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. 13-01112 (CKK)

PLAINTIFFS' OPPOSITION TO CFPB'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Morgan Drexen, Inc. ("Morgan Drexen") and Kimberly A. Pisinski, Esq. ("Pisinski") oppose the motion to dismiss of the Consumer Financial Protection Bureau ("CFPB"). Despite CFPB's arguments to the contrary, Plaintiffs have every right to bring this facial constitutional challenge under the Supreme Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.* 130 S. Ct. 3138 (2010), and controlling D.C. Circuit precedent. The D.C. Circuit has held that facial challenges—like those advanced by Plaintiffs here—are "presumptively reviewable." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs (NAHB II)*, 440 F.3d 459, 464 (D.C. Cir. 2006) (internal quotations omitted).

CFPB's motion does nothing to address this controlling authority. Instead, CFPB contends that Plaintiffs are not entitled to (1) injunctive relief because they are not suffering irreparable harm; (2) declaratory relief because they are engaging in procedural gamesmanship; or (3) any relief because the constitutional challenges can be resolved in California.

CFPB's arguments are simply wrong. This Court has jurisdiction to entertain Plaintiffs' facial constitutional challenge. Plaintiffs' claims are ripe. Plaintiffs have standing (indeed, CFPB does not even contest Morgan Drexen's standing). Plaintiffs filed this action only after suffering significant injury and being threatened with significantly greater harm. There is no doctrine that requires Plaintiffs to wait like sitting ducks in CFPB's crosshairs, unable to bring a constitutional challenge unless and until CFPB files an enforcement action. As explained below, numerous cases hold the exact opposite.

CFPB's arguments about procedural gamesmanship are belied by the timing and merits of Plaintiffs' suit. CFPB itself represented to the Court that it had not decided whether to file an enforcement action even after Plaintiffs filed suit. Accordingly, CFPB cannot now contend that Plaintiffs somehow knew it would file suit and beat it to the punch. Finally, this Court should

exercise its jurisdiction and resolve the constitutional challenge in this case, where both parties consented to an expedited schedule and where merits briefing has already been submitted and will soon be closed. Plaintiffs should not be required to start over again in California in the context of an enforcement proceeding, the resolution of which could take years.

SUMMARY OF RELEVANT FACTUAL BACKGROUND[1]

I. MORGAN DREXEN'S SUPPORT SERVICES AND PISINSKI'S LAW PRACTICE

Morgan Drexen is in the business of licensing its proprietary software to law firms and providing these firms with live paraprofessional and support services. SF ¶ 62. Morgan Drexen provides non-attorney paralegal support services to attorneys in the areas of debt resolution, bankruptcy, personal injury, mass tort litigation, and tax preparation. SF ¶ 63.

Pisinski is a lawyer practicing law in Connecticut. SF ¶ 95. Pisinski is among those attorneys who have contracted with Morgan Drexen to provide non-attorney/paralegal services that support her law practice. SF ¶ 97. Pisinski depends on Morgan Drexen to assist her in providing her clients with high quality and relatively low cost legal services. SF ¶ 98. Pisinski remains responsible for tasks delegated to Morgan Drexen pursuant to Rule 5.3 of the Connecticut Rules of Professional Conduct. Compl. ¶¶ 22, 27.

II. CFPB'S INVESTIGATION OF MORGAN DREXEN

On March 13, 2012, CFPB issued a Civil Investigative Demand ("CID") to Morgan Drexen. SF ¶ 64. The CID contained various mandatory language, including the following:

[1] The facts are taken from Plaintiffs' Complaint, the Statement of Facts in Support of Motion for Summary Judgment (Docket No. 13-1) ("SF"), and from other materials outside the pleadings given that CFPB seeks dismissal under Federal Rule of Civil Procedure 12(b)(1).

- The "[a]ction [r]equired" is to "[p]roduce [d]ocuments and/or [t]angible [t]hings" and to "[p]rovide [w]ritten [r]eports and/or [a]nswers to [q]uestions" by April 13, 2012." SF ¶ 65.
- "The delivery of this demand to you by any method prescribed by Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service and may subject you to a penalty imposed by law for failure to comply." SF ¶ 66.
- "You must contact Wendy J. Weinberg . . . to schedule a meeting . . . to be held within 10 calendar days after receipt of this CID . . . ." SF ¶ 67.
- Any petition to modify the demand "must be filed . . . within twenty calendar days after service of the CID . . . ." SF ¶ 68.

The CID requested information including communications between Morgan Drexen and its supported attorneys like Pisinski concerning attorney clients, and various personal financial data (including written notes memorializing communications with clients). SF ¶ 69.

Morgan Drexen responded to the CID on April 13, 2012. SF ¶ 70. CFPB followed up on Morgan Drexen's responses with language requiring further production. SF ¶ 72. On April 24, 2012, CFPB wrote: "In light of Morgan Drexen's unacceptable failure to provide the materials described above, it is critical that you produce them immediately and in any event by close of business Friday, April 27, 2012." SF ¶ 73. Over the course of the investigation, Morgan Drexen produced over seventeen thousand pages of documents to CFPB. SF ¶ 74.

Over the course of its investigation, CFPB deposed Jeffrey Katz, David Walker, Laura Wiegman, and Walter Ledda, all from Morgan Drexen. SF ¶ 77.

III. CFPB'S INVESTIGATION INJURES PLAINTIFFS

CFPB's investigation—aside from the California Lawsuit, and aside from any attempt to judicially enforce compliance with the CIDs—has caused significant injury to Morgan Drexen. It has forced Morgan Drexen to "divert[] substantial attention and resources, in terms of paying attorney's fees, as well as the company time necessary to provide officers for depositions, collect and review documents, and otherwise respond to CFPB's demands." SF ¶ 78. CFPB's investigation has significantly increased Morgan Drexen's costs with respect to accessing credit. SF ¶ 79. For example, CFPB's CIDs caused the loss of Morgan Drexen's credit facilities and impacted Morgan Drexen's ability to obtain reasonable financing. SF ¶¶ 80-81. Morgan Drexen now pays 22% interest where, before the CID, Morgan Drexen was able to obtain financing at 4.5%. SF ¶ 82.

CFPB also demanded documents directly from certain of Morgan Drexen's attorney business partners and its marketing services firm (SF ¶¶ 83-84). It also threatened to send subpoenas to all of Morgan Drexen's attorney customers. SF ¶ 88. In addition, during the investigation, CFPB informed counsel to Morgan Drexen that its work with supported attorneys was in violation of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq*. SF ¶ 89. CFPB informed counsel to Morgan Drexen that it would not accept any resolution short of Morgan Drexen refusing to support attorneys engaged by clients for both bankruptcy counseling and debt settlement. SF ¶ 93. These engagements comprise a large percentage of Morgan Drexen's total business, and any requirement that Morgan Drexen stop providing these services to attorneys would threaten the viability of Morgan Drexen's business. SF ¶ 94.

CFPB's investigation is causing ongoing injury to Pisinski as well, although for different reasons. Pisinski faced an agency seeking to violate the attorney-client privilege between her and her clients by essentially sending a subpoena to her paralegal. *See* SF ¶¶ 85-86, 97-98, 102-

103. Furthermore, Pisinski depends on Morgan Drexen for paralegal support. SF ¶ 97. If CFPB stops Morgan Drexen from providing its services to Pisinski, it will disrupt Pisinski's legal practice. SF ¶ 99. CFPB has also taken the position that Pisinski's paralegal is acting unlawfully, in performing the precise services that Morgan Drexen performs for Pisinski and for attorneys around the county. SF ¶ 92. This necessarily means that CFPB has taken the position that attorneys who contract with Morgan Drexen to assist in providing bankruptcy and debt resolution services are acting unlawfully. SF ¶ 89. More fundamentally, Pisinski is a lawyer actively engaged in the practice of law, SF ¶ 95, and CFPB is effectively trying to regulate her practice by investigating (and ultimately suing) Morgan Drexen, her paralegal.

IV. PLAINTIFFS SUE CFPB IN THIS COURT

In light of CFPB's actions, the harm caused to Plaintiffs, and CFPB's demands for information protected by the attorney-client privilege (the production of which would violate the attorney client privilege between Pisinski and her clients), Plaintiffs filed the instant suit on July 22, 2013. Docket No. 1.

During a telephone conference with the Court, CFPB represented that it had "not yet determined whether or not to file an enforcement action, and I can't commit to what we will do in that regard . . ." 7/25/13 Tr. 5:10-6:11. The Court commented that it would make an "expedited decision," and therefore it "would be helpful, probably, not to have an enforcement action . . . going on at the same time." *Id.* at 5:20-24. The Court set a summary judgment briefing schedule, with the consent of all parties, and issued an order on July 25, 2013 that provided for merits briefing to be completed by September 25, 2013. Docket No. 8.

Plaintiffs initially sought a temporary restraining order and preliminary injunction, but withdrew their motion after the conference with the Court and in light of the Court's view that this matter was better resolved on summary judgment pursuant to an expedited briefing schedule.

V. CFPB SUES MORGAN DREXEN IN CALIFORNIA

Notwithstanding the July 25, 2013 hearing, CFPB filed suit in the United States District Court for the Central District of California against Morgan Drexen and its Chief Executive Officer on August 20, 2013. *CFPB v. Morgan Drexen Inc.*, No. 8:13-cv-01267 (filed Aug. 20, 2013) (the "California Lawsuit"); *see also* Docket No. 14-1. In its Complaint, CFPB alleged that Morgan Drexen and its Chief Executive Officer were in violation of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531(a), 5536(a), 5564(a), and 5581, and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6102(c)(2) and 6105(d). Cal. Compl. ¶ 1.

The same day it filed the California Lawsuit, CFPB issued a press release, stating among other things: "The company falsely claims that it does not charge consumers upfront fees for debt-relief services and falsely represents to consumers that they will become debt free in months if they work with Morgan Drexen."[2] Unlike other statements in CFPB's press release, the foregoing is not couched in terms of what is "alleged" or what CFPB "believes." CFPB presents its allegations as fact.

Pisinski is not a defendant in the California Lawsuit.

Plaintiffs have moved to enjoin the prosecution of the California Lawsuit pending the outcome of this case. *See* Docket Nos. 15, 18-19. That motion is fully briefed and pending resolution.

[2] Press Release, Consumer Protection Financial Bureau, "CFPB Files Suit Against Morgan Drexen for Charging Illegal Fees and Deceiving Consumers" (Aug. 20, 2013) *available at* http://www.consumerfinance.gov/pressreleases/cfpb-files-suit-against-morgan-drexen-inc-for-charging-illegal-fees-and-deceiving-consumers/.

ARGUMENT

I. LEGAL STANDARD

CFPB moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Mem. in Supp. of Def.'s Mots./Opp to Pls.' Mot. ("Def.'s Br.") 10 (Docket No. 17-1). This Court has recently set forth the applicable standards in ruling on a motion to dismiss under these rules. *See Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, --- F. Supp. 2d ---, 2013 WL 1398570, at *7-8 (D.D.C. Apr. 8, 2013) (Kollar-Kotelly, J.) (granting-in-part, denying-in-part motion to dismiss). By way of summary, Plaintiffs' complaint is "to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Id* at *7 (citing *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005)). Under Rule 12(b)(1), Plaintiffs have the "burden to prove subject matter jurisdiction by a preponderance of the evidence." *Id.* Although the Court may consider "materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction . . . the court must still accept all of the factual allegations in the complaint as true." *Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (internal quotations omitted). Under Rule 12(b)(6), Plaintiffs must allege facts that give rise to a "plausible" claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. THIS COURT HAS JURISDICTION TO HEAR PLAINTIFFS' PRE-ENFORCEMENT FACIAL CONSTITUTIONAL CHALLENGE

A. CFPB Fails to Address Controlling Authority Permitting This Suit

CFPB's memorandum in support of its motion to dismiss ignores the longstanding principle that courts can and should exercise jurisdiction over facial challenges to an agency's enabling statute independent of statutory mechanisms or defenses to enforcement actions.

In *Free Enterprise Fund*, the government argued that the plaintiff had no "private right of action directly under the Constitution" to challenge the agency's structure, asserting that such challenges could only be raised "through established statutory mechanisms or as ***defenses to enforcement actions***." Brief for the United States, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 3290435, at *22-23 (emphasis added). The Court rejected the government's argument, holding that federal courts have original jurisdiction and equitable power to hear and remedy such constitutional claims. *Free Enterprise Fund*, 130 S. Ct. at 3151 n.2. The Court found that the petitioner's constitutional claim was "collateral" to particular agency orders and rules because petitioners more fundamentally "object to the Board's ***existence***." *Id.* at 3150 (emphasis added). Accordingly, the petitioner was "entitled to declaratory relief sufficient to ensure that the [rules] to which they are subject will be enforced only by a constitutional agency . . . ." *Id.* at 3164.

Here, like the plaintiff in *Free Enterprise Fund*, Plaintiffs bring a facial constitutional challenge to CFPB's enabling statute. Like the plaintiff in *Free Enterprise Fund*, Plaintiffs fundamentally object to CFPB's existence – not to any particular CID or any given agency action. Accordingly, the Court has jurisdiction over this action.

This conclusion is further required by controlling D.C. Circuit precedent. *See Gen. Elec. Co. v. E.P.A.*, 360 F.3d 188, 190-94 (D.C. Cir. 2004) (holding that the district court should have exercised jurisdiction over a "facial" constitutional challenge to the CERCLA regime, and emphasizing that the "usual practical considerations counseling against pre-enforcement review are not present in the adjudication of a facial [constitutional] claim."); *Hettinga v. United States*, 560 F.3d 498, 506 (D.C. Cir. 2009) (exercising jurisdiction over a constitutional claim and rejecting the government's argument that the claim first required exhaustion of administrative

remedies); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996) (exercising jurisdiction and noting that there is a "necessary distinction between a constitutional challenge that is exclusively directed to the source of putative agency authority and a challenge to the manner in which the agency has exercised or . . . failed to exercise that authority."); *Elk Run Coal Co. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8, 21 (D.D.C. 2011) (exercising jurisdiction over the plaintiff's "broad facial and systemic challenges," which did not require prior exhaustion of administrative remedies). *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) (rejecting the government's argument that the Court should abstain from reviewing a Guantanamo detainee's challenge to a military commission in favor of the commission proceeding, and holding that the government "has identified no other important countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction that is conferred upon them by Congress").

B. Plaintiffs Are Not Required to Expose Themselves to an Enforcement Action Before Seeking Relief From the Unconstitutional Structure of CFPB

Plaintiffs are not required to expose themselves to an enforcement action before seeking relief. In a footnote, CFPB argues against the application of *Free Enterprise Fund*, arguing that the plaintiffs in that case 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." Def.'s Br. at 17 n.11. CFPB's argument implies that no plaintiff could ever challenge the constitutionality of CFPB's enabling statute unless and until CFPB sues it. Contrary to CFPB's argument, the Supreme Court's holding is not so limited. In *Free Enterprise Fund*, the government "advise[d] petitioners to raise their claims by appealing a Board sanction." 130 S. Ct. at 3150. The Court rejected this argument, holding that "the investigation . . . produced no sanction" and the plaintiffs would not be required to "*incur* a sanction" before suit. *Id.* (emphasis in original).

Free Enterprise Fund does not require Plaintiffs—after being placed in CFPB's crosshairs and drawing fire—to wait like sitting ducks, and to continue doing business at risk. *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"); *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581 (1985) ("One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough") (quotation omitted); *cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights") (citation omitted).

Here, Plaintiffs filed suit even later in the investigatory process than did the plaintiffs in *Free Enterprise Fund*. 130 S. Ct. at 3149 ("The Board inspected the firm, released a report critical of its auditing procedures, and ***began a formal investigation***. [The plaintiffs] then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers.") (emphasis added). If anything, Plaintiffs' claims are more appropriate due to the advanced stage of CFPB's investigation, its issuance of the Notice and Opportunity to Respond and Advise (NORA) letter, and the existing harm and damage caused by the CIDs.

C. CFPB Cannot Be Permitted to Strong-Arm Plaintiffs

If adopted, CFPB's position that Plaintiffs must wait unless and until CFPB sues before raising a constitutional challenge to the agency's very existence would have the practical effect of permitting CFPB to "strong-arm[] . . . regulated parties into voluntary compliance without the opportunity for judicial review." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012). CFPB could simply "investigate" parties out of business by sending CIDs to all of their business partners

without ever facing a facial constitutional challenge. The Supreme Court rejected a similar argument in *Sackett*, and the Court should reject CFPB's argument here.

D. There Is No Congressional Restriction on Pre-Enforcement Review

Courts begin with a "'strong presumption that Congress intends judicial review of administrative action' . . . which 'may be overcome only upon a showing of clear and convincing evidence of a contrary intent.'" *Lepre v. Dept. of Labor*, 275 F.3d 59, 72 (D.C. Cir. 2001) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)). "[S]uch judicial oversight is needed to protect against 'freewheeling agencies meting out their brand of justice in a vindictive manner.'" *Id.* (quoting *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237 (1968)). Here, CFPB has not argued that Title X of the Dodd-Frank Act restricts the historic availability of pre-enforcement review (and even if it did, that would be a separate constitutional violation).

III. THIS CASE PRESENTS A "PURELY LEGAL CLAIM" THAT IS "PRESUMPTIVELY REVIEWABLE"

"The remedy made available by the Declaratory Judgment Act . . . relieves potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while instituting suit at his leisure—or never." 10B Charles Alan Wright, Arthur R. Miller, *et al.*, *Federal Practice and Procedure* § 2751 (3d ed. 1998) (quotation omitted).

The D.C. Circuit has "held that a claim that raises purely legal questions is presumptively fit for judicial review . . . ." *Time Warner Entm't Co.*, 93 F.3d at 974. "Thus, a controversy is ripe if further administrative process will not aid in the development of facts needed by the court to decide the question it is asked to consider." *Id.* (quotation omitted). "A purely legal claim in the context of a facial challenge . . . is presumptively reviewable." *NAHB II*, 440 F.3d at 464 (quoting *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs (NAHB I)*, 417 F.3d 1272,

1282 (D.C. Cir. 2005)). This is so because the "challenged features will not change from case to case or become clearer in a concrete setting." *Id.*; *see also Venetian Casino Resort, LLC v. E.E.O.C.*, 409 F.3d 359, 364-65 (D.C. Cir. 2005) (holding that case was ripe for decision because it presented a "clear-cut legal question" that could be resolved by analyzing relevant statutes and legal authority); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (same); *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) (same). *Cf. Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. Apr. 9, 2009) ("In the context of a facial challenge [to a statute], a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record.").

Here, Plaintiffs have brought a facial constitutional challenge to CFPB's enabling statute, a claim that is "presumptively reviewable" under the law of this circuit. The question of whether CFPB's structure is constitutional will not change from case to case or become clearer in a concrete setting. This Court does not need a developed factual record to resolve Plaintiffs' challenge.

CFPB does not argue ripeness in its moving papers, but this matter is undeniably ripe for judicial review in any event. "The framework for analyzing the ripeness of pre-enforcement agency action is well established. Under the two-part test set forth by the Supreme Court in *Abbott Laboratories,* [the court] must consider 'both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration.'" *Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 434 (D.C. Cir. 1986) (quoting *Abbott Labs v. Gardner,* 387 U.S. 136, 149 (1967)). "Fitness and hardship function as independent but related variables, the former as a measure of the interests of the court and agency in postponing review and the latter as a measure of the challenging party's countervailing interest in securing immediate judicial review." *Id.*

"The judiciary's ultimate determination of ripeness in a specific setting depends on a pragmatic balancing of those two variables and the underlying interests which they represent. *Id.* (quoting *Continental Air Lines, Inc. v. CAB,* 522 F.2d 107, 125 (D.C. Cir. 1974) (en banc)).

Here, Plaintiffs satisfy both parts of the ripeness test. Plaintiffs' facial constitutional challenge is fit for judicial review because "the issue tendered is a purely legal one." *Time Warner Entm't Co.,* 93 F.3d at 972. (quotation omitted) (holding that where "any difference in the ways in which franchising authorities might actually implement the requirement does not affect the First Amendment analysis of this argument, the issue tendered is . . . fit for judicial review"). Plaintiffs face significant hardship should the Court withhold consideration, as demonstrated by affidavits submitted by Walter Ledda and Pisinski. Morgan Drexen has already spent significant moneys in attorney's fees to respond to CFPB's investigation, and has incurred increased costs with respect to accessing credit and financing. SF ¶¶ 78-82. More fundamentally, CFPB informed counsel to Morgan Drexen that it would not accept any resolution short of Morgan Drexen refusing to support attorneys engaged by clients for both bankruptcy counseling and debt settlement. SF ¶ 93. These engagements comprise a large percentage of Morgan Drexen's total business. Any requirement that Morgan Drexen stop providing these services threatens the viability of Morgan Drexen's business. SF ¶ 94.

Pisinski will also suffer significant hardship in the absence of the Court's review because she relies upon Morgan Drexen to provide her with paralegal support. SF ¶ 97. If CFPB's actions against Morgan Drexen are successful, CFPB will stop Morgan Drexen from providing services, disrupting Pisinski's practice. SF ¶ 99. CFPB has also taken the position that Morgan Drexen's business model is unlawful—which necessarily means that CFPB believes that Pisinski is acting unlawfully by partnering with Morgan Drexen to provide bankruptcy and debt

resolution services. SF ¶¶ 89, 92. More fundamentally, Pisinski is a lawyer actively engaged in the practice of law, SF ¶ 95, and CFPB is effectively regulating her practice by taking action against Morgan Drexen (her paralegal), and alleging that Morgan Drexen is acting unlawfully.

IV. BOTH PLAINTIFFS HAVE STANDING TO SUE

Plaintiffs demonstrated that they have standing to maintain this suit in their memorandum in support of motion for summary judgment. *See* Mem. in Supp. of Pls.' Mot for Summ. J. ("Pls.' Br.") 4-7, Docket No. 13-2.[3] CFPB's motion does not contest Morgan Drexen's standing argument in any way. Although CFPB contests Pisinski's standing, Def.'s Br. at 22-23, "if 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." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

In any event, Pisinski does have standing. To have Article III standing, a party must meet three requirements: (1) an injury-in-fact that is (a) concrete and particularized, and (b) actual or imminent; (2) the injury must be caused by or fairly traceable to the challenged act; and (3) the injury must be redressable by a favorable court decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). CFPB's argument against Pisinski's standing is limited to her interest in protecting her clients' confidential information. Def.'s Br. at 23. To be sure this is a weighty interest. It is also a straw man because CFPB's actions threaten Pisinski with far more substantial injury.

[3] Specifically, Plaintiffs argued that Morgan Drexen had standing because: (1) Morgan Drexen is subject to CFPB's authority and incurred significant time and expense resulting therefrom, Pls.'s Br. at 4-6; (2) Morgan Drexen faces an immediate threat of further injury due to CFPB's litigation threat, *id.* at 6; (3) Morgan Drexen suffered concrete and presently existing harm from CFPB's actions in sending CIDs to Morgan Drexen's business partners, *id.* at 7; and (4) CFPB demanded privileged information that presented Morgan Drexen with a Hobson's choice of violating its ethical obligations and harming client relationships or facing CFPB retribution, *id.*

Pisinski meets the *Lujan* test for the same reasons that withholding consideration would cause her to suffer significant hardship. Further, CFPB's actions fly in the face of the Dodd-Frank Act's exemption for lawyers engaged in the practice of law, as well as long-standing precedent attributing the regulation of lawyers to the States under the Tenth Amendment. *See* 12 U.S.C. § 5517(e) (exempting attorneys from CFPB authority under the Consumer Financial Protection Act); *Am. Bar Ass'n v. F.T.C.*, 671 F. Supp. 2d 64 (D.D.C. 2009), *vacated as moot*, 636 F.3d 641 (D.C. Cir. 2011) (district court invalidated attempt by FTC to regulate lawyers; D.C. Circuit vacated as moot in light of subsequent legislation). *See also Moore v. Suthers*, Case No. 11CV7027, at 18 (Colo. Dist. Ct. Denver Cnty. Sept. 12, 2012) (holding that "because of the nature of the relationship between attorneys and their non-lawyer assistants, where attorneys can be held professionally responsible for their assistants' actions, the Court concludes that regulation of an attorney's non-lawyer assistant [Morgan Drexen] has direct implications on the attorney and therefore implicates the separation-of-powers doctrine.") (attached as Exhibit A hereto). Pisinski 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.

V. CFPB'S SECOND-FILED ENFORCEMENT ACTION DOES NOT REQUIRE DISMISSAL OF THIS CASE

CFPB argues that Plaintiffs' suit should be dismissed under *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987) because (a) permitting Plaintiffs' suit would "frustrate the final judgment rule," and (b) if Morgan Drexen wins on the merits in California then the court "might be able to avoid deciding the constitutional issue." Def.'s Br. at 13. CFPB's reliance on *Deaver* is misplaced because *Deaver* stands for the limited proposition that civil proceedings are stayed

pending collateral ***criminal*** proceedings. 822 F.2d at 71 ("Prospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal ***criminal*** procedure") (emphasis added). Further demonstrating that the rationale of *Deaver* is limited to criminal cases, the D.C. Circuit held that: "all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved." *Id.* at 69 (citations omitted). "'Bearing the discomfiture and cost of prosecution for crime even by an innocent person is one of the painful obligations of citizenship.'" *Id.* (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)). Permitting civil suits in the context of criminal proceedings would further permit "much more extensive discovery" that Congress "hardly intended to permit criminal defendants." *Rankins v. Winzeler*, No. 02-cv-50507, 2003 WL 21058536, at *6 (N.D. Ill. May 9, 2003) (citing *Deaver*, 822 F.2d at 68-71).

The rationale of *Deaver* does not extend to civil enforcement proceedings because there are no countervailing concerns about circumventing criminal procedure. "It is well-established that a district court has discretionary authority to stay a civil proceeding pending the outcome of a parallel ***criminal*** case when the interests of justice so require . . . . Courts are afforded this discretion because the denial of a stay could impair a party's Fifth Amendment privilege against self-incrimination, extend criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure 16(b), expose the defense's theory to the prosecution in advance of trial, or otherwise prejudice the criminal case." *Estate of Gaither ex rel. Gaither v. District of Columbia*, No. 03-cv-1458, 2005 WL 3272130, at *3 (D.D.C. Dec. 02, 2005) (citations omitted and emphasis added).

Here, this is a civil case, not a criminal case. In any event, no discovery is necessary because this is a facial constitutional challenge. Thus, there is no danger that this lawsuit will

impair Plaintiffs' Fifth Amendment rights or provide for criminal discovery beyond the limits of the Federal Rules of Criminal Procedure. Moreover, as demonstrated *supra*, the Supreme Court and D.C. Circuit have repeatedly entertained constitutional challenges to potential civil enforcement activity of the very type CFPB argues is barred by *Deaver*.

VI. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

CFPB argues that Plaintiffs' suit should be dismissed because "Morgan Drexen is not entitled to injunctive relief." Def.'s Br. at 11. This argument flies in the face of Supreme Court precedent which recognizes that equitable relief is the "proper means for preventing entities from acting unconstitutionally." *See Free Enterprise Fund*, 130 S. Ct. at 3151 n.2 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)); *Id.* ("It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution") (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). CFPB's memorandum neither mentions this authority nor explains what else the Court could do if it determines that CFPB is unconstitutional.

CFPB's focus on its investigation being "now-completed" and that it has "not sought enforcement" of any CIDs mischaracterizes Plaintiffs' claim. *See* Def.'s Br. at 14, 17. Plaintiffs are not challenging CFPB's investigation or its CIDs. They are seeking an order declaring CFPB unconstitutional and enjoining it from exercising any authority. It is the fact that CFPB is purporting to exercise authority over Plaintiffs that gives rise to the harm entitling Plaintiffs to injunctive relief, not any particular action. As the Court noted in *Free Enterprise Fund*, in finding that it had jurisdiction to resolve the plaintiff's constitutional challenge to the agency's existence, "petitioners object to the Board's existence, not to any of its auditing standards. Petitioner's general challenge to the Board is 'collateral' to any Commission orders or rules from which review might be sought." 130 S. Ct. at 3150 (citation omitted).

CFPB's reliance on cases involving CIDs and subpoenas from other agencies is inapposite because those cases did not involve constitutional challenges to the agency's very existence. *See* Def.'s Br. at 16 (citing cases involving the FTC, Office of Thrift Supervision, and SEC). Here, as explained *supra*, Plaintiffs are differently situated because they raise a facial constitutional challenge to CFPB's existence.

VII. THE COURT SHOULD NOT DECLINE TO EXERCISE ITS DISCRETION TO ISSUE A DECLARATORY JUDGMENT

As a fallback, CFPB asks that this Court exercise its discretion to decline to issue declaratory relief. Def.'s Br. at 17-21. CFPB makes this request because it claims that declaratory relief would "serve no useful purpose," and Morgan Drexen can raise any constitutional challenge in the California Lawsuit. *Id.* at 18-19. CFPB's argument that declaratory relief would not be useful should be rejected out of hand because declaratory judgment would serve a useful purpose and fulfill the public interest embodied in the Constitution's core principles of separation of powers and accountability to the electorate.

CFPB's argument that this case should be dismissed in favor of the California Lawsuit should also be rejected, but for different reasons. First and most obviously, Pisinski is not a defendant in the California Lawsuit. Dismissing this case in favor of the California Lawsuit would leave Pisinski without a remedy. Second, the cases on which CFPB relies did not involve facial constitutional challenges to an agency's enabling statute. For example, *Swish Marketing, Inc. v. F.T.C.* involved a plaintiff facing investigation by the FTC who sued for declaratory judgment as to the amount of damages for which it would be liable if the agency sued him and won the case. 669 F. Supp. 2d 72, 75-76 (D.D.C. 2009). Because the plaintiff's request was limited to the quantum of damages, no ruling from the Court in that case could ever possibly resolve the underlying merits. *See Id.* at 77-78. Here, on the other hand, Plaintiffs' facial

constitutional challenge is presumptively reviewable. Similarly, in *POM Wonderful LLC v. F.T.C.*, the plaintiff sought a declaratory judgment that certain statements in settlement agreements between the FTC and other parties violated the plaintiff's due process rights. 894 F. Supp. 2d 40, 42 (2012). Neither case involved a facial constitutional challenge to the enabling statute of the agency.

Moreover, even if this Court extended these cases beyond existing precedent to cover a facial constitutional challenge, dismissal in favor of the California Lawsuit would still be inappropriate. In *POM Wonderful*, the court noted that "there are no dispositive factors" in deciding whether to dismiss a first-filed case in favor of an enforcement action, but held that the "D.C. Circuit has found [the following] to be useful considerations":

> [1] Whether [declaratory relief] would finally settle the controversy between the parties; [2] whether other remedies are available or other proceedings pending; [3] the convenience of the parties; [4] the equity of the conduct of the declaratory judgment plaintiff; [5] prevention of 'procedural fencing'; [6] the state of the record; [7] the degree of adverseness between the parties; and [8] the public importance of the question to be decided.

Id. at 44 (quoting *Hanes Corp. v. Millard*, 531 F.2d 585, 592 n.4 (D.C. Cir. 1976)).

Here, almost every single factor weighs in favor of the Court's retaining jurisdiction or is otherwise neutral:

First, declaratory relief would finally settle the controversy between Plaintiffs and CFPB. This is a facial constitutional challenge to Title X of the Dodd-Frank Act creating CFPB. If Plaintiffs are successful, there will be nothing further to litigate.

Second, although other proceedings are pending, this case is more advanced, and the only remedy available for a constitutional violation is to exercise equitable relief. Here, Plaintiffs filed suit on July 22, 2013, and both parties have already submitted merits briefing. In California, meanwhile, the case has not proceeded beyond CFPB's complaint.

Third, the convenience of the parties weighs in favor of this Court. CFPB is based in Washington, D.C., and its convenience supports this forum. Although Plaintiffs are located elsewhere, the majority of CFPB's investigation took place in Washington, D.C., and Plaintiffs have availed themselves of this forum. CFPB cannot object based on Plaintiffs' convenience. Further, Pisinski is located in Connecticut, and Washington, D.C. is more convenient to her than California.

Fourth, Plaintiffs have acted with the utmost equity and integrity in bringing this action. In *POM Wonderful*, the Court was persuaded that "POM's conduct leaves the disfavored appearance that POM hastily filed the instant case, in part, to secure tactical leverage . . ." 894 F. Supp. 2d at 45. Here, by contrast, Plaintiffs brought a facial constitutional challenge to the structure of an agency purporting to exercise authority over them through the issuance of CIDs. Plaintiffs acted before—in the words of CFPB's counsel—CFPB had "determined whether or not to file an enforcement action." 7/25/2013 Tr. 6:4-5. Notwithstanding CFPB's representations to the Court, CFPB claims that Morgan Drexen attempted to "beat [CFPB] to the courthouse" (Def.'s Br. at 1), and that "the only conceivable purpose for bringing this action is an inappropriate one (Def.'s Br. at 19). To the contrary, the record reflects that CFPB was not sure about suing (so there was no race), and an equally if not more plausible "conceivable purpose" for bringing this action was to raise a constitutional challenge to the validity of CFPB, a question that has been raised by others[4] but never resolved.

[4] Law Professors (SF ¶¶ 133-34), regulated entities (SF ¶¶ 135-37), the Chamber of Commerce (Docket No. 19 at 5), and members of Congress (SF ¶ 132) have raised similar concerns. Yesterday, Financial Services Committee Chairman Jeb Hensarling stated that "CFPB is arguably the single most powerful and least accountable Federal agency in the history of America" and that "[CFPB] was designed to operate outside the usual system of checks and balances that applies to almost every government agency." Statement of J. Hensarling, (Sept. 12, 2013) (*available at* http://www.loansafe.org/statement-on-cfpb-semi-annual-report).

Fifth, the prevention of procedural fencing weighs heavily in favor of keeping this case here. As explained above, Plaintiffs filed here with the utmost equity and integrity. CFPB, on the other hand, indicated that it had not "determined whether or not to file an enforcement action." *Id.* Then, after the Court stated that "[i]t would be helpful, probably, not to have an enforcement action, which they're claiming is unconstitutional, going on at the same time," *Id.* 5:22-24, CFPB rushed to the courthouse in California and filed an enforcement action.

Sixth, the state of the record weighs in favor of this Court because merits briefing is well advanced here, and there has been no activity in the California case.

Seventh, the degree of adverseness between the parties is neutral. The parties are sufficiently adverse regardless of the forum.

Eighth, the public importance of the question to be decided—the constitutionality of a federal agency based in Washington, D.C.—weighs heavily in favor of keeping the case in this Court, which has particular expertise and experience in adjudicating constitutional questions and challenges to agency action.

CFPB's argument that Plaintiffs won the "race to the courthouse," Def.'s Br. at 21, is misguided for the reasons explained in Plaintiffs' reply in support of their motion for a temporary restraining order and preliminary injunction enjoining CFPB from prosecuting its second-filed action. *See* Pls.' Reply at 9, Docket No. 19.

VIII. THE COURT SHOULD NOT PERMIT CFPB TO WHIPSAW PLAINTIFFS SUCH THAT THEY CAN NEVER SEEK JUDICIAL REVIEW EXCEPT ON CFPB'S TERMS

Taken together, CFPB's arguments stand for the unique proposition that Plaintiffs may never bring a facial constitutional challenge absent litigation initiated by CFPB. For example, CFPB contends that Plaintiffs did not have standing during the investigation phase because its CIDs are not self-enforcing and CFPB had not yet decided whether to sue. Then, after Plaintiffs

sued, CFPB declared its investigation "complete" and filed the parallel California Lawsuit, now contending that this Court should decline to exercise jurisdiction in favor of California. If adopted, CFPB's argument would whipsaw Plaintiffs and eliminate the type of pre-enforcement review espoused by the Supreme Court and the D.C. Circuit. It would also give CFPB license to "strong-arm . . . regulated parties into 'voluntary compliance' without the opportunity for judicial review," the exact evil against which the Supreme Court warned in *Sackett*. 132 S. Ct. at 1374. In CFPB's view, it could threaten action against anyone, secure in the knowledge that if it were ever challenged, it could delay the result and obtain dismissal simply by filing an enforcement action in another forum. The law does not give CFPB such a trump card.

The Court could still exercise jurisdiction over this matter even if CFPB had simply concluded its investigation and never brought an enforcement action. *See Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) (holding that when an agency withdraws an order while maintaining that the legal position of the order is justified or is likely to be reinstated, the claim should not be considered moot); *Nader v. Volpe*, 475 F.2d 916, 917 (D.C. Cir. 1973) ("Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn"). *See also Dow Chem. Co. v. EPA*, 605 F.2d 673, 679-80 (3d Cir. 1979) (denying EPA's motion to dismiss where EPA withdrew the challenged regulation and holding that the challenged conduct "has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests" of the plaintiff) (quotation omitted).

Here, Plaintiffs challenge CFPB's existence, not its actions. Regardless of any individual CID, subpoena, or enforcement action, CFPB contends that it has the authority to regulate lawyers engaged in the practice of law. CFPB has already subjected Plaintiffs to its authority,

regardless of whether its CIDs are "self-enforcing" or not. Plaintiffs are entitled to their day in court, and, for the reasons stated herein, it should be in this Court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny CFPB's motion to dismiss.

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Respectfully submitted,

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