IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

THE PROPERTY MANAGEMENT CONNECTION, LLC, ET AL.,	:	CIVIL ACTION NO.: 3:21-cv-359
Plaintiffs,	:	
v.	:	
ACTING DIRECTOR UEJIO, CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,	:	
Defendants.	:	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs The Property Management Connection, LLC (PMC), Gordon J. Schoeffler, the National Association of Residential Property Managers (NARPM), Matthew S. Chase, The Chase Law Firm, PC, James Hodge and Apex Ventures, Inc. respond in opposition to motions to dismiss filed by Defendants Acting Director Dave Uejio, Consumer Financial Protection Bureau, and the United States of America (collectively CFPB). *See* ECF Nos. 50, 52.[1] For the reasons set out below, the motions should be denied entirely.

FACTS AND PROCEDURAL HISTORY

On September 1, 2020, the U.S. Centers for Disease Control and Prevention issued an order entitled, *Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*. 85 Fed. Reg. 55292 (Sept. 4, 2020). "Under this Order, a landlord … shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." *Id*. Violations were criminal offenses. *Id*. at 55296. The Halt Order was effective upon publication until December 31, 2020, "unless extended." *Id*. at 55297. It was

[1] Defendant USA has adopted CFPB's motion entirely without filing a separate memorandum of law, and therefore Plaintiffs' response does not separately address its arguments. *See* ECF No. 52.

subsequently extended several times through June 30, 2021.

The Halt Order was challenged within the Sixth Circuit resulted in two decisions invalidating CDC's action. First, in *Skyworks, Ltd. v. CDC*, No. 5:20-cv-2407, ---F.Supp.3d ----, 2021 WL911720, at *13 (N.D. Ohio Mar. 10, 2021), the court held that the Halt Order "exceed[ed] the agency's statutory authority provided in Section 361 of the Public Health Service Act, 42 U.S.C. § 264(a), and the regulation at 42 C.F.R. § 70.2 promulgated pursuant to the statute, and [was], therefore, invalid." Just days later in *Tiger Lily, LLC, et al. v. HUD, et al.*, No. 2:20-cv-2692, ---F.Supp.3d ----, 2021 WL 1171887, at *10 (W.D. Tenn. Mar. 15, 2021) the Court likewise held that the "Halt Order is *ultra vires* and unenforceable in the Western District of Tennessee."

CDC appealed the *Tiger Lily* decision and sought a stay pending appeal. On March 29, 2021, the Sixth Circuit denied a stay. *Tiger Lily, LLC v. HUD*, 992 F.3d 518, 522 (6th Cir. 2021).

Undeterred, on April 22, 2021, Defendant CFPB issued an interim final rule entitled, *Debt Collection Practices in Connection With the Global COVID-19 Pandemic (Regulation F)*, 86 Fed. Reg. 21163. The CFPB Rule became effective on May 3, 2021, without public comment. *Id.*

The CFPB Rule imposed new obligations on any person seeking to collect unpaid rent through the eviction process in any jurisdiction in which the CDC Order purportedly applied. *Id*. The CFPB Rule applies to any person seeking to collect a debt for back rent, including "attorneys who engage in eviction proceedings on behalf of landlords or residential property owners to collect unpaid residential [rent]," to make certain affirmative written disclosures to any tenants prior to filing eviction proceedings in state courts. *Id*. at 21165, 21169. According to CFPB, the failure to make such disclosures would violate the Fair Debt Collection Practices Act, which would subject a housing provider or the provider's agent to private damages or regulatory enforcement. *See id.*

The Rule prohibits any property owner or other person seeking to collect owed rent from:

> (1) Fil[ing] an eviction action for non-payment of rent against a consumer to whom the CDC Order reasonably might apply without disclosing to that consumer clearly and conspicuously in writing, on the date that the debt collector provides the consumer with an eviction notice or, if no eviction notice is required by applicable law, on the date that the eviction action is filed, that the consumer may be eligible for temporary protection from eviction under the CDC Order; or

> (2) Falsely represent[ing] or imply[ing] to a consumer that the consumer is ineligible for temporary protection from eviction under the CDC Order.

Id. at 21180.

The CFPB Rule further provides that a "consumer to whom the CDC Order reasonably might apply is a consumer who reasonably might be eligible to be a covered person as defined in the CDC Order." *Id*. Strangely, however, CFPB insists that "A debt collector does not violate [the] FDCPA… merely because the debt collector provides the disclosure to consumers … even if the consumer is not reasonably eligible to be a covered person." *Id*. CFPB further says, "A debt collector does not violate[the] FDCPA … merely because the debt collector provides the [disclosure] to a consumer in a jurisdiction in which the CDC Order does not apply." *Id*.

On May 3, 2021, Plaintiffs PMC, Schoeffler and NARPM filed their complaint challenging CFPB's Rule, together with a motion for a temporary restraining order raising challenges under the Administrative Procedure Act and the First Amendment. ECF Nos. 1, 6.

On May 14, 2021, this Court denied a restraining order because the CFPB Rule "applies … only in jurisdictions in which the CDC Order applies," and, in light of the Sixth Circuit's stay decision in *Tiger Lily*, the CDC Order "does not apply in light of an effective court order." ECF No. 23 at 6, 8. Relatedly, this Court concluded that the First Amendment claims did not "warrant the issuance of a TRO" "because the Rule does not apply to Plaintiffs in the jurisdictions (such as the Sixth Circuit) within the scope of Plaintiffs' theory, the Rule cannot and does not create irreparable harm by its (non-existent) application in such jurisdictions." ECF No. 23 at 10.

This Court noted, however, that it was not issuing a *declaratory* judgment, because such a declaration would be premature. ECF No. 23 at 14. This Court added, "Nevertheless, the Court is not averse to stating, as dicta, its view that the Sixth Circuit *Tiger Lily* opinion is precedential and binding on courts within the Sixth Circuit." ECF No. 23 at 14.[2]

[2] In a footnote this Court left "for another day" the question of any potential relief for Mr. Schoeffler, "as he is based outside of the Sixth Circuit." ECF No. 23 at 14 n. 15. CFPB has not raised any argument concerning this Court's ability to order relief to those plaintiffs residing outside the Sixth Circuit. There's also no doubt that this Court has jurisdiction over this matter, which involves federal questions under the APA and U.S. Constitution. *See* 5 U.S.C. § 702; 28 U.S.C. §§ 1331, 2201, 2202. This is also an appropriate forum as CFPB and the USA are federal

Separately, several other plaintiffs also challenged the Halt Order in the District of Columbia. *See Ala. Ass'n of Realtors v. HHS*, No. 20-cv-3377, 2021 WL 1779282 (D.D.C. May 5, 2021) (*AAR I*). That court concluded that the relevant statute "authorizes the Department to combat the spread of disease through a range of measures, but these measures plainly do not encompass the nationwide eviction moratorium set forth in the CDC Order." *Id.* at *8. That court stayed its decision pending appeal, which a panel of the D.C. Circuit declined to vacate. *See Ala. Ass'n of Realtors v. HHS*, No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021).

On June 3, those plaintiffs filed a request with the Supreme Court to vacate the stay. While that application was pending, CDC extended the Order until July 31.

On June 29, the Court denied the DC application without opinion. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2320 (2021). Justices Thomas, Alito, Gorsuch and Barrett would have granted the application. *See id.* Justice Kavanaugh concurred in the result, but explained:

> I agree with the District Court and the applicants that the [CDC] exceeded its existing statutory authority by issuing a nationwide eviction moratorium. Because the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds, I vote at this time to deny the application to vacate the District Court's stay of its order. In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.

Id. at 2320-21 (citations omitted).

On July 7, 2021, Plaintiffs filed an Amended Complaint, which added four plaintiffs—Matthew S. Chase, the Chase Law Firm, PC, James Hodge and Apex Ventures, Inc. ECF No. 38.

Plaintiffs PMC, Apex and Hodge are property management companies in Nashville, TN, that seeks to collect rent from tenants who rent properties that they manage. ECF No. 38 at ¶¶1, 2, 8, 9. They regularly seek to collect rent in arrears and to evict tenants when warranted under

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entities found in this district. *See* 5 U.S.C. § 703; 28 U.S.C. § 1391(e)(1). And even if there is a question about whether a *nationwide injunction* is appropriate, there is no doubt that this Court may *enjoin* Defendants and also issue a *declaration* for all parties everywhere. *See Skyworks*, 2021 WL 2228676, at *13 (entering "declaratory judgment" that the Halt Order was unlawful and restraining CDC). Plaintiffs who reside outside the Sixth Circuit request only that relief—injunctions against CFPB and the USA and declaratory relief.

Tennessee law. ECF No. 38 at ¶50. At the time of the filing some of their respective tenants owed unpaid rent and were eligible for eviction for unpaid rent under Tennessee law. ECF No. 23 at ¶50. Since the effective date of the CFPB Rule, however, they have refused to make CFPB's required disclosure to tenants who are eligible for eviction for unpaid rent in reliance on the Sixth Circuit's decision in *Tiger Lily*. ECF No. 23 at ¶51.

Plaintiff Schoeffler is an attorney who regularly seeks to collect back rent from tenants on behalf of clients who are property owners. ECF No. 23 at ¶52. At the time of the filing, Schoeffler represented clients who were pursuing state eviction proceedings for unpaid rent. ECF No. 23 at ¶52. Rule 4.1 of the Rules of Professional Responsibility of Louisiana states, "In the course of representing a client a lawyer shall not knowingly … make a false statement of material fact or law to a third person[.]" ECF No. 23 at ¶53. Additionally, Rule 4.3 prohibits providing "legal advice to an unrepresented person" if the lawyer knows the interests of such a person "have a reasonable possibility of being in conflict with the interests of the client." ECF No. 23 at ¶53. Plaintiff Schoeffler has thus refused to make CFPB's required disclosure to tenants on behalf of certain of his clients since the Rule's effective date. ECF No. 23 at ¶54.

Plaintiff Matthew Chase, on behalf of his and Plaintiff Chase Law Firm's clients, seeks to collect rent and pursue eviction when warranted under Missouri law. ECF No. 23 at ¶55. As of the effective date of CFPB's Rule, however, he and the firm have been required to make inaccurate disclosures to those tenants concerning the possibility of the Halt Order. ECF No. 23 at ¶55. Like Plaintiff Schoeffler, as an attorney in Missouri, the Missouri Rules of Professional Conduct prevent Mr. Chase from making a knowingly false statement to a third person or providing legal advice to an unrepresented person with interests that might conflict with those of his clients. ECF No. 23 at ¶56. Plaintiff Chase has thus refused to make CFPB's required disclosure to tenants on behalf of certain of his clients since the Rule's effective date. ECF No. 23 at ¶57.

Plaintiff NARPM is a trade association comprised of more than 5,000 members who are residential property managers. ECF No. 23 at ¶58. Many of NARPM's members, including members who reside within the geographic confines of the Sixth Circuit, manage properties with

tenants who are eligible for eviction for unpaid rent under state law. ECF No. 23 at ¶58. Since the effective date of the CFPB Rule, NARPM members who reside within the Sixth Circuit have refused to make CFPB's required disclosure to tenants who are eligible for eviction for unpaid rent in reliance on the decision in *Tiger Lily*. ECF No. 23 at ¶59. Other NARPM members outside of the Sixth Circuit have refused to make CFPB's required disclosures to tenants who are eligible for eviction for unpaid rent because these disclosures are unlawful. ECF No. 23 at ¶59.

Some of NARPM's members have complied with the CFPB Rule, however. ECF No. 23 at ¶60. Fearing liability under the FDCPA, those plaintiffs were forced to provide inaccurate and potentially misleading disclosures to their tenants informing them that they "may be eligible for temporary protection from eviction under the CDC Order." ECF No. 23 at ¶60.

The Amended Complaint raised three counts. First, the plaintiffs who operated outside of the Sixth Circuit challenged the CFPB Rule based on the APA. Second, those same plaintiffs challenged the Rule on First Amendment grounds. Third, the plaintiffs who operated *within* the Sixth Circuit sought a declaratory judgment solidifying what this Court already said in dicta—that the CFPB Rule did not apply within the Sixth Circuit.

On July 23, 2021, the Sixth Circuit set aside the CDC Halt Order in a published opinion. *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 669 (6th Cir. 2021). The court again concluded that the statute on which CDC relied, 42 U.S.C. § 264 "does not grant the CDC the power it claims." *Id.*

The Halt Order expired on July 31st. On August 3 President Biden said, "[L]ook, the courts made it clear that the existing moratorium was not constitutional; it wouldn't stand." *Remarks by President Biden* (August 3, 2021) https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/. Nevertheless, the President suggested CDC might issue a new order, but "[w]hether that option will pass constitutional measure with this administration, I can't tell you. I don't know. … But, at a minimum, by the time it gets litigated, it will probably give some additional time[.]" *Id.* Later that same day, CDC issued a new extension of the Order remaining in effect until October 3, 2021.

Meanwhile, the *AAR I* plaintiffs again sought intervention from the Supreme Court. This

time, the Court reinstated the district court's opinion. *Ala. Ass'n of Realtors v. HHS*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021) (*AAR II*). The Court said, "The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing." *Id.*

ARGUMENT

CFPB's tactic in this litigation is to deny the obvious. Today it is pellucidly clear that CDC's underlying Halt Order was unlawful. CFPB's follow-on rule, which claims to hold property owners and managers and their attorneys liable if they did not affirmatively inform tenants facing eviction of the unlawful order's existence, is likewise unlawful. If CDC could not lawfully shut down state courts, it's impossible that CFPB can lawfully force disclosures about CDC's order.

CFPB sidesteps all of this, pretending now that this case cannot be heard by this Court because the Rule never really did anything. It claims that its formal edict, set down in the Code of Federal Regulations, has no real effect and won't *actually* be enforced by anyone, and thus chides the plaintiffs for being so foolish as to worry about any repercussions from violating the Rule. CFPB's mish-mash of untenable arguments concerning mootness, standing and ripeness telegraph what has always been clear—CFPB's Rule is unlawful but CFPB won't promise not to enforce it or even admit it's invalidity. Thus, Plaintiffs are in need of this Court's intervention.

I. This Case Is Not Moot

CFPB first argues that this entire case is moot because its rule has lapsed. Specifically, CFPB says that all counts are moot because the Rule "compels nothing at all … in jurisdictions where the CDC Order does not apply," and "the CDC Order is not in effect in any jurisdiction." ECF No. 51 at 11.[3] Essentially CFPB says that because its Rule *no longer* does anything Plaintiffs have nothing to gain from this lawsuit.

But Plaintiffs have not received complete relief. CFPB's Rule *was* facially effective against the plaintiffs. CFPB has never disavowed its prior effectiveness outside this jurisdiction, it remains facially effective in this jurisdiction and the plaintiffs who refused to follow the Rule face

[3] ECF Number 51 is CFPB's Memorandum of Law. Page citations to this document adopt the page numbers used by CFPB, not the page numbers of the document itself.

continued liability for potential private and public enforcement. For the plaintiffs who complied with the Rule, two exceptions to mootness require this Court's ongoing action. Plaintiffs therefore have a significant ongoing interest in the relief they have requested.

A. The Noncompliant Plaintiffs Face the Threat of Liability from CFPB's Rule

"There is [] no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. But a case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citations omitted, emphasis added).

Even if subsequent events provide some relief to the plaintiff, if it is not "fully satisfactory [] with respect to the case as whole, even the availability of a partial remedy is sufficient to prevent a case from being moot." *Id.* at 177 (cleaned up). "The party asserting mootness bears the burden of establishing that there is no effective relief that the court can provide. That burden is heavy; a case is not moot where *any* effective relief may be granted." *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006) (cleaned up, emphasis in original). If just "one of the requests for relief in this case remains live" this "suffices to prevent this aspect of the case from being moot." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 287 (6th Cir. 2009).

The expiration of CFPB's Rule, and the partial vacatur of the underlying CDC Order, does not foreclose *all possible* relief for Plaintiffs. To the contrary—it does almost nothing to resolve the legal uncertainty that they face. Plaintiffs requested that the Court provide the following relief: (1) issue a declaration that the CFPB Rule was "in violation of the FDCPA" and "the First Amendment" for "Plaintiffs who operate outside the confines of the Sixth Circuit;" (2) "set aside and invalidate the CFPB Rule;" (3) issue "an injunction prohibiting the rule's enforcement and prohibiting the entry, reentry, promulgation, or extension of the CFPB Rule or any order like it;" and (4) "enter a judgment declaring that the CFPB Rule does not apply in the Sixth Circuit, and that the Sixth Circuit Plaintiffs or anyone else in the Sixth Circuit seeking back rent in a rent or eviction proceeding are not required to provide any information to tenants about the CDC Order." *See* ECF No. 38 Counts I-III. Plaintiffs have received none of those things.

CFPB's mootness argument ignores the fact that *its* rule was never invalidated, did have consequences while it was effective, and *continues* to threaten civil liability against many of the plaintiffs. CFPB just says that "the CDC Order is not in effect in any jurisdiction," and thus "there is no jurisdiction in which Plaintiffs are compelled to make any disclosures pursuant to the Bureau's Rule." ECF No. 52 at 12-13. This may be true, but it makes no difference to Plaintiffs as they *were compelled* to make such disclosures, and CFPB has never disavowed the possibility of liability arising from CFPB's Rule. While CFPB acknowledges that after *AAR II* "the judgment vacating the moratorium in all jurisdictions will remain in effect," it does not concede that this invalidates the CFPB Rule. *See* ECF No. 52 at 13. Moreover, the Halt Order was not vacated nationwide until *August 26th*, after it had been in effect for nearly a year.

This makes all the difference to Plaintiffs who refused to comply with the Rule while it was in effect. Plaintiffs requested "an injunction prohibiting the rule's enforcement" by CFPB as well as declarations that the CFPB Rule is unlawful "outside the confines of the Sixth Circuit;" and "that the CFPB Rule does not apply in the Sixth Circuit," so that they will not face potential liability from either CFPB or private litigants for past violations. *See* ECF No. 38 Counts I-III.

The *availability* of future civil penalties from a terminated action or order prevents a finding of mootness. *See United States v. Able Time, Inc.*, 545 F.3d 824, 828 (9th Cir. 2008) ("This action is not moot because the civil penalty remedy is still available."). Thus, in *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 192-93 (2000), the Court rejected a mootness argument brought by a defendant that had "come into compliance," because the defendant could still face civil penalties.

Furthermore, for *mootness* purposes (as opposed to standing, which is discussed below), this Court must not employ the same analysis of how *likely* future enforcement might be to determine that a challenge to a lapsed order is moot. The Court explained that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing [or ripeness], but not too speculative to overcome mootness." *Laidlaw*, 528 U.S. at 190. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983), on

which the Court in *Laidlaw* relied, the Court had held that a challenge to a city's policy that had since been the subject of a six-month moratorium was "not moot, since the moratorium by its terms is not permanent" and thus "[i]ntervening events have not irrevocably eradicated the effects of the alleged violation." (cleaned up).

Some of the Plaintiffs still face the possibility of civil penalties for violating CFPB's Rule, negating a finding of mootness. The FDCPA prohibits the use of "false, deceptive, or misleading representation" or "unfair or unconscionable means" "in connection with the collection of any debt." 15 U.S.C. §§ 1692e, 1292f. Any debt holder has a private right of action for violations with the availability of statutory damages of $1,000 regardless of actual damage and potential awards for costs and attorneys' fees. 15 U.S.C. §§ 1692k(a), (d). A debt holder may file suit "within one year from the date on which the violation occurs." *Id.* at § 1692(k)(d). CFPB may also enforce violations. 15 U.S.C. § 1692l. It has a different statute of limitations though—CFPB may bring a civil action no more than "3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1); *see also CFPB v. Navient Corp.*, No. 3:17-cv-101, 2021 WL 134618, at *14 (M.D. Pa. Jan. 13, 2021) (allowing CFPB suit under FDCPA filed more than three years after conduct based on equitable tolling).

The Plaintiffs who refused to comply with CFPB's Rule while it was in effect are well within the statute of limitations period for both public and private enforcement. Mr. Schoeffler, Mr. Chase, and many of NARPM's members refused to make the required disclosures to the tenants covered by CFPB's Rule because it required them to make false and potentially unethical statements to tenants. ECF No. 38 at ¶¶54, 57, 59. They reside in jurisdictions where the Halt Order remained in effect until August 26th, meaning that, at a minimum, those plaintiffs' conduct between May 3rd and August 26th remains actionable by either CFPB *or* any affected tenant. Even the plaintiffs in this jurisdiction face potential liability as the CFPB rule facially applies everywhere. What's more, with a $1,000 statutory bounty available per violation, as well as the possibility of costs and attorneys' fees, tenants have every incentive to file suit. Tellingly, CFPB has never suggested it *won't* file suit. It intimates the opposite—CFPB says that "in the event an

enforcement action is brought against any Sixth Circuit plaintiff for violating the Bureau's Rule; the defendant in any such action could simply invoke *Tiger Lily* as a defense to liability." ECF No. 51 at 16. That suggests that CFPB might bring enforcement *and* that it doesn't think that any plaintiff outside the Sixth Circuit has a defense.

B. The Compliant Plaintiffs' Claims Are Not Moot Because Two Exceptions Apply

The remaining Plaintiffs who complied with the Rule (albeit under compulsion) can rely on two exceptions to mootness. First, this case presents a question that is capable of repetition, yet evading review. Second, CFPB's voluntary cessation does not allow it to moot this case.

1. This Issue Is Capable of Repetition, Yet Evading Review

In one of CFPB's most questionable uses of precedent, CFPB notes that "[t]his Court, and numerous other courts, have previously found that challenges to … no longer in effect[] public health orders are moot." ECF No. 51 at 12 (citing *ARJN #3 v. Cooper*, 517 F. Supp. 3d 732, 741 (M.D. Tenn. 2021)." While that may be true in the abstract, CFPB omitted the rest of this Court's analysis finding that a challenge to a repealed order *was not moot* "because the restrictions were capable of being repeated." *ARJN #3*, 517 F. Supp. 3d at 742. That same reasoning applies here.

As this Court wrote,

> [An] exception to the mootness doctrine [] exists for cases that are capable of repetition, yet evading review. This exception applies if the challenged action is too brief to be litigated fully before it concludes and if there is a reasonable expectation that the same complaining party will be subject to the same action again.

Id. (cleaned up).

If a litigant cannot achieve a final decision before the end of the policy this will establish the first element. *See Resurrection Sch. v. Hertel*, 11 F.4th 437, 452-53 (6th Cir. 2021). "[T]he Supreme Court has found periods of up to two years to be too short to be fully litigated." *Id.*

Concerning the second element, the "standard is a forgiving one." *Id.* "This standard provides that the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness." *Id.* (citation omitted). "[A] challenge to state [Covid] restrictions is not moot when 'officials with a track record of moving the goalposts retain authority

to reinstate those heightened restrictions at any time,'" because that demonstrates a "reasonable expectation" of recurrence. *Brach v. Newsom*, 6 F.4th 904, 919, 921 (9th Cir. 2021) (quoting *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Further, courts have long recognized that when a government actor has defended the legality of its conduct before and during litigation, this can demonstrate a likelihood that it will revive conduct it has ceased. *See, e.g.*, *Bourgeois v. Peters*, 387 F.3d 1303, 1309 (11th Cir. 2004) (plaintiff had a "reasonable expectation" of recurrence when the defendant "has argued for over two years that its search policy is constitutional and has continued to implement it even in the face of ongoing litigation").

For the plaintiffs who complied with the Rule their requested relief is not moot because their challenge is capable of repetition, yet evading review. CFPB's Rule was inherently temporary, pegged as it was to the Halt Order, which, despite its continuous extensions, never claimed to be effective for more than a few months at a time. *CFPB Rule*, 86 Fed. Reg. at 21180. In fact, Plaintiffs filed this action 7 days after CFPB issued its rule but were still unable to obtain anything like a final judgment before it expired. This claim evades review by its very nature. *See Resurrection Sch.*, 11 F.4th at 452-53.

The issues are also capable of repetition as CFPB retains the authority to issue the Rule's provisions at any time and have never acknowledged that they are prohibited from doing so. CFPB has yet to say it agrees that the Halt Order was unlawful, much less that it lacked any basis to issue its rule. CFPB just says its now-expired Order has no effect *now*. *See* ECF No. 51 at 12. Further, CDC's longstanding efforts to manipulate the jurisdiction of other courts concerning the underlying Halt Order, including the President's confessions that he directed the agency to act in defiance of the Supreme Court merely to buy "additional time," suggests that CFPB may likewise attempt to reinstate its order no matter the law. *See* Biden Aug. 3 Remarks, *supra*. That's why Plaintiffs need a judgment—CFPB has never acknowledged its legal overreach and remains poised to act again at any time. *See Bourgeois*, 387 F.3d at 1309.

2. CFPB Cannot Moot This Case Through Its Voluntary Cessation

A "case has been mooted by the defendant's voluntary conduct" only when "subsequent

events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189. The party asserting mootness bears the "formidable," "heavy burden of persuading the court" that "the challenged action cannot reasonably be expected to start up again." *Id.* at 190. The *defendant* must therefore show that "(1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Thomas v. City of Memphis, Tennessee*, 996 F.3d 318, 324 (6th Cir. 2021).

While the Sixth Circuit sometimes grants special consideration to government actors who voluntarily cease their conduct—it does so only after looking at *how* the change occurred. *Id.* "If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim." *Id.* (citation omitted). Similarly, "an executive action that is not governed by any clear or codified procedures cannot moot a claim" because it falls within the voluntary cessation exception. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). Thus, when a prior policy has been rescinded because it was altered by a court, but the government has not repudiated its prior conduct, the voluntary cessation doctrine precludes a finding of mootness. *See Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1271 (11th Cir. 2018) (challenge to policy was not moot where policy was "altered by a local judge," and "while it is perhaps unlikely, we cannot say that this judge might not revert to the original policy").

CFPB cannot carry its burden of showing mootness because it has not made it "absolutely clear" that it will not try again to reinstate the challenged rule. CFPB has voluntarily ceased its offending conduct, at least for this lawsuit, by reluctantly acknowledging that the Rule *no longer* comes with affirmative obligations. *See* ECF No. 51 at 12. But it did so only because it was the inescapable conclusion from the *Tiger Lily* decision, not because it thought better of its policy, and even then, only to the extent that the Rule has *forward looking* consequences. *See* ECF No. 51 at 12-13. CFPB says "Plaintiffs no longer face obligations under the Bureau's Rule," which suggests that it thinks they *did* at some point face obligations. *See* ECF No. 51 at 13. There was thus no

"interim relief" that "completely and irrevocably eradicated the effects of the alleged violation." *See Thomas*, 996 F.3d at 324. In these circumstances CFPB's conduct has not mooted this case.

II. All Plaintiffs Have Standing to Bring This Suit

CFPB next argues that none of the plaintiffs have standing because they only have a "speculative fear that they may someday be subject to an enforcement action for their past non-compliance with the Rule." *See* ECF No. 51 at 14. This argument collapses the distinction between two types of plaintiffs, addressing only a subset who face potential enforcement, while ignoring those plaintiffs who *complied* with the Rule. CFPB is wrong on that point, but, in any event, some of the plaintiffs would have standing to pursue this litigation even if there was no genuine risk of enforcement because they *have* incurred costs by complying with the Rule.

CFPB appears to make the common mistake of confusing standing with ripeness—but, no matter how labeled, Plaintiffs can pursue this litigation now. CFPB has already tried this same tactic, and the D.C. Circuit, in an opinion written by then-judge Kavanaugh dismissed it easily. In *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53-54 (D.C. Cir. 2015) the court held that "a party a regulated individual or entity [by CFPB] has standing to challenge an allegedly illegal statute or rule under which it is regulated," and their challenge was ripe without their first being forced "to violate a law (and thereby trigger an enforcement action against it)." CFPB's attempt to resurrect that same, failed, argument in this case should likewise be rejected.

A. The Plaintiffs Who Complied with the CFPB Rule Have Standing

For standing: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical (2) there must be a causal connection between the injury and the conduct complained of, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

This case is the archetype for how one has standing to "challeng[e] the legality of government action or inaction." *See id.* at 561. When "the plaintiff is himself an object of the action (or forgone action) at issue," "there is ordinarily little question that the action or inaction has

caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561-62. The Sixth Circuit has recognized as much—noting that a plaintiff's standing depends on "whether the Plaintiffs are within the group of individuals whose conduct the [challenged] statute regulates." *Phillips v. DeWine*, 841 F.3d 405, 414-15 (6th Cir. 2016). "A petitioner's standing to seek review of administrative action is usually self-evident" because "he has been made subject" to the agency rule, is thus "an object of the action at issue, so there is little question that it has caused him injury, and that a judgment preventing the action will redress it." *Bonacci v. TSA*, 909 F.3d 1155, 1159–60 (D.C. Cir. 2018) (cleaned up).

Plaintiffs who *complied* with CFPB's Rule on threat of enforcement have standing now to sue. Some of NARPM's members complied with the CFPB Rule. ECF No. 38 at ¶60. Those plaintiffs were compelled to provide false speech in violation of the First Amendment, as well as the FDCPA, but they did so for fear that they would be subject to both private and regulatory liability under the FDCPA. ECF No. 38 at ¶60. They no doubt have standing to "challeng[e] the legality of government action or inaction." *See Lujan*, 504 U.S. at 561.

CFPB recognized all of this in the Rule. CFPB said, "Debt collectors who engage in eviction-related activities on behalf of landlords may be subject to three costs as a result of this interim final rule. First is the direct cost of providing the required disclosure." *CFPB Rule*, 86 Fed. Reg. at 21178. "Second, debt collectors may incur one-time costs to train staff and update systems to ensure that the disclosure is provided and to demonstrate compliance." *Id.* "Third, debt collectors who represent landlords as attorneys in eviction actions may collect decreased legal fees to the extent that the required disclosure leads to a decrease in eviction filings." *Id.* at 21179. CFPB thus recognized the reality that its rule did *something* to regulated parties.

B. The Challenge of Plaintiffs Who Face Potential Liability Is Ripe

CFPB doesn't really dispute this—it just raises a ripeness argument concerning the plaintiffs who have refused to comply with the Rule. CFPB relies primarily on *Kiser v. Reitz*, 765 F.3d 601, 606 (6th Cir. 2014), a case concerned with "ripeness," which is a subset of the standing doctrine. *See* ECF No. 51 at 14. Standing is measured "at the time the action commences."

Laidlaw, 528 U.S. at 191. Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *Magaw*, 132 F.3d at 284.

The plaintiffs who have refused to follow the Rule can sue now without having to wait for CFPB, or some other party, to enforce the Rule. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). "[T]he threatened enforcement of a law creates an Article III injury" when a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 158-59 (cleaned up).

"In the context of a free-speech overbreadth challenge like this one, however, a relaxed ripeness standard applies to steer clear of the risk that the law may cause others not before the court to refrain from constitutionally protected speech or protection." *Kiser*, 765 F.3d at 607 (cleaned up). For a "First Amendment challenge," the plaintiff "does not bear a heavy burden to demonstrate a claim of specific present objective harm or a threat of specific future harm," and, "in the context of threats to the right of free expression, courts justifiably often lessen standing requirements." *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 492 (6th Cir. 1995) (cleaned up).

A threat is adequately "concrete and imminent" "[w]hen a plaintiff has engaged in a course of conduct and the state has instructed him to stop or face disciplinary action[.]" *Kiser*, 765 F.3d at 607-08. "Such a threat is considered especially substantial when the administrative agency has not disavowed enforcement if the plaintiffs make similar statements in the future." *Id.* at 609. The threatened enforcement can also be from "administrative proceedings." *Id.* And the "credibility of that threat is bolstered by the fact that authority to file a complaint [or seek enforcement] is not limited to a prosecutor or an agency." *Susan B. Anthony List*, 573 U.S. at 164.

The Supreme Court's decision in *Babbit v. United Farm Workers Union*, 442 U.S. 289 (1979) is instructive. In that case the Court found "a credible threat of prosecution" where the challenged law "on its face proscribe[d] dishonest, untruthful, and deceptive publicity," the plaintiffs had "actively engaged in consumer publicity campaigns in the past" and alleged "an

intention to continue" those campaigns in the future. *Id.* at 301-02. Although they did not "plan to propagate untruths," the plaintiffs argued that "erroneous statement is inevitable in free debate," and the Court concluded that their fear of prosecution was not "imaginary or wholly speculative," and thus their challenge was ripe. *Id.* at 302.

The plaintiffs who refused to follow CFPB's Rule don't have to wait for an enforcement action to challenge it—it is enough that they face the real possibility of private and public enforcement. As a threshold, those plaintiffs did much more than just state "an intention to engage in a course of conduct … proscribed by a statute," *Susan B. Anthony List*, 573 U.S. at 158-59, they flatly refused to make the required disclosures. ECF No. 38 at ¶¶ 54, 57, 59. This is why this Court must give special solicitude to these plaintiffs' First Amendment interests—they have uttered the challenged speech despite the chilling consequences. *See Briggs*, 61 F.3d at 492.

But without this Court's intervention that principled refusal might come with costs. Just as in *Babbit*, these plaintiffs were doing their best *not* to engage in deceptive speech, but to do so they had to ignore CFPB's directives. *See* 442 U.S. at 301-02. And just as in that case, the threat of enforcement is hardly "imaginary or wholly speculative." *See id.* These plaintiffs have now said that they violated the Rule while it was effective and the statute of limitations period for both public and private enforcement has yet to run. *See* 12 U.S.C. § 5564(g)(1); 15 U.S.C. § 1692k(d). Any tenant who did not receive such a notice has the temptation of statutory damages of $1,000 for each violation, coupled with potential attorneys' fees, which "bolster[s]" the threat of enforcement from not only the agency but *private individuals*. *See Susan B. Anthony List*, 573 U.S. at 164. Moreover, CFPB "has not disavowed enforcement if the plaintiffs make similar statements in the future," *Kiser*, 765 F.3d at 607-08, on the contrary, it contemplates a possible "enforcement action is brought against any Sixth Circuit plaintiff for violating the Bureau's Rule" ECF No. 51 at 16. Even for the plaintiffs in the Sixth Circuit, CFPB has refused to acknowledge that the Rule *never* had an effect, it has just insisted that those plaintiffs might have a defense when they are sued either by the agency or plaintiffs who would take the Rule at face value. The challenge brought in this case is therefore ripe for all plaintiffs.

The only counterargument CFPB musters is its claim that Plaintiffs haven't cited a "history of past enforcement" or "that they have been specifically warned of enforcement regarding their specific conduct" because "by the Rule's own operation – it has no application where the CDC Order, on account of a court order or otherwise, does not apply." ECF No. 51 at 14 (cleaned up). A history of past enforcement can help show the likelihood of future enforcement, but it is by no means necessary. Take *Kiser*, for example. There a dentist challenged a disciplinary board that had threatened him that his protected conduct was a violation of its rules but had not instituted disciplinary proceedings. *Kiser*, 765 F.3d at 609. CFPB's Rule is also an explicit threat. *See CFPB Rule*, 86 Fed. Reg. at 21163. It makes no mention of the *Tiger Lily*, or any other decision, and it purports to impose liability on Plaintiffs no matter where they live. CFPB continues to insist it can (and likely will) enforce its rule *outside* the Sixth Circuit. *See* ECF No. 51 at 16. And what private litigant would eschew the statutory damages available under the FDCPA, declared available by CFPB against the plaintiffs who have pled that they refused to follow CFPB's Rule? Even those in the Sixth Circuit are targets because private plaintiffs could hardly be expected to forgo suit based solely on this Court's "dicta" that *Tiger Lily* likely means that the Rule never actually applied in this jurisdiction. This Court's intervention is desperately needed.

III. This Court Has An Obligation to Enter a Declaratory Judgment on These Ripe Claims

CFPB next suggests that this Court should decline to issue a declaratory judgment for the plaintiffs within the Sixth Circuit because "it would not serve a useful purpose for the Court to further consider this Count, and because Plaintiffs have an alternative remedy available" by invoking "*Tiger Lily* as a defense to liability" in a lawsuit. ECF No. 51 at 16. CFPB is wrong.

While CFPB labels this a distinct line of argument, a court's inquiry into whether it exercises discretion to issue a declaratory judgment in a pre-enforcement challenge to a regulation is essentially co-extensive with the ripeness inquiry. *See Fieger v. Michigan Supreme Ct.*, 553 F.3d 955, 974 (6th Cir. 2009) ("For the same reasons already articulated [concerning ripeness], we also conclude that the district court abused its discretion in entering a declaratory judgment under the

Declaratory Judgment Act."); *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967) ("The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution."). In fact, the Sixth Circuit has cautioned that any discretionary considerations concerning whether to issue a declaratory judgment against unconstitutional conduct is "in some tension with the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging" and has declined to consider "prudential" concerns going to ripeness. *Kiser*, 765 F.3d at 606-07 (cleaned up). Moreover, the "very purpose" of the DJA is to encourage pre-enforcement lawsuits against coercive rules and avoid "[t]he dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129-30 (2007).

As discussed above, the plaintiffs in the Sixth Circuit continue to have genuine fears that they might be subject to public or private enforcement of CFPB's Rule notwithstanding the *Tiger Lily* decision. CFPB's argument concerning the DJA bears this out—CFPB says "*Tiger Lily* as a defense to liability." ECF No. 51 at 16. In other words, CFPB is asking this Court to ignore the "very purpose" of the DJA and force Plaintiffs to either abandon their rights or risk prosecution that they *should* be able to defeat. *See MedImmune*, 549 U.S. at 129-30.

IV. Plaintiffs Have Plausibly Pled An APA Violation and First Amendment Violation Because the Plaintiffs Outside the Sixth Circuit Are Compelled to Utter False Speech and Refrain from Truthful Speech

At long last, on the merits, CFPB breezes past the relief sought by Plaintiffs and simply argues what amounts to support for the declaration sought by Count III. CFPB says that *all* counts are legally unsupportable because the plaintiffs in the Sixth Circuit are not bound by the Rule. ECF No. 51 at 17. Concerning the APA claim, they again say that the Rule has "no application where the CDC Order does not apply," and thus the Rule does not "compels them to make any statement[.]" ECF No. 51 at 19-20. But these arguments have no bearing on Counts I and II.

The plaintiffs in Counts I and II reside in jurisdictions where the CFPB Rule did apply, and the Halt Order was not invalidated until August 26th. *See* ECF No. 38, Counts I, II. Glibly asserting

that other plaintiffs "could simply invoke *Tiger Lily* as a defense to liability," doesn't advance CFPB's argument. *See* ECF No. 51 at 16. What this does show, however, is that the plaintiffs within the Sixth Circuit remain in need of a declaratory judgment. If the CFPB Rule never applied to them, then they should not have to wait until they are sued by either CFPB or private litigants to engage in costly and unpredictable litigation over whether they have a viable "defense."

For those plaintiffs outside the Sixth Circuit, as set out in detail in Plaintiffs' Memorandum of Law in support of the TRO, the CFPB Rule conflicts with the FDCPA's text and violates the First Amendment and is thus invalid. *See* ECF No. 7 at 9-17.

A. Where It Applies, the CFPB Rule Conflicts with the FDCPA

The FDCPA generally prohibits debt collectors from using "any false, deceptive, or misleading representations or means in connection with the collection of any debt." 15 U.S.C. § 1692e. CFPB claims regulatory authority over how to define what constitutes a "false, deceptive, or misleading representation or means in connection with the collection of any debt" pursuant to 15 U.S.C. § 1692(d). *See* CFPB Rule, 86 Fed. Reg. at 21168-69.

Whether or not CFPB's claimed regulatory authority empowers it to define prohibited practices, it nearly goes without saying that CFPB cannot proscribe conduct that, in fact, is not "false, deceptive, or misleading[.]" *See City of Cleveland v. Ohio*, 508 F.3d 827, 838 (6th Cir. 2007) ("Agency action is 'not in accordance with the law' when it is in conflict with the language of the statute relied upon by the agency.") (quoting 5 U.S.C. § 706(2)(A)). A court may "hold unlawful and set aside agency action" that violates a statutory directive because it is "not in accordance with law." 5 U.S.C. § 706(2)(A).

The FDCPA uses "an objective test" to determine if conduct falls under its prohibitions. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006). Statements are not "false, deceptive, or misleading" if they are *true*. *Id*. at 331; *see also Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 594 (6th Cir. 2009) (debt collector did not violate FDCPA with unclear language because it "did not go so far as to falsely describe [the] debt"). In *Harvey* the Court rejected an argument that filing a debt-collection lawsuit without first obtaining documentary proof of all the

facts underlying the suit was a deceptive practice. *See id*. at 331-32. This was because there was no indication that the suit lacked an evidentiary basis, and the debtor "never denied … that she owed [] a debt" or that the collectors "misstated or misrepresented the amount she owed." *Id*. at 332. "It would take a bizarre or idiosyncratic interpretation by the least sophisticated consumer to conclude that [a] true statement violates the FDCPA." *Remington v. Fin. Recovery Servs., Inc.*, No. 3:16-CV-865 (JAM), 2017 WL 1014994, at *4 (D. Conn. Mar. 15, 2017).

Moreover, even if a statement is false, it must be materially so, and not just "false in some technical sense." *Miller*, 561 F.3d at 596 (citation omitted). "A statement cannot mislead unless it is material, so a false but non-material statement is not actionable." *Id*.

In the jurisdictions where it applies, CFPB's Rule prohibits truthful disclosures and mandates misleading ones, under the agency's view that it is materially misleading for Plaintiffs to refuse to tell their tenants about the illegal CDC Order. The Rule is unequivocal that it "prohibits debt collectors from filing an eviction action against a consumer to whom the CDC Order reasonably might apply without disclosing that the consumer may be eligible for temporary protection from eviction under the CDC Order," or "falsely representing or implying to a consumer that the consumer is not eligible for temporary protection from eviction under the CDC Order," and the Rule says that it applies "in jurisdictions in which the CDC Order is effective." *CFPB Rule*, 86 Fed. Reg. at 21169-70. A "consumer to whom the CDC Order reasonably might apply is a consumer who reasonably might be eligible to be a covered person as defined in the CDC Order." *Id.* at 21180. The Rule therefore "prohibits" anyone in a jurisdiction where the CDC Order "reasonably might" have been in effect to make the required disclosures and affirmatively bars them from "representing or implying to a consumer that the consumer is not eligible for temporary protection from eviction under the CDC Order[.]" *See id.* This is so even though the underlying CDC Order was invalid all along. *See AAR II*, 2021 WL 3783142, at *3.

In fact, the disclosures *required* by the Rule are themselves deceptive and misleading. CFPB insists that Plaintiffs should provide a disclosure "even if the consumer is not reasonably eligible to be a covered person" or even if "the debt collector provides the sample language in this

comment … to a consumer in a jurisdiction in which the CDC Order does not apply." *CFPB Rule*, 86 Fed. Reg. at 21180. But such disclosures would be clearly *false* because the CDC Order was invalid from day one. CFPB's Rule therefore conflicts with the text of the FDCPA—mandating misleading disclaimers and prohibiting truthful statements—and must be set aside.

B. In Jurisdictions Where It Applies, the CFPB Rule Violates the First Amendment

For similar reasons CFPB's Rule violates the First Amendment. The First Amendment prohibits the government from restricting or compelling speech. *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 425 (6th Cir. 2019) (citing *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (*NIFLA*)).“When laws, whether restrictive or compulsive, ‘target speech based on its communicative content,’ they generally ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.’” *Id*. (quoting *NIFLA*, 138 S.Ct. at 2371). “Speech is not unprotected merely because it is uttered by ‘professionals.’” *NIFLA*, 138 S.Ct. at 2371-72.

With respect to compelled speech, the Court has explained that “strict scrutiny” applies unless a government actor shows that the speech falls into a limited exception for “commercial speech.” *Id*. at 2372. This “contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome. A compelled disclosure … must meet all three criteria to be constitutional.” *Am. Beverage Ass'n v. San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019) (citing *NIFLA*, 138 S.Ct. at 2372).[4]

“Purely factual” and “noncontroversial” speech is just that—true statements that are not subject to interpretation. *See NIFLA*, 138 S.Ct. at 2372 (disclosures concerning abortion were on “anything but an ‘uncontroversial’ topic”); *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 264 (2d

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[4] Another potential exception exists for the regulation of professional conduct. NIFLA, 138 S.Ct. at 2374. CFPB does not directly argue that *any* exception applies, or that strict scrutiny is an improper analysis, it just pushes through with a discussion of commercial speech. *See* ECF No. 51 at 19. Regardless, the Rule does not apply to a narrow class of purely professional conduct as it applies to any person who seeks to collect a debt for back rent, whether they let a room in their house for rent or have multiple properties. *See CFPB Rule*, 86 Fed. Reg. at 21165.

Cir. 2014) (law requiring disclosure of the name of a competitor's business was neither "purely factual" nor "noncontroversial" because "[p]rohibiting a business from promoting its own product on the condition that it also promote the product of a competitor is a very serious deterrent to commercial speech."). Unsurprisingly, when the government mandates *false* speech, or even *misleading* speech, a court looks to that mandate with strict scrutiny. *See MAPSC v. Healey,* 159 F. Supp. 3d 173, 206-08 (D. Mass. 2016) (invalidating prohibition on "unfair or deceptive" practices that would encompass "truthful" statements about an educational program).

Whether compelled speech is unjustified or unduly burdensome asks whether the goals of the proposed law "could be accomplished" with less burdensome alternatives. *Am. Beverage Ass'n*, 916 F.3d at 757. Similarly, restrictions that sweep too broadly and include protected as well as unprotected speech "chill the speaker's protected speech" and are also unduly burdensome. *Id.* (quoting *NIFLA*, 138 S.Ct. at 2378).

Under strict scrutiny, "precision must be the touchstone" of any regulation of speech. *NIFLA*, 138 S.Ct. at 2376 (cleaned up). Compelled speech must be shown, with "evidence," to actually address the purported government interest and must be narrowly tailored so that it is neither "underinclusive" in its reach to target harms nor overbroad in its application to protected speech that is unrelated to the harms. *See id.* If the government could reach its goals "without burdening a speaker with unwanted speech[,]" it fails strict scrutiny. *See id.*

CFPB's Rule violates the First Amendment. First, the Rule must be subject to strict scrutiny because it does not fit the commercial speech exception. The speech here is neither purely factual nor uncontroversial. Instead, it requires disclosures that suggest to a relevant tenant that they "may be eligible for temporary protection from eviction under the CDC Order," and forbids "representing or implying to a consumer that the consumer is not eligible for temporary protection from eviction under the CDC Order," even though the CDC Order was invalidly enacted. *See CFPB Rule*, 86 Fed. Reg. at 21169-70, 21180. CFPB insists that Plaintiffs should make *false* disclosures to a tenant that the tenant can take advantage of the CDC Order "even if the consumer is not reasonably eligible to be a covered person" or even if "the debt collector provides the sample

language in this comment … to a consumer in a jurisdiction in which the CDC Order does not apply." *CFPB Rule*, 86 Fed. Reg. at 21180. The Rule *mandates* untrue speech and encourages misleading speech. It thus warrants strict scrutiny. *See MAPSC.*, 159 F. Supp. 3d at 206-08.

Applying strict scrutiny, the Rule fails. CFPB's Rule does nothing to accomplish its stated purpose. CFPB insists that the Rule is necessary to abate "consumer harms associated with evictions during the COVID-19 pandemic," because "consumers may be unaware of their eligibility for temporary protection under the CDC Order." *CFPB Rule*, 86 Fed. Reg. at 21168. But the CDC Order is invalid, and it cannot lawfully prevent any eviction under state law. *See AAR II*, 2021 WL 3783142, at *3. The Rule cannot therefore have any legitimate impact on evictions. Of course, a rule mandating *false* disclosure about an invalid eviction moratorium does have significant adverse impacts on tenants themselves because it provides false assurances to tenants that they simply do not have to meet their rent obligations.

The Rule forbids truthful speech, and in fact compels *unethical* speech, showing also that it lacks "precision." *See NIFLA*, 138 S.Ct. at 2376. The Rule prohibits a plaintiff from saying what is true—that the Halt Order was void and thus that "the consumer is not eligible for temporary protection from eviction under the CDC Order," even though the CDC Order was invalidly enacted. *See CFPB Rule*, 86 Fed. Reg. at 21170. Moreover, for Plaintiffs Schoeffler and Chase, the Rule coerces them into violating rules of attorney ethics that forbid them from misleading adverse parties and providing advice to adverse parties that conflicts with the interests of their clients. *See* ECF No. 38 at ¶¶53-57. CFPB insists that these attorneys *falsely* should have told parties with adverse interests to their own clients that they could take advantage of a void and unlawful moratorium order. That prohibition encompasses protected speech.

Of course, even under lesser scrutiny, the Rule is invalid. The government can only mandate "truthful, non-misleading, and relevant" disclosures. *See EMW*, 920 F.3d at 429. The Rule is none of these things. It mandates false disclosures about the CDC order, encourages misleading disclosures whenever the moratorium might not actually apply, and creates irrelevant burdens on Plaintiffs when a tenant has simply refused to pay rent.

C. CFPB's Counter-Argument Is Unconvincing

In response, CFPB mostly clings to its position that the Rule doesn't actually apply to those plaintiffs who reside in the Sixth Circuit, and offers a tepid suggestion that the Rule never actually did anything *anywhere*. CFPB's only acknowledgement of the distinct claims presented in Counts I and II by Plaintiffs outside the Sixth Circuit is its aside that the Rule "merely requires debt collectors who are 'collecting a debt in a jurisdiction in which the CDC Order applies' to inform consumers to whom the CDC Order 'reasonably might apply' that the consumers 'may be eligible' for temporary protection under the CDC Order. … That statement is not only true where it must be provided—it is nearly tautological." ECF No. 51 at 19.

CFPB acts like the plaintiffs outside the Sixth Circuit have a choice under the Rule about whether to provide disclosures that are themselves false and misleading. CFPB relies far too much on its use of the equivocal "may be eligible" language in erroneously suggesting that the *disclosures that are mandated by law* don't really have any consequences. The Rule is unequivocal that it "prohibits certain acts by debt collectors," and "prohibits debt collectors from filing an eviction action against a consumer to whom the CDC Order reasonably might apply without disclosing that the consumer may be eligible for temporary protection from eviction under the CDC Order," or "falsely representing or implying to a consumer that the consumer is not eligible for temporary protection from eviction under the CDC Order," and the Rule says that it applies "in jurisdictions in which the CDC Order is effective." *CFPB Rule*, 86 Fed. Reg. at 21169-70. The plaintiffs have no choice under the Rule—they must say certain things and refrain from saying others—and the best justification CFPB has is that some of these statements might not be strictly *false*, even if they are misleading. *See* ECF No. 51 at 19. Plaintiffs should not, and cannot lawfully, be forced to provide disclaimers that a tenant "may be eligible" for a moratorium that was *always* illegal and was always an exercise of void agency action.

CONCLUSION

Defendants' motion to dismiss should be denied.

October 8, 2021

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
John Vecchione
Senior Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
Appearing Pro Hac Vice
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Counsel for Plaintiffs