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.

Civil Action. No. 1:20-cv-3122-APM

DEFENDANT CONSUMER FINANCIAL PROTECTION BUREAU'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION

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INTRODUCTION

The National Association for Latino Community Asset Builders (NALCAB) seeks to invoke this Court's jurisdiction to challenge a recent Consumer Financial Protection Bureau (CFPB or Bureau) regulation pertaining to payday lending. But in its Opposition to the Bureau's Motion to Dismiss, ECF No. 36 (hereinafter, "Opposition" or "Opp."), NALCAB fails to demonstrate that it or its member organization the Mission Economic Development Agency (MEDA) has suffered a cognizable injury. It has also failed to offer any basis beyond speculation to conclude that the injuries it alleges are reasonably traceable to the regulation at issue. NALCAB has therefore not met its burden to establish the subject-matter jurisdiction of this Court.

To begin, nothing in NALCAB's Opposition nor the two declarations it submits demonstrate that its standing allegations are more than mere speculation. NALCAB and its declarants assert that vacatur of the 2020 Revocation Rule would lessen demand for financial coaching and similar services, but this is pure conjecture. NALCAB has offered no tangible evidence that, in the absence of the 2020 Revocation Rule, NALCAB or MEDA would be relieved of any injury.

Moreover, the injuries NALCAB has alleged are not cognizable under Article III. NALCAB's central argument is that the 2020 Revocation Rule has required it and MEDA to provide more clients with more services. But an increase in demand for an organization's services does not constitute organizational injury. As set forth in the Bureau's Motion to Dismiss the Amended Complaint, ECF No. 32 (hereinafter, "Motion to Dismiss" or "CFPB Mot."), the D.C. Circuit has repeatedly considered the standing of organizations claiming that they were required to expend resources to fill a void left by regulatory inaction. And the D.C. Circuit has repeatedly found such organizations lack standing. The reason is simple: To have standing, an organization

must show some impairment of its ability to render services or inhibition of its operations. NALCAB has not met that burden here.

For those reasons, NALCAB has failed to demonstrate its standing and this Court should dismiss the Amended Complaint for lack of subject-matter jurisdiction.

ARGUMENT

I. NALCAB's Allegations Regarding Its Standing Are Speculative.

NALCAB's allegations that the 2020 Revocation Rule has resulted in concrete and demonstrable injuries to its interests and those of its member organization MEDA improperly rely on an attenuated causal chain. *See Physicians' Educ. Network, Inv. v. Dep't of Health, Educ. & Welfare*, 653 F.2d 621, 627 (D.C. Cir. 1981). Nothing in NALCAB's Opposition or its two supporting declarations is able to save NALCAB's standing allegations from this defect. And, because speculation precludes a showing of injury, causation, or redressability, this defect is "fatal." *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017).

NALCAB posits that the 2020 Revocation Rule has allowed lenders to engage in no-underwriting lending which, in turn, allows some consumers to take out loans they cannot afford. *See* CFPB Mot. at 9 (quoting Am. Comp. ¶¶ 6–9). As a result, according to NALCAB, more consumers will need financial coaching and other economic assistance; more of MEDA's clients will need more assistance, leaving it with no choice but to divert resources from other programming; MEDA and other organizations like it will allegedly have no choice but to seek additional assistance from NALCAB; and, finally, NALCAB allegedly will be required to divert its resources away from other needs. *Id.*

In its Motion to Dismiss, the Bureau identified four links in this chain that are at best guesswork. *See* CFPB Mot. at 9–10. First, NALCAB speculates as to how a worsening of families'

financial circumstances would affect the demand for financial coaching services. Second, NALCAB speculates as to how an alleged increased demand for financial coaching services will affect the operations and expenditures of its members organizations including MEDA. Third, NALCAB speculates as to how an alleged strain on the operations and expenditures of its member organizations will affect the need for assistance from umbrella organizations such as NALCAB. Fourth, NALCAB speculates as to how an alleged increase in demand for assistance from NALCAB will affect NALCAB's own operations and expenditures. And, the Bureau identified three principle arguments as to why this type of speculation defeats standing. First, binding authority holds that Article III standing cannot rely on guesswork. *See* CFPB Mot. at 11. Second, Article III standing cannot rely on assumptions about the future actions of third parties. *See id.* at 11–12. Third, Article III standing cannot rely on unsubstantiated assertions. *See id.* at 12–13.

In its Opposition, NALCAB mainly responds to a different argument that the Bureau did not make. NALCAB goes to great lengths to argue that following the implementation of the 2020 Revocation Rule lenders will continue their current practice of no-underwriting lending. *See* Opp. at 29–30. This does not establish Plaintiff's Article III standing, however. Rather, plaintiff must show that vacatur of the 2020 Revocation Rule (and implementation of the Mandatory Underwriting Provisions) would somehow grant NALCAB or MEDA a reprieve from injuries they argue they would otherwise suffer.[1]

Moreover, NALCAB focuses much of its argument on alleging that it is not speculative to conclude that the 2020 Revocation Rule will result in lenders offering no-underwriting loans and

[1] Thus, when the Bureau states that NALCAB is engaged in speculation as to the conduct of lenders, *e.g.*, CFPB Mot. at 11, it is simply pointing out that NALCAB's assertions about how lenders will operate (or what products they will offer) in a hypothetical world with the Mandatory Underwriting Provisions in place is based on NALCAB's speculation.

that consumers will be harmed by these products. However, even assuming this is true, while it has important policy implications, it does not confer standing. That is because the link between the alleged harms to consumers and any resultant injury to NALCAB or MEDA is speculative. *See* CFPB Mot. at 9–10.

NALCAB also misses the point when it argues that it is entitled to make assumptions about third-party behavior. Opp. at 29–30. It cites *Tozzi v. U.S. Dep't of Health & Hum. Servs.*, 271 F.3d 301 (D.C. Cir. 2001) for the proposition that "the mere involvement of other parties do not render an injury speculative," and *Competitive Enter. Inst. v. FEC*, 970 F.3d 372, 381 (D.C. Cir. 2020) (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)) for the proposition that its standing may be predicated on the "predictable effect of Government action on the decisions of third parties." Opp. at 29. However, the problem with NALCAB's standing allegations is not the mere involvement of third parties but rather the fact that NALCAB speculates without basis as to how consumers and consumer organizations would respond to implementation of the Mandatory Underwriting Provisions. Projections as to how third parties will react to a challenged regulation must be based on "evidence." *Competitive Enter. Inst.*, 970 F.3d at 382. In the cases cited by NALCAB, the alleged third-party conduct was known and observable. S*ee id.* (consumers had standing to challenge corporate merger because they proffered proof that prices had *already* increased); *Tozzi*, 271 F.3d 301 (manufacturer had standing to challenge designation of products as carcinogenic because it proffered evidence that customers had *already* announced plans to stop purchasing its products). Here, on the other hand, plaintiff offers no evidence as to how the 2020 Revocation Rule will injure plaintiff and its members. Thus, NALCAB is asking this Court to engage in a form of (evidence-free) speculation that was not at issue in the cases that it cites.

NALCAB's argument that standing is proper where the challenged regulation permits conduct that causes the plaintiff's injuries so long as that conduct would be illegal otherwise, Opp. at 29, is also inapposite. In the cases NALCAB cites, the permitted conduct *directly* resulted in the plaintiff's injuries. In *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) the plaintiff alleged that the Department of Agriculture's regulation did not meet the statutory requirement to "establish humane living conditions for animals," *id.* at 441, and having to see "particular animals enduring inhumane treatment," *id.* at 431, was itself the "aesthetic injury" that the court found to be cognizable, *id.* at 428. In other words, no speculation was required to conclude that the conduct that the agency permitted would injure the plaintiff. The permitted conduct was the injury. The same holds for *Orangeburg v. FERC*, 862 F.3d 1071, 1080 (D.C. Cir. 2017). There the plaintiff challenged a FERC decision permitting wholesale power providers to engage in certain preferential practices that would restrict the plaintiff's ability to purchase power, and the plaintiff's alleged injury was that preferential practices restricted its ability to purchase power. *Id.* at 1080–81. No further analysis or speculation was required. Here, on the other hand, NALCAB challenges the Bureau's 2020 decision to effectively permit certain types of lending activity that would be illegal had the 2017 Payday Rule gone into effect. But neither NALCAB nor MEDA is directly injured by lending that would have been proscribed by the 2017 Rule. Rather, NALCAB alleges that it and MEDA will be indirectly injured by those financial products because the effects those products allegedly have on consumer behavior would, ultimately, through an attenuated chain of events, culminate in a strain on NALCAB's and MEDA's resources. This is a speculative chain unlike the direct injuries at issue in the cases NALCAB cites.

Much of the remainder of NALCAB's argument focuses on defending its assertion that the 2020 Revocation Rule will cause "MEDA to continue receiving more financial coaching clients

who are stuck in unaffordable payday loans." Opp. at 31. NALCAB's support for this assertion is mostly a description of its current clients and their current needs. NALCAB asserts that the harms from no-underwriting lending are "already happening" and the Court must credit such "existing harms." *Id*. at 31. Similarly, NALCAB asserts that "MEDA *already* has served clients who need extra assistance to address unaffordable payday loans and will continue to serve the same client base, with similar needs." *Id*. at 32. But the question at hand is whether these purported injuries are reasonably traceable to the 2020 Revocation Rule and are therefore redressable by an order of the Court enjoining that rule. There is no doubt that MEDA currently serves clients who have used payday loans. But where NALCAB engages in impermissible speculation is in asserting that the strain on MEDA's resources would be less had the 2020 Revocation Rule not gone into effect. This is based on guesswork.

Similarly, NALCAB asks the Court to credit its "past experience" to "establish an imminent injury traceable to the Repeal Rule." *Id*. at 32. But the 2017 Rule never went into effect, so the entirety of NALCAB and MEDA's past experience is in a world without the Mandatory Underwriting Provisions. This past experience does little to illuminate whether there is a causal relationship between the repeal of the Mandatory Underwriting Provisions and any injury these organizations may be suffering. In the cases cited by NALCAB, the challenged policies (or related policies) had already gone into effect, thus allowing a comparison of the plaintiffs' experiences before and after the implementation of the policy to determine whether the policy is traceable to any injury. *See League of Women Voters v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (plaintiffs proffered data showing that policy requiring proof-of-citizenship language be included on voter registration forms reduced participation in voter drives by up to 85%); *NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 84 (D.C. Cir. 2012) (plaintiff showed that Medicaid policies

had already resulted in improper denials of coverage). Here, there are no such facts to observe and NALCAB is left to speculate.

Elsewhere, NALCAB asserts that MEDA's needs are "greater under the Repeal Rule than they would be under the Ability-to-Repay restrictions, since those restrictions would severely restrict unaffordable lending" and that its clients stuck in unaffordable loans have "extra coaching" needs. Opp. at 31–33. However, this analysis too is impermissibly speculative. Assuming, as NALCAB alleges, that the Mandatory Underwriting Provisions would (1) reduce the use of no-underwriting lending and (2) MEDA's current clients who take out no-underwriting loans generally need more assistance than other clients, it still requires a speculative jump to conclude that implementation of the 2017 Rule would lessen the need for MEDA's services. For one thing, NALCAB assumes that MEDA's clients who currently use no-underwriting loans, in the absence of the 2020 Revocation Rule, would have less need for financial coaching. But MEDA's clients who currently use no-underwriting loans may do so because they are experiencing underlying financial distress and thus will continue to have greater needs for financial coaching with or without the 2020 Rule. Or, it may be that, even if the Mandatory Underwriting Provisions were to go into effect, other clients with acute financial needs would fill the void resulting in no actual consequences for MEDA. Alternatively, other policy interventions or intervening events may alleviate the financial coaching needs of MEDA's existing clients even with the 2020 Revocation Rule in place. This is illustrated by evidence that suggests that payday lending significantly declined in 2020 due to federal policy unrelated to the 2020 Revocation Rule.[2]

[2] *E.g.*, Peter Robison, *Payday Lenders Didn't Get a Boost from the Pandemic's Hard Times*, Bloomberg (May 6, 2021), https://www.bloomberg.com/news/articles/2021-05-06/payday-lenders-didn-t-get-a-boost-from-the-pandemic-s-hard-times.

At the end of the day, NALCAB is asking the Court to believe that, given of all the reasons why individuals may seek financial coaching and all of the factors that may affect the demand for financial coaching, vacating the 2020 Revocation Rule would somehow measurably reduce demand for these services and thus spare MEDA and NALCAB a needless strain on their resources. That is pure speculation that the Court is not required to credit.

NALCAB dismisses the possibility that factors other than the 2020 Revocation Rule are likely the true determinant of demand for financial coaching and the strain on MEDA's and its resources. *See* Opp. at 34–35. It argues that is not required to "negate every conceivable impediment to effective relief." *Id.* (quotation omitted). But, even the case on which NALCAB relies concedes that a plaintiff must show "*some* causal relationship." *See Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 812 (D.C. Cir. 1983) (emphasis added). As the Bureau points out in its motion, it is plausible if not likely that the true driver of demand for financial coaching is macroeconomic fluctuation and so any effect that the 2020 Revocation Rule will have on the needs of MEDA's client population will be negligible. NALCAB has not met its burden to show that the 2020 Revocation Rule, accounting for all the other relevant factors, will still result in a "perceptible impairment" to its or MEDA's activities. *E.g., Am. Lung Assoc. v. EPA*, 985 F.3d 914, 989 (D.C. Cir. 2021); *see also Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1290 (D.C. Cir. 2007) (finding no standing where there was an "obvious causal disconnect").

Moreover, NALCAB asserts that it is not required to back its speculation with "specific data sets." Opp. at 33. While that may be true, NALCAB makes no attempt to answer or distinguish the authorities that the Bureau cites in its motion, CFPB Mot. at 12–13, for the proposition that NALCAB's chain-of-causation allegations "bear closer scrutiny" than under an ordinary motion

to dismiss for failure state a claim. *Grand Lodge of Fraternal Ord. of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (quoting 5A Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. 2d, § 1350). Under this heightened standard, NALCAB has the burden to "adduce facts showing" causation, redressability, and injury. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). "Absent any tangible evidence, it is mere 'unadorned speculation'" to infer that the 2020 Revocation Rule will result in any of the consequences that NALCAB predicts. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. FDIC*, No. 14-cv-953, 2016 WL 7376847, at *10 (D.D.C. Dec. 19, 2016) (quoting *Nat's Wrestling Coaches Ass'n*, 366 F.3d at 838).

But NALCAB offers no tangible evidence. Rather, NALCAB submits two declarations that fall short for the same reasons as NALCAB's argumentation, as explained above. They describe the organizations' current practices and client population under the 2020 Revocation Rule without providing any insight, other than speculation, into how those operations would be different in the absence of the Rule. *E.g.*, Granados Decl. ¶ 17 (speculating that in the absence of the 2020 Revocation Rule MEDA may be able to spend less time with some clients). Moreover, while the declarations assert that clients with no-underwriting loans generally need more services, they provide little more than conclusory assertions in arguing that in the absence of the 2020 Rule there would be any meaningful difference in the demands on their organization's resources. *E.g.*, Granados Decl. ¶ 17 (speculating that in the absence of the 2020 Revocation Rule MEDA may be able to schedule appointments with new clients more quickly or take on new projects).

Thus, NALCAB has failed to show that the 2020 Revocation Rule is reasonably traceable to the injuries it alleges, or that the relief it requests would redress those injuries. Its standing allegations are speculative, and this action should be dismissed for that reason alone.

II. Neither NALCAB Nor MEDA Has Shown a Cognizable Injury-in-Fact.

Even if NALCAB's speculation about its standing were not fatal to its claim of jurisdiction in this Court, it still lacks standing and dismissal is nonetheless proper because the injury it alleges are not cognizable for purposes of Article III. An organizational plaintiff has suffered an injury-in-fact only if (1) the challenged conduct has injured the organization's interests, or in other words impaired its activities or inhibited its operations, and (2) the organization has expended resources to counteract that harm. *See, e.g.*, *Ctr. for Biological Diversity v. Bernhardt*, 490 F. Supp. 3d 40, 46 (D.D.C. 2020); *see also* CFPB Mot. at 14. NALCAB has failed to satisfy either prong of this test for either itself or for its member organization MEDA.

A. The Diversion of Resources Is Not A Cognizable Injury.

NALCAB alleges it is injured because the 2020 Revocation Rule has financially endangered certain consumers and, it argues, some of MEDA's clients have "extra needs" and therefore require "more coaching" than they otherwise would. Opp. at 14–15. As a result, NALCAB suggests that MEDA and some of NALCAB's other member organizations may need "extra training and technical assistance" from NALCAB. Opp. at 21. While NALCAB repeatedly suggest that the rule has somehow impaired its or MEDA's ability to provide services, a closer look reveals that where NALCAB says its or MEDA's services have been impaired what it really means is that there is now greater need for the organizations' services. *E.g.*, Opp. at 22 (arguing that the 2020 Revocation imposes an "impairment" because it makes "providing NALCAB's financial capability services more difficult," but then explaining this difficulty arises from the fact that its member organizations will see "increasing … needs"). So, NALCAB's core argument, put somewhat differently, is that the 2020 Revocation Rule has (through a chain of speculation, as discussed above) increased the demand for NALCAB's and MEDA's services. That increase in demand has purportedly required NALCAB and MEDA to "spend additional resources." Opp. at

12. And, that expenditure of resources constitutes the sole injury that NALCAB argues confers this Court with jurisdiction.

The fatal flaw in this theory is that courts in this Circuit have repeatedly and unambiguously held that the expenditure of resources in response to an agency decision is not in and of itself enough to show organizational injury. Rather, an organization seeking to challenge a regulation must show *both* a perceptible impairment of its ability to provide services *and* a consequent diversion of resources. *See* CFPB Mot. at 14–21. NALCAB must show that "something about the challenged action itself … makes [its] task more difficult." *Weingarten v. Devos*, 468 F. Supp. 3d 322, 334 (D.D.C. 2020) (quoting *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)). NALCAB does not meet the first prong, and the "mere diversion of resources" alone "is insufficient to confer standing." *Id.* (quoting *Ctr. for Responsible Sci.*, 346 F. Supp. 3d at 42).

As the Bureau explained in its opening brief, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015) illustrates this point. *See* CFPB Mot. at 24–25. There, the plaintiff argued that it had suffered an injury-in-fact because, among other reasons, the challenged regulations required it to "increase the amount of resources that it spends" protecting the public from contaminated poultry. *Food & Water Watch*, 808 F.3d at 920. The D.C. Circuit held that the plaintiff's expenditure of resources in response to agency inaction was not enough to confer standing because the plaintiff had failed to allege that its "organizational activities [had] been perceptibly impaired in any way." *Id.* at 921. So too here. NALCAB argues that the 2020 Revocation Rule leaves consumers exposed to dangerous products (in this case, financial products rather than poultry) and that it and MEDA will thus be required to expend resources protecting the public from those products (in this case, by providing financial coaching rather than public health

advocacy). But that is not enough because nothing about the 2020 Revocation Rules makes either NALCAB or MEDA's "*activities* more difficult." *Id.* at 921 n.9.

NALCAB's attempt to distinguish *Food & Water Watch* is unpersuasive. NALCAB argues that, there, "the plaintiff[] failed to show its services were impaired," whereas here, "NALCAB has alleged an impairment of … [its] services." This begs the question. Opp. at 25–26. Under the logic of *Food & Water Watch*, NALCAB has failed to allege any cognizable impairment to its or MEDA's services. NALCAB contends that MEDA's ability to provide services has been impaired because the 2020 Rule "caus[es] more clients to need more time-intensive help" and thereby "makes it harder for [the] organization to serve [the] community." Opp. at 15. NALCAB does not argue that anything about the 2020 Revocation Rule makes it more difficult to provide a fixed amount of financial coaching or related services. Rather, NALCAB's argument is that as a result of the 2020 Rule there is more need for the types of services MEDA and it provide. But an increased demand for an organization's services is not a perceptible impairment of an organization's ability to provide services, as *Food & Water Watch* makes clear.

First, *Food & Water Watch* (and an abundance of other authority in this Circuit) recognizes that to establish organizational standing, a plaintiff must show both an injury to its activities and a resultant diversion of resources to counteract the injury. *See Food & Water Watch*, 808 F.3d at 905. NALCAB's theory that spending resources to meet increased demand for certain services constitutes impairment of those services would collapse this two-part test into a single inquiry. Any organization that expends resources in response to a challenged regulation would necessarily satisfy both prongs of the test because the expenditure of resources would also constitute the injury that the resources are being expended to counteract. As courts in this Circuit have repeatedly explained, it is "'hopelessly circular' to hold that the diversion of resources itself—necessary for

establishing step two—also inflicts the harm necessary for establishing step one." *Weingarten*, 468 F. Supp. 3d at 334 (quoting *Ctr. for Responsible Sci.*, 346 F. Supp. 3d at 41).

And, if the court in *Food & Water Watch* had embraced this circular logic it would have reached a different outcome. There, the plaintiff alleged that the challenged regulations resulted in a heightened need for public health advocacy to protect consumers from contaminated poultry and that it would expend resources meeting that need. If the fact that the plaintiff expended resources in response to a social need that resulted from agency inaction was enough for standing the D.C. Circuit would have found standing. But it did not, because, an organization's decision to expend resources in response to a regulation is not the same as the regulation injuring the organization's activities, impairing its ability to provide services, or inhibiting its operations.

Second, *Food & Water Watch* recognizes a distinction between an injury to an organization's activities and an impediment to the organization fulfilling its mission. *See Food & Water Watch*, 808 F.3d at 919 (quoting *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006)) ("The court has distinguished between organizations that allege that their activities have been impeded from those that merely allege that their mission has been compromised."). In light of that distinction, an organization asserting standing "must allege more than a frustration of its purpose." *Id.* NALCAB attempts to recast a frustration of its and MEDA's purposes as an impairment of their ability to provide services. Unable to explain any way in which the 2020 Revocation Rule will make it more difficult to provide financial coaching or related services, NALCAB's asserted injury is predicated entirely on an increased need for its and MEDA's services that made "it more difficult for NALCAB and its member MEDA to achieve their missions." Opp. at 12. NALCAB argues that an organization has standing where "members of a community need *more* of an organization's resources and thus

make the organization's work harder." Opp. at 23. Yet, if this were the law, the court in *Food & Water Watch* would have reached a different conclusion. There, the plaintiff organization aimed to promote "food systems that guarantee safe, wholesome food produced in a sustainable manner." *Food & Water Watch*, 808 F.3d at 920. It alleged that the challenged regulations frustrated this purpose and it would therefore be required to expend additional resources to achieve its mission. *Id.* The court nonetheless found the plaintiff lacked standing because (just as here) it merely alleged a frustration of is purposes not a perceptible impairment of its ability to renders services.

NALCAB's attempt to distinguish *Center for Responsible Science*, 809 F. App'x 10 (D.C. Cir. 2020), is also unpersuasive for similar reasons. In that case, the plaintiff organization challenged FDA regulations that it believed did not require adequate warnings be provided to clinical trial participants. The plaintiff alleged that it would be required to "'step[] into the breach and do[] what the agency should have done,' notably by engaging in direct outreach to encourage principal investigators to provide the warnings that [it] believes are required." *Id.* at 12. The plaintiff further alleged that these efforts to protect clinical trial participants would cost it "a substantial sum of money and/or time." *Id.* The court found that the plaintiff lacked standing because even though it alleged that it would expend significant resources meeting a social need resultant from agency inaction it nonetheless "failed to allege that the government's … omissions perceptibly impaired [its] ability to provide services." *Id.* (quotation omitted). NALCAB suggests the case is inapplicable because the plaintiff's expenditures were "initiated only in an apparent attempt to create standing." Opp. at 26. But, the court's holding is plainly not so limited as evidenced by its reliance on *Food & Water Watch* where there was no indication that the plaintiffs expenditures were initiated to create standing. NALCAB also attempts to distinguish *Center for Responsible Science* on the basis that it "has established how the Repeal Rule makes providing …

services more difficult." Opp. at 26. But, again, this begs the question. The crux of the court's holding in *Center for Responsible Science* is that the mere fact that an organization cannot accomplish its objectives without expending more resources does not mean its activities have been impaired. The expenditure of resources by an organization to fill a void left by agency inaction is simply not enough to establish Article III injury. And that holding is ultimately dispositive of NALCAB's standing arguments.

In search of support for its contention that the expenditure of resources alone constitutes Article III injury, NALCAB's relieves heavily on *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994) and *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990). This reliance is misplaced for two reasons.

First, *Fair Employment Council* and *Spann* involve claims asserted by civil rights organizations against private parties for employment and housing discrimination, respectively. The claims were asserted pursuant to express statutory causes of action found in the Fair Housing Act and Title VII and in accordance with Congress's judgment that enforcement of those statutes should be left primarily in the hands of private litigants. These two cases thus pose a different standing inquiry than this case, brought against a public agency pursuant to the Administrative Procedure Act (APA).

Indeed, in *Spann*, the court acknowledged that it likely would not have found cognizable injury if the action was asserted against a public entity. *See Spann*, 899 F.2d at 30–31. Central to the court's holding was the fact the plaintiffs' claims were asserted against a private party pursuant to an express statutory cause of action. The plaintiffs were "private actors suing other private actors, traditional grist for the judicial mill." *Id.* at 30. The court explained that "[t]o the extent the plaintiffs seek to vindicate values, those values were endorsed by Congress in the Fair Housing

Act, the enforcement of which Congress specifically left in the hands of private attorneys general like plaintiffs." *Id.* However, the court acknowledged that the Article III injury analysis was wholly different in "suits against the government to compel the state to take, or desist from taking, certain action." *Id.* The reason being that "[s]uch cases implicate most acutely the separation of powers, which the Supreme Court instructs, is the 'single basic idea' on which the Article III standing requirement is built." *Id.* at 30 (D.C. Cir. 1990) (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984) and *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). The court in *Fair Employment Council* followed the *Spann* court's lead. 28 F.3d at 1277 (citing *Spann*'s Article III injury analysis and concluding that the plaintiff had standing to assert Title VII claims against a private party).

In this case, NALCAB aims to compel a federal agency to implement NALCAB's preferred public policy. The separation of powers concerns undergirding Article III are acutely at stake and the lenient Article III injury analysis that was appropriate in *Spann* and *Fair Employment Council* is thus of little guidance here.

Second, both *Fair Employment Council* and *Spann* rely principally on the Supreme Court's holding in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982). *See Fair Emp. Council*, 28 F.3d at 1276 (D.C. Cir. 1994) (finding standing because the "allegations closely track the claims that the Supreme Court found sufficient in *Havens*"); *Spann*, 899 F.2d at 28 (finding standing because the allegations were "no less palpable or specific than the injuries asserted by the organizational plaintiff in *Havens*"). And both cases read *Havens* broadly. *See Fair Emp. Council*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (concluding that the plaintiff had standing under *Havens* where the plaintiff was required to "expend resources to counteract [the defendant]'s alleged discrimination" and the alleged discrimination "made [the plaintiff]'s overall task more difficult"); *Spann*, 899 F.2d 24, 27

(D.C. Cir. 1990) (concluding that the plaintiff had standing under *Havens* where "it allege[d] that purportedly illegal action increase[d] the resources the group must devote to programs independent of the suit challenging the action").

However, in the context of public litigation brought under the Administrative Procedure Act, the D.C. Circuit has read *Havens* more narrowly. Where an organizational plaintiff seeks to challenge a regulation and the organization is not directly subject to that regulation, the D.C. Circuit has consistently found injury only if the plaintiff alleges either that the challenged regulation (1) restricts the plaintiff's access to information, or (2) limits the plaintiff's procedural avenues for redress. *See* CFPB Mot. at 19–20. For instance, in *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), a case on which NALCAB heavily relies, the D.C. Circuit found that an organizational plaintiff had standing to challenge federal regulations because the plaintiffs had alleged "the same type of injury as the plaintiffs in *Havens Realty*: the challenged regulations deny the … organizations access to information and avenues of redress." *Id.* at 937–38.

The D.C. Circuit has repeatedly endorsed this more narrow reading of *Havens*, including in the other cases on which NALCAB relies. *Compare PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094–95 (D.C. Cir. 2015) (quoting *Action All.*, 789 F.2d at 937) (finding standing because the plaintiff's alleged injuries— the "denial of access to bird-related [Animal Welfare Act] information … and a means by which to seek redress for bird abuse"—were "the same type of injur[ies] as the plaintiffs [pleaded] in *Havens Realty*") *and Am. Anti-Vivisection Soc'y v. United States Dep't of Agric.*, 946 F.3d 615, 619 (D.C. Cir. 2020) (quoting *PETA*, 797 F.3d at 1094) (finding standing, in reliance on *PETA* and *Havens*, because the agency's "alleged inaction has 'perceptibly impaired' the [plaintiff]'s organizational interests by depriving it 'of key information

that it relies on' to fulfill its mission") *with Food & Water Watch*, 808 F.3d at 921 (finding no standing because the plaintiff did "not allege that the [challenged regulation] limits its ability to seek redress for a violation of law. Nor does [the plaintiff] allege that the [agency]'s action restricts the flow of information that [it] uses to educate its members") *and Ctr. for Responsible Sci.*, 809 F. App'x at 12–13 (finding no standing because the plaintiff did "not allege that the [challenged regulation] limits its ability to seek redress for a violation of the law. Nor does [it] allege that the [agency]'s action restricts the flow of information that [it] uses").

Applying this authority, judges of this Court have concluded that to have standing under *Havens* an organization must show that the regulation it seeks to challenges either limits its access to information needed to fulfill the organization's mission or limits the organization's ability to redress unlawful conduct. For example, this Court recently acknowledged that an organizational plaintiff had alleged "*significant past and ongoing* diversions of resources" as a result of the challenged conduct but nonetheless found the plaintiff lacked standing because it failed to allege either "the denial of educational information [or] the inability to seek redress for a violation of the law." *Ctr. for Biological Diversity*, 490 F. Supp. 3d at 48; *see also* CFPB Mot. at 20 (citing cases). Thus, the weight of authority indicates that these types of informational and procedural injuries "mark[] the outer bounds of the Circuit's highly permissive organizational standing doctrine." *Ctr. for Democracy & Tech. v. Trump*, No. 1:20-cv-01456, 2020 WL 7318008, at *5 (D.D.C. Dec. 11, 2020).

In short, NALCAB's reliance on *Fair Employment Council* and *Spann* is misplaced both because the reasoning of those cases is expressly limited to the context of private litigation and also because more recent D.C. Circuit authority has endorsed a narrower reading of the types of organizational injuries that are sufficient to confer Article III standing, at least in the context of

APA litigation. In this Circuit, organizational plaintiffs must allege injuries that "are 'concrete and specific to the work in which they are engaged."' *PETA*, 797 F.3d at 1095. The mere expenditure of resources to fill a regulatory void or to meet an unmet social need is not enough, and the district court opinions on which NALCAB relies illustrate this point.

For instance, NALCAB heavily cites *Northwest Immigrant Rights Project v. United States Citizenship & Immigration. Services*, 496 F. Supp. 3d 31 (D.D.C. 2020) and *Capital Area Immigrants' Rights Coalition v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020). In these cases, however, the plaintiffs, immigration advocacy organizations, were found to have standing to challenge agency decisions that imposed concrete and specific obstacles to these organizations' work providing legal representation to low-income immigrants—not because these agency actions allegedly increased the demand for the organizations' work. In *Northwest Immigrant Rights Project*, the plaintiffs challenged a rule that imposed new filing fees on asylum seekers and other immigrants, increased other fees, and restricted access to fee waivers. 496 F. Supp. 3d at 31. The challenged rule directly made immigration advocacy more expensive, and the court found that burden would be largely borne by advocacy organizations that represented low-income immigrants. *Id*. Similarly, in *Capital Area Immigrants Rights Coalition*, the plaintiffs challenged a rule that barred many immigrants from seeking asylum and therefore forced them to seek relief under a more onerous standard applied to non-asylum withholding of removal claims. 471 F. Supp. 3d at 38–39. The challenged rule directly made immigration advocacy more difficult and, again, the court found that burden would largely be borne by the advocacy organizations that brought suit. There is no allegation here that the 2020 Revocation Rule has any such direct, concrete impact on NALCAB or any of its members—NALCAB's speculation that the Rule will increase demand for its services is categorically different.

As set forth above, authority in this Circuit makes clear that the mere expenditure of resources is not a sufficient injury for standing to challenge agency action under the APA. Yet even if it were, NALCAB's injuries are not cognizable for two separate reasons: neither public education nor ordinary expenditure are cognizable injuries.

B. Outreach and Education Expenditures Are Not a Cognizable Injury.

First, an organization's expenditure of resources educating its members and the public about a challenged rule is not a cognizable injury. *See* CFPB Mot. at 21–22. NALCAB argues that its injury is not merely expenditures on "general education," but rather increased demand for a "suite of services." Opp. at 25. But this distinction is semantic. It is clear that the suite of services that NALCAB and MEDA have provided purportedly in response to the 2020 Revocation Rule is, at core, aimed at educating the public about no-underwriting lending and consumer finance more generally. *See* Garcia Decl. ¶¶ 21–22 (explaining that the 2020 Revocation Rule has required NALCAB to conduct training and provide technical assistance which involves providing information and answering questions about small-dollar loan products); Granados Decl. ¶¶ 6–7, 12 (explaining that the 2020 Revocation Rule has required MEDA to provide additional coaching which includes educating clients about consumer finance). In any event, the D.C. Circuit has found similarly targeted and technical outreach programs to be insufficient to establish injury. *See, e.g.*, *Ctr. for Responsible Sci.*, 809 F. App'x at 12; *Food & Water Watch*, 808 F.3d at 921; *see also* CFPB Mot. at 22.

NALCAB's citation to *PETA* to argue that increasing educational expenditures constitutes an injury sufficient to confer standing, Opp. at 23, 25, is unavailing. As the Bureau has explained at length, courts in this Circuit have interpreted *PETA* narrowly and held time and again that it stands only for the proposition that a limited set of informational and procedural injuries are cognizable; it provides no support for the notion that all efforts to educate the public constitute

Article III injury. *See* CFPB Mot. at 19–20. NALCAB also cites *Fair Employment Council* and *Spann*. Opp. at 23, 25. But, as the Bureau explains above, these cases are expressly limited to the private litigation context and more recent authority has refused to extend these holdings to cases like this one. For example, in the years since *Fair Employment Council* and *Spann*, the D.C. Circuit has repeatedly held that expenditures to educate the public about a challenged law or its consequences are not cognizable. *See Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (the fact that plaintiff "has expended resources to educate its members and others regarding [the challenged law] does not present an injury in fact"); *see also Food & Water Watch*, 808 F.3d at 920 (holding that an organization's expenditures to educate the public or its members are not cognizable); *Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 12 (D.C. Cir. 2011) (same).

C. A Continuation of Ordinary Programming Is Not a Cognizable Injury.

Second, an organization continuing to do what it already does is not an injury to the organization's interests and is not sufficient to establish an injury-in-fact. *See* CFPB Mot. at 22–24. NALCAB cites cases where an organizational plaintiff's injury was thematically related to its core mission, *see* Opp. at 19, but the nature of the cognizable injury was never simply that the plaintiff would have to spend more time or resources on its core activities. Rather, the plaintiffs in these cases provided non-speculative allegations that those core activities would be made more difficult by the challenged agency action. For example, the plaintiff in *League of Women Voters*, did not allege that the challenged rule would mean there would be more eligible voters and thus a greater demand for voter registration drives; it alleged that the challenged rule caused interest in voter registration to drop precipitously. 838 F.3d at 73–75. In other words, its injury was a *reduction* in demand for its core services, not an increase. *Id.* NALCAB also cites both *PETA* and *Action Alliance* on this point, but, as explained above, in both of those cases the court found that

the challenged regulation made it more difficult for the organizations to pursue their mission by limiting their access to information and restricting avenues to redress unlawful conduct. In neither case did the plaintiff allege that it would simply be required to do more of what it already does.

Here it is plain from the Amended Compliant and the declarations submitted by NALCAB that providing financial coaching is one of MEDA's routine activities and has been part of its core programmatic offering since well before the 2020 Revocation Rule. Granados Decl. ¶ 6. Likewise with NALCAB and the support services it provides to its member organizations. Garcia Dec. ¶ 4–6. There is an abundance of authority in this Circuit, all largely ignored by NALCAB in its Opposition, that holds where an organization's alleged injury is simply a continuation of ordinary programming there is no injury. *E.g.*, *Env't Working Grp. v. United States Food & Drug Admin.*, 301 F. Supp. 3d 165, 172 (D.D.C. 2018) (organizational plaintiff cannot point to continuation of routine activities as basis for injury because those activities are "exactly what these organizations always do"); *Int'l Acad. of Oral Med. & Toxicology v. FDA*, 195 F. Supp. 3d 243, 259 (D.D.C. 2016) (a continuation of "standard programmatic efforts" is not cognizable injury); *Ctr. for Democracy & Tech. v. Trump*, No. 1:20-CV-01456, 2020 WL 7318008, at *4 (D.D.C. Dec. 11, 2020) ("[Plaintiff] cannot assert Article III standing by claiming the activities that it would otherwise engage in now injure it.").

D. Neither NALCAB Nor MEDA Has Been Exposed to Costs Beyond Those Ordinarily Expended.

As a final matter, even if NALCAB or MEDA were able to show an injury to their activities sufficient to satisfy the first prong of the organizational injury test they would still have to satisfy the second prong by showing that they had expended resources to counteract the alleged harm beyond the resources ordinarily expended. *See* CFPB Mot. at 26–28. NALCAB argues that the proper comparison is between what the agency did and what the plaintiff alleges the agency should

have done. Opp. at 19–20. But in the case NALCAB cites the plaintiffs argued that the agency was compelled by statute to implement regulations adopting minimum standards guaranteeing humane treatment of animals. *See Animal Legal Def. Fund*, 154 F.3d at 430. Here, the context is different. NALCAB is not arguing that the Bureau is compelled by statute to implement the Mandatory Underwriting Provisions or even to issue any regulation governing no-underwriting lending. Rather, it is challenging as arbitrary and capricious the revocation of a rule that was never implemented. And NALCAB ignores recent, contrary authority addressing precisely this scenario. *See Pub. Citizen Health Rsch. Grp. v. Pizella*¸ No. 19-cv-166, 2021 WL 86861, at *6 (D.D.C. Jan. 11, 2021) (finding no injury where plaintiffs argued they were "deprived of an *anticipated* benefit" from a regulation that "never played a role in the [plaintiff]'s ability to provide services or their daily operations").

Yet, even assuming that NALCAB has properly framed the question, it still has not satisfied its burden. NALCAB simply asserts that the 2020 Revocation Rule has required it and MEDA to shift resources from some services to other related services. There is no allegation in the Amended Complaint, in NALCAB's Opposition, or in either of the declarations that the 2020 Revocation Rule has subjected either organization to operational costs beyond those normally expended. NALCAB cites *Equal Rights Center v. Post Properties, Inc,* 633 F.3d 1136 (D.C. Cir. 2011) to suggest that it is enough that it and MEDA are redirecting resources among clients and projects. *See* Opp. at 20. But in that case the D.C. Circuit *affirmed* the district court's finding that the plaintiff lacked standing, and the court made no affirmative finding that the redirection of resources was sufficient to satisfy the second prong of the organizational inquiry test. *Equal Rts. Ctr.*, 633 F.3d at 1141–42. Moreover, the Bureau's argument is not necessarily that NALCAB must show that it and MEDA would spend less money overall in the absence of the 2020

Revocation Rule, though that certainly would be one way to satisfy the second prong of the test. Rather, the organizations must show that the diversion of resources to counteract the alleged harm kept them "from pursuing [their] true purpose." *Nat'l Taxpayers Union*, 68 F.3d at 1434. At minimum, the organizations need to show that that resources expended to counteract the alleged harm prevented them from doing something essential to their mission. As discussed above, NALCAB has simply alleged that it and MEDA have been required to shift resources among financial coaching and financial training services. There is no allegation of any diversion away from their routine activities or inconsistent with their institutional purpose. And it, therefore, has not satisfied the second prong of the organizational injury test.

Neither NALCAB nor MEDA has suffered an injury to their activities and, even if either had, neither has been required to expend resources to counteract the harm beyond its ordinary expenditures. Because NALCAB has not shown that either it or any of its members have suffered an injury-in-fact, this Court lacks jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

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Respectfully submitted,

STEPHEN VAN METER
Acting General Counsel

JOHN R. COLEMAN
Deputy General Counsel

STEVEN Y. BRESSLER
Assistant General Counsel

/s/ Ryan Cooper
RYAN COOPER (D.C. Bar No. 1645301)

KAREN S. BLOOM (D.C. Bar No. 499425)
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Telephone: 202-702-7541
Fax: 202-435-7024
Ryan.Cooper@cfpb.gov