be shown for at least one plaintiff, [the court] need not consider the standing of other plaintiffs to raise that claim." *See* Pl. Opp. at 14 (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)).

As the Bureau pointed out in its opening brief, Pisinski's only asserted injury is the alleged harm that would occur if the Bureau were to compel Morgan Drexen to produce privileged communications between her and her clients. *See* Def. Mem. at 23 (citing Declaration of Kimberly A. Pisinski, Dckt. #3-3, ¶¶ 4, 10). But because the Bureau never sought Pisinski's privileged communications, *see* Shaheen Decl. Ex 2 at 2, and because the Bureau could not have compelled Morgan Drexen to provide *any* of Pisinski's information without a district court order, the harm asserted in Pisinksi's declaration was always speculative. *See* Def. Mem. at 23. The prospect of such harm is even more remote now that the Bureau's investigation is complete. The Bureau has not sought discovery in its pending enforcement action. If and when it does, Pisinski will have all the tools available under the Federal Rules of Civil Procedure to protect her interests should she believe that the Bureau's discovery requests affect them.

Pisinski fails to rebut the Bureau's argument that her declaration is not sufficient to demonstrate standing. *See* Pl. Opp. at 14. Rather, she simply asserts—without any evidentiary support—that "the CFPB's actions threaten [her] with far more substantial injury." *Id.* Pisinski contends that she "has standing to challenge the constitutionality of the agency that is threatening

her client confidentiality, regulating her practice, investigating (and now suing) her paralegal, and alleging that what her paralegal (Morgan Drexen) is doing to assist her in the practice of law is somehow unlawful." *Id.* at 15. But she fails to support these assertions (including the characterization of her relationship with Morgan Drexen, which the Bureau disputes) with citations to the record, *see* Fed. R. Civ. P. 56(c), or to provide any legal support for the astonishingly broad proposition that a government agency's enforcement of the law against one company gives all of that company's contractual counterparties standing to challenge the agency's constitutionality. Pisinski's conclusory assertions of harm are clearly insufficient, and she therefore lacks standing to challenge the Bureau's constitutionality.[2]

D. The Cases Cited by Plaintiffs Concerning the Scope of Specific Statutory Review Mechanisms or the Ripeness Doctrine Are Irrelevant

Rather than contest the Bureau's actual arguments for why the Court should dismiss the case without reaching the merits, Plaintiffs cite cases that concern jurisdictional issues that are not before the Court and therefore are wholly irrelevant to this matter. *See* Pl. Opp. at 7-14. For example, Plaintiffs cite cases that have held, in the context of specific statutes, that a plaintiff bringing a constitutional challenge in federal district court need not have exhausted some

[2] Even if the Court were to find that Pisinski had met her burden of demonstrating standing, it should deny her request for declaratory and injunctive relief for the same reasons that it should deny Morgan Drexen's. Pisinski has failed to demonstrate irreparable harm and can protect any interest she might have that is implicated by the Bureau's enforcement action against Morgan Drexen by seeking to intervene in that case. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 748 (1984).

statutory scheme for administrative or judicial review.[3] In these cases, courts must ask whether "the 'statutory scheme' [at issue] displays a 'fairly discernable' intent to limit jurisdiction, and [whether] the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enter. Fund*, 130 S. Ct. at 3150 (quoting *Thunder Basin Coal v. Reich*, 510 U.S. 200, 207 (1994)).

That inquiry is beside the point here. Whether Morgan Drexen is entitled to declaratory or injunctive relief in this case is governed not by the scope of some unidentified "statutory scheme of administrative or judicial review," *Elgin*, 132 S. Ct. at 2132, but by the well-established equitable considerations that govern federal courts' discretion to grant such relief. *See, e.g.*, *Monsanto*, 130 S. Ct. at 2756 (listing the factors that plaintiffs seeking a permanent injunction must satisfy); *Hanes*, 531 F.2d at 591 & n.4 (listing the "factors relevant to the propriety of granting a declaratory judgment"). Similarly, whether Pisinski has standing does not depend on the nature of her claim, but on whether she has proven the familiar elements of injury, causation, and redressability. *Lujan*, 504 U.S. at 560-61.

Plaintiffs also cite cases where courts considered whether a controversy is sufficiently ripe to permit pre-enforcement review. *See* Pl. Opp. at 11-14. As Plaintiffs candidly admit,

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[3] *See* Pl. Opp. at 7-9 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-51 (2010) (holding that Congress did not intend to require plaintiffs to pursue their claims through the Securities and Exchange Act's statutory review mechanism, 15 U.S.C. § 78y, before pursuing their claims in federal court); *Hettinga v. United States*, 560 F.3d 498, 503-06 (D.C. Cir. 2009) (holding that mandatory administrative exhaustion requirement of the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(15)(A), did not apply to a constitutional challenge to the Milk Regulatory Equity Act of 2005); *Elk Run Coal, Inc. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8, 16-19 (D.D.C. 2011) (holding that the Mine Act's provision requiring administrative exhaustion of any citation or order of the Mine Health Safety Administration, 30 U.S.C. §§ 815, 816, 823, did not apply to a constitutional challenge to the Mine Act)). *But see Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2131-47 (2012) (holding that Congress intended the plaintiffs to channel their constitutional challenge to 5 U.S.C. § 3328 through the special statutory review mechanisms of the Civil Service Reform Act, 5 U.S.C. §§ 7511-14, 7701-03).

however, the Bureau "does not argue ripeness in its moving papers." *Id.* at 12. And while the fact that a claim is "purely legal" may be relevant to whether that claim is ripe (*id.* at 11-13 (citing cases)), it has no bearing on whether Plaintiffs are entitled to declaratory or injunctive relief. As discussed above, Plaintiffs have failed to demonstrate that they are entitled to declaratory or injunctive relief. This case should be dismissed on that ground alone.

II. The Bureau's Structure Is Constitutional[4]

If this Court decides to reach 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.

As the Bureau's opening brief demonstrates, each of the Bureau features to which Plaintiffs object—a single Director removable only for cause, funding outside of the annual appropriations process, and judicial deference to agency interpretations[5]—is wholly consistent with the separation of powers. Def. Mem. at 24-35. Plaintiffs appear to acknowledge that none of these features alone violates the separation of powers and instead posit that the "cumulative impact" of the "combination" of these features makes the Bureau unconstitutional. *See* Pl. Reply at 1.

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[4] The Bureau sought dismissal or summary judgment based on Plaintiffs' lack of entitlement to injunctive or declaratory relief or, if the Court reached the merits, based on their failure to state a valid constitutional claim. *See* Def. Mem. at 24. In response, Plaintiffs filed an opposition (which ignored the constitutional claim) to the Bureau's motion to dismiss, *see* Pl. Opp. at 7-23, and a reply (which addressed only the constitutional claim) in support of their own motion for summary judgment, *see* Plaintiffs' Reply in Support of Mot. for Summary Judgment, Dckt. #21 (Pl. Reply). To avoid any confusion caused by Plaintiffs' bifurcated response, the Bureau clarifies that the following discussion of the constitutional claim is a reply in support of the Bureau's motion to dismiss or for summary judgment.

[5] Plaintiffs no longer press their claim that the Bureau's insulation from "accountability to . . . the Federal Reserve" presents a separation-of-powers problem. Plaintiffs' Mem. of Points and Authorities in Support of Mot. for Summary Judgment, Dckt. #13-2 (Pl. Mem.), at 15; *see also* Def. Mem. at 30 n.14.

Plaintiffs' argument fails. As explained in the Bureau's opening brief, whether viewed one-by-one or in combination, the Bureau's features do not impair the constitutional prerogatives of any of the three branches of government. Def. Mem. at 25-35. Plaintiffs ignore this basic fact and instead argue that the Bureau's structure undercuts "democratic control of government" and runs afoul of a supposed constitutional requirement for a multimember commission. These arguments have no basis in separation-of-powers principles and fall far short of demonstrating any constitutional infirmity in the Bureau's structure.

A. The Bureau's Features Do Not Impede Any Branch of Government in the Exercise of its Functions

The Supreme Court has made clear that 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.* Conversely, it poses no separation-of-powers problem to "commingle the functions of the Branches" to some degree, so long as there is "no danger of either aggrandizement or encroachment." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). The Bureau's structure complies with these basic principles. Nothing about the Bureau's combination of features impairs the President, Congress, or the courts in the performance of their duties.[6]

1. The Bureau's features do not impede the President's ability to perform his constitutional functions

The Constitution vests the executive power in the President and assigns him the duty to "take care that the laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. As the Bureau discussed in its opening brief, well-established precedent confirms that the President's power to

[6] Plaintiffs do not even attempt to argue that Congress has arrogated power to itself or otherwise aggrandized another branch's powers in creating the Bureau.

remove the Bureau Director for cause is consistent with the vesting of the executive power in the President and protects the President's ability to faithfully execute the laws. Def. Mem. at 25-30 (citing *Free Enter. Fund*, 130 S. Ct. 3138; *Morrison v. Olson*, 487 U.S. 654 (1988); and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). Plaintiffs attempt to brush aside this precedent, claiming that the Bureau has a unique combination of features that requires the President to have the authority to remove the Director at will. *See* Pl. Reply at 1-3, 19. Plaintiffs fail, however, to explain how features unrelated to presidential control—*i.e.*, the Bureau's funding mechanism or the deference it receives on judicial review—in any way diminishes the President's ability to faithfully execute the laws. At best, Plaintiffs might be understood to contend that for-cause removal does not adequately protect the President's ability to perform his constitutional duty given Plaintiffs' views about the scope of the Bureau's powers and its lack of a multimember commission. Neither argument has merit.

Precedent forecloses Plaintiffs' suggestion that the scope of the Bureau's powers renders the for-cause removal restriction constitutionally invalid. Although *Morrison* makes clear that for-cause removal does not deprive the President of the "substantial ability to ensure that the laws are 'faithfully executed,'" *Morrison*, 487 U.S. at 696, Plaintiffs contend that *Morrison* is inapposite because it involved for-cause protection for an inferior officer with only "'limited' duties and jurisdiction," Pl. Reply at 19. But *Morrison* in no way suggested that for-cause removal protections were permissible only for officers with limited powers. On the contrary, it reaffirmed *Humphrey's Executor*, an earlier case upholding for-cause removal protections for the Federal Trade Commission (FTC), an agency with powers similar to the Bureau's. *See Morrison*, 487 U.S. at 689-91 (discussing *Humphrey's Executor*, 295 U.S. 602); *see also* Def. Mem. at 36-37. And more recently, the Supreme Court in *Free Enterprise Fund* made clear that

it was permissible to protect members of the Public Company Accounting Oversight Board with "a single level of good-cause tenure," even though that agency had "expansive powers to govern an entire industry." 130 S. Ct. at 3147, 3161.

Plaintiffs' contention that for-cause removal is constitutionally compatible only with multimember commissions is equally unavailing. First, Plaintiffs' contention that *Humphrey's Executor* approved for-cause removal protections only for multimember bodies (Pl. Reply at 10-11, 19) finds no support in that case's reasoning. The Court in that case considered two questions: (1) the statutory interpretation question whether the law in fact protected commissioners from removal except for cause, and (2) the constitutional question whether that for-cause removal protection was consistent with the separation of powers. *Humphrey's Executor*, 295 U.S. at 619. Although the Court noted that the FTC was a "body of experts" in evaluating the statutory interpretation question, that feature had no bearing on its resolution of the constitutional question. *See id.* at 624-25, 626-32. Instead, the Court upheld the removal restriction's constitutionality on the ground that the FTC exercised "quasi legislative and quasi judicial" functions.[7] *Id.* at 629; *see* Def. Mem. at 25-28.

Second, Plaintiffs contend that for-cause removal gives the President adequate control over an agency only if that agency is headed by a multimember body. In particular, Plaintiffs claim that the President "[i]n many instances" has the power to designate a commission's chairperson and that, because commissioners' terms are staggered, he usually will have an opportunity to appoint "at least some" commission members during his time in office. Pl. Reply

[7] Contrary to Plaintiffs' contention, *see* Pl. Reply at 19, *Myers v. United States*, 272 U.S. 52 (1926), does not require the President to have the ability to remove the Bureau Director at will. The Supreme Court has "disapproved" *Myers* to the extent that it was "out of harmony" with the decision in *Humphrey's Executor*. *Humphrey's Executor*, 295 U.S. at 626. For the reasons discussed above and in the Bureau's opening brief (Def. Mem. at 27-28), *Humphrey's Executor* and the cases following it control here.

at 5. This argument finds no support in the case law. On the contrary, it is in part foreclosed by *Humphrey's Executor*, which upheld for-cause removal protections for the FTC even though the President lacked authority to appoint the FTC chair. *See Humphrey's Executor*, 295 U.S. at 620 (citing statutory provision providing that "[t]he commission shall choose a chairman from its own membership").

Moreover, even if a President has the opportunity to appoint "at least some" commissioners, he would not necessarily have that opportunity at the start of his presidency, but only after sitting commissioners' terms expire. Whatever influence appointing "at least some" commissioners might give the President, the President would not gain that influence until he made his appointments. Plaintiffs do not explain their apparent view that the Constitution requires the President to have this influence at some point during his term, but not at the beginning. In any event, the for-cause removal power adequately protects the President's ability to faithfully execute the laws by empowering him to "hold the [agency] to account for everything . . . it does." *Free Enter. Fund*, 130 S. Ct. at 3154. As the Bureau noted in its opening brief, the for-cause removal power gives the President just as effective a tool for holding a single Director accountable as for holding commissioners accountable. Def. Mem. at 28.

As *Humphrey's Executor*, *Morrison*, and *Free Enterprise Fund* demonstrate, the power to remove an official for cause gives the President "ample authority to assure that the [official] is competently performing his or her statutory responsibilities in a manner that comports with [the statute]" and "to ensure the faithful execution of the laws." *Morrison*, 487 U.S. at 692-93. Neither the Bureau's scope of powers nor its single-Director leadership—nor any other feature—changes that.

2. The Bureau's features do not impair Congress's legislative or appropriations powers

As the Bureau's opening brief demonstrates, Congress retains its constitutional powers to oversee the Bureau, both through its power of the purse and through other traditional legislative and oversight authorities. Def. Mem. at 30-34. Plaintiffs no longer press their claim that Congress unconstitutionally relinquished its legislative power by delegating legislative authority to the Bureau, a claim that the Bureau explained was wholly without merit. *See* Pl. Mem. at 11; Plaintiffs' Complaint, Dckt. #1 (Compl.), ¶ 120; Def. Mem. at 33 n.16. Moreover, Plaintiffs now concede that "Congress, as CFPB argues, has the constitutional authority to create agencies outside of the appropriations process." Pl. Reply at 16; *see also* Def. Mem. at 30-32.

Plaintiffs' sole remaining objection to the Bureau's funding mechanism is that the Constitution precludes Congress from funding an agency outside of annual appropriations *only if* the agency is headed by a single Director whom the President can remove only for cause. Pl. Reply at 15. Plaintiffs, however, fail to identify any constitutional principle to support such an idiosyncratic limitation on Congress's legislative prerogative. Plaintiffs suggest that, without annual appropriations, the Dodd-Frank Act enables the Director to spend the Bureau's "monied resources at his pleasure."[8] Pl. Reply at 15, 16 (quoting *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012)). But the Constitution requires only that federal officials not spend the nation's "monied resources" without the approval of Congress. *See U.S. Dep't of*

[8] Plaintiffs also suggest that Congress unconstitutionally abdicated its appropriations power by providing that the Bureau's primary funding "shall not be subject to review by" the House and Senate Appropriations Committees. Pl. Reply at 17 (quoting 12 U.S.C. § 5497(a)(2)(C)). But, as the Bureau explained in its opening brief, this is constitutionally irrelevant. Def. Mem. at 32 n.15. The Constitution does not assign the power of the purse to congressional appropriations committees (which in any event are creatures of Congress, not the Constitution), but to Congress as a whole. U.S. Const. art. I, § 9, cl. 7. Congress retains that power: It established, and retains full legislative authority over, the Bureau's funding mechanism. *See* Def. Mem. at 30-32.

Navy, 665 F.3d at 1347. Congress gave its approval here in § 1017 of the Dodd-Frank Act. 12 U.S.C. § 5497.

Plaintiffs simply have not explained how the Bureau's funding mechanism—though otherwise permissible—becomes unconstitutional when combined with the Bureau's single-Director leadership, for-cause removal protection, or regulatory authority. Pl. Reply at 15-17. Indeed, those other features have no impact on Congress's ability to exercise its power of the purse or any other power—and the combination of those features thus does not impair congressional prerogatives.

3. The Bureau's features do not interfere with the judiciary's powers

Finally, the Bureau's features do not interfere with the judiciary's powers. As the Bureau explained in its opening brief, the Bureau's final actions are subject to ordinary judicial review under the Administrative Procedure Act. Def. Mem. at 34-35.

Plaintiffs do not suggest that the Bureau's for-cause removal provision, single-Director leadership, funding mechanism, or scope of authority interferes with the judiciary's powers. Rather, Plaintiffs object to a Dodd-Frank Act provision that "requires courts to grant . . . *Chevron* deference" to the Bureau's interpretations of Federal consumer financial law as if the Bureau "'were the only agency authorized to apply, enforce, interpret, or administer'" that law. Pl. Reply at 20 (quoting 12 U.S.C. § 5512(b)(4)(B)). As the Bureau explained in its opening brief, this provision simply expresses Congress's intent for the Bureau's interpretations to receive deference even if other agencies share authority to administer the laws that the Bureau has interpreted. Def. Mem. at 34-35 & n.17.

In contending that this provision presents a "separation-of-powers 'problem'" (Pl. Reply at 20), Plaintiffs turn separation-of-powers principles on their head. Plaintiffs argue that this

provision impermissibly "mandates that Courts treat any CFPB interpretation as displacing all previous agency interpretations" and "future conflicting determinations by other agencies" and "convert[s] discretionary rules of deference to statutory, mandatory rules of obeisance." Pl. Reply at 20. At bottom, Plaintiffs' arguments suggest that courts should be able to overrule Congress's determination on which agency deserves deference on questions of statutory interpretation—or whether to apply deference at all. But that is backwards. The premise of *Chevron* is that *Congress* controls who has authority to interpret a statute: "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). In enacting the judicial-review provision to which Plaintiffs object, Congress simply made clear its intent to delegate interpretive authority over Federal consumer financial laws to the Bureau. This was well within Congress's authority and in no way impinges on the courts' prerogatives.

B. Plaintiffs' Arguments that the Bureau's Combination of Features Violates the Constitution Find No Support in Separation-of-Powers Principles

In objecting to the combination of features that Congress gave the Bureau, Plaintiffs never confront the basic fact that the Bureau's structure does not impede the President, Congress, or the courts in the exercise of their respective functions. Instead, Plaintiffs emphasize that "[j]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute." Pl. Reply at 2 (citing *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013)). But the fact that a combination of two otherwise-permissible features *can be* unconstitutional does not mean that such a

combination *is* unconstitutional—or that precedent approving those features in isolation does not apply. In *American Railroads*, for example, the statute in question was not unconstitutional merely because it combined "two structural features [that] raise no constitutional concern independently," but because the statute gave a private entity (Amtrak) the right to "jointly exercise regulatory power on equal footing with an administrative agency," thereby "vitiat[ing] the principle that private parties must be limited to an advisory or subordinate role in the regulatory process." 721 F.3d at 673. Likewise, combining features will raise a separation-of-powers concern only if those features, when joined together, violate an actual separation-of-powers principle that neither feature violates independently.

Plaintiffs here have failed to take the next step of demonstrating a separation-of-powers principle that the Bureau's combination of features actually violates. Tellingly, although Plaintiffs cite several constitutional provisions in passing in their complaint and opening brief (Compl. ¶¶ 117-119; Pl. Mem. at 11), they never tie their arguments to those provisions, and do not refer in their reply brief to any constitutional provision at all. Lacking any concrete basis for their challenge, Plaintiffs instead argue that the Bureau's combination of features undercuts "democratic control of government" and runs afoul of a previously undiscovered constitutional requirement for a multimember commission that applies uniquely to the Bureau. Pl. Reply at 13, 14. These arguments find no support in separation-of-powers principles.

1. The Bureau's structure does not undercut "democratic control of government"

Plaintiffs claim that the Bureau's structure "violates the democratic principles that underlie our system of government." Pl. Reply at 14. They, however, offer no explanation for this claim that is distinct from their general separation-of-powers argument. Nor could they. As explained, the Dodd-Frank Act preserves "democratic control of government" by ensuring that

the political branches retain constitutionally sufficient control over the Bureau. Indeed, the only threat to democratic principles presented here arises from Plaintiffs' meritless constitutional challenge to the Dodd-Frank Act. "When [the court] is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Mistretta*, 488 U.S. at 384 (internal quotation marks omitted). Plaintiffs' bald invocation of "democratic control" does not clear this high hurdle.

2. The Constitution does not impose a multimember commission requirement

Plaintiffs next argue that, in the Bureau's unique case, "the Constitution mandates a multimember commission." Pl. Reply at 13. In advocating for this new constitutional requirement, Plaintiffs make various claims about the policy benefits of multimember commissions and invoke "the Nation's history and traditions" and the Bureau's supposed "novelty." Pl. Reply at 1, 2, 3. None of these arguments has any basis in constitutional principles.

a. Plaintiffs' arguments about the benefits of multimember commissions have no basis in constitutional principles

Plaintiffs throw out various arguments about the benefits of a commission structure to see what sticks. Nothing does. None of Plaintiffs' arguments finds any support in separation-of-powers principles.

Plaintiffs first complain that the Bureau's leadership structure concentrates "too much unchecked power . . . in the hands of a single person." Pl. Reply at 8. According to Plaintiffs, Congress has unconstitutionally accumulated "all powers legislative, executive and judicia[l] in the same hands," which is "the very definition of tyranny." *Id.* But, as explained above and in the Bureau's opening brief (Def. Mem. at 38), the legislative, executive, and judicial powers are

dispersed among the three branches, not concentrated in the hands of the Bureau Director. The President, Congress, and the courts all exercise checks on the Bureau—and the Bureau Director—through the constitutional powers that remain at their disposal. Moreover, as the Bureau's opening brief explained (Def. Mem. at 36-37), and as Plaintiffs fail to refute, the scope of the Bureau's authority does not somehow make these checks constitutionally inadequate. In short, Plaintiffs' contention that the Bureau Director exercises unchecked power is wholly without merit.

In a related vein, Plaintiffs contend that the Constitution requires a multimember structure to supply "internal checks and balances" as a substitute for the "external checks"—"presidential removal and congressional appropriations"—that the Bureau supposedly lacks. Pl. Reply at 8-9. As the Bureau has already explained, however, the "external checks" on the Bureau are constitutionally adequate, so no internal check would be necessary even under Plaintiffs' theory. More fundamentally, Plaintiffs' argument flies in the face of separation-of-powers principles. If missing "external checks" on an agency left a branch of government unable to perform its constitutional duties—for example, if the President lacked any authority to remove the agency head—that would violate the separation of powers. The "internal check" of a commission structure could not restore that branch's impaired authority, and thus could not cure the violation. In short, the number of people that Congress has decided should head up an agency has no bearing on any separation-of-powers inquiry.

Plaintiffs next contend that a commission structure makes an agency more democratically accountable because, by statute, commission meetings are open to the public. Pl. Reply at 10. But Plaintiffs concede that open meetings are a statutory requirement, not a constitutional one. *Id.* And Plaintiffs' related contention, that commissions also promote democratic accountability

by allowing the President to appoint "some" commissioners and possibly a chairman, is meritless for the reasons discussed above. *See supra* pages 15-16.

Plaintiffs next (somewhat contradictorily) laud multimember commissions for "dilut[ing] the effect of transitory political events on agency policy" and enabling "'expert decisions as distinguished from raw political . . . decisions." Pl. Reply at 9, 10. But even if Plaintiffs' views on the optimal policy for agency decisionmaking were correct, Plaintiffs do not attempt to tie their views to any constitutional principle.

Finally, Plaintiffs contend for the first time in their reply that the absence of a commission structure "undermin[es] judicial review" because "there will be insufficient recordation of competing considerations" offered by commissioners with "minority viewpoints." Pl. Reply at 9. That argument is baseless. Federal courts are fully capable of reviewing—and routinely do review—actions by agencies with single heads just as they review the actions of multimember commissions.

At bottom, all of Plaintiffs' arguments are untethered from separation-of-powers principles and simply tout the perceived policy benefits of multimember commissions. But as the Bureau has explained (Def. Mem. at 39), the policy benefits (and drawbacks) of a commission structure are quintessentially questions for Congress to consider. Here, Congress decided that the Bureau should be headed by a single Director. Nothing in the Constitution compelled Congress to make a different choice.

b. Neither "tradition" nor "novelty" supports creating a new constitutional requirement for a multimember commission

Finally, Plaintiffs contend that the Bureau's structure is "unmoored" from history because Congress has "traditionally" structured independent agencies to be led by multimember

commissions.[9] Pl. Reply at 3, 5. But, as the Bureau explained in its opening brief (Def. Mem. at 39), Congress broke no new ground in giving the Bureau a single Director removable only for cause. Plaintiffs respond that it is "the combination of CFPB's features of autonomy that makes the agency novel and unprecedented," which in Plaintiffs' view "*may* . . . signal unconstitutionality." Pl. Reply at 2 (quoting *Ass'n of Am. R.R.*, 721 F.3d at 673 (emphasis added)). The Supreme Court has made clear, however, that "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta*, 488 U.S. at 385. To prevail, Plaintiffs must show that the alleged novelty of the Bureau's structure actually violates separation-of-powers principles. Plaintiffs have failed to make that showing for the reasons explained above and in the Bureau's opening brief. Plaintiffs' constitutional challenge to the Bureau's existence therefore must be rejected.

[9] Plaintiffs contend that history and tradition must be given "great weight' in assessing the constitutionality of the Bureau's structure, but the cases they cite to support that contention do not apply to this case. *See* Pl. Reply at 6. Rather, those cases give "great weight" to the existence of a longstanding practice—particularly one in which the branches of government have acquiesced—in upholding the practice as constitutional. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (upholding practice "[g]iven the fact that [it] goes back over 200 years and has received congressional acquiescence throughout its history"); *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (upholding statute that followed history of an "unbroken congressional practice" of enacting similar statutes); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (approving President's actions in part because "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952))); *The Pocket Veto Case*, 279 U.S. 655, 688-89 (1929) (giving "great weight" to "the practical construction that has been given to [a constitutional provision] by the Presidents through a long course of years, in which Congress has acquiesced"); *Bauer v. Marmara*, -- F. Supp. 2d --, 2013 WL 1684051, at *3 (D.D.C. 2013) ("[T]he rich history of informer statutes is well nigh conclusive as to their constitutionality." (quotations omitted)). These cases do not hold that Congress's practice of doing something one way deserves "great weight" whenever a party raises a constitutional challenge to Congress's decision to depart from that practice. Thus, Congress's past decisions to structure many (though not all, *see* Def. Mem. at 39) independent agencies as multimember commissions says nothing about the constitutionality of independent agencies headed by a single leader.

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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