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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

STUDENT DEBT CRISIS, Plaintiff, v. CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*	NO. 2:19-CV-10048-JAK-AS PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case involves the New Supervision Rule that Plaintiff Student Debt Crisis (SDC) alleges Defendants the Consumer Financial Protection Bureau (CFPB) and its Director, Kathleen Kraninger, have adopted. Under that Rule, Defendants have ceded their supervisory authority over corporations that service federal student loans, which account for 90% of the student loan market. This action frustrates the CFPB's mandate under the Dodd-Frank Act to act as an independent consumer watchdog that protects the United States' 45 million student borrowers.

The New Supervision Rule violates the Administrative Procedure Act. The CFPB promulgated the Rule without providing an opportunity for notice and comment and without a statement of basis and purpose (Counts I and III). The Rule unlawfully curtails the CFPB's supervisory authority in a manner contrary to law, namely Dodd-Frank and CFPB regulations (Count II) and is arbitrary and capricious for departing from CFPB regulations without a reasoned explanation (Count IV). Because of the Rule, examinations of federal student loan servicers required by Dodd-Frank have ceased in violation of the APA's requirement that agency action not be unlawfully denied or unreasonably delayed (Count V).

Defendants' motion to dismiss SDC's claims lacks merit. Their primary contention is that Counts I-IV are nonjusticiable for lack of final agency action and lack of standing. Contrary to their arguments, SDC's First Amended Complaint alleges the plausible existence of a New Supervision Rule that satisfies the established requirements of final agency action. Moreover, at this early stage of this litigation, it does not matter whether the exact details of that action are uncertain. The CFPB's contrary arguments rest not on a full record, but largely on extrinsic snippets from congressional testimony. These include Director Kraninger's vague assertions about the CFPB's supervisory authority and tentative plans to conduct a "joint" examination with the Department of Education at some unspecified future time. These statements are no substitute for a full administrative record or limited discovery on the contours of the Rule, and they cannot defeat SDC's claims at this procedural stage. Similarly, and again contrary to Defendants' contention, SDC has organizational standing under binding precedent because it adequately alleges both a diversion of its resources and a frustration of its mission due to the CFPB's unlawful actions.

The CFPB also argues that Count V – which alleges that the CFPB's decision to cease supervisory examinations under the New Supervision Rule constitutes agency action unlawfully denied or unreasonably delayed – challenges a nonenforcement decision and is thus nonjusticiable. That argument ignores case law establishing that, where, as here, the challenged action is not a "single-shot" nonenforcement decision, but a categorical abandonment of its statutory and regulatory obligations, it is justiciable. Count V is also adequately pleaded.

For these reasons, the CFPB's motion should be denied in its entirety and this case should proceed to an APA merits review on the full record or on limited discovery.

BACKGROUND

I. Problems with Student Loan Servicing

Student loans are essential for many students to obtain post-secondary education and are a significant part of the nation's economy.[1] At over $1.6 trillion, student loan debt is now the second-largest source of consumer debt, after housing debt. Almost 90% of that debt is held by the federal government. FAC ¶¶ 2, 7, 28.

The Department of Education contracts with servicers to manage its federal student loan portfolio. *Id.* ¶¶ 27-28. Servicers are private-sector corporations that manage private and federal loans, as well as the federal Public Service Loan

[1] CFPB, CFPB Supervision and Examination Process 325, (Feb. 2020), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.

Forgiveness (PSLF) program. *Id.* ¶¶ 28-30, 32. Most borrowers, once they have obtained their student loans, conduct almost all loan transactions through servicers.[2]

Servicers that manage federal student loans, including those that manage the PSLF program, are the source of thousands of consumer complaints stemming from, inter alia, loan mismanagement and the abysmal rates of loan forgiveness under the PSFL program. *Id.* ¶¶ 42-49.

II. The CFPB's Supervisory Authority Over Larger Participants Engaged in Servicing Federally Held Student Loans

Although, under the current Administration, the Department of Education has claimed sole supervisory authority over servicers that manage *federal* student loans – authority that it, in turn, has abdicated as part of its effort to curb regulations – the CFPB, as an independent consumer watchdog, has its own mandate to supervise these servicing corporations to protect student borrowers. FAC ¶ 53. In particular, Dodd-Frank established the CFPB to ensure "that all consumers have access to markets for consumer financial products and services and that [these] markets . . . are fair, transparent, and competitive." *Id.* ¶ 54; 12 U.S.C. § 5511(a). The CFPB is responsible for implementing, examining for compliance with, and enforcing federal consumer financial law. 12 U.S.C. § 5481(14). Dodd-Frank and CFPB regulations give the CFPB broad supervisory authority over private and federal student lending by nonbank entities, including servicers. FAC ¶¶ 56-58; 12 U.S.C. § 5514(a)(1)(B), (b) (establishing supervisory authority). A key component of this supervisory authority is CFPB examinations.[3]

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[2] *Id.* at 328 (detailing servicer tasks and duties).

[3] Regarding student loans, the CFPB also has the authority to conduct consumer education programs and to bring enforcement actions against regulated entities, including servicers. This lawsuit focuses on its supervisory authority.

Consistent with the CFPB's legal authority to regulate student loan servicers, the Larger Participant Rule[4] issued on December 3, 2013, gives the CFPB supervisory authority over "larger participants" in the student loan servicing market, *including* large servicers of federally held student loans. 12 U.S.C. § 5514(a)(1)(B), (b). In issuing the Larger Participant Rule, the CFPB noted that this oversight "is needed due to the size of the market, uneven existing oversight, and the particular vulnerability of student loan borrowers." 78 Fed. Reg. at 73385. The CFPB found that this authority "will further the Bureau's mission to ensure consumers' access to fair, transparent, and competitive markets for consumer financial products and services." *Id.* at 73386. And while specific supervisory examinations are at the CFPB's discretion, the very "prospect of potential supervisory activity" creates "an incentive for larger participants to increase their compliance with Federal consumer financial law." *Id.* at 73399. In short, a functioning Larger Participant Rule allows the CFPB to supervise servicers of both private and federally held student loans through examinations to meet the agency's obligations under Dodd-Frank.

When the current administration assumed control of the CFPB, it ceded its supervisory authority over larger participants servicing federal student loans. In September 2018, then-Acting Director Mick Mulvaney announced the New Supervision Rule, stating[5] that Dodd-Frank limited the CFPB's supervisory authority to private, but not federal, student loan servicers. FAC, ¶¶ 7-8. 69. It is this new Rule that is at issue in this case.

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[4] *See* Defining Larger Participants of the Student Loan Servicing Market, 78 Fed. Reg. 73383. In the FAC, SDC refers to this regulation as the Student Loan Servicing Supervision Rule. For the sake of conformity with the CFPB's terminology, SDC will refer to this as the "Larger Participant Rule" in this brief.

[5] CNBC, *Watch CNBC's Full Interview with OMB's Mick Mulvaney* (Sept. 12, 2018) https://www.cnbc.com/video/2018/09/12/watch-cnbcs-full-interview-with-ombs-mick-mulvaney.html (last visited Nov. 12, 2019).

Consistent with this new Rule, the CFPB examined no servicers of federal student loans from the date the New Supervision Rule was issued until the time the FAC was filed. Notably, while the CFPB and the Department of Education executed a long overdue memorandum of understanding relating to information sharing between the agencies on January 31, 2020, they have not yet executed an MOU related to supervision.[6] *See* FAC ¶ 75 & n.30

LEGAL STANDARD

A challenge to subject matter jurisdiction under Rule 12(b)(1) may be facial or factual. See *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the challenge is confined to plaintiff's allegations as pleaded and the allegations are accepted as true. See *Wolf v. Stankman*, 392 F.3d 358, 362 (9th Cir. 2004). If the challenge is factual and supported by proper evidence, plaintiff may then rely on the allegations in the complaint along with "whatever other evidence they submitted in support of their . . . motion to meet their burden." *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017), *reh'g en banc denied*, 853 F.3d 933 (9th Cir. 2017), *superseded by* 858 F.3d 1168 (9th Cir. 2017); *see also McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (court may review affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction).

A court "is vested with a broad discretion to permit or deny discovery" and should grant jurisdictional discovery "when . . . the jurisdictional facts are contested or more facts are needed." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (citing *Hallett v. Morgan*, 287 F.3d 1193, 1212 (9th Cir. 2012)); *see also Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.

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[6] *See* U.S. Senate Comm. on Banking, Housing, and Urban Affairs, *Brown, Murray, Colleagues Demand Answers from CFPB Director on Agency's Oversight Plans for the Student Loan Market*, May 20, 2020, available at https://www.banking.senate.gov/newsroom/minority/brown-murray-colleagues-demand-answers-from-cfpb-director-on-agencys-oversight-plans-for-the-student-loan-market.

24 (9th Cir. 1977) (suggesting that courts should allow jurisdictional discovery when "pertinent facts bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary.") (citations omitted). A plaintiff need only establish a "colorable basis" for jurisdiction for the court to permit jurisdictional discovery. *See Orchid Biosciences, Inc. v. St. Louis University*, 198 F.R.D. 670, 673 (S.D. Cal. 2001).

Motions to dismiss for failure to state a claim under Rule 12(b)(6) are governed by the notice pleading requirements of Rule 8(a), which states that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *DichterMad Family Partners, LLP v. United States*, 707 F. Supp. 2d. 1016, 1025 n.10 (C.D. Cal. 2010) *aff'd*, 709 F.3d 749 (9th Cir. 2013)., Specific facts are not required, so long as the factual allegations in the complaint, accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. SDC's Counts I-IV are Justiciable and Properly Pleaded

The CFPB's threshold justiciability arguments lack merit because the New Supervision Rule constitutes final agency action that satisfies the predicates for APA review and SDC has standing to bring its claims.

A. <u>To the Extent Final Agency Action is a Jurisdictional Requirement, it is Intertwined with the Merits of This Case</u>

As a preliminary matter, Defendants are incorrect that their final agency action argument implicates this Court's subject matter jurisdiction. *See* Mot. 9. This Court has jurisdiction over SDC's claims under the general jurisdiction question statute, 28 U.S.C. § 1331,[7] *see* FAC ¶ 17.While other circuit courts have held that final agency action is an element of an APA claim, and not a jurisdictional requirement,[8] this issue is currently unsettled in the Ninth Circuit. *See Carino v. Campagnolo*, No. CV-18-3426, 2018 WL 7461692, at *1 (C.D. Cal. Dec. 13, 2018) (explaining conflicting decisions from Ninth Circuit panels on this issue). The Court need not "wade into this intra-circuit split," *id.*, however. Even if final agency action could be a jurisdictional issue, dismissal on that basis would be improper in this case because the factual existence of final agency action is intertwined with the merits of this case, as demonstrated below. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) ("The district court erred in characterizing its dismissal of [plaintiff's] complaint under Rule 12(b)(1) because the jurisdictional issue and substantive issues in this case are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits."). In particular, whether the unwritten New Supervision Rule constitutes final agency action and was adopted *sub silentio* in violation of the APA is the central question of this lawsuit and should be reviewed on the merits.

B. <u>SDC Plausibly Alleges Final Agency Action</u>

SDC plausibly alleges that the New Supervision Rule is (1) the consummation of the agency's decisionmaking process and (2) an action by which "rights or obligations have been determined, or from which legal consequences will flow" as required to show final agency action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)

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[7] District courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[8] For example, in *Trudeau v. Fed. Trade Comm'n*, the D.C. Circuit explained that the APA does not confer jurisdiction and rejected that "the presence of final agency action is a jurisdictional issue." 456 F.3d 178, 183-84 (D.C. Cir. 2006).

As alleged in the FAC, the Rule "mark[s] the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178. Indeed, it has immediate and binding effect on servicers and students (and within the agency) because it directs CFPB employees to apply a specific approach to supervisory examinations of the federal student loan portfolio held by servicers and to reach a particular result (i.e., do not undertake those examinations). CFPB employees are applying the Rule every day. Consequently, many student borrowers and organizations whose mission it is to assist them are harmed. Courts have held that the APA finality requirement is satisfied where, as here, an agency promulgates a broad, categorical rule about how it will make particular kinds of determinations. *See CropLife Am. v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003) (EPA decision that it will "not consider or rely on any [third-party] human studies in its regulatory decisionmaking" was final agency action); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (agency's "settled position" which "officials in the field are bound to apply" was final agency action).

The Rule also determines "rights or obligations," and is an action from which "legal consequences will flow." *Bennett*, 520 U.S. at 178 (citation omitted). Only one of these standards need be met to demonstrate final agency action. *Id.* The New Supervision Rule changes the obligations to federal student loan servicers by ordering the CFPB to generally cease its supervision. *Appalachian Power Co.*, 208 F.3d at 1023 (final agency action where those responsible for enforcement are given "marching orders" that they are expected to follow, even if those orders may not be followed with complete uniformity). The Rule thus removes what CFPB itself has previously identified as the "incentive for larger participants to increase their compliance with Federal consumer financial law." 78 Fed. Reg. at 73399. Additionally, the New Supervision Rule has profound and immediate consequences for student borrowers and organizations like SDC. *See infra* Part D (regarding standing allegations). An immediate consequence of the

New Supervision Rule is that student borrowers and these organizations can no longer rely on the CFPB to act on the thousands of borrower complaints it receives, thereby allowing servicers to continue to mismanage federal student loans and PSLF with impunity. Abrams Decl. ¶¶ 6-8

In addition to meeting the *Bennett* factors, SDC also plausibly alleges the contours of an unwritten agency action in the form of the New Supervision Rule. Ordinarily, final agency action is subject to judicial review after it is reduced to a discrete agency order and publicized. *See, e.g.* 5 U.S.C. § 553(d) (requiring publication of rules "not less than 30 days before [their] effective date"). But this practice does not account for scenarios, like here, where an agency adopts new policies without notifying the public, thereby obscuring the policies' details and foreclosing judicial review of a discrete, readily identifiable agency work product. Accordingly, courts have recognized that claims under the APA are cognizable if they allege the plausible existence of unannounced agency action, even if the exact details of that action are uncertain. *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (once an agency "announces . . . a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the [APA.]"); *see also Venetian Casino Resort, LLC. v. Equal Employment Opportunity Comm'n*, 530 F.3d 925, 930 (D.C. Cir. 2008).

In *Hispanic Affairs Project v. Acosta*, the plaintiffs in an APA case did not identify any discrete government statement acknowledging a change in policy or explaining its details. 901 F.3d 378, 385 (D.C. Cir. 2018). Reviewing the district court's dismissal of the plaintiffs' claims, the appellate court held that the plaintiff's inability to precisely describe the agency policy was no obstacle to judicial review. *Id.* at 387. Because the plaintiffs had identified the broad strokes of an agency policy, it was not necessary for them "to list . . . specific [agency actions] in [their] complaint[.]" *Id.* Instead, the court addressed the possibility of gaps in the plaintiff's pleadings by explaining that "[o]n remand, the district court is free to exercise its discretion to permit further discovery to ascertain the contours of the precise policy at issue." *Id.* at 388 (citation omitted).[9]

Several district courts have since applied this rationale to review claims challenging unannounced or unexplained agency action, consistently rejecting the government's motions to dismiss.[10] In each of these cases plaintiffs stated a valid claim for relief where they alleged a pattern of individual adjudications or behavior as evidence of the existence of an official policy, the precise details of which were unclear.

This Court should likewise reject the CFPB's motion to dismiss because SDC has sufficiently alleged a consistent and plausible pattern of behavior as evidence of the New Supervision Rule. That pattern includes:

<u>The Department of Education Objects to CFPB Supervision</u> – The Department of Education has and continues to object to CFPB supervision over the servicing of federal student loans, arguing that these servicers are contractors of the Department and under its purview. FAC ¶¶ 72-73; Martinez Decl. ¶¶ 3-5, 8(b).

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[9] The district court supervised such discovery until the parties settled. *See* Order, *Hisp. Aff. Project v. Perez*, 141 F. Supp. 3d 60 (D.D.C. 2015) (ECF No. 136).

[10] *See Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138 (D.D.C. 2018) (finding plaintiffs adequately pleaded challenge to an unannounced and unwritten policy); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (rejecting government's arguments that allegations of policy were "amorphous" and attacked only "a generalized agency decision-making process"); *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 165 (E.D.N.Y. 2018) (finding plaintiffs appropriately challenged agency's unannounced policy of searching airline passengers); *see also Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1206-09 (S.D. Cal. 2019) (concluding that agency's unwritten migrant "turnback" policy was subject to judicial review); *Wagafe v. Trump*, No. CV 17-94-RAJ, 2017 WL 2671254 at *1 & *10 (W.D. Wash. June 21, 2017) (denying a motion to dismiss APA challenge to "an allegedly secret and unlawful government program").

In Response, the CFPB Adopts the New Supervision Rule – Prior CFPB leadership pushed back on the Department of Education's position[11] but Director Kraninger, has followed the New Supervision Rule. For instance, in March 2019, she disclaimed CFPB authority over the PSLF loan forgiveness program, testifying to Congress that the fact that "99% of [PSLF] applicants are being denied" is "a question for the Department of Education." FAC ¶ 71. She has also dodged various versions of the same question from Congress: whether the CFPB affirms it has the authority to supervise servicers of federal student loans. Instead of giving a clear affirmative answer, she has offered a canned response pointing to the continued existence of the Larger Participant Rule, a technicality that has never been in question. Martinez Decl. ¶¶ 8(a), 9(c). The mere existence of the Larger Participant Rule, though, says nothing about the CFPB's exercise of its authority to supervise vis-a-vis the Department of Education. *See id.* ¶¶ 3-5, 7-9, 12-13. Indeed, in October 2019, Director Kraninger testified to Congress that, while the Larger Participant Rule technically remains in effect, the Department of Education under Secretary DeVos has refused to give the CFPB any information relating to federal student loan servicers. When pressed, Kraninger admitted that this lack of information made the CFPB's supervisory authority under the Larger Participant Rule meaningless. See id. ¶ 4.

The CFPB Has Conducted No Examinations Under the New Supervision Rule – Data shows that, because of the New Supervision Rule, CFPB supervision over servicers of federal student loans has ceased. FAC ¶ 79. Director Kraninger

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[11] The CFPB has previously moved for and obtained a court order to access servicer information against the objections of the Department of Education. *See* U.S. Senate Comm. on Banking, Housing, and Urban Affairs, *Brown, Menendez Demand Answers from CFPB Director on Failure to Protect Student Loan Borrowers*, Jan. 30, 2020, available at https://www.banking.senate.gov/newsroom/minority/brown-menendez-demand-answers-from-cfpb-director-on-failure-to-protect-student-loan-borrowers.

recently confirmed to Congress that the CFPB has not conducted any examinations of student loan servicers of federal student loans for over two years.[12] Martinez Decl. ¶¶ 9(b), 13(a). To date, the CFPB and Department of Education have not executed a MOU relating to servicer supervision, *see id.* ¶ 7(a), 8(b), 10(a), which means there is no formal process in place for conducting these examinations.

The CFPB's statements and actions confirm that allegations of an unannounced Rule are not some figment of SDC's imagination. *See Amadei*, 348 F. Supp. 3d at 164 (denying motion to dismiss of claim on basis of scattered agency allusions to unannounced policy). It defies belief that, after previously adopting the Larger Participant Rule and enforcing it vigorously, the CFPB stopped supervising federal student loan servicers for two years following the Acting Director's renouncement of agency's authority on a completely ad hoc basis. Far more plausible is the inference that the CFPB ceded its supervisory role pursuant to the New Supervision Rule. *Cf. Hisp. Aff. Project*, 901 F.3d at 386 (recognizing final agency action from "widespread pattern of . . . extraordinary circumstances"). That is sufficient to deny Defendants' motion.

The CFPB challenges the plausibility of SDC's final agency action allegations under Rule 12(b)(1)[13] and attaches to its motion a declaration from its counsel offering snippets from Director Kraninger's February and March 2020 congressional testimony. That testimony makes three points: (1) that the Larger Participant Rule is still in effect, which gives the CFPB authority over larger participants that service federal student loans, (2) that the CFPB and Department of

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[12] The CFPB cites a legacy enforcement action, *Consumer Financial Protection Bureau v. Navient, Corp.*, No. 3:17-cv-00101 (M.D. Pa.), filed on January 17, 2017 in the final hours of the previous administration, presumably as evidence that it is enforcing consumer protection laws against loan servicers. But this action is inapposite as it predates the New Supervision Rule.

[13] As stated above, this is incorrect. Final agency action is an element of an APA claim, not a jurisdictional requirement.

Education may resume supervision of these servicers in a "joint" effort at some unspecified future time, and (3) that former Acting Director Mulvaney commented about the CFPB's limited supervisory authority and announced the New Supervision Rule in the manner SDC alleges in the FAC. See Barrett Decl. (ECF No. 33-1). This attempt to convert a facial challenge to a factual challenge fails, as does the CFPB's contention that the FAC should be dismissed based on these general statements at this procedural stage.

To the extent that Defendants intend this declaration to allow the court to decide facts at the motion to dismiss stage, that attempt should fail. As noted above, final agency action is sufficiently intertwined with the merits that the Court should not resolve factual disputes at this preliminary point in the litigation. In any event, here the three points in the declaration do not even counter the truth of SDC's factual assertions; the declaration simply offers the defendant's interpretation of those facts. *Menna v. Radmanesh*, No. CV 14-355-MAN, 2014 WL 6892724, at *6 (C.D. Cal., Oct. 7, 2014) (explaining that factual 12(b)(1) challenges "contest the truth of the plaintiff's factual allegations").

As to the declaration's first point, SDC does not contest that the Larger Participant Rule is still on the books. To the contrary, SDC alleges that it is the operative rule and that the CFPB's departure from it *sub silentio* is a basis for the New Supervision Rule's invalidity under the APA. FAC ¶¶ 6-7, 104. Also, the existence of the Larger Participant Rule means nothing if the CFPB makes no push to obtain information from the Department of Education necessary to conduct examinations.

As to the second point, Director Kraninger's suggestion on March 10, 2020 that the CFPB contemplates resuming supervision at some point only confirms that no supervision was occurring between the time the New Supervision Rule was issued and the time the FAC was filed on March 2, 2020. Nor is it clear if or when supervision will resume. As Members of Congress recently stated, "[t]he CFPB described this as a 'joint examination' with the U.S. Department of Education. We have received few other details about how this 'joint examination' would be carried out or the Department's role in this examination." [14] To the extent that Director Kraninger has explained current policy at all, she has merely suggested that the CFPB could send detailees to work at the Department of Education. Martinez Decl. ¶¶ 7(a), 8(b). This does nothing to counter the existence of a New Supervision Rule, nor the harm that comes from the CFPB abdicating its obligations in deference to the Department of Education when supervising these large corporations.

And as to the last point, the CFPB's gloss on former Acting Director Mulvaney's remarks about the CFPB's limited authority is not evidence that the statement did not occur or evidence that the New Supervision Rule has no effect, as is clear by the CFPB's years of supervisory inaction over the servicers of federal student loans. The CFPB may quibble with the interpretation of Mulvaney's statements, but that goes to the merits of this action, not whether a claim was properly pleaded.

Finally, the CFPB's description of SDC's final agency actions allegations as "inconsistent" or "contradictory" (Mot. 11-12) to support its implausibility argument misses the mark. To support this contention, it cites *Baker v. Rodriguez*, No. SACV 11-00138-JST, 2011 WL 4529644, at *6 (C.D. Cal. Sept. 29, 2011), where plaintiff argued that police officers failed to disclose evidence by alleging both the presence of a disclosure policy *and* defendant's failure to train on that policy. The court found these statements were at odds and factored that into its dismissal of plaintiff's § 1983 claim. Here, SDC alleges that the CFPB's supervision has "ceased" completely or been "improperly curtailed." FAC, ¶¶ 68, 111. The potential *degree* to which the CFPB has abdicated its authority does not

[14] *Supra* n.6 (May 20, 2020 letter from Members of Congress to Director Kraninger *after* her March 2020 testimony suggesting "joint" examinations).

make these allegations inconsistent or contradictory as "curtailed" has a broader meaning that encompasses "ceasing."

In sum, as in *Hispanic Affairs Project* and related cases, SDC has met its burden by alleging a plausible set of facts of an unannounced agency policy in the form of the New Supervision Rule. Director Kraninger's statements do not change any of this. Not only are the statements post hoc, but also they are so general that they provide no basis to say, before any factual development, that the New Supervision Rule lacks a continuing effect. The Rule is therefore subject to limited discovery[15] and APA merits review

C. <u>SDC Alleges Facts Sufficient to Establish Standing</u>

The CFPB's New Supervision Rule has caused SDC a cognizable Article III injury. The CFPB's actions (a) impaired SDC's mission, and (b) forced diversion of organizational resources to address this impairment. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).

The CFPB asserts that SDC's injuries are speculative and self-inflicted. Mot. 15-18. But SDC has already suffered the kinds of perceptible injuries to its mission that the Supreme Court recognized in *Havens*. In particular, the New Supervision Rule has both increased the number of borrowers with servicer-related problems seeking SDC's assistance and removed tools SDC previously used to assist them. The student borrowers SDC assists face significant debt loads, which impact all aspects of their lives. These borrowers report unprecedented frustration with their loan servicers. The New Supervision Rule allows and exacerbates student loan and servicer problems, including the failures of the PSLF program. As stated above, the

[15] As in *Hispanic Affairs Project*, the Court can order limited discovery on the contours of the New Supervision Rule, such as the CFPB's position on its authority to supervise the servicers of federal student loans and the alleged plan between the CFPB and Department of Education to conduct "joint" examinations.

mere possibility of supervision under the Larger Participant Rule created "an incentive for larger participants to increase their compliance with Federal consumer financial law," 78 Fed. Reg. at 73399, but that incentive has been removed right at the time that the CFPB's actions created a dramatic spike in the number of borrowers seeking SDC's assistance. See Martinez Decl. ¶ 10.

Core to SDC's mission is the educational and practical assistance it provides to student borrowers in the form of direct communications, lectures, webinars, and special events. Abrams Decl. ¶¶ 2-4. It also advocates for student loan and debt policies through legislative efforts and media pressure. *Id.* Prior to the New Supervision Rule, SDC directed student loan borrowers to CFPB resources for their needs, encouraged the use of the CFPB's consumer complaint tool, and provided loan servicer experience data to the CFPB upon request. *Id.* ¶¶ 3, 6-8. SDC would also direct its members to submit complaints to CFPB because these complaints informed CFPB's oversight of larger participants in the student loan market, including those engaged in the servicing federal student loans. Under the New Supervision Rule, the CFPB is no longer conducting examinations so it is no longer a viable resource for SDC which perceptibly impairs its mission by making assistance significantly more difficult, *id.* at 3, 6-8, 9-10. These are precisely the kinds of harms that are sufficient for standing. *See East Bay v. Bay Sanctuary v. Trump*, 932 F.3d 742 (9th Cir. 2018) (finding standing where ability to provide services organizations were formed to provide are "perceptibly impaired"); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (finding standing where organization's mission to assist day laborers was made more difficult when city passed ordinance discouraging specific hiring transactions).

SDC further alleged that it has suffered "both a diversion of its resources and a frustration of its mission" because it has been forced to respond to the New Supervision Rule. *See Fair Hous. of Marin*, 285 F.3d at 905. It has diverted significant resources away from its other programs related to its core mission and altered its methods of providing services to effectively respond to the CFPB's illegal actions. *See* Abrams Decl. ¶¶ 3, 10-12. The New Supervision Rule has forced SDC to redirect its educational efforts by increasing the number of its student debt workshops to assist borrowers experiencing unprecedented challenges when dealing with their student loan servicers and to respond to increased consumer complaints that could have previously been addressed by the CFPB. *Id.* SDC has more than doubled its direct communications relating to consumer education and awareness following the New Supervision Rule. Moreover, the New Supervision Rule has forced SDC to incur costs, including: hiring additional staff members to support increased consumer protection-related work, securing shared workspace to accommodate the growing staff, responding to borrowers impacted by particular loan servicing issues, developing custom workshops to better address the growing need for direct services created by the CFPB's abandonment of its supervisory role, expanding its email platform to deal with increased communications, and conducting consumer research and compiling servicer experience data at additional costs. *Id.* ¶¶ 8-12. *See Serv. Women's Action Network v. Mattis*, No. 12-CV-06005-EMC, 2018 WL 6268873, at *6 (N.D. Cal. Nov. 29, 2018), (finding that diversion of resources for "outreach campaigns" and educating the public was a diversion of resources sufficient to establish organizational standing).

The CFPB is wrong to suggest the harms SDC alleges under *Havens* are insufficient because the New Supervision Rule does not prevent SDC from carrying out its mission. Mot. 14-15. *Havens* does not require that SDC be completely prevented from carrying out their organizational missions, but simply "impaired" or "frustrated." 455 U.S. at 369, 379 (racial policies did not wholly prevent organization from improving equal opportunity housing, but "frustrated" and "perceptibly impaired" this goal); *see also Valle del Sol Inc. v. Whiting*, 732

F.3d 1006, 1018 (9th Cir. 2013) (law "perceptibly impaired" mission to assist immigrants by "deterring" volunteers) (citing *Havens*, 455 U.S. at 379). Here, because they can no longer assist student borrowers in the same manner, SDC is sufficiently limited in effectively carrying out its mission of assisting borrowers. Abrams Decl. ¶¶ 3, 8-12.

Moreover, the costs SDC will incur to respond to the New Supervision Rule are costs to "counteract this frustration of mission." *Valle del Sol*, 732 F.3d at 1018, as envisioned in *Havens*. Rather than allocate resources to assist student borrowers to file complaints with the CFPB, SDC will now have to reallocate these limited resources to applying for more labor-intensive forms of relief for its supporters, and retrain staff to deal with the new regulatory landscape. *Id.* ¶¶ 6-12. The Ninth Circuit has repeatedly found standing when organizations challenge practices that frustrate their mission to provide services to their clientele in this manner. *See Valle Del Sol*, 732 F.3d at 1018-19 (organizational plaintiffs established standing by alleging that their "core activities involve[d] the transportation and/or provision of shelter to unauthorized aliens," and they "diverted their resources to address their constituents' concerns"); *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 748 (9th Cir. 1992) (organizational plaintiff that provided assistance to refugees in their efforts to obtain asylum established standing by alleging that a "policy frustrate[d] the[ir] goals and require[d] the organizations to expend resources in representing clients they otherwise would spend in other ways"); *see also Comm. for Immigrants Rights v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177, 1185, 1195 (N.D. Cal. 2009) (organization established standing by alleging that it "had to expend time and resources engaging in a campaign to end the challenged practices at issue").

The CFPB's argument (at Mot. 15 & n.9) that SDC is only diverting resources to other areas within its mission also runs counter to Ninth Circuit precedent.[16] In *Nat'l Council of La Raza v. Cegavske*, the Ninth Circuit emphasized that, even if an agency is diverting resources to activities in the same area that it normally operates, such a diversion is sufficient to give rise to organizational injury, so long as the organization's resources are being redirected from another aspect of its mission. *See* 800 F.3d 1032, 1040 (9th Cir. 2015) (finding organizational standing by diverting resources to address harm that would have spent on some other aspect of their organizational purpose). SDC has not alleged that it is simply going about its "business as usual," unaffected by the CFPB's conduct.[17] *See Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (holding that plaintiff organizations have standing to sue to stop a roommate-matching website from discriminating because they expended non-litigation resources to campaign against discriminatory roommate advertising, even though their ordinary business includes investigating and raising awareness about housing discrimination). Because SDC has modified its organization and shifted its resources to counteract the CFPB's actions, "it necessarily follows that they have fewer resources" to dedicate to other areas of focus. *We Are Am./Somos Am. v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1099 (D. Ariz. 2011).

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[16] The CFPB cites one unpublished memorandum opinion in *United Poultry Concerns v. Chabad of Irvine*, 743 Fed. App'x 130, 131 (9th Cir. 2018), in support of this argument. This opinion is not precedent. *See* 9th Cir. R. 36-3. The case also misses the mark because plaintiff, an animal welfare organization, there sought standing based *only* on the time its employee spent investigating defendant's allegedly unlawful treatment of chickens. As stated above, SDC alleges actual harm to its mission that establishes standing in the Ninth Circuit.

[17] The CFPB's reliance on *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010), is likewise unavailing. The claims were dismissed there because plaintiff's complaint failed to allege organizational standing at all. Even the CFPB acknowledges that SDC has alleged organizational standing in the FAC. *See* Mot. 14-18 (challenging sufficiency, not existence of allegations).

SDC has also adequately alleged causation.[18] The New Supervision Rule allows servicers to ignore consumer financial laws and caused a spike in servicer complaints from student borrowers and the abysmal rates of PSLF denials. FAC §§ 9, 19, 42, 48. SDC must divert resources to address this surge. At the same time, SDC can no longer rely on the CFPB consumer complaint tool to address servicer mismanagement. This cycle of effects causes SDC harm. SDC would not have had to expend those additional resources and would have put them to work in other aspects of the organization's mission such as its legislative advocacy or press efforts. *See Nat'l Council of La Raza*, 800 F.3d at 1039; Abrams Decl. ¶¶ 4, 6-12.

The CFPB relies on *Torres v. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1054 (C.D. Cal. 2019), to argue that SDC's diversion of resources "is too tenuously linked" to the challenged conduct. There, the Court found that while plaintiff, an immigrants' rights organization, had alleged a diversion of resources resulting from an agency's conduct generally, the challenged conduct was specific to one immigrant detention facility. The court suggested that it "could infer" that the diversion was due in part to that single facility, but it needed plaintiff to make the allegation. Here, the agency action is not siloed as in *Torres*. The effects are widespread and SDC has connected the Rule to its harm, by having been forced to step in to fill the gaps left by the CFPB.

Finally, the CFPB's conclusory statement that SDC has not pleaded redressability (Mot. 18-19) ignores the allegations in the FAC. SDC alleges that its injuries would be redressed by a favorable decision by this Court, which would invalidate the New Supervision Rule pending a public rulemaking process and order that the CFPB resume its supervision pursuant to Dodd-Frank and the Larger

[18] The CFPB again suggests that causation fails, somehow, due to the existence of a legacy enforcement action against a loan servicer, Navient Corporation. But as explained above this lone example from the last administration is inapposite since it predates the New Supervision Rule. *See supra* n.12.

Participant Rule. *See* FAC ¶ 19(h). Even beyond that, as stated above, the CFPB has within its authority the ability to push back against the Department of Education but has decided to sit on its hands. This process could ultimately lead the CFPB to abandon or modify the Rule or the underlying policy through a public rulemaking process that includes input from affected student borrowers, which would diminish the harm to SDC's interests. The public process serves an important check on the agency and holds it accountable for its actions. *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992) ("The procedural safeguards of the APA help ensure that government agencies are accountable and their decisions are reasoned.").[19]

D. SDC Properly Pleaded Counts I-IV

The CFPB's Rule 12(b)(6) arguments as to Counts I-IV are limited to whether "final agency action" is sufficiently pleaded. The CFPB posits that, if the Court finds no agency action in connection with its jurisdictional arguments, then ipso facto, there would be no final agency action for 12(b)(6) purposes. Mot. 12. For the aforementioned reasons, SDC has pled final agency action for jurisdictional purposes and those allegations suffice under 12(b)(6) as well.

II. SDC' Claim V is Justiciable and Properly Pleaded

The CFPB argues that Count V of the FAC – which challenges CFPB's decision to categorically abandon examinations of an entire class of loan servicers – is nonjusticiable because it is action committed to agency discretion by law. That is incorrect. Categorical policy decisions not to enforce are reviewable under established law. *Nat'l Treasury Employee Union v. Horner*, 854 F. 2d 490, 496-98

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[19] The CFPB argues that SDC does not plead standing facts relating to Count V because paragraphs 109-111 of the claim do not specifically reference the New Supervision Rule (Mot. 13 & n.7). But of course, facts relating to the Rule and its practical effects (no CFPB examinations of servicers of federal student loans) are incorporated by reference. *See* FAC ¶ 108. Facts applicable to standing apply to all five claims.

(D.C. Cir. 1998) ("[The agency's] . . . major policy decision [is] quite different from day-to-day agency nonenforcement decisions" and justiciable.). Dodd-Frank mandates that the CFPB "require reports and conduct examinations on a periodic basis of" larger participants of "a market for . . . consumer financial products or services." 12 U.S.C. § 5514(a)(1)(B), (b)(1). The categorical abandonment of these examinations under the New Supervision Rule is unlawful and justiciable.

At the outset, there is a "strong presumption favoring judicial review" of agency actions, and the CFPB must carry a "heavy burden" to establish that Congress intended to preclude judicial review. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (internal quotation marks omitted). Although judicial review is unavailable for agency actions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), this "very narrow exception" applies only in "rare instances." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *see also ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th Cir. 2015) ("Section 701(a)(2) has never been thought to put all exercises of discretion beyond judicial review."). Section 701(a)(2) applies only where a court "would have no meaningful standard against which to judge the agency's exercise of discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), and there is "no law to apply," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Where, by contrast, there are "statutes, regulations, established agency policies, or judicial decisions that provide a meaningful standard against which to assess" agency action, section 701(a)(2) does not bar judicial review. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003).

The CFPB relies heavily on *Heckler v. Chaney* in claiming that the New Supervision Rule and the resulting agency inaction constitute a discretionary determination entrusted to the agency alone. *Chaney*, however, does not govern here. There, the Supreme Court found an agency's nonenforcement decision to be nonjusticiable because decisions not to take enforcement actions (1) do not implicate the agency's exercise of "coercive power of an individual's liberty or property rights, and thus do[] not infringe upon areas that courts often are called to protect," 470 U.S. at 832, and (2) "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," *id.* at 831. Accordingly, courts have limited *Chaney* to "individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards." *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996).

Abandoning supervision under New Supervision Rule is not a "single shot" enforcement decision like in *Chaney*—it is a decision to categorically cede the CFPB's obligation to examine corporations making up almost 90% of the student loan market. See *Regents of the Univ. of Calif. v. United States Dep't of Homeland Sec.*, 908 F.3d 476, 499 & n.13 (9th Cir. 2018) (listing line of cases limiting *Chaney* to "single shot" nonenforcement decisions). SDC is not challenging the CFPB's decision to examine or not examine any particular servicer. An agency's "major policy decision" is different from day-to-day agency nonenforcement decisions as in *Chaney*, and the "appropriate starting point" in such a case is the "APA presumption of reviewability." *Nat'l Treasury Emps. Union*, 854 F.2d at 496-97. Because programmatic decisions do not involve "the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision," *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676-77 (D.C. Cir. 1994), they do not present *Chaney*'s concern that courts should avoid intrusion into such decisions.

Abandoning examinations wholesale also involves none of the "complicated balancing of a number of factors" that rendered the nonenforcement decision in *Chaney* unreviewable. The CFPB's inaction at issue here appears to rest only on determinations that its examinations are limited to private student loans and that the Department of Education has authority to supervise federal student loans. Those determinations are unquestionably justiciable. *See Regents of the Univ. of Calif.*, 908 F.3d at 499 ("[A]n official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her. She may escape political accountability or judicial review, but not both.") (citations omitted).

Finally, SDC has sufficiently alleged a claim for agency action unlawfully denied or unreasonably delayed. The Dodd-Frank Act states that the CFPB "shall require reports and conduct examinations on a periodic basis of" larger participants of "a market for . . . consumer financial products or service." 12 U.S.C. § 5514(a)(1)(B), (b)(1). This includes supervision to assess compliance with federal consumer financial law. *Id.* SDC has alleged that the CFPB has ceased or improperly curtailed its examinations in violation of Dodd-Frank and that this action has caused SDC harm. FAC ¶¶ 19, 110-111. While the CFPB may have discretion whether and when to bring individual supervisory examinations, if Dodd-Frank's mandate that the CFPB bring these examinations on a periodic basis has any meaning, the decision to categorically cease this supervision violates the Act and §706(1) of the APA.

CONCLUSION

For the foregoing reasons, the CFPB's motion should be denied in its entirety. If necessary, SDC respectfully requests leave to amend the FAC.

Respectfully submitted this 10th day of June, 2020.

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