IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION FOR LATINO COMMUNITY ASSET BUILDERS, Plaintiff, v. CONSUMER FINANCIAL PROTECTION BUREAU, Defendant, and COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, Intervenor-Defendant.	Case No. 1:20-cv-03122-APM

INTERVENOR-DEFENDANT COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA'S MOTION TO DISMISS

This Court should dismiss plaintiff NALCAB's amended complaint pursuant to Rule 12(b)(1) for all the reasons stated in the Bureau's motion to dismiss the amended complaint, and for an independent reason set forth here: NALCAB challenges the Repeal Rule, but the injuries that NALCAB ascribes to the Repeal Rule would persist with *or without* that rule. Because the success of NALCAB's challenge would thus do nothing to cure its alleged injuries, NALCAB cannot satisfy the redressability criterion for Article III standing. So it would lack standing to bring this action even if it could rebut the Bureau's arguments on the other two criteria for standing, injury and causation.

BACKGROUND

In its "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule, 82 Fed. Reg. 54,472 (Nov. 17, 2017) ("2017 Rule"), the Bureau invoked its statutory authority to identify and prohibit "unlawful[,] unfair, deceptive, or abusive acts or practices" in the lending and finance industry. 12 U.S.C. § 5531(b). In particular, the 2017 Rule imposed two major limits on covered lenders. First, through its "underwriting provisions," the Rule prohibited lenders from making payday and vehicle-title loans unless the borrower could satisfy a government-mandated test for "ability to repay." 12 C.F.R. § 1041.4. Second, the Rule's "payments provisions" forbade a covered lender to make or attempt an authorized withdrawal from a borrower's bank account in connection with any payday loan and certain installment loans after the lender's second consecutive attempt has failed due to a lack of sufficient funds, unless the lender obtains the consumer's new and specific authorization for further withdrawals. *Id.* § 1041.7. The Bureau designated any departures from either rule as practices that are both "unfair" and "abusive."

In November 2018, in a challenge to the 2017 Rule brought by Intervenor CFSA, a district court granted the Bureau and CFSA's joint motion to stay the rule's compliance date while the Bureau reconsidered the rule. *See* Order, ECF 53, *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018). And in early 2019, the Bureau initiated rulemaking proceedings to revoke the rule's underwriting provisions. *See* Notice of Proposed Rulemaking, 84 Fed. Reg. 4,252 (Feb. 14, 2019).

In June 2020, while CFSA's lawsuit and the revocation rulemaking were pending, the U.S. Supreme Court held that the Bureau had been unconstitutionally structured. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020). The Court invalidated the statutory provision that had insulated the Bureau's director from removal by the President except for cause. *Id.* at 2209–11. The Court noted that the Bureau's unconstitutional structure resulted in a "constitutional defect in

the" agency action under review (a civil investigative demand), but remanded for the lower courts to determine whether that demand "ha[d] since been ratified by an Acting Director accountable to the President" and "whether, if so, [such ratification] is legally sufficient to cure the constitutional defect in the original demand." *Id.* at 2208.

Weeks later, the Bureau—now led by a Director duly removable at will by the President—sought to cure the "constitutional defect[s]" in its prior actions by ratifying those actions. It published in the Federal Register a "ratification" that purported to ratify virtually all rules and other regulatory actions taken by the Bureau before *Seila Law* "*except* … the November 2017 rule titled 'Payday, Vehicle, and Certain High-Cost Installment Loans'" and one other rule that had previously been disapproved by Congress under the Congressional Review Act. 85 Fed. Reg. 41,330, 41,330 (July 10, 2020) (emphasis added; footnotes omitted)). And it published a second document that purported to ratify the "payments provisions" of the 2017 Rule but *not* "the mandatory underwriting provisions" that are the subject of the Repeal Rule. 85 Fed. Reg. 41,905-02, 41,905 (July 13, 2020). The Bureau also finalized and promulgated the Repeal Rule, amending the 2017 Rule to remove the underwriting provisions. 85 Fed. Reg. 44,382 (July 22, 2020). CFSA's lawsuit, now focused on challenging the payments provisions, remains pending.

In October 2020, NALCAB filed this action, claiming that the Repeal Rule is arbitrary and capricious, flouts the Dodd-Frank Act, and was promulgated without observance of rulemaking requirements. *See* Original Complaint ("Comp."), ECF 1, ¶¶ 92–109. After this Court granted CFSA leave to intervene as a defendant, CFSA filed a memorandum in support of a motion to dismiss that had been filed by the Bureau. NALCAB then amended its complaint. CFSA now moves to dismiss the amended complaint for lack of subject-matter jurisdiction.

ARGUMENT

This Court lacks subject-matter jurisdiction because NALCAB lacks standing. *First*, as shown in the Bureau's motion to dismiss the amended complaint, NALCAB cannot establish that it has suffered a cognizable injury traceable to the Repeal Rule. *Second*, even if NALCAB could do so, complete success on the merits would not—and could not possibly—redress NALCAB's alleged injury.

To survive a motion to dismiss for lack of subject-matter jurisdiction, NALCAB—or its members, *see Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011)—must plausibly allege standing. And for that, NALCAB or its members must have suffered an injury in fact, the injury must be fairly traceable to the defendant, and it must be "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). None of these requirements is met here.

I. NALCAB cannot show that the Repeal Rule has caused it or its members any cognizable injury.

NALCAB's allegations, even if taken as true, do not establish injury or causation. The amended complaint alleges that the Repeal Rule's elimination of the underwriting provisions will harm both NALCAB (an association of community organizations dedicated to Latinos' economic advancement) and one of its members, Mission Economic Development Agency ("MEDA"). But as shown in the Bureau's motion to dismiss, NALCAB's causal claims improperly rest on pure conjecture, *see* CFPB Mem. Supp. Mot. Dismiss, ECF 32-1, at 8–14, and the harms alleged would not be legally cognizable in any event, *see id.* at 14–34.

A. NALCAB's causal claims rest on pure speculation about many contingencies, including other actors' independent choices.

In NALCAB's amended complaint (as in the original), the organization asserts that (a) the absence of the underwriting provisions will lead lenders to offer burdensome loans, (b) which will

cause Latino consumers to take out such loans, (c) which will worsen the financial positions of those consumers, (d) which will require NALCAB's members to divert resources to financial coaching for the same consumers and away from other clients or activities, (e) which will require NALCAB to divert resources to help those members assist their debt-saddled Latino clients and away from other training and technical assistance. Am. Compl., ECF 26, ¶¶ 7–9; *see also* Compl. ¶¶ 7–8. This is just the sort of "speculative chain of possibilities," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013), that the Supreme Court has deemed insufficient to trace an alleged injury to a defendant. That is especially so because this particular five-link chain requires "guesswork as to how independent [third-party] decisionmakers" at every level—lenders, consumers, member organizations—"will exercise their judgment," which is itself fatal to standing. *Id.* at 413.

The Bureau's motion to dismiss details many of the conjectural steps in NALCAB's speculative causation chain and some of the eventualities, contingencies, and intervening events that could lead to different results. *See* CFPB Mem. Supp. Mot. Dismiss at 9–11. As another example, it is purely conjectural whether, as NALCAB hypothesizes, non-underwritten payday loans will do more to harm than to help consumers' financial positions, given the less favorable alternatives (e.g., pawn loans, defaults on other obligations, late-payment fees, and unregulated and illegal underground sources of credit) available to cash-strapped consumers in the absence of payday loans. *See* CFSA Mot. Summ. J., ECF 80, at 4–6, *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Sept. 25, 2020) (detailing evidence in the administrative record of the 2017 Rule showing that the availability of non-underwritten payday loans *improves* consumers' financial positions). These conjectural steps prevent NALCAB from establishing standing.

B. NALCAB has identified no cognizable organizational injury to itself or its members.

Even if every one of NALCAB's causal claims were more than speculation, NALCAB would lack standing because the injury alleged is legally insufficient. An organizational plaintiff like NALCAB or MEDA must allege *both* that "the defendant's conduct 'perceptibly impaired' the organization's ability to provide services" *and* that the plaintiff will have to spend more resources to counteract that allegedly harmful action. *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982)). Thus, an "increase" in "the amount of resources that [an organization] spends" will be cognizable for standing purposes only if that increase is needed to "counteract" a separate "inhibition of [the organization's] daily operations" caused by the defendant's conduct. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919–20 (D.C. Cir. 2015). In fact, courts "need not [even] address" the allegation that an organization must spend more if the organization has not first shown some independent impairment of its activities. *Id.* at 919.

Here, to be sure, NALCAB has now added to its complaint the conclusory assertions that lending permitted by the Repeal Rule would "make[] NALCAB's work more difficult" and would—unless NALCAB paid organizations more to advise families affected by such lending—"reduce the effectiveness of NALCAB's other family financial capability services to organizations." Am. Compl. ¶ 7. But NALCAB's only attempt to support this naked assertion proves its insufficiency under blackletter standing law. NALCAB contends that "[b]ecause of the Repeal Rule, [it] will continue expending resources" to address the lending practices allowed by that Rule, and that those resources "would otherwise be devoted to other work." *Id.* ¶ 8; *see also id.* ("Likewise, providing organizations technical assistance related to no-underwriting lending means that NALCAB is unable to provide or must delay other technical assistance."). NALCAB

makes precisely analogous claims on behalf of its member organization MEDA—e.g., that under the Repeal Rule, "MEDA will spend coaching resources on providing additional per-client assistance to these individuals [affected by the Rule], which reduces MEDA's time available for other clients or activities." *Id.* ¶ 9.

The problem is that not a single one of these statements shows—as required for the first, "impairment" prong of the organizational standing test—that NALCAB or its members will have to "expend resources *in a manner that keeps [them] from pursuing [their] true purpose*." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (emphasis added). On the contrary, every one of these statements is just a thinly disguised way of saying that NALCAB or its members will have to spend more money on some parts of their core mission and less on other parts—just the sort of resource-diversion claim that courts have repeatedly deemed insufficient to show impairment of an organization's activities.

As this Court has noted, an "allegation that [an organization] has had to redirect its resources from other projects . . . 'confuses the two prongs of the injury-in-fact inquiry'" for such plaintiffs. *Weingarten v. DeVos*, 468 F. Supp. 3d 322, 334 (D.D.C. 2020) (citation omitted). For while "[a] diversion of resources 'is certainly relevant to step two'—whether the [plaintiff] used resources to counteract the alleged harm to its activities," it is simply "irrelevant unless the organization can show harm to its activities *distinct from* the diversion of resources." *Id.* (citation omitted). Thus,

> "[the fact t]hat [NALCAB or MEDA] has diverted resources . . . comes into play only after [the plaintiff] shows an initial impairment to its programs. Put otherwise, an organization can only divert resources to counteract 'that harm' once there is a harm to counteract. The diversion itself cannot alone constitute the harm. Holding otherwise would be hopelessly circular. The law here, too, is clear: organizational standing is not based on 'diversion of resources from one program to another, but rather on the alleged

> injury that the defendants' actions themselves had inflicted upon the organization's programs.' [*Fair Emp. Council of Greater Wash., Inc. v.*] *BMC Marketing* [*Corp.*], 28 F.3d [1268,] 1277 [(D.C. Cir. 1994)] (interpreting *Havens Realty*, 455 U.S. at 379 . . . . Plaintiff must show . . . that something about the challenged action itself—rather than the organization's response to it—makes the organization's task more difficult."

Ctr. for Responsible Sci. v. Gottlieb, 346 F. Supp. 3d 29, 41 (D.D.C. 2018), *aff'd sub nom. Ctr. for Responsible Sci. v. Hahn*, 809 F. App'x 10 (D.C. Cir. 2020).

For example, NALCAB might have satisfied prong one—inhibition of its activities—if it had been able to show that the Repeal Rule would lead to a "denial of access to . . . information" used in its members' efforts to "educate the public" about financial choices. *PETA v. USDA*, 797 F.3d 1087, 1095 (D.C. Cir. 2015). But mere diversion of resources from one educational program to another is insufficient. That is the unmistakable lesson of *Food & Water Watch*, where the D.C. Circuit held that an organization forced "to increase the resources that it spends on educating the general public and its members" about health risks alleged to flow from a new regulation had not thereby suffered an impairment to its activities or, thus, a cognizable injury. 808 F.3d at 920. It is hard to imagine a precedent that more directly forecloses NALCAB's standing to sue in its own right or on MEDA's behalf, since its standing on either front rests on the same resource-diversion claim rejected in that case.

II. A favorable judicial decision would not redress NALCAB's alleged injury.

But even if the injuries alleged by NALCAB were legally cognizable, they would not be redressable. As noted, NALCAB alleges that the Repeal Rule has injured it (or its members) by preventing the underwriting provisions from taking effect. Am. Compl. ¶¶ 7–9. So to establish redressability, as needed for standing, NALCAB must show that "a favorable judicial decision" on its claims against the Repeal Rule would bring the underwriting provisions *into* effect. *Spokeo*,

136 S. Ct. at 1547. In fact, however, the underwriting provisions would remain without force no matter how this Court ruled on NALCAB's claims against the Repeal Rule.

NALCAB has raised three legal counts against the Repeal Rule: (1) that it constitutes arbitrary and capricious agency action under the Administrative Procedure Act ("APA"), Am. Compl. ¶ 102; (2) that it "is not in accordance with the Dodd-Frank Act," *id.* ¶ 105; and (3) that it was adopted "without the observance of procedure required by law," *id.* ¶ 110. If NALCAB were to prevail on any or all of these counts, the proper remedy would go no further than "set[ting] aside" the "agency action" that had been "h[e]ld unlawful," namely, the Repeal Rule. 5 U.S.C. § 706(2)(A).

But vacatur of the Repeal Rule would not bring the underwriting provisions into force because the Repeal Rule is not the only thing depriving them of force. An independent problem—and one this lawsuit could not possibly reach—is the underwriting provisions' adoption in 2017 by an unconstitutionally structured Bureau, which rendered them null and void from the start.

In 2017, when the underwriting provisions were promulgated, the Bureau was led by a single director who was insulated from removal by the President except for cause. *Seila Law*, 140 S. Ct. at 2194. As the Supreme Court ruled last year, this structure "violate[d] the separation of powers." *Id.* at 2197. To prospectively cure this defect in the agency's structure, the Court invalidated the statutory provision insulating the Bureau's Director from removal without cause. *Id.* at 2209–11. But the severance of this provision in 2020 could not alter the past: it did not change the fact that in 2017, the Bureau that attempted to adopt the underwriting provisions was unconstitutionally structured.

The underwriting provisions were therefore null and void from the start. Actions taken by an officer or agency that violates the Constitution's separation-of-powers protections are invalid.

Ryder v. United States, 515 U.S. 177, 182–83 (1995); *see also FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). Thus, as the Supreme Court recognized in *Seila Law*, the Bureau's actions prior to the Court's severance of the removal restrictions were "constitutional[ly] defect[ive]" and must be set aside unless some subsequent action by a "Director accountable to the President" suffices to remedy the constitutional defect. 140 S. Ct. at 2210–11; *see also Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) ("the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official") (quoting *Ryder*, 515 U.S. at 183, 188); *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (invalidating an order issued by unlawfully composed Board); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (affirming a decision setting aside, as "without legal force and effect," *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986), the order of an official unlawfully insulated from presidential removal); *IBS, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340–42 (D.C. Cir. 2012) (vacating Copyright Board decision "[b]ecause the Board's structure was unconstitutional at the time it issued its determination"). Simply put, since an unlawfully structured agency "lacks authority to bring [even an] enforcement action" against a single party, *NRA Pol. Victory Fund*, 6 F.3d at 822, it surely lacks the power to promulgate legislative rules that are enforced against whole classes of actors.

The Bureau itself recognized this consequence of *Seila Law* when its Director, now "accountable to the President" as a result of the Supreme Court's invalidation of the unlawful removal restriction, attempted to ratify virtually all of the rules and other regulatory acts promulgated by the unconstitutionally insulated Director. *See supra* p. 3. Notably, however, the Bureau expressly *excepted* the underwriting provisions of the 2017 Rule from its broad attempted ratification. *See* 85 Fed. Reg. at 41,330; 85 Fed. Reg. at 41,905. CFSA and the Bureau disagree over whether the Bureau's ratification of the payments provisions of the 2017 Rule was lawful or

otherwise sufficient to cure the constitutional defect in those provisions. *See* CFSA Mot. Summ. J., ECF 80, *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Sept. 25, 2020); *cf. Seila Law*, 140 S. Ct. at 2208 (remanding to address "whether … ratification … is legally sufficient to cure the constitutional defect in the original [agency action]"). But that question is irrelevant here, because the Bureau expressly declined to ratify the underwriting provisions of the 2017 rule in the wake of *Seila Law*. Accordingly, even if NALCAB were to prevail in this lawsuit and the Court were to invalidate the Repeal Rule, the *unratified* underwriting provisions could not be implemented.

It follows that even the complete success of Plaintiff's APA challenge to the Repeal Rule would not redress Plaintiff's alleged injury. "Any injury Plaintiff might attribute to the [Repeal Rule] could only be redressed by an order requiring Defendant[] to re-open and ultimately [re-promulgate the underwriting provisions]." *Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 134 (D.D.C. 2012); *accord Raval v. USCIS*, 369 F. Supp. 3d 205, 211 (D.D.C. 2019); *see also Pub. Citizen v. Dep't of Health & Human Servs.*, 795 F. Supp. 1212, 1222 (D.D.C. 1992) (no standing where reversal of one action would not redress alleged injury without independent, discretionary action by lawmaking body). This hard fact deprives NALCAB of standing to bring this action, even if it could rebut the compelling arguments about the injury and causation prongs of Article III standing analysis that are set forth in the Bureau's motion to dismiss.

CONCLUSION

The Court should dismiss this action because NALCAB lacks Article III standing to bring it.

Dated: March 22, 2021

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of Defendant Consumer Financial Protection Bureau's and Intervenor Community Financial Services Association of America's Motions to Dismiss Plaintiff's Amended Complaint for Lack of Subject-Matter Jurisdiction, dated March 22, 2021, it is hereby **ORDERED** that the motions are **GRANTED**. It is further **ORDERED** that this action is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

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Amit P. Mehta
United States District Judge

DATE: