



8010 TOWERS CRESCENT DRIVE SUITE 300 TYSONS CORNER, VA 22182
T 703.760.1600 F 703.821.8949 www.Venable.com

Randall K. Miller
Partner
(703) 905-1449
rkmillier@venable.com

November 3, 2014

VIA E-FILING

Clerk of the Court
U.S. Court of Appeals for the
D.C. Circuit
333 Constitution Avenue, NW
Washington, DC 20001

Re: *Morgan Drexen and Kimberly Pisinski v. CFPB* (13-5342)
Rule 28(j) Submission

Dear Sir/Madam:

Pursuant to FRAP 28(j), Appellants advise the Court of *NLRB v. Canning*, 134 S. Ct. 2550 (2014), a unanimous decision by the United States Supreme Court, issued after merits briefing in this case closed, which invalidated President Obama's use of the Recess Appointment Clause to appoint NLRB officials.

Significance:

1. *Canning* reaffirms the legal principle that courts are required to place "great weight" on historical practice in interpreting structural constitutional issues, *Canning* at 2559-60, which is relevant to Appellants' multimember commission argument (relying on the traditional use of the multimember structure for comparable enforcement agencies such as FTC and SEC) (Appellant Br. 42-45).
2. *Canning* confirms that the CFPB began with a constitutional violation, namely, that its first Director was appointed in violation of the Constitution (the Director was appointed on the same day and same manner as the NLRB officials in *Canning*). These circumstances further confirm that this case is not a plain-vanilla challenge to the authority of an *established* and constitutionally-compliant agency, but rather a challenge to a new and unprecedented agency, which is now known to have suffered from at least one foundational defect. CFPB was stripped of traditional safeguards, and one of the few remaining safeguards (the requirement of a Senate-confirmed Director) was violated.



Clerk of the Court
U.S. Court of Appeals for the
D.C. Circuit
November 3, 2014
Page 2

Pre-enforcement review should be permitted as envisioned by the Supreme Court's *Free Enterprise* decision, and CFPB's second-filed enforcement action in California should be enjoined to permit the challenge to proceed in an orderly manner. Appellant Br. 45-49.

3. The CFPB issued its CID, conducted its investigation, and issued its NORA letter (JA 314) in this matter during the recess appointment period. The *Canning* decision suggests that actions during this time could be invalid. See Congressional letter to the CFPB Director, http://www.crapo.senate.gov/issues/banking/documents/JH_MDCtoCFPB_Canning_7_29_14.pdf. CFPB's subsequent one-sentence global ratification of all actions taken during the recess appointment period (79 FR 53734) did not afford Appellants an opportunity for any re-examination of the actions (as distinguished from the NLRB approach after *Canning*).¹

Respectfully submitted:
VENABLE LLP

By: /s/ Randall K. Miller
Attorney for Appellants

¹ <http://law.marquette.edu/facultyblog/2014/08/27/supreme-court-review-on-labor-law-cases-noel-canning-and-harris-v-quinn/>.

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, an electronic .pdf of Appellant's Citation of Supplemental Authority Pursuant to Federal Rule of Appellate Procedure 28(j) was uploaded to the Court's CMECF System, which will automatically generate and send by electronic mail a notice of docket activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

John Robert Coleman
Nandan M. Joshi
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
(202) 435-7254
(202) 435-7314 (Facsimile)
John.coleman@cfpb.gov
Nandan.joshi@cfpb.gov

Counsel for Appellee

/s/ Randall K. Miller