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. 20-cv-3122-APM

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND INTERVENOR-DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

In 2017, the Consumer Financial Protection Bureau (Bureau) adopted a strong consumer-protection rule designed to prevent and reduce the harms that consumers suffer from unfair and abusive practices in the markets for payday and vehicle-title loans. In 2020, under new leadership and before the 2017 rule was implemented, the Bureau rescinded key aspects of the rule. The rescinded portions would have protected consumers from the harms they suffer from being trapped in unaffordable loans that result from lenders offering payday and vehicle-title loans without assessing whether borrowers can repay them.

Plaintiff National Association for Latino Community Asset Builders (NALCAB) and its member organization Mission Economic Development Agency (MEDA) are nonprofit organizations that seek to improve Latino families' financial capability, to enable those families to advance and thrive economically. The Bureau's 2020 repeal rule makes both organizations' work more difficult by enabling payday and title lenders to continue making unaffordable loans on terms that the Bureau's 2017 rule would have prohibited. These unaffordable loans cause consumers, and organizations that serve consumers, to need more assistance, from NALCAB and MEDA, than they would otherwise need. As a result of the Bureau's 2020 rule, NALCAB and MEDA will suffer harm that is traceable to the Bureau's action and redressable through this lawsuit. NALCAB thus has standing to sue on its own behalf and on behalf of its members. The motions to dismiss of the Bureau and intervenor-defendant Community Financial Services Association of America (CFSA) should be denied.

BACKGROUND

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) and created the Bureau. *Id.* § 1011; 12 U.S.C.

§ 5491. Central to the Bureau's mission is the objective of protecting consumers from unfair, deceptive, or abusive acts or practices (UDAAPs). *See* 12 U.S.C. §§ 5511(b)(2), 5531, 5536(a)(1)(B). In 2017, the Bureau used its UDAAP and other authority to adopt a rule that identified two loan-related practices as unfair and abusive and restricted them. *See* 82 Fed. Reg. 54,472 (Nov. 17, 2017), *codified at* 12 C.F.R. part 1041 (Payday Lending Rule). At issue, principally, were short-term payday and vehicle-title loans.

I. Payday and vehicle-title loans

A. Payday and title loans are short-term loans that lenders offer without determining that borrowers can repay them.

Payday and vehicle-title loans are two types of short-term consumer loans. They are often made to consumers in financial distress, priced with fees that may amount to annual percentage rates of 300 percent or more, and usually structured to require repayment of the entire principal in a single payment due within a month. *See* First Amended Complaint (FAC) ¶¶ 11-13, ECF No. 26; 82 Fed. Reg. at 54,476-78, 54,486-88, 54,490, 54,557-58. A payday loan generally requires the borrower to repay when the borrower receives his or her next paycheck or government benefits payment, often two weeks or a month later. *See* FAC ¶ 12; 82 Fed. at 54,476-78. Lenders require borrowers to provide post-dated checks or electronic access to their bank accounts, enabling lenders to recoup funds without additional interaction with consumers. *See* FAC ¶ 12; 82 Fed. Reg. at 54,477, 54,488, 54,499. In a vehicle-title loan, the lender "retains the vehicle title or some other form of security interest that provides it with the right to repossess the vehicle." FAC ¶ 13; 82 Fed. Reg. at 54,490. If a borrower defaults, the lender can seize and sell the vehicle to pay off the loan. FAC ¶ 13; 82 Fed. Reg. at 54,490. Title loans are typically structured with 30-day, single-payment terms. FAC ¶ 13; 82 Fed. Reg. at 54,490. The Bureau found the median single-payment title loan size is $694, compared to $350 for a storefront payday loan. *See* 82 Fed. Reg. at 54,477, 54,490.

In "virtually every other credit market," lenders assess borrowers' ability to repay their loans. *Id*. at 54,623. Payday and title lenders, however, generally do not assess borrowers' ability to repay. *See* FAC ¶ 14; 82 Fed. Reg. at 54,480-81, 54,488, 54,493, 54,562-63. This practice—offering loans without determining that a borrower has the ability to repay the loan according to its original terms (hereafter, "no-underwriting lending")—means that "those consumers who are least able to repay" loans can obtain them. *Id*. at 54,562. On average, the Bureau found, a storefront payday borrower paid bi-weekly "would need to devote 37 percent of her bi-weekly paycheck to repaying the loan." *Id.* at 54,561. For the median single-payment title-loan borrower, repayment would require 49 percent of monthly income. *Id.*

B. No-underwriting causes consumers to suffer severe financial and other harm.

When a borrower lacks funds to repay a payday or title loan on its due date, the borrower is forced to choose among three options. *See* FAC ¶ 15. The first option is to reborrow: take out a new loan to repay the old one, either by "rolling over" the first loan or by paying it off and taking out a new one shortly after (either of which incurs a new loan fee). *See id.*; 82 Fed. Reg. at 54,484, 54,563, 54,565. The second option is to default. *See* FAC ¶ 15; 82 Fed. Reg. at 54,472. The third option is to repay the loan and, because the borrower could not actually afford to do so, "fail to meet basic living expenses or other major financial obligations." FAC ¶ 15; 82 Fed. Reg. at 54,472.

Lending data showing, in stark terms, how frequently loans are *not* repaid on time reflect that many borrowers cannot afford to repay on the loans' original terms. *See* FAC ¶¶ 14, 17. In nearly every instance—85 percent of the time—a storefront payday or single-payment title loan is reborrowed within a month of the due date; a majority of these reborrowings occur on the very day the earlier loan was due. *See* FAC ¶ 17; 82 Fed. Reg. at 54,554-55. Half of storefront payday-loan sequences and more than half of single-payment title loan sequences include four or more loans, and in more than a fifth of sequences, borrowers take out ten or more loans in a row—meaning they are trapped in months of reborrowing. *See id.* at 54,565, 54,566. About 20 percent of payday-loan sequences and 33 percent of title-loan sequences end in default. FAC ¶ 17; 82 Fed. Reg. at 54,572, 54,573. Borrower income and household economics data underscore that when borrowers pay off their loans, those payments may make it impossible to meet other necessary expenses. Analyzing these and other data, the Bureau's economic modeling assumed that only 33 percent of borrowers can repay payday and title loans as currently offered, in addition to covering basic living expenses and major financial obligations. *See* 82 Fed. Reg. at 54,826.

In most other credit markets, lenders succeed when their borrowers do, by repaying according to loans' terms. *See id.* at 54,562, 54,623. Payday and title lenders, however, have "incentives" to continue making unaffordable loans, when the consequence "is that … borrowers are likely to find themselves re-borrowing repeatedly." *Id.* at 54,562. The lenders use extensive reborrowing revenue to cover losses from defaults and other expenses. *See id.* at 54,483-84, 54,489, 54,494. A study of payday loans showed that "90 percent of all loan fees comes from consumers who borrowed seven or more times and 75 percent comes from consumers who borrowed 10 or more times." *Id.* at 54,484; *see also id.* at 54,489, 54,494 (similar, regarding online lenders and title lenders); *see generally* FAC ¶ 17.

For consumers, however, unaffordable loans can be financially destructive. *See* FAC ¶ 16. Reborrowing can turn a short-term loan into a lengthy, expensive cycle of debt, often with no reduction in principal. *See id.*; 82 Fed. Reg. at 54,563, 54,565. A median loan fee on a median loan amount would be $52.50 on a $350 loan. 82 Fed. Reg. at 54,477-78. Repeated over and over, such fees can drain hundreds of dollars (or more) from a consumer. *See id*. at 54,565, 54,592. Indeed, with a typical fee, a seven-loan sequence means a borrower pays fees *exceeding* the principal (still, without reducing the principal). *See id.* at 54,477, 54,565, 54,615. The Bureau recognized an example of a consumer who paid far more: "$12,960 to borrow $1,020 in principal." *Id.* at 54,592.

Delinquency and default cause other significant harms. Aggressive debt collection tactics can jeopardize borrowers' employment or lead to psychological distress. *See* FAC ¶ 16; 82 Fed. Reg. at 54,555, 54,574. A lender's attempts to collect payments from an account without enough funds can saddle the borrower with new fees, charged by the lender or the bank. *See* FAC ¶ 16; 82 Fed. Regs. at 54,574. Delinquency can also lead to bank account closures, *id*. at 54,564, 54,573, leaving borrowers to "bear the many attendant costs of becoming stranded outside the banking system," including "reduced safety of their funds," *id.* at 54,564. And defaulting on a title loan can cause even more "dire" harm. *Id.* at 54,604. The Bureau found that about one in five title borrowers have their vehicles repossessed. FAC ¶ 17; 82 Fed. Reg. at 54,573-74. Loss of a vehicle not only strips consumers of important financial assets, but also "can seriously disrupt people's lives and put at risk their ability to remain employed or to manage their ordinary affairs as a practical matter." 82 Fed. Reg. at 54,573; *see also* FAC ¶ 16.

Borrowers who make unaffordable loan payments suffer harm from forgoing "major financial obligations or basic living expenses." 82 Fed. Reg. at 54,591; *see also id.* at 54,575-76 (discussing harm); FAC ¶ 16. Because of lenders' control over coercive repayment mechanisms—access to a bank account or a vehicle title—borrowers may "feel compelled" to prioritize repayment over other expenses. *Id*. at 54,575. Payday borrowers also may have little choice; lenders can seize from borrowers' accounts the funds intended to pay for necessities. *See id.*

II. The Ability-to-Repay Protections in the Bureau's 2017 Rule

The Bureau's 2017 Payday Lending Rule identified two practices as unfair and abusive in the markets for short-term payday loans, short-term title loans, and other similarly structured loans. The first practice is no-underwriting: making "covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms," 12 C.F.R. § 1041.4 (2019); *see generally* 12 C.F.R. §§ 1041.2(a)(7), (10), 1041.3(b), (d) (defining types of covered loans). The second practice, which is not at issue here, is making three or more "attempts to withdraw payment from consumers' accounts in connection with a covered loan," absent authorization, after two consecutive attempts fail due to lack of funds. *Id*. § 1041.7.

To address no-underwriting lending and the harms it causes, the Payday Lending Rule included a set of requirements, referred to herein as the Ability-to-Repay Protections.[1] In general, the rule restricted unaffordable loans by requiring lenders to (a) make a reasonable determination that a borrower would have the ability to repay the loan according to its original terms, and (b) limit loan sequences to three loans. *See id*. § 1041.5(b), (d) (2019). The rule also included a "principal step-down" exception, under which lenders could offer short-term loans with alternative consumer-protection requirements. The exception limited reborrowing to three-loan sequences, restricted the number of loans (to six) or length of indebtedness (to 90 days) in a year; and required that, across any loan sequence, the principal would decrease ("step down") by one third each time,

[1] The Ability-to-Repay Protections included 12 C.F.R sections 1041.4 through 1041.6, 1041.10, 1041.11, and parts of other sections, as well as appendix and supplement material. *See* 85 Fed. Reg. 44,382, 44,444-46 (July 22, 2020) (identifying rescinded portions of 2017 rule).

which the Bureau concluded would enable more consumers to afford repayment over the course of a three-loan sequence, even when they could not afford to repay on the first loan's terms, 82 Fed. Reg. at 54,700-01, 54,703, 54,705. Title loans would not qualify. *See id.* § 1041.6 (2019).

When implemented, the Ability-to-Repay Protections would have an "overall … positive" impact on consumers, by limiting unaffordable loans and reborrowing sequences and the harms they cause, while allowing consumers to receive payday and title loans when they could be useful: "for short periods to address an unforeseen and discrete need." 82 Fed. Reg. at 54,818; *see* FAC ¶ 30. The Bureau concluded that the volumes of payday and title loans, offered on the current, unaffordable terms, would drop significantly. *See id.* at 54,817, 54,834-35; FAC ¶ 30.

The Bureau set an effective date of January 16, 2018, and a compliance date for lenders of August 2019. *See* 82 Fed. Reg. at 54,472.

III. The Repeal Rule

In June 2019, under the leadership of a new director, Kathleen Kraninger, the Bureau finalized a rule that delayed the compliance date for the Ability-to-Repay Protections to November 19, 2020. *See* 84 Fed. Reg. 27,907 (June 17, 2019). In July 2020, the Bureau finalized a new rule that rescinded the Ability-to-Repay Protections. That rule took effect on October 20, 2020. *See* 85 Fed. Reg. 44,382 (July 22, 2020) (hereafter, Repeal Rule).

In the absence of the Ability-to-Repay Protections, lenders continue the no-underwriting lending that the Ability-to-Repay Protections would have restricted. *See* FAC ¶ 14; Bureau, *CFPB Examination Procedures, Short-Term, Small-Dollar Lending* 2 (Mar. 2019), https://files.consumerfinance.gov/f/documents/cfpb_payday_manual_revisions.pdf (recognizing that payday lenders still "generally do not underwrite their applicants using traditional credit criteria"); 85 Fed. Reg. at 44,420 (underscoring that "most covered lenders do not assess ability to repay similar to what the 2017 Final Rule would require").[2] Indeed, the Bureau's analysis of the costs and benefits of the Repeal Rule assumed that lenders would "return[] to [what] the status quo [was] prior to the Bureau issuing the 2017 Final Rule," including by reversing any compliance efforts, and recognized a "lack of new evidence that would suggest a change" to its 2017 economic modeling regarding the portion of loans at issue. *Id.* at 44,433; *see also id.* at 44,435 & n.374 (similar).

Continued no-underwriting lending, without the Ability-to-Repay Protections, means more consumer harm from unaffordable payday and title loans. *See* FAC ¶¶ 14-17, 60. The Bureau's discussion of the Repeal Rule's costs and benefits recognized this effect. For instance, the Bureau concluded that the rule's overall impact on consumers was negative—the "inverse" of the 2017 provisions' "positive" impact. 85 Fed. Reg. at 44,434. Moreover, the Bureau noted recent research providing more "support" for its 2017 conclusion that the Ability-to-Repay Protections would have "enhance[d]" the "welfare" of consumers who otherwise would be caught in long reborrowing sequences, on average. *Id.* at 44,439 (also recognizing that evidence shows consumer welfare decreases from the "long durations of indebtedness" enabled by the Repeal Rule).

More recently, the Bureau has acknowledged that "the harms identified by the 2017 rule still exist." Dave Uejio, *Our Commitment to Protecting Vulnerable Borrowers*, Consumer Financial Protection Bureau Blog (Mar. 23, 2021), https://www.consumerfinance.gov/about-

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[2] California regulatory data show continued high rates of payday reborrowing, which reinforce the Bureau's analysis that lenders are making loans to people who cannot afford to repay them. *See* Cal. Dep't of Bus. Oversight, *Annual Report of Payday Lending Activity Under the California Deferred Deposit Transaction Law, 2019*, at 1, 11, 25, 28 (July 2020), https://dfpi.ca.gov/wp-content/uploads/sites/337/2020/08/Annual-Report-CDDTL-Aggregated.pdf.

us/blog/our-commitment-to-protecting-vulnerable-borrowers (Bureau Statement). And the Bureau stated that it "continues to believe that ability to repay is an important underwriting standard." *Id*.

IV. *Seila Law*

In June 2020, while the Bureau's proposal to rescind the Ability-to-Repay Protections was pending, the Supreme Court addressed a constitutional challenge to the Bureau's structure. In *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court held that the Bureau's "leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers" due to the limitation on the President's power to remove the Bureau director. 140 S. Ct. 2183, 2197 (2020). A majority of the Court also held that the Dodd-Frank Act provision limiting the President's removal authority was severable from the remainder of the Act, though the opinion on this point was split and reflected no overlapping reasoning. *See id.* at 2209-11 (Roberts, C.J., joined by two justices); *id.* at 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part, joined by three justices). The Court did not, however, determine the outcome of the underlying case, which arose from the Bureau's petition to enforce a civil investigative demand against a law firm that raised the constitutional question as a defense and sought for the demand to be set aside. *See id.* at 2194. Instead, the Court remanded the case, with the lead opinion directing the Ninth Circuit to consider whether the civil investigative demand had been ratified, *see id.* at 2211.

In the wake of *Seila Law*, Kraninger ratified many past Bureau rulemakings, through notices issued on July 7, 2020—the same day that the Bureau issued the Repeal Rule. *See* 85 Fed.

Reg. 41,330 (July 10, 2020). As to the 2017 Payday Lending Rule, the Bureau ratified the part of the rule that it did not repeal. *Id.* at 41,331; 85 Fed. Reg. 41,905 (July 13, 2020).[3]

V. Plaintiff NALCAB

Plaintiff NALCAB and NALCAB's member, MEDA, are nonprofit organizations that seek to improve Latino families' financial circumstances. *See* FAC ¶¶ 6-7, 9. NALCAB is a membership association of mission-driven community and economic development organizations that serve Latino communities. FAC ¶ 6; Garcia Decl. ¶¶ 2, 7-9. NALCAB's mission is to strengthen the economy by advancing economic mobility in Latino communities. FAC ¶ 6; Garcia Decl. ¶ 3. A principal way in which NALCAB advances its mission is through capacity-building services that it offers to members and other organizations, to help those organizations develop strong financial capability programs: financial coaching or other services that help consumers reduce their debt, increase their savings, and build their credit history. *See* FAC ¶ 6; Garcia Decl. ¶¶ 4, 10. For instance, NALCAB pairs grants with customized technical assistance for each grantee, to help those organizations identify and address their key financial-capability program needs and build programs with lasting impact. FAC ¶ 6; Garcia Decl. ¶¶ 5, 14. NALCAB also addresses financial capability skills during its annual National Training. This training is one of the principal services that NALCAB offers to the staff and executives at member organizations and other entities, to help them develop strategies to advance economic mobility in the communities

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[3] The notices were posted online prior to Federal Register publication. *See* CFPB, *Consumer Financial Protection Bureau Issues Final Rule on Small Dollar Lending* (July 7, 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-final-rule-small-dollar-lending/; CFPB, *Consumer Financial Protection Bureau Ratifies Prior Agency Actions* (July 7, 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-ratifies-prior-regulatory-actions/.

they serve; developing and providing the training requires months of work each year. *See* FAC ¶ 6; Garcia Decl. ¶¶ 6, 16.

NALCAB member MEDA "works to advance a national equity movement by building Latino prosperity, community ownership, and civic power." FAC ¶ 9; Granados Decl. ¶ 3. To advance this mission, MEDA serves families directly, offering a variety of programs, including a financial capability program. *See* FAC ¶ 9; Granados Decl. ¶¶ 4, 6. In its financial capability program, MEDA offers one-on-one financial coaching to help individuals identify and achieve their own financial goals. *See* FAC ¶ 9; Granados Decl. ¶ 6.

Both NALCAB's financial capability capacity-building work and MEDA's financial coaching include helping families avoid and address the harms of no-underwriting payday or title loans. *See* FAC ¶¶ 7-9; Garcia Decl. ¶¶ 20-22; Granados Decl. ¶ 12. MEDA has helped clients stuck in unaffordable payday loans in the past and expects to continue receiving clients in similar circumstances in the future, if the Repeal Rule remains in place. *See* FAC ¶ 9; Granados Decl. ¶¶ 10, 12. Similarly, NALCAB members and grantees have in the past needed, and will in the future need, technical assistance and training regarding unaffordable payday and title loans, which NALCAB will provide. *See* FAC ¶¶ 7-8; Garcia Decl. ¶¶ 20-22. Notably, the communities that NALCAB and MEDA serve may be especially likely to suffer harms from no-underwriting lending. Payday borrowers are disproportionately likely to be Hispanic. *See* 82 Fed. Reg. at 54,556-57; FDIC, *How America Banks: Household Use of Banking and Financial Services, 2019 FDIC Survey, Appendix Tables* 88 (2020), https://www.fdic.gov/analysis/household-survey/2019appendix.pdf. Regulatory data from California, where many NALCAB members, including

MEDA, operate, show payday lenders disproportionately concentrated in Latino-majority zip codes, *see* Garcia Decl.¶ 18; Granados Decl. ¶ 4.[4]

By enabling more no-underwriting lending to Latino families, the Repeal Rule makes it more difficult for NALCAB and its member MEDA to achieve their missions. In the absence of the Ability-to-Repay Protections, more of MEDA's financial capability coaching clients are stuck in unaffordable payday loans, and those loans cause clients to require more coaching than they would otherwise need. FAC ¶ 9; Granados Decl. ¶¶ 12, 14-15, 17. Similarly, under the Repeal Rule, the organizations that NALCAB serves need more training or technical assistance, to learn how they can help consumers avoid or address such lending. *See* FAC ¶¶ 7-8; Garcia Decl. ¶¶ 20, 26. Without the Bureau 2017's measures to protect consumers, MEDA and NALCAB will spend additional resources responding to the extra needs that no-underwriting lending creates. *See* FAC ¶¶ 8-9; Garcia Decl. ¶¶ 21-27; Granados Decl. ¶¶ 14-17.

LEGAL STANDARD

To have standing to bring suit, "a plaintiff must show (1) an 'injury in fact,' (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (cleaned up). At the pleading stage, "[p]laintiffs are required only to state a *plausible* claim that each of the standing elements is present." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017) (cleaned up). "[T]he burden imposed on plaintiffs to establish standing

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[4] Cal. Dep't of Bus. Oversight, *The Demographics of California Payday Lending: A Zip Code Analysis of Storefront Locations* 4, 7 (Dec. 2016), https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/02/The-Demographics-of-CA-Payday-Lending-A-Zip-Code-Analysis-of-Storefront-Locations.pdf.

is not onerous, … and general factual allegations of injury resulting from the defendant's conduct may suffice." *NB ex rel. Peacock v. Dist. of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (cleaned up).

In assessing the Bureau's and CFSA's motions to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1), this court must accept the factual allegations in NALCAB's complaint as true, grant NALCAB "the benefit of all inferences," and assume that NALCAB "will prevail on the merits." *Id*. The Court may also "consider materials outside the pleadings," *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005), including NALCAB's and MEDA's declarations, which this Court must also accept as true. *See Spann v. Colonial Vill., Inc*., 899 F.2d 24, 28 n.1 (D.C. Cir. 1990); *Sec. Indus. & Fin. Markets Ass'n v. CFTC*, 67 F. Supp. 3d 373, 399, 401 n.13 (D.D.C. 2014).

ARGUMENT

NALCAB has standing to sue on its own behalf because the Repeal Rule "injure[s]" its "interest" by hampering its financial capability services, and NALCAB will "use[] its resources to counteract that harm." *People for the Ethical Treatment of Animals v. USDA (PETA)*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (*quoting Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011)). These showings establish an injury-in-fact: "a concrete and demonstrable injury to [the] organization's activities—with the consequent drain on the organization's resources," *PETA*, 797 F.3d at 1093 (quoting *Havens Realty Corp*. *v. Coleman*, 455 U.S. 363, 379 (1982)). Because this harm is caused by the Repeal Rule and redressable if NALCAB prevails, NALCAB satisfies all three elements of standing.

Moreover, NALCAB has standing to sue on behalf of its members, including MEDA, because it satisfies the well-established test for associational standing: a member, MEDA, would have standing to sue in its own right; the interests NALCAB seeks to protect are germane to its purposes; and neither the claims asserted nor the relief requested requires participation of individual members in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133-34 (D.C. Cir. 2006). NALCAB has established MEDA's standing to sue in its own right. The Repeal Rule causes a "concrete and demonstrable injury" to MEDA's financial capability coaching, "with the consequent drain" on MEDA's resources, and this injury would be redressable if NALCAB prevails. *PETA*, 797 F.3d at 1093.

I. NALCAB has adequately established that it has standing on behalf of its members.

A. Financial capability coaching to help clients meet their financial goals is one of the primary ways in which MEDA pursues its mission to "build[] Latino prosperity" and seeks "to promote generations of Latino families … thriving economically." FAC ¶ 9; *see also* Granados Decl. ¶¶ 3, 6. The Repeal Rule "perceptibly impair[s]" this work and thus injures MEDA's interests, *PETA*, 797 F.3d at 1095, by causing more MEDA clients to need more financial coaching than they would otherwise, *see* FAC ¶ 9; Granados Decl. ¶¶ 12-17. For instance, no-underwriting lending, which includes no consideration of consumers' other debt obligations, *see* 82 Fed. Reg. at 54,562, leads some MEDA clients to be trapped in multiple unaffordable payday loans; the multiple unaffordable loans necessitate more coaching than a single loan or an underlying budget shortfall. *See* Granados Decl. ¶ 14. Clients trapped in unaffordable payday loans also need extra coaching to address reborrowing cycles and the urgent risk of payday lenders seeking to debit their bank accounts of needed funds. *See id.* On average, MEDA clients stuck in unaffordable payday loans need three more coaching sessions than other clients. *See id.* ¶ 15.

The Ability-to-Repay Protections would have reduced the number of consumers facing these extra needs, by restricting lenders' ability to make unaffordable loans and reborrowing. *See supra* pp. 6-7; FAC ¶ 9; Granados Decl. ¶ 17. Absent those protections, more MEDA clients will need extra coaching from MEDA to address such loans. *See* FAC ¶ 9; Granados Decl. ¶¶ 12, 14-15. MEDA will respond to this harm by providing the extra financial coaching that its clients need, *see* FAC ¶ 9; Granados Decl. ¶ 16, and thus devote resources to "counteract[ing]" the Repeal Rule's harm, *PETA*, 797 F.3d at 1094. Because MEDA would therefore have standing to sue in its own right, NALCAB has standing to sue on its members' behalf.

B. The Bureau (at 31) and CFSA (at 6-8) argue that, while NALCAB has shown that MEDA will spend more resources coaching certain clients, it has not also shown impairment to MEDA's activities. But as the amended complaint makes clear, and MEDA's declaration further evidences, the Repeal Rule "raise[s] the cost and difficulty" of MEDA providing financial capability coaching services, by causing more clients to need more time-intensive help, and thus "inhibit[s]" the organization's "daily operations," *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986). *See* FAC ¶ 9; Granados Decl. ¶¶ 12-15, 17. This showing establishes impairment, sufficient for injury-in-fact. *See id.*; *Equal Rts. Ctr.*, 633 F.3d at 1139 (organization's programs are "perceptibly impaired" by action that makes organization's "overall task more difficult").

Indeed, the D.C. Circuit and this Court have repeatedly held that organizations have standing in circumstances where a challenged action makes it harder for an organization to serve a community, including by causing individuals to need more assistance. *See, e.g., Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (holding that an organization has standing to challenge discrimination that "might increase the number of people in need of counseling" or "reduce[d] the effectiveness of any given level of outreach efforts"); *Spann*, 899 F.2d at 28, 29 (holding that organizations have standing to challenge advertisements that reduce the effectiveness of the organizations' fair housing efforts and could require them to "increase[] education and counseling" "to counteract the influence of defendants' discriminatory ads"); *Action All.*, 789 F.2d at 937-38 (holding that an organization has standing to challenge action that inhibits its routine assistance to elderly individuals by, among other things, leaving it with only a more "time-consuming and expensive" option to contest certain service denials); *Nw. Immigrant Rts. Project v. USCIS*, ___ F. Supp. 3d. ___, No. CV 19-3283 (RDM), 2020 WL 5995206, at *6-7 (D.D.C. Oct. 8, 2020) (holding that organizations have standing to challenge a rule that makes it harder for them to provide legal services to immigrants by increasing the time required to serve individual clients, among other things); *Garnett v. Zeilinger*, 485 F. Supp. 3d 206, 216-17 (D.D.C. 2020) (holding that a direct-services organization has standing to challenge practice that increases demands for its food, legal, and other services); *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 22 (D.D.C. 2020) (appeal pending) (holding that organizations have standing to challenge action that "forc[es] them to deliver costlier and more difficult treatment to a growing number of patients"); *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 38-39 (D.D.C. 2020) (appeal pending) (holding organizations have standing to challenge rule that made certain legal services "far more resource intensive" to provide).

MEDA's circumstances are unlike those in *Weingarten v. DeVos*, 468 F. Supp. 3d 322 (D.D.C. 2020) and *Center for Responsible Science v. Gottlieb*, 346 F. Supp. 3d 29 (D.D.C. 2018), *aff'd sub nom. Ctr. for Responsible Science v. Hahn*, 809 F. App'x 10 (D.C. Cir. 2020) (per curiam), on which the Bureau (at 31) and CFSA (at 7-8) rely. In each of those cases, a plaintiff reacted to an agency action and, to be able to do so, diverted funds from other projects. The plaintiffs argued that they were harmed by the loss of funds for other projects, but did not identify any impairment to the operations on which they were spending money to respond to the agency action. In other words, they had not identified harm, caused by the agency, that their expenditures *counteracted*. *See* 468 F. Supp. 3d at 334; 346 F. Supp. 3d at 41. Here, by contrast, MEDA suffers injury because the Repeal Rule impairs its coaching. Its expenditures to address clients' extra needs is "in response to, and to counteract" those harmful effects, *Equal Rts. Ctr.*, 633 F.3d at 1140.

CFSA's reliance (at 7, 8) on *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995), and *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015), is also unavailing. In *National Taxpayers Union*, the plaintiff (NTU) challenged a new tax law and, to show standing, pointed to its efforts to educate the public about that law. But NTU had not shown impairment of the relevant activity—"review[ing], challeng[ing], and educat[ing] the public about revenue-related legislation." 68 F.3d at 1434. In concluding that NTU thus did not have standing, the court pointed to the lack of any increase in resources required for reviewing, challenging, and educating the public about legislation, and it suggested that the expense was similar to the expense of a lawsuit to challenge the law—which the D.C. Circuit has long held does not support standing. *See id*. Similarly, in *Food & Water Watch*, the D.C. Circuit held that a food-safety organization lacked standing when it alleged that it would "spend resources educating its members and the public about" the challenged agency action but had not shown impairment to its "organizational activities." 808 F.3d at 921. *See also Ctr. for Biological Diversity v. Bernhardt*, 490 F.Supp.3d 40, 47-48 (D.D.C. Sept. 24, 2020) (applying *Food & Water Watch*, concluding that organization lacked standing when it pointed only to "parts of larger advocacy and lobbying efforts").

MEDA, by contrast, suffers impairment to one of its longstanding services, financial capability coaching. *See* Granados Decl. ¶ 6. The Repeal Rule hampers MEDA's ability to pursue its "true purpose," of striving to build Latino prosperity through financial coaching, by making it harder for clients to meet their financial goals, necessitating higher "operational costs" for extra MEDA coaching. *Nat'l Taxpayers Union*, 68 F.3d at 1434. This injury is "concrete and specific to the work in which [MEDA is] engaged." *PETA*, 797 F.3d at 1095. *National Taxpayers Union* and *Food & Water Watch* thus do not apply. Indeed, the impairment of MEDA's activities is comparable to the injury recognized by the D.C. Circuit in *Spann*, a case whose holding *National Taxpayers Union* reinforced. *See* 68 F.3d at 1434 (distinguishing *Spann*). In *Spann*, fair-housing organizations challenged advertising practices whose depictions of race interfered with the plaintiffs' efforts to "bring about equality of opportunity … in housing" and required "increased education and counseling" to counteract the ads' effects. 899 F.2d at 28-29. Likewise, the district court in *Northwest Immigrant Rights Project* recently held that organizations have suffered injury that supports standing where the challenged rule, among other things, increased the time required to serve clients. 2020 WL 5995206, at *7-8 (holding *National Taxpayers Union* inapposite).

Citing *PETA*, 797 F.3d 1087, *Action Alliance*, 789 F.2d 931, and cases discussing those opinions, the Bureau implies (at 19, 31) that organizations have standing only when, like the plaintiffs in *PETA* and *Action Alliance*, they challenge agency action or inaction that hampers their access to information and avenues of redress. But the courts have recognized organizational injury in a "wide range of circumstances." *Abigail All*, 469 F.3d at 133. *See, e.g.*, *League of Women Voters of United States v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016) (organizations had standing to challenge a proof-of-citizenship requirement that made "it more difficult for the Leagues to accomplish their primary mission of registering voters"); *Fair Emp. Council*, 28 F.3d at 1276 (organization had standing to challenge action interfering with "community outreach and public education, counseling, and research projects" by "increase[ing] the number of people in need of counseling" or "reduc[ing] the effectiveness of any given level of outreach"); *Whitman-Walker Clinic*, 485 F. Supp. 3d at 20-22 (organizations have standing to challenge rule that will cause patients to fear discrimination elsewhere, and thus seek more and costlier services from plaintiffs).

The Bureau also asserts (at 32) that MEDA is not injured because the Repeal Rule injures a service that MEDA already provides: financial coaching. It is well-established, however, that impairment to "[o]ne of the primary ways in which" an organization "accomplishes its mission" constitutes harm that supports standing. *PETA*, 797 F.3d at 1094 (cleaned up); *see, e.g.*, *League of Women Voters*, 838 F.3d at 7 (organizations that hold voter registration drives are harmed by impingement on *voter registration* activities); *Action All.*, 789 F.2d at 937-38 (organizations have standing to challenge regulations that inhibit "routine … activities"); *Fair Emp. Council*, 28 F.3d at 1276 (challenged conduct interfered with existing outreach and counseling). The fact that the Repeal Rule impinges on a foundational aspect of MEDA's operations underscores that the rule "hamper[s] and directly conflicts" with MEDA's mission. *PETA*, 797 F.3d at 1095. More, MEDA is not simply continuing "standard operations," as the Bureau suggests (at 32). Here, as compared to the Ability-to-Repay Protections, the Repeal Rule increases the number of clients needing different and "more resource intensive" coaching, *Cap. Area Immigrants' Rts. Coal.*, 471 F. Supp. 3d at 39. *See* FAC ¶ 9; Granados Decl. ¶¶ 12, 14-15, 17.

Finally, the Bureau contends that MEDA's expenditures of resources to counteract the Repeal Rule's harm are insufficient to establish that it would have standing to sue. The Bureau first argues (at 33) that MEDA's post-rule expenditures do not show injury because they are the same as its pre-rule expenditures. As the D.C. Circuit has explained, however, when a plaintiff is challenging an agency action that extends the status quo, "[t]he proper comparison" for standing purposes "is not between what the agency did and the status quo before the agency acted"—but rather "between what the agency did and what the plaintiff[] allege[s] the agency should have done." *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 441 (D.C. Cir. 1998) (en banc); *see, e.g.*, *PETA*, 797 F.3d at 1095 (organization has injury from action allegedly unlawfully withheld, compared to what the agency "would provide if it complied with its legal obligations"). Thus, what matters here are MEDA's operations under the Repeal Rule, compared to what its operations would be under the rescinded Ability-to-Repay Protections.

In the absence of the Ability-to-Repay Protections, MEDA will spend extra resources—approximately three extra coaching sessions for some clients—to counteract the Repeal Rule's harm. *See* FAC ¶ 9; Granados Decl. ¶¶ 14-16. Because MEDA will spend more resources to help a given number of clients, it will be forced to delay coaching other clients and may give up other financial capability work. *See* FAC ¶ 9; Granados Decl. ¶ 17. The Bureau nevertheless contends (at 34) that MEDA lacks injury because it has not shown "an overall increase in expenditures." But the case law does not require that, in order to have standing, a nonprofit raise funds to increase its total budget (or, in challenging a rule extending the status quo, that it commit to decreasing its overall budget if it prevails). What the law does require is "a concrete and demonstrable injury to [the] organization's activities—with the consequent drain on the organization's resources." *PETA*, 797 F.3d at 1093. To show the drain on resources, it is enough that MEDA will "redirect [its] resources to counteract the effects of" the Bureau's unlawful rule and spend *more* time helping certain clients. *Equal Rts. Ctr.*, 633 F.3d at 1140; *see, e.g.*, *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (finding standing when agency inaction led organization to produce materials, without analyzing the source of funds); *Nw. Immigrant Rts. Project*, 2020 WL 5995206, at *6-7 (holding that organizations have standing, when, among other things, they will "spend greater time helping clients meet the [challenged] Rule's demands").

II. NALCAB has adequately established that it has standing to sue on its own behalf.

NALCAB also has standing to sue on its own behalf. The Repeal Rule "perceptibly impair[s]," *PETA*, 797 F.3d at 1095, its financial capability services by increasing organizations' need for NALCAB services and reducing the effectiveness of other NALCAB efforts.

Unaffordable payday and title loans set families back financially and threaten their ability to achieve even basic financial stability. *See* FAC ¶ 7. For instance, these loans push borrowers into reborrowing cycles, with fees draining their bank accounts all the while. *See* 82 Fed. Reg. at 54,565; Garcia Decl. ¶ 19. Delinquency and default can put borrowers' jobs and assets at risk. *See* 82 Fed. Reg. at 54,572-75; Garcia Decl. ¶ 19. And an unaffordable loan, taken out for personal reasons, can inhibit a family's efforts to start a business and thus begin a path toward building wealth. *See* Garcia Decl. ¶ 19. *See generally supra* pp. 4-5; 85 Fed. Reg. at 44,434 (lending permitted by the Repeal Rule has overall negative effect on consumers).

As a result of such dynamics, no-underwriting lending, without the Ability-to-Repay Protections, makes it harder for NALCAB to assist organizations seeking to develop financial capability programs. *See* FAC ¶ 7. These programs aim to enable families to reduce debt, increase savings, build credit, and ultimately, to thrive financially, by being "able to meet immediate financial needs, build assets for the future and create intergenerational wealth." Garcia Decl. ¶ 10; *see also* FAC ¶ 6. And when no-underwriting lending threatens consumers' abilities even to stabilize their finances, organizations serving those consumers need *additional* capability, to be able to help their clients avoid or address the harms caused by such lending. *See* FAC ¶ 7; Garcia Decl. ¶¶ 20, 24. Thus, when lenders offer no-underwriting loans, without the Ability-to-Repay Protections, organizations seek extra training and technical assistance from NALCAB on strategies specific to such loans. *See* FAC ¶ 7; Garcia Decl. ¶¶ 20-23, 26.

The Repeal Rule further injures NALCAB because unaffordable, no-underwriting lending reduces the effectiveness of NALCAB's other services. FAC ¶ 7. Without strategies to address unaffordable payday and title loans, NALCAB grantees serving communities struggling with such loans cannot as effectively use NALCAB's grants to build strong programs. *See* Garcia Decl. ¶ 25. Indeed, because consumers trapped in unaffordable payday or title loans generally need to address those loans *first*, organizations may not be able to implement other programs fully *until* they have strategies to help clients find a way out of the payday or title debt. *See id*.

If the Ability-to-Repay Protections went into effect, they would restrict unaffordable payday and title lending and protect consumers from the harms such lending causes. *See supra* pp. 6-7; FAC ¶ 8. As a result, organizations would need less training and technical assistance from NALCAB in this area. *See* FAC ¶ 8; Garcia Decl. ¶ 26. But without these protections, organizations' need for specialized NALCAB assistance in this area will continue. *See* FAC ¶ 7; Garcia Decl. ¶ 20. To counteract the Repeal Rule's effects on its work, NALCAB will provide more technical assistance than it would otherwise, to help grantees develop strategies for helping families avoid or address the harms caused by unaffordable payday and title loans. *See* FAC ¶¶ 7-8; Garcia Decl. ¶¶ 22, 26, 27. Further, NALCAB will devote more time than it would otherwise, to planning and delivering training on such topics. *See* FAC ¶¶ 7-8; Garcia Decl. ¶¶ 21, 26, 27.

B. The Bureau and CFSA nevertheless contend that NALCAB has alleged only an expenditure of its resources—not an impairment to its services. *See* Bureau Mot. 17-19; CFSA Mot. 6-8. But they ignore that the Repeal Rule makes providing NALCAB's financial capability services more difficult, by increasing organizations' training and technical assistance needs and reducing the effectiveness of NALCAB's existing services. *See* FAC ¶ 7; Garcia Decl. ¶¶ 20, 23-26. NALCAB's expenditure of resources, to provide the needed technical assistance and training, responds to and counteracts that harm to NALCAB's services. *See* FAC ¶ 8; Garcia Decl. ¶¶ 21-22. Though the Bureau argues (at 16) that organizations' need for more NALCAB assistance is "not relevant," it overlooks the D.C. Circuit's and this Court's repeated recognition that organizations' activities are impaired by actions, like the Repeal Rule, that cause clients or members of a community to need *more* of an organization's resources-and thus make the organization's work harder. Thus, an organization suffers cognizable harm from action that "raise[s] the cost and difficulty" of providing services, *Action All.*, 789 F.2d at 937; "increase[s] the number of people in need of counseling," *Fair Emp. Council*, 28 F.3d at 1276; or otherwise means that constituents need more assistance from the plaintiff, *see, e.g*, *Garnett*, 485 F. Supp. 3d at 216-17; *Whitman-Walker Clinic*, 485 F. Supp. 3d at 20-22; *Nw. Immigrant Rts. Project*, 2020 WL 5995206, at *6-7; *Cap. Area Immigrants' Rights Coal.*, 471 F. Supp. 3d at 38-40. Similarly, the D.C. Circuit recognizes injury-in-fact when, as here, an action "reduce[s] the effectiveness of" an organization's existing efforts. *Fair Emp. Council*, 28 F.3d at 1276. Moreover, the Bureau ignores precedent in suggesting (at 19-20) that organizations are harmed only when they suffer a loss of access to information or avenues of redress. *See supra* pp. 18-19. Thus, the Bureau's and CFSA's cited cases, regarding plaintiffs that failed to show impairment, do not apply.

The Bureau also argues (at 21) that NALCAB lacks standing because its hampered activities involve "efforts to educate its membership or the public." The D.C. Circuit, however, has repeatedly held that organizations have standing to challenge actions that impair educational activities (and necessitate spending on educational activities to counteract such harm). *See, e.g.*, *PETA*, 797 F.3d at 1094-96. For example, *Fair Employment Council* and *Spann* both held that the plaintiffs had standing where the challenged actions increased the need for the plaintiffs' education and counseling services or decreased the effectiveness of existing efforts. *See Fair Emp. Council*, 28 F.3d at 1276; *Spann*, 899 F.2d at 28. The Repeal Rule's injury to NALCAB, which increases organizations' needs for NALCAB's capacity-building services, is comparable. Additionally, in *American Anti-Vivisection Society*, the D.C. Circuit recognized that an animal-rights organization suffered harm that supported standing to challenge an agency's failure to promulgate standards for the protection of birds, because the absence of standards left a "void" that made it harder to "educate the public" and "promote humane treatment"; the plaintiff organization spent resources to fill the void of agency inaction, including by developing How-to Guides and other materials "to help shelters and care facilities tend to the needs of birds." 946 F.3d at 619 (cleaned up). Again, NALCAB's injury is similar: The Repeal Rule leaves a void in consumer protection that makes it harder for NALCAB to advance financial capability, and thus Latino economic mobility. Without federal measures to protect consumers from the harms of no-underwriting lending, NALCAB must expend its resources to help organizations develop their own measures to assist consumers.

The Bureau additionally characterizes NALCAB's training and technical assistance activities related to no-underwriting lending as what NALCAB "already does" (at 22) and argues that harm to NALCAB's services is therefore irrelevant. But compared to what it would do under the Ability-to-Repay Protections, NALCAB is not simply continuing existing activities. *See Animal Legal Def. Fund*, 154 F.3d at 441 (explaining that this is the proper comparison). NALCAB provides services to enable organizations to build strong financial capability programs—not public warnings about hazards, as the Bureau suggests (at 24). And under the Repeal Rule, organizations are seeking—and NALCAB is providing—extra, targeted, technical services regarding no-underwriting lending. *See* FAC ¶¶ 7, 8; Garcia Decl. ¶¶ 20-26. Rather than "ordinary" costs, *see* Bureau Mot. 22, these needs are in addition to organizations' other needs, *see* FAC ¶ 7; Garcia Decl. ¶¶ 23-24. And though the Bureau argues that NALCAB's injury, for standing purposes, cannot be based on a *type* of activity that NALCAB has previously pursued, standing law embraces, rather than discounts, injuries to an organization's core services. *See supra* p. 19.

The Bureau and CFSA rely on *National Taxpayers Union*, 68 F.3d 1428, *Food & Water Watch*, 808 F.3d 905, and cases citing them. But in *National Taxpayers Union* and *Food & Water Watch*, courts concluded that plaintiffs failed to show their services were impaired. It was for this reason that the plaintiffs lacked standing—not because they were spending money on education, had provided other types of public education in the past, or (as the Bureau suggests at 25) because the action in *Food & Water Watch* was "deregulatory." *See* 808 F.3d at 921; 68 F.3d at 1434. In fact, in both *National Taxpayers Union* and *Food & Water Watch*, the D.C. Circuit recognized *other* cases in which organizations established standing by virtue of injury to their pre-existing, education activities. *See Nat'l Taxpayers Union*, 68 F.3d at 1434 (quoting and distinguishing *Spann*); *Food & Water Watch*, 808 F.3d at 920-21 (discussing and distinguishing *PETA*).

Neither case applies here. In *National Taxpayers Union* and *Food & Water Watch*, the plaintiffs pointed only to general education of others about the specific law or practice challenged in the litigation, and they did not show impairment of their services. *See* 68 F.3d at 1434; 808 F.3d at 921. NALCAB's harm, by contrast, is not a general desire to communicate publicly about the Repeal Rule or NALCAB's views on no-underwriting lending. Instead, NALCAB has identified a suite of services—including customized technical advice, interactive workshops, and grant funding—that NALCAB provides to help organizations develop strategies to serve consumers, and it has established that the Repeal Rule hampers its ability to provide those services by increasing organizations' needs for targeted assistance and reducing the effectiveness of other financial capability services. FAC ¶¶ 6-7; Garcia Decl. ¶¶ 5-6, 14-16, 20-25. Thus, unlike the plaintiffs in *National Taxpayers Union* and *Food & Water Watch*, NALCAB has alleged an impairment of and concrete injury to a "discrete programmatic concern[]." 68 F.3d at 1433. Indeed, NALCAB's impaired services, provided to organizations, are akin to the direct services routinely recognized as the basis for organizational injury. *See, e.g., Spann*, 899 F.2d at 28 (education to individuals *and* industry); *Whitman-Walker Clinic*, 485 F. Supp. 3d at 21-22 (health services); *Nw. Immigrant Rts. Project* 2020 WL 5995206, at *6-7 (assistance seeking immigration benefits).

For similar reasons, the Bureau errs in attempting (at 25-26) to liken NALCAB's allegations to the circumstances in *Center for Responsible Science*, 809 F. App'x 10. In that case, the plaintiff sued after the government denied its petition for a regulation requiring certain disclosures to clinical trial participants. *Id.* at *12. The court concluded that the organization did not have standing by virtual simply of its "direct outreach" to "encourage" researchers to use the warnings that the organization had failed to persuade the government to adopt. *Id.* Finding the outreach was initiated only in an apparent attempt to create standing, the court explained that the plaintiff's efforts "amount[ed] to 'no more than an abstract injury to its interests' and broadened issue advocacy," not impairment of services. *Id.* (quoting *Food & Water Watch*, 808 F.3d at 921). By contrast, NALCAB's financial capability program and efforts to help organizations address no-underwriting lending constitute core NALCAB services, begun long before the Repeal Rule, and in response to organizations' identified needs. *See* Garcia Decl. ¶¶ 4, 10-12, 20-22; FAC ¶¶ 6-8. Moreover, NALCAB has established how the Repeal Rule makes providing those services more difficult, by reducing the effectiveness of other services and creating demands that would not exist under the Ability-to-Repay Protections. *See* FAC ¶ 7; Garcia Decl. ¶¶ 20, 23-26.

Notably, *Center for Responsible Science* does not cast doubt *generally* on the injuries that organizations suffer by virtue of their efforts to protect the public from harms suffered from regulatory inaction. The D.C. Circuit has recognized injury in precisely such circumstances. *See*

Am. Anti-Vivisection Soc'y, 946 F.3d at 619 (injury suffered when agency inaction leaves a void that organization fills). What matters is whether impairment is established; it was not in *Center for Responsible Science*, but it was in *American Anti-Vivisection Society* and it is here.

Finally, the Bureau disputes NALCAB's expenditures (at 27), but it misconstrues the test. In this context as well, what matters is NALCAB's expenditures under the Repeal Rule, compared to what NALCAB would experience under the Ability-to-Repay Protections—*not* compared to the status quo that the Repeal Rule extends. *Animal Legal Def. Fund*, 154 F.3d at 441. Assessed with the proper standard, NALCAB's provision of additional training and technical assistance, regarding no-underwriting lending, establishes that NALCAB will spend resources to counteract the Repeal Rule's harm to its financial capability services.

Contrary to the Bureau's suggestion (at 28), NALCAB need not show an increase in its total budget to establish standing. As explained above, an organization suffers concrete injury from impairment that necessitates moving resources *within* an agency's operations. *See supra* p. 20; *Equal Rts Ctr.*, 633 F.3d at 1140. NALCAB has established such a diversion of resources, to counteract the Repeal Rule's harm. *See* FAC ¶ 8; Garcia Decl. ¶¶ 21, 22, 27. The Bureau cites *Food & Water Watch* and *National Taxpayers Union*, as well as cases citing them, but *Food & Water Watch* and *National Taxpayers Union* do not address organizations' expenditures of resources to counteract impairment or require that organizations increase their *overall* budgets in order to show organizational harm. Instead, those cases refer to the "operational costs" of specific activities and reference such costs as one measure of whether a plaintiff suffers impairment in the first place. For example, in concluding that NTU had not shown impairment of its services, by pointing to its public education about the challenged law, *National Taxpayers Union* observed that the challenged law had not "subjected NTU to operational costs beyond those normally expended *to review, challenge, and educate the public about revenue-related legislation*." 68 F.3d at 1434 (emphasis added); *see Food & Water Watch*, 808 F.3d at 920 ("Further, an organization does not suffer an injury in fact where it 'expend[s] resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended'") (quoting *National Taxpayers Union*, 68 F.3d at 1434); *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (quoting *National Taxpayers Union*, regarding advocacy expenses).

As established above, NALCAB has shown impairment to its financial capability services. And by providing training and technical assistance it would not otherwise provide, NALCAB is spending resources to counteract that harm. The Bureau's description (at 28) of NALCAB's diversion of resources is inaccurate. NALCAB is not simply moving resources among "similar" trainings. To respond to the extra needs that the Repeal Rule creates, NALCAB is diverting resources from technical assistance and trainings, on topics that can include financial-capability program design, as well as topics for NALCAB's small-business program. *See* Garcia Decl. ¶¶ 21, 27. In any case, to establish that NALCAB's injury is concrete, any diversion of resources to counteract the Repeal Rule's harm is enough. *See supra* p. 20; *see, e.g.*, *Spann*, 899 F.2d at 28, 29 (concluding that expenditures for extra "education and counseling" suffice for standing, without inquiring whether resources are redirected from other counseling efforts or elsewhere).

III. NALCAB's and MEDA's injuries are not speculative.

NALCAB has adequately established that the Repeal Rule will cause NALCAB and MEDA injury that is traceable to the rescission of the Ability-to-Repay Protections. The Bureau and CFSA make a variety of arguments suggesting the injuries are speculative; none have merit.

Principally, the Bureau and CFSA suggest that NALCAB's and MEDA's injuries are speculative because they involve actions of lenders, borrowers, and NALCAB members. But the mere involvement of other parties does not render an injury speculative. *See, e.g.*, *Tozzi v. HHS*, 271 F.3d 301, 308 (D.C. Cir. 2001) (manufacturers have standing to challenge agency action, due to its influence on other regulatory decisions and other companies). Here, NALCAB has standing because its allegations, supplemented by declarations and the Bureau's own findings, establish imminent injury to NALCAB and MEDA, resulting from the "predictable effect of Government action on the decisions of third parties." *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 381 (D.C. Cir. 2020) (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) and discussing examples). Indeed, payday and title lenders would not be able to offer no-underwriting loans, without the Ability-to-Repay Protections, if the Bureau had not issued the Repeal Rule. Thus, the Bureau and CFSA ignore the well-established principle that harm is traceable to a challenged action where that action, like the Repeal Rule, "permit[s] the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise." *Animal Legal Def. Fund*, 154 F.3d at 440; *see also Orangeburg v. FERC*, 862 F.3d 1071, 1083 (D.C. Cir. 2017) (applying principle); *see generally Garnett*, 485 F. Supp. 3d at 218 (recognizing that causation requirement "is not particularly demanding" and requires only that harm be "fairly traceable" to defendant). In such circumstances, third parties' conduct is not "truly independent" of the challenged government policy. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004).

To begin with, the Bureau's and CFSA's suggestion that lenders' response to the Repeal Rule is "speculative" is absurd. *See* Bureau Mot. 11; CFSA Mot. 5. NALCAB has alleged an existing, ongoing industry practice of no-underwriting lending, FAC ¶¶ 11-17, and these allegations must be credited at the motion-to-dismiss stage. *See Peacock*, 682 F.3d at 82, 83. Moreover, the allegations are bolstered by the Bureau's own documentation, *supra* pp. 7-9, and the Bureau's assumption, in rulemaking, that the Repeal Rule would lead lenders to continue their current practice. *See, e.g.*, 85 Fed. Reg. at 44,433.[5] Basic economics provide further support. It is a "hardly speculative exercise in naked capitalism," *Am. Trucking Ass'ns, Inc. v. FMCSA*, 724 F.3d 243, 248 (D.C. Cir. 2013), to predict that lenders will continue offering no-underwriting loans, without the Ability-to-Repay Protections, when nothing has erased lenders' "incentives" to engage in the practice, *see* 82 Fed. Reg. at 54,562; *see also id.* at 54,817 (recognizing lenders could have voluntarily adopted many of the Ability-to-Repay Protections but, given the choice, did not). The D.C. Circuit has "long relied" on such economic incentives to find standing. *In re Idaho Conservation League*, 811 F.3d 502, 510 (D.C. Cir. 2016); *see also, e.g.*, *Abigail All.*, 469 F.3d at 135 (predictions based on companies' "pecuniary interests" are not speculative). Moreover, CFSA itself has vigorously opposed the Ability-to-Repay Protections, even before this litigation, and in its motion to intervene (ECF No. 11 at 4), argued that its members would be harmed if the protections went into effect.[6] CFSA's suggestion now (at 5), that lenders' response to the Repeal Rule is simply "guesswork," contradicts its own prior representation. *See Sierra Club v. EPA*, 755

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[5] Contrary to the Bureau's suggestion (at 11 n.4), NALCAB does not "acknowledge[]" any relevant uncertainty. The Bureau notes NALCAB's allegation that, in describing the effect of the Ability-to-Repay Protections on lenders, the Repeal Rule failed to account for those lenders' ability to make loans *other than* what the Ability-to-Repay Protections would restrict: payday and title loans made on their current terms. *See* FAC ¶¶ 30, 64. This allegation has no bearing on standing. The harm here results from the *unaffordable* payday and title lending that the Ability-to-Repay Protections would have prevented, had the Bureau not rescinded those protections. In any case, NALCAB's standing does not rest on a precise accounting of lending volume.

[6] *See* CFSA Mot. to Intervene 2 (recognizing CFSA litigation against Payday Lending Rule); *Comment Submitted by Dennis Shaul, Community Financial Services Association of America* (posted Oct. 18, 2016), https://www.regulations.gov/comment/CFPB-2016-0025-142779 (opposing proposed Payday Lending Rule).

F.3d 968, 975 (D.C. Cir. 2014) (concluding it was not speculative to predict that companies "would take advantage of [an] Exclusion for which they lobbied").

With lenders continuing to exploit no-underwriting lending, it is also eminently predictable that the Repeal Rule will cause NALCAB member MEDA to continue receiving more financial coaching clients who are stuck in unaffordable payday loans and need extra assistance on that basis. *See* FAC ¶ 9; Granados Decl. ¶ 12. The Bureau suggests (at 10) that NALCAB's standing rests on a "future worsening" of consumers' circumstances. But consumers' financial harm from no-underwriting loans, without the Ability-to-Repay Protections, is already happening. NALCAB's allegations regarding such existing harms must be accepted as true, and are well-supported by the Bureau's earlier findings, *see* FAC ¶¶ 7, 9, 14-16; 82 Fed. Reg. at 54,565-76, 54,590-94, 54,826, as well as more recent statements, *see* Bureau Statement, *supra* pp. 8-9.[7] Similarly, MEDA's experience shows the extra coaching needed by clients stuck in unaffordable loans, *see* FAC ¶ 9; Granados Decl. ¶¶ 14-15, and the Bureau's findings reinforce this experience.[8] Moreover, it cannot seriously be doubted that more MEDA clients will have unaffordable payday loans under the Repeal Rule than would if the Ability-to-Repay Protections went into effect. The Bureau predicted that, if those protections were implemented, the volume of payday loans would

[7] The Bureau's analysis of the Repeal Rule's impact also recognized the overall negative impact of the loans permitted by the rule, *see* 85 Fed. Reg. at 44,434, and repeated the Bureau's 2017 calculations regarding the small portion of borrowers able to repay and the extent of reborrowing, *see id.* at 44,433, 44,435; *see also* 82 Fed. Reg. at 54,824-26 (describing method).

[8] The Bureau found that many consumers do not understand the risks of no-underwriting lending, 82 Fed. Reg. 54,617-18; may have a hard time digging their way out of an unaffordable loan, *id.* at 54,565-72; face risks from lenders' required access to their accounts, *id.* at 54,476-77, 54,488-89, 54,564-65; and overall, cannot reasonably avoid the harm suffered from no-underwriting loans and are unable to reasonably protect their own interests, *see id.* at 54,596-98, 54,619-21.

drop by nearly 40 percent. 82 Fed. Reg. at 54,817. Though the Bureau implies (at 10) that MEDA clients might turn elsewhere for help, the Bureau ignores 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. *See* FAC ¶ 9; Granados Decl. ¶¶ 12, 14. Supported by MEDA's declarations and the Bureau's findings, NALCAB's allegations are sufficient to establish imminent injury traceable to the Repeal Rule. *See, e.g.*, *Cap. Area Immigrants Rts. Coal.*, 471 F. Supp. 3d at 39, 41 (concluding that organization established "realistic danger" of injury, sufficient for standing, with predictions based on experience with "its service delivery model, its client base statistics, and the … resource shifting that it already is undertaking"); *see also League of Women Voters*, 838 F.3d at 8-9 (concluding that one organization's past experience with potential voters is enough to establish imminent injury for that organization and others); *Peacock*, 682 F.3d at 84, 86 (crediting plaintiff's "past experience" with insurance denials in finding standing based on "realistic danger" of harm).

Likewise, NALCAB has established that the Repeal Rule causes it imminent harm because as long as the Repeal Rule remains in the place, organizations will continue to need more NALCAB assistance regarding unaffordable payday and title loans than they would need if the Ability-to-Repay Protections were implemented. *See* Garcia Decl. ¶¶ 20, 26. NALCAB's expectation is supported by the fact that NALCAB is continuing to serve a membership that is heavily concentrated in states with payday and/or title lending, and that membership has repeatedly expressed the need for NALCAB assistance regarding no-underwriting lending. *See* Garcia Decl. ¶¶ 18, 20; 85 Fed. Reg. at 44,383 & n.28, 44,385 & n.54 (regarding Texas and California). Organizations' 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. *See* 82

Fed. Reg. at 54,817; Garcia Decl. ¶ 26. Again, the Bureau's findings support NALCAB's experience by explaining the many ways in which no-underwriting loans damage borrowers financial lives. *See supra* pp. 4-5; Garcia Decl. ¶ 19; 5 Fed. Reg. at 44,434 (overall impact of lending permitted by Repeal Rule is negative). Indeed, in 2017, the Bureau noted that commenters had described efforts to help people trapped in unaffordable loans—a signal that assistance from organizations like NALCAB's members is often needed, without the Ability-to-Repay Protections. *See* 82 Fed. Reg. at 54,517, 54,560, 54,618. The Bureau suggests (at 10) that organizations may fundraise instead of seeking NALCAB's support. But this speculative statement misses the point. The extra services organizations seek from NALCAB to address no-underwriting lending include specialized training and technical assistance. *See* FAC ¶¶ 6-7; Garcia Decl. ¶¶ 5, 6, 14, 16, 20-22.

The Bureau criticizes NALCAB (at 12) for not providing data comparing MEDA's and NALCAB's experiences in states with payday lending to their experiences in states where payday lending does not exist or has "similar regulations." MEDA, however, operates only in one state. Granados Decl. ¶ 4; *see also* 85 Fed. Reg. at 44,383-84 (recognizing that no state laws are similar to the Ability-to-Repay Protections). And standing does not require specific data sets. In any event, NALCAB has compared the needs of MEDA clients stuck in unaffordable payday loans to those of other MEDA clients, NALCAB's declaration reflects its experience with payday and title lending as currently offered, and both organizations' expectations are supported by the Bureau's findings, as described above. *See* FAC ¶¶ 7, 9; Garcia Decl. ¶¶ 20, 26; Granados Decl. ¶¶ 13-15.

Nonetheless, the Bureau hypothesizes (at 10) that other "eventualities, contingencies, and intervening events … could lead to different results." But the existence of other factors affecting MEDA's clients or NALCAB's members does not defeat standing, when the Bureau's action is one factor causing the organizations' harm. *See Orangeburg*, 862 F.3d at 1080. Further, NALCAB has no duty to invent and dispel every *other* possible scenario. *See Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 811 (D.C. Cir. 1983) (holding, regarding redressability, that "appellants need not negate every conceivable impediment to effective relief no matter how speculative"). The Bureau refers to COVID-19, but the current pandemic does not affect standing, which turns on the "probability of harm, not its temporal proximity." *Orangeburg*, 862 F.3d at 1078 (finding standing based on harm that will occur several years in the future). The Repeal Rule does not rely on, and is set to outlast, the pandemic. *See* 85 Fed. Reg. at 44,386. Further, NALCAB's declarations explain that although NALCAB and MEDA paused some financial capability work in light of COVID-19, both will soon restore their normal efforts, as the public health emergency abates. *See* Garcia Decl. ¶ 6; Granados Decl. ¶ 10.

The Court should also ignore CFSA's speculation (at 5) that, without payday loans, consumers will turn to more harmful alternatives. The Ability-to-Repay Protections would not prohibit payday loans: They would restrict an unfair and abusive practice (no-underwriting lending) and "allow for continued access to the [payday] credit that appears most beneficial—that which assists consumers with discrete, short-term needs." 82 Fed. Reg. at 54,818. In any event, the Bureau has repeatedly rejected CFSA's speculation that curtailing no-underwriting lending will lead consumers to more harmful alternatives. For instance, CFSA points to "unregulated and illegal underground" credit, but the Bureau has twice concluded that no evidence suggests that the Ability-to-Repay Protections will lead consumers to such loans. 85 Fed. Reg. at 44,412; 82 Fed. Reg. at 54,610-11. CFSA identifies pawn loans, but the Bureau has explained that pawn loans do not pose the same risks to consumers' finances as no-underwriting payday or title loans. *See* 82 Fed. Reg. at 54,609. CFSA also imagines some consumer losing the chance to use a payday loan to avoid late fees or default on *other* debt. But the Bureau concluded that any immediate benefits to using an unaffordable payday loan in this circumstance would be slight and generally outweighed by the harms of reborrowing, default, or making unaffordable payments—particularly because the Ability-to-Repay Protections, with the principal step-down exception, would permit continued access to payday loans for discrete, short-term needs. *See id.* at 54,604-06; 54,818. Overall, the Bureau's extensive findings, after considering the same arguments CFSA makes here, document that the "impacts of the decreased loan volume resulting from" the Ability-to-Repay Protections would be "positive." 82 Fed. Reg. at 54,818; *see id.* at 54,602-11 (concluding that the substantial harms consumers suffer from no-underwriting lending outweigh any benefits); *see also* 85 Fed. Reg. at 44,412 (recognizing lack of evidence that Ability-to-Repay Protections "would drive consumers toward … more expensive alternatives"); *id.* at 44,434 (recognizing that Repeal Rule will have overall negative effect on consumers—the inverse of the Ability-to-Repay Protections' positive impact); *id.* at 44,439 (similar, expressly noting that Bureau is "taking into account potential alternatives to which consumers might turn if long sequences were proscribed").

IV. NALCAB's and MEDA's injuries are redressable by the Court.

In this action, NALCAB requests relief including an order setting aside the Repeal Rule, which expressly revoked the Ability-to-Repay Protections, *see* 85 Fed. Reg. at 44,382. If NALCAB prevails, this revocation of the Ability-to-Repay Protections will be vacated, and those protections will remedy the harms caused by their absence. *See Action on Smoking & Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam). NALCAB's and MEDA's harms are thus redressable. *See Orangeburg*, 862 F.3d at 1083 (recognizing that redressability inquiry assumes that the court grants plaintiff's requested relief).

Neither the Bureau nor CFSA contests that if NALCAB is right that the Repeal Rule causes MEDA's and NALCAB's injuries, the Ability-to-Repay Protections would provide relief. Instead, citing *Seila Law*, CFSA (but not the Bureau) argues that the injuries are not redressable because the Ability-to-Repay Protections cannot be restored without new notice-and-comment rulemaking. CFSA's argument is wrong and, in addition, contradicts the position CFSA earlier took before this Court, in its motion to intervene. There, CFSA argued that there could be "no rational challenge" to its own standing, because CFSA's members "will be subject to" the Ability-to-Repay Protections if NALCAB prevails. CFSA Mot. to Intervene 4, ECF No. 11; *see also id.* at 7 (describing the Ability-to-Repay Protections as "revived" if Repeal Rule is reversed). CFSA's assertion was not contested by the Bureau, which also assumed in its rulemaking that, without the Repeal Rule, the Ability-to-Repay Protections would be in effect. *See, e.g.*, 85 Fed. Reg. at 44,382 (stating that rule's purpose was to revoke these provisions). This Court should reject CFSA's self-serving reversal of position. Indeed, to establish its standing, NALCAB's interpretation of the law regarding the availability of the Ability-to-Repay Protections need only be "nonfrivolous," *Sierra Club v. Jewell*, 764 F.3d 1, 8 (D.C. Cir. 2014), and for all the reasons described below, NALCAB more than satisfies that standard; CFSA's motion-to-dismiss arguments are meritless. "Standing … is not a game of heads the industry intervenors win; tails [plaintiffs] lose." *Sierra Club v. EPA*, 755 F.3d at 975-76. If CFSA is correct that lenders will be harmed if NALCAB prevails—because lenders will then have to comply with the Ability-to-Repay Protections—then NALCAB's and MEDA's injuries are redressable by this lawsuit.

A. *Seila Law* did not change the availability of the Ability-to-Repay Protections.

1. If NALCAB prevails, the Ability-to-Repay Protections return.

In *Seila Law*, the Supreme Court held that the statutory provision limiting the President's authority to remove the Bureau's director was unconstitutional. 140 S. Ct. at 2197. Looking to *Seila Law*, CFSA argues that because the Ability-to-Repay Protections were issued when the unconstitutional removal provision was in effect, the Ability-to-Repay Protections were "null and void from the start" and cannot be revived by setting aside the Repeal Rule. CFSA Mot. 9. *Seila Law* did not, however, rule on the validity of the agency action at issue there. *See* 140 S. Ct. at 2207-11 (Roberts, C.J., joined by two justices); *id.* at 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part, joined by three justices). Instead, it remanded the case for the lower courts to consider the remaining issues. *Id.* at 2211. And as the Ninth Circuit has observed, nothing in *Seila Law* "suggests that [the Court] believed [the removal restriction] rendered all of the agency's prior actions void." *CFPB v. Seila L. LLC*, 984 F.3d 715, 719 (9th Cir. 2020). CFSA's argument is inconsistent with Supreme Court and appellate authority that, together, establish that such a constitutional flaw in the agency's structure does not automatically render actions taken void. Any question whether the Ability-to-Repay Protections should be voided or set aside is properly considered only after a ruling on the merits of a separate challenge to those provisions—not in assessing NALCAB's standing to challenge the Repeal Rule.

CFSA's contention that the Ability-to-Repay Protections were void at their inception is at odds with *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), which, like *Seila Law*, addressed a restriction on the President's removal authority. There, the Court concluded that the restriction was unconstitutional, but it explained that "the existence" of the agency itself did not "violate the separation of powers" and rejected the argument that "all power and authority exercised by it" violated the Constitution. *Id.* at 508. The Court then severed the removal restriction from the remainder of the statute. *Id.* at 508-09. After dismissing a separate Appointments Clause challenge, the Court held that the only remaining remedy to which petitioners were entitled was "[d]eclaratory relief sufficient to ensure that the reporting requirements and auditing standards to which [petitioners] are subject will be enforced only by a constitutional agency accountable to the

Executive." *Id.* at 513 (rejecting the request for "broad injunctive relief against the Board's continued operations"). On remand, the agreed-upon judgment declared certain statutory provisions unconstitutional and void and severed them from the rest of the statute, but it granted no further relief. *See* Judgment, *Free Enter. Fund v. PCAOB*, No. 06-cv-00217-RMU (D.D.C. Feb. 23, 2011) (ECF No. 66); Judgment (proposed), *Free Enter. Fund v. PCAOB*, No. 06-cv-00217-RMU (D.D.C. Feb. 18, 2011) (ECF No. 65-1). This result would make no sense if, as CFSA asserts, all actions taken before severance of the removal provision (including the referenced "requirements" and "standards") were already, automatically void.

CFSA (at 9-10) points to instances in which courts have invalidated agency actions adopted by agencies with Appointments Clause or other separation-of-powers violations. But these and other authorities underscore that the question of whether the Ability-to-Repay Protections should be invalidated, is one that would arise, if at all, after a court resolves a claim or defense against the Bureau, regarding those provisions. Thus, for example, in *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), the D.C. Circuit held that a party's assertion that the Federal Election Commission was "unconstitutionally composed" was an affirmative defense to an enforcement proceeding that could be waived. *Id.* at 707. Moreover, in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court addressed an Appointments Clause challenge and ordered a new hearing for a party as a form of *relief*, only available for "one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case." *Id.* at 2055 (emphasis added). In *Ryder v. United States*, 515 U.S. 177 (1995), where the court concluded that a petitioner challenging a court-martial conviction was entitled to a new hearing, the Court likewise described its conclusion as regarding the "relief … appropriate" after "a decision on the merits" if an Appointments Clause violation "indeed occurred." *Id.* at 182-83 (also recognizing instances in which, based on the circumstances, the Supreme Court preserved past acts of a body, despite finding a constitutional violation in the structure or certain appointments). As the Supreme Court has held regarding an Appointments Clause argument, unlike the issue of standing, a separation-of-powers challenge is not a jurisdictional issue, but a merits issue. *See Freytag v. CIR*, 501 U.S. 868, 878 (1991).

Moreover, circuit authority has repeatedly recognized that a separation-of-powers defect does not mean every past agency action is invalid—even when challenged. For instance, in *Legi-Tech*, the D.C. Circuit rejected the proposition that a separation-of-powers problem in the agency's structure "as a matter of constitutional compulsion, void[s] all prior [agency] actions." 75 F.3d at 708. It then recognized that later ratification, by a properly constituted commission, was an adequate remedy for the earlier separation-of-powers problem. *Id.* at 709. When considering a pre-*Seila Law* challenge to the Bureau authority, the D.C. Circuit concluded that "vacatur of past actions is not routine" for separation-of-powers violations. *John Doe Co. v. CFPB,* 849 F.3d 1129, 1133 (D.C. Cir. 2017); *see also Collins v. Mnuchin*, 938 F.3d 553, 593-95 (5th Cir. 2019) (en banc) (cert. granted) (declining to set aside challenged action by agency held to have unconstitutional removal restriction); *Metro. Wash. Airports Auth. Pro. Fire Fighters Ass'n Loc. 3217, Int'l Ass'n of Fire Fighters, AFL-CIO-CLC v. United States*, 959 F.2d 297, 304 (D.C. Cir. 1992) (following Supreme Court's conclusion that a board's structure violated the separation of powers, reiterating conclusion that board's actions "not be invalidated automatically on the basis of" the constitutional flaw and leaving challenged rule in place).

CFSA's argument also finds no support in the Administrative Procedure Act (APA). The APA authorizes courts to declare unlawful and "set aside" final agency actions, based on specified reasons and after considering any defenses. *See* 5 U.S.C. § 706(2); *see also id.* §§ 702, 704, 706 (recognizing availability of equitable defenses, final agency action requirement, and prejudicial error doctrine). The APA does not suggest that an action that is set aside—even based on a finding that the action was "not in accordance with law" or "contrary to constitutional right"—would therefore have been void from its inception and without any court review, *id.* § 706(2).

In practice, CFSA's argument means that to assess NALCAB's standing, the Court must evaluate potential challenges to a predecessor rule. If this were true, courts would routinely be called upon to assess nested sets of potential claims, not otherwise raised by plaintiffs, regarding agency actions that are not in effect and not otherwise before the court. Fortunately for the courts and litigants, the case law imposes no such requirement.

If NALCAB prevails, CFSA might, in a different lawsuit against the Bureau, raise arguments regarding the lawfulness of the Ability-to-Repay Protections and ask that they be "set aside." CFSA Mot. 10. The merits of those arguments, as well as any appropriate remedy, would depend on the facts and circumstances present in that case. *Cf. Moose Jooce v. FDA*, 981 F.3d 26, 29 (D.C. Cir. 2020) (recognizing that ratification of challenged rulemaking can occur during litigation and cure any Appointments Clause violations); *Collins*, 938 F.3d at 593-95 (deciding not to set aside action taken by agency with unconstitutional removal restriction, based on details regarding actions and officials at issue).

This case, however, does not present a challenge to the Ability-to-Repay Protections. Those provisions, therefore, which were expressly revoked by the Repeal Rule, will be reinstated if NALCAB prevails, *Action on Smoking & Health*, 713 F.2d at 797, just as they would have remained in effect if the Bureau had not adopted the Repeal Rule. Indeed, if CFSA's argument to the contrary were correct, and the Ability-to-Repay Protections were already void, the Bureau would have had no reason to issue the Repeal Rule at all.

2. Ratification can resolve any constitutional concern.

Alternatively, *Seila Law* does not affect the availability of redress because ratification of the Ability-to-Repay Protections, by a current Bureau director (or acting director), would resolve any constitutional concern that could be imputed to the Ability-to-Repay Protections. As the D.C. Circuit has "repeatedly held," "a properly appointed official's ratification of an allegedly improper official's prior action resolves … on the merits" a claim regarding such action by remedying any defect from the first official's position. *Guedes v. BATFE*, 920 F.3d 1, 13 (D.C. Cir. 2019) (citing cases); *accord Moose Jooce*, 981 F.3d at 29 (ratification of rulemaking cures any Appointments Clause violation); *Legi-Tech*, 75 F.3d at 708-09 (ratification cures a separation-of-powers violation). Following *Seila Law*, the Ninth Circuit considering the case on remand, as well as other courts, have credited the Bureau's post-*Seila Law* ratifications and concluded that they resolve any argument that a past Bureau action was invalid. *See CFPB v. Seila L. LLC*, 984 F.3d at 719.[9]

CFSA does not contest that ratification would resolve any constitutional concern. In fact, CFSA points to cases regarding actions taken by officials lacking authority at the National Labor Relations Board, the Copyright Royalty Board, and the Federal Election Commission: As to each of those agencies, the D.C. Circuit later concluded that ratification, by officials with the proper authority, cured any violation and thus rejected entities' challenges to other past actions. In *Wilkes-Barre Hosp. Co., LLC v. NRLB*, 857 F.3d 364, 371-72 (D.C. Cir. 2017), for example, the D.C.

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[9] *See also CFPB v. Navient Corp.*, No. 3:17-CV-101, 2021 WL 134618, at *3-15 (M.D. Pa. Jan. 13, 2021); *BCFP v. Citizens Bank, N.A.*, No. CV 20-044 WES, ___ F. Supp. 3d ___, 2020 WL 7042251, at *7-11 (D.R.I. Dec. 1, 2020); *BCFP v. Fair Collections & Outsourcing, Inc.*, No. GJH-19-2817, 2020 WL 7043847, at *5-7 (D. Md. Nov. 30, 2020).

Circuit held that ratification of action initially taken under an unconstitutionally constituted Board cured any error stemming from Appointments Clause violations. In *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 796 F.3d 111, 118-19 (D.C. Cir. 2015), the D.C. Circuit upheld the agency's reconsideration of action after curing of the constitutional flaw in the agency's structure. And in *Legi-Tech*, 75 F.3d at 706, 709, the D.C. Circuit upheld ratification of action initially taken by a Commission including officials whose appointment violated the separation of powers.

Instead, CFSA suggests (at 10-11) that ratification is irrelevant because it has not yet happened. But the Bureau retains the option to ratify the Ability-to-Repay Protections—just as happened in *Seila Law, see* 984 F.3d at 718—if NALCAB prevails in this litigation and if ratification is necessary for the Ability-to-Repay Protections to be revived. The *availability* of such Bureau action, which would ensure that the Ability-to-Repay Protections are revived, is enough to establish that NALCAB's and MEDA's injuries are redressable. *See FEC v. Akins*, 524 U.S. 11, 25 (1998) (plaintiff's harm redressable, even when agency retained prosecutorial discretion not to enforce requirements whose applicability was at issue); *Bennett v. Donovan*, 703 F.3d 582, 589-90 (D.C. Cir. 2013) (redressability exists when defendant agency has the "tools" to provide redress, even when not required).

CFSA points to the Bureau's exclusion of the Ability-to-Repay Protections from its July 7, 2020 ratification announcements. But the announcements were not *themselves* a repeal of the Ability-to-Repay Protections, which could be accomplished only through rulemaking. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (per curiam). Nor did the announcements tie the hands of a later Bureau director. *See, e.g.*, *Moose Jooce*, 981 F.3d at 28-29 (upholding rule based on second ratification, without considering sufficiency of first ratification); *CFPB v. Seila L. LLC*, 984 F.3d at 718 (similar).[10]

Indeed, setting aside the Repeal Rule would remove the barrier to ratification that the Bureau earlier identified. *See* 85 Fed. Reg. at 41,331; 85 Fed. Reg. at 41,905-06 (together, making clear that the Repeal Rule is the critical factor distinguishing the Ability-to-Repay Protections from rules and parts of rules that Kraninger ratified). This fact underscores that NALCAB's and MEDA's injuries are redressable, since enjoining a factor that earlier weighed against redress amounts to making redress more likely. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 178 (D.D.C. 2015) Such "[a] significant increase in the likelihood that [a plaintiff] would obtain relief that directly redresses the injury suffered will suffice for standing." *Id.* (redressability satisfied where plaintiffs sought to "enjoin consideration of a factor that, at the very least, diminishes the likelihood" of release from detention).

B. NALCAB's and MEDA's injuries are redressable even if future Bureau action is needed to restore protections.

NALCAB would have standing even if this Court agreed with CFSA that notice-and-comment rulemaking would be required to restore the Ability-to-Repay Protections. D.C. Circuit precedent establishes that redressability exists when, as here, a defendant agency has the authority to provide redress, even when redress requires additional agency action, and the agency may decide not to take such action.

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[10] *Cf. Canning v. NLRB*, 823 F.3d 76, 80 (D.C. Cir. 2016) (rejecting company's attempt to "exploit" technical timing circumstances and language of court mandate "in order to prevent the [NLRB] from resolving its case" after an earlier-constituted Board was declared unconstitutional); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009) (recognizing potential for reconstituted NLRB to ratify or otherwise reinstate NLRB decision vacated for lack of quorum), *holding limited in other part by New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

In *Bennett v. Donovan*, for example, the surviving spouses of certain borrowers of government-insured, private mortgages brought suit against the Department of Housing and Urban Development (HUD) Secretary. Facing foreclosure by the private lenders, the spouses argued that a HUD rule regarding the mortgages was unlawful because it failed to provide the spouses with protections from such foreclosure. But because of the structure of the mortgage insurance program, a ruling on the validity of the HUD regulation would not itself eliminate the threat of foreclosure or give the lenders economic incentive *not* to foreclose. *See* 703 F.3d at 584-87. Still, the court concluded that the spouses' injuries were redressable because HUD had an optional "statutory means to provide complete relief" to the plaintiffs. *Id.* at 588 (describing possibility that HUD could take assignment of the mortgages and then decline to foreclose). Although the parties themselves had given only a "limited presentation" on the issue, *id.*, and HUD "perhaps … would decide no such relief was appropriate" or choose an alternative course, *id.* at 589, the court concluded that redressability was established. The court explained: "We do not hold, of course, that HUD is *required* to take this precise series of steps, nor do we suggest that the district court should issue an injunction to that effect." *Id.* But plaintiffs' injuries were redressable because HUD was "the government actor alleged to have caused appellants' injury" and also "the actor that can provide relief"; "that arrangement is sufficient to establish that relief is likely." *Id.* at 590.

The principle in *Bennett* applies here: To the extent that further action is required, the Bureau, which caused NALCAB's and MEDA's injuries, can provide relief. Thus, their injuries are redressable. CFSA's cited opinions (at 11) are inapposite, as well as non-binding. None recognize remedies available to the agency, upon plaintiffs prevailing (and two pre-date *Bennett*).

Moreover, the Bureau's March 23, 2021, statement underscores that NALCAB's and MEDA's injuries are redressable, by showing a "substantial probability that a favorable outcome would redress [the organizations'] injuries." *Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011). The statement not only recognizes that the harms from no-underwriting lending "still exist," but also expresses the Bureau's belief in ability-to-repay underwriting and intent to "use the authority provided by Congress" to address those harms. Bureau Statement, *supra* pp. 8-9. *Cf. Nat'l Women's Law Ctr. v. OMB*, 358 F. Supp. 3d 66, 81-82 (D.D.C. 2019) (concluding that redressability was established even when action by third-party agency was required, based in part on that agency's statement about its intent). CFSA has also expected that "reversal of the Bureau's Repeal Rule—and reinstatement of the underwriting provisions" will be followed by the Bureau "presumably … enforcing the revived regulations." CFSA Mot. to Intervene 7.

Finally, the *substance* of the Repeal Rule supports the likelihood of redress if NALCAB prevails. Central to the Repeal Rule are evidentiary and legal standards that the Bureau describes as harder to meet than what the Bureau used in 2017, and that the Repeal Rule uses to disregard much of the information the 2017 rule treated as probative. *See* FAC ¶¶ 47-50, 70, 73-79, 86-90; *e.g.*, 85 Fed. Reg. at 44,394-97, 44,399-400, 44,403, 44,407 (regarding unfairness standard and new "robust and reliable" evidentiary standard); *id.* at 44,422-23, 44,424 (regarding abusiveness standard and application of new "robust and reliable" evidentiary standard). If NALCAB succeeds in its challenge, *see* FAC ¶¶ 93-110, those standards and their applications will be vacated. By thus removing "factor[s]" the Bureau earlier relied upon in *rescinding* consumer protections, set aside of the Repeal Rule would "significant[ly] increase … the likelihood" of relief, which suffices for standing. *R.I.L-R*, 80 F. Supp. 3d at 178.

CONCLUSION

For the foregoing reasons, this Court should deny defendant's and intervenor-defendant's motions to dismiss.

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Respectfully submitted,

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