IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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NALCAB's opposition to the motions to dismiss fails to rebut CFSA's and the Bureau's showing that NALCAB lacks standing for three independent reasons. First, neither NALCAB nor its member MEDA have alleged cognizable injury because, on NALCAB's telling, the Repeal Rule does not impose any impediment to the organizations' ability to carry out their daily operations or cause them to incur any operational costs beyond those normally expended; rather, it simply affects the content of the counseling and training offered as part of daily those operations. Second, the alleged injuries are too speculative to support standing because they depend on a series of contingencies, including conjectural predictions about remote injuries that financially struggling consumers might suffer if allowed to have continued access to certain payday loans. Third, NALCAB does not dispute that the Bureau expressly declined to ratify the underwriting provisions of the 2017 rule; for this reason, even if NALCAB obtains the relief it seeks (vacatur of the Repeal Rule), the underwriting provisions would remain without force and effect, and NALCAB and its members would obtain no redress from the injuries allegedly caused by the absence of those provisions.

ARGUMENT

I. NALCAB adds nothing new to fill out its bare assertion of a legally cognizable "impairment" of services, or to support its highly speculative causal claims.

As the Bureau (at 11, 31) and CFSA (at 5–8) both showed, NALCAB has not alleged a legally cognizable injury or rested its causal claims on anything more than speculation. On both points, NALCAB's opposition does little more than pound the table.

A. NALCAB fails to show that it has pleaded anything but a change to the mix of services it and its members provide—neither of which counts as an "injury" for organizational standing.

NALCAB alleges that its member organizations, like MEDA, offer "financial capability coaching" to individuals, and that NALCAB offers training and technical support to its member organizations to enable those coaching programs. But NALCAB's description of how those offerings would allegedly change if the Repeal Rule were vacated lays bare the deficiency in NALCAB's standing. Specifically, NALCAB never claims that the Repeal Rule impairs NALCAB's or its members' ability to offer these services, either by raising the costs of providing those service, denying resources or information necessary to provide those services, or otherwise. Instead, NALCAB simply contends that the content of those offerings would look different if the underwriting provisions were to go into effect, with NALCAB' members offering a different mix of financial coaching to consumers and NALCAB in turn offering a different mix of training and technical support to its members. That is not cognizable injury under well-settled Circuit precedent.

Merely diverting resources from one part of an organization's mission rather than another is insufficient for standing. *See* Mot. at 6–8; *see also Weingarten v. DeVos*, 468 F. Supp. 3d 322, 334 (D.D.C. 2020) ("allegation[s] that [an organization] has had to redirect its resources from other projects" are not sufficient). Rather, an organization must allege both that its "ability to provide services" has been perceptibly impaired and that the organization will have to spend more resources to counteract that allegedly harmful action. *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015). "An organization's ability to provide services has been perceptibly impaired when the defendant's conduct causes an inhibition of the organization's daily operations." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (cleaned up). Therefore even an "increase" in the "resources that [an organization] spends" is not cognizable injury unless that increase is required to undo or "counteract" the independent "inhibition of [its] daily operations." *Id.* at 919–20. And "an organization does not suffer an injury in fact where it expends resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." *Id.* at 920 (cleaned up).

Thus, it is well established that an organizational plaintiff must show impairment of its (or its members') core services. Simply rearranging the services provided to focus on one topic at the expense of another is insufficient even if, unlike here, it causes the organization to increase its expenditures. Under these standards, for instance, an organization that tutors low-income students for the SAT exams would have standing to challenge requirements that make it more burdensome to provide tutoring services, but not to challenge a state's adoption of the "core curriculum" in mathematics, even if that action causes the organization to focus more time per student on math than on verbal preparation.

NALCAB's opposition brief and accompanying declarations make clear that NALCAB claims only a non-cognizable change to the mix of services that it and its members provide. NALCAB has not alleged that the Bureau's repeal of the underwriting requirements for payday loans would subject NALCAB or its members to *any* increase in operational costs, let alone an increase to counteract some unspecified inhibition of their daily operations. It does not contend that the Bureau's failure to restrict payday loans will reduce NALCAB's or its members' revenues or increase their total costs, deprive them of access to necessary information, reduce the demand for their services, or otherwise impose any obstacle to the organizations' carrying out their daily operations. Rather, it claims only that, in carrying out their unimpeded daily operations, NALCAB and its members will alter the mix of services provided, by spending more time on services relating to payday-loan debt and less time on services relating to other financial concerns (such as credit-card debt).

For example, NALCAB points to its annual multi-day National Training event, but does not allege that the Repeal Rule in any way interferes with or inhibits this event or makes it more costly. Instead, NALCAB claims only that it will change the content of its National Training workshops, with "portions" of those workshops to include training about payday loans, instead of "other topics" like a "deeper-dive into more advanced asset-building strategies." Garcia Decl. ¶¶ 21, 27. Similarly, NALCAB does not allege that the Repeal Rule imposes any impairment of its members' ability to offer financial counseling or other services, but claims only that its members will spend more time focusing on payday-loan counseling than other types of counseling. *See* Granados Decl. ¶¶ 14–17. None of this is alleged to result in greater operational costs or other burdens to NALCAB or its members.

Faced with this inability to plead either an impairment to its and its members' ability to offer their services or operational costs beyond those normally expended, NALCAB is forced to argue that the Repeal Rule's alleged impact on the mix of services they offer is all that the law requires. NALCAB tries to distinguish *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995), cited by CFSA (at 7), on the conclusory (and thus insufficient) ground that the plaintiff there "had *not* shown impairment." Opp. at 17. The reason the plaintiff there had not shown impairment was because—like NALCAB here—it failed to show that the government had "subjected [it] to operational costs beyond those normally expended" or "forced [it] to expend resources in a manner that keeps [it] from pursuing its true purpose." 68 F.3d at 1434.

Even the cases cited by NALCAB (at 15–16) reflect this basic distinction. In *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1 (D.D.C. 2020), health-care providers alleged that their medical services would be impaired by policies making their patients less than "fully transparent with" the providers about their medical histories, *id.* at 21—a clear instance of an impairment, rather than an increase, in the providers' ability to serve. Likewise, in *Capital Area Immigrants' Rights Coalition v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020), the immigration policy at issue would "frustrate [immigrant-services organizations'] ability to provide legal services directly to asylum applicants," and not simply require them to offer more of those services, *id.* at 38–39. In *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), information that had been "secured by . . . general regulations, but cut short by the [challenged] HHS-specific regulations, would [have] enhance[d]" the ability of organizations serving the elderly to carry out their usual services (e.g., helping people determine "when unlawful age discrimination may have figured in a benefit denial," *id.* at 937). In *Northwest Immigrant Rights Project v. USCIS*, 496 F. Supp. 3d 31 (D.D.C. 2020), organizations had standing to challenge a rule that would not only "increas[e] the time required to serve individual clients" (Opp. at 16), as NALCAB emphasizes, but also spend extra funds, reduce revenues, and impose "new burdens and costs" directly on the services provided—e.g., by increasing the risk that the organizations would have to resubmit certain applications on their clients' behalf, *see Nw. Immigrant*, 496 F. Supp. 3d at 46–47. And in *Garnett v. Zeilinger*, 485 F. Supp. 3d 206 (D.D.C. 2020), a regulation burdened an organization by vastly increasing demand for all of its major goods and services at once, thus clearly "[i]nhibit[ing] ... [its] daily operations," and requiring it to spend significant amounts of money (including hiring new staff) in response. *Id.* at 216–17.

Other cases cited by NALCAB are irrelevant here because they involved causes of action asserted against private defendants. *See Fair Emp. Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24 (D.C. Cir. 1990). As then-Judge Bader Ginsburg explained, the "[t]he standing barrier" is lower in such suits, which are "traditional grist for the judicial mill," whereas lawsuits that "seek to compel government action" would face a higher bar for organizational standing, because they "implicate most acutely the separation of powers" principles underlying "the Article III standing requirement." *Spann*, 899 F.2d at 30. In any event, even these cases involved "concrete drains on the[organizations'] time and resources" (*id.* at 29) caused by the need to remedy the defendants' discriminatory mistreatment of minority home buyers and job seekers. Here, in contrast, NALCAB has alleged only "[t]he diversion of resources" from one program to another, which the D.C. Circuit confirmed in *Fair Employment Council* is not sufficient for standing. 28 F.3d at 1276–77.

In sum, NALCAB claims only that, as a result of the Repeal Rule, NALCAB's and its members' training, technical support, and financial counseling will need to focus more on payday-loan debt and less on other financial concerns. This reshuffling of resources *within* NALCAB's and its members' daily operations does not counteract any impediment to the provision of those services and therefore is not cognizable injury for standing purposes.

B. NALCAB's causal claims remain speculative, and doubly so regarding risks allegedly flowing from payday loans.

CFSA (at 4–5) and the Bureau (at 9–11) have explained that NALCAB's allegations of injury hang on a highly "speculative chain of possibilities" about the conduct of lenders, consumers, and nonprofits serving Latinos. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). NALCAB does not dispute that these multiple contingencies exist, but merely insists that its posited chain of events is likely to occur.

For example, NALCAB indulges in pure conjecture about whether restricting the availability of payday loans would do more harm than good to the consumers who seek financial counseling from NALCAB's members. In other words, NALCAB speculates that a financially distressed consumer who has access to payday loans will be worse off financially than a consumer forced to rely instead on other forms of consumer credit, and therefore will demand more (or different) financial counseling than if the underwriting provisions were in effect. But it is also possible that these consumers will be better off (or no worse off), *see* CFSA Mot. at 5, and that the "injury" that NALCAB hypothesizes will never come to be.

In response, NALCAB does not contest that its claims of injury reflect its speculative view of the world. Instead, it changes the subject by contending (at 34) that CFSA is the one "speculat[ing]" about the impacts of the Bureau's rules on consumers' financial well-being. This gets things backward: the burden is on NALCAB to plausibly allege a non-speculative injury. The court cannot simply accept NALCAB's "guesswork" (*Turlock*, 786 F.3d at 25) about how the absence of new and untested restrictions on the availability of payday loans will affect consumers' financial choices and circumstances, let alone whether and on what topics those consumers will subsequently need financial counseling. This is especially so given the myriad complex factors that bear upon an individual's financial choices and circumstances.

II. NALCAB's attempts to establish redressability depend on misdirection and misreadings of law.

The case against redressability is simple, and NALCAB's response to it is unsound and often simply off-topic. As CFSA showed, (1) NALCAB's injury is not redressable if the underwriting provisions would remain without force and effect even absent the Repeal Rule, and (2) those provisions would indeed remain without force and effect because they were adopted by a Bureau held by the Supreme Court to be unconstitutionally structured and were not ratified by the Bureau after the structural flaw was removed. CFSA Mot. at 8–11. Nowhere does NALCAB contest, much less refute these points, as it must in order to show redressability. Instead, NALCAB vaguely suggests that separation-of-powers problems with agencies do not *automatically* render their actions defective, *see* Opp. at 36–40; that a ratification that the Bureau here has expressly refused to make—if done later, in a hypothetical world where the Bureau reverses course—could breathe life into the underwriting provisions, *id.* at 41–43; and that this suffices to establish redressability back in the real world, *id.* at 43–45. NALCAB is wrong on all points.

NALCAB is also wrong to urge this Court to leave for another day the legal issues underlying its assertions of redressability. Precedent requires courts to ascertain standing and forbids them to defer to plaintiffs' bare assertions about the legal conclusions behind their arguments for standing. This Court should thus confirm the plain import of *Seila Law LLC v. CFPB* for this case: the underwriting provisions adopted in 2017 were and remain without force and effect and vacatur of the Repeal Rule would therefore accomplish nothing, for NALCAB or anyone else.

A. As NALCAB never outright denies, the underwriting provisions are invalid on constitutional grounds, which suffices to defeat redressability and thus standing.

CFSA showed that even if NALCAB prevailed on the merits, that would not redress its (or its members') alleged injury, as required for standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). After all, NALCAB asserted that it (or its member MEDA) was injured by the elimination of the underwriting provisions. So any redress would have to give those provisions effect. But the provisions would remain *ineffective* even if NALCAB obtained all it seeks—vacatur of the Repeal Rule—since the provisions are invalid for a separate reason: their adoption by a Bureau that was unconstitutionally structured, and thus incapable of *any* legally effective rulemaking.

NALCAB acknowledges several "instances in which courts have invalidated agency actions adopted by agencies with . . . separation-of-powers violations." Opp. at 38. And it never quite contests that the underwriting provisions here were invalid at the start—even though a concession on this point is fatal to its standing. Instead, NALCAB tries to kick up dust, asserting that separation-of-powers violations do not "*automatically* render actions taken void." Opp. at 37 (emphasis added).[1]

In support of this, NALCAB insinuates that *Seila Law* took no position on whether the Bureau's unconstitutional structure invalidated the civil investigative demand challenged in that case, instead remanding that question to the lower courts. *Id.* at 36–37; *see also id.* at 37 ("*Seila Law* did not . . . rule on the validity of the agency action at issue there," but "remanded [on] . . . the remaining issues"). But that simply shows that the separation-of-powers violation might not have automatically invalidated the underlying agency action if and only if that action has been ratified by a constitutionally valid officer. *Seila Law* specifically remanded *only* on the question of ratification, which would have been unnecessary had the underlying agency action been valid absent ratification. *Seila Law* thus took *for granted* that the investigative demand would be invalid from the start, and remanded only on whether the Bureau had later tried to ratify the demand "and whether, if so, [ratification] is legally sufficient to cure the *constitutional defect in the original demand*." 140 S. Ct. 2183, 2208 (2020) (emphasis added). This remand would have been pointless if a "cure" were unnecessary because there never was any "defect." Thus, far from supporting NALCAB's position, *Seila Law* shows that the Bureau's unconstitutional structure by itself did render its prior actions void *ab initio*.

Perhaps anticipating the failure of its attempted jujitsu on *Seila Law*, NALCAB also argues that the Supreme Court's earlier decision in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), somehow supports NALCAB's position that not all actions of unconstitutionally structured

[1] NALCAB also contends that at least some "circuit authority" supports the notion that some agency actions are not invalidated by "separation-of-powers defect[s]." Opp. at 39. But as NALCAB concedes, *id.*, those cases either predated *Seila Law* (in some cases by almost 30 years) or involved a purported ratification (which would be needed only on the assumption that the actions at issue *were* invalid at the start) or both.

agencies are void from the start. The opposite is true. Having found an agency's structure unconstitutional, the *Free Enterprise Fund* Court granted petitioners relief to ensure that any regulations they faced would "be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513. And its express reason for doing so was that separation-of-powers violations "create" an "injury" calling for judicial remedy. *Id.* For support, tellingly, the Court cited *Bowsher v. Synar*, 478 U.S. 714 (1986), which affirmed a decision setting aside, as "without legal force and effect," *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986), the order of an official unlawfully insulated from presidential removal. Thus, through its reasoning and remedy alike, *Free Enterprise Fund* actually confirms that actions of unlawfully structured agencies are invalid from the start—a principle just as well supported by decades of Supreme Court and circuit court precedents. *See* CFSA Mot. at 9–10 (collecting cases).

Ignoring all of this, NALCAB zeroes in on *Free Enterprise Fund*'s statement that the separation-of-powers violation at issue there did not destroy "all [the] power and authority exercised by [the agency]." 561 U.S. at 508. But in the next breath, the Court explained what this meant: that it need not strike down the entire statute creating the agency, because the statute's unconstitutional provisions were "severable from the remainder." *Id.* That does not change the fact that *until* those provisions were severed, any actions taken by the agency would be unlawful. Were it otherwise, after all, the Court would have had no reason—indeed, no authority—to grant relief; there would have been no prospective "injury" to justify a judicial remedy. *Id.* at 513.

Similarly unavailing is NALCAB's focus on the fact that *Free Enterprise Fund* did not take the further step of invaliding the "requirements and auditing standards" previously issued by the agency, which underlay the agency's investigation of the petitioners. Opp. at 37–38. That proves nothing since the validity of those requirements and standards was not before the Court, as the Court itself took pains to clarify. *See* 561 U.S. at 490 (explaining that "petitioners object to the Board's existence, not to any of its auditing standards," and that this posture made sense "because only new rules, and not existing ones, are subject to challenge") (citations omitted).

So there is no mystery or ambiguity about the status of the underwriting provisions here. *Seila Law* plainly teaches, and *Free Enterprise Fund* only reinforces, that actions taken by unconstitutionally structured agencies (like the 2017 Bureau) are themselves "constitutional[ly] defect[ive]," *Seila Law*, 140 S. Ct. at 2208, and thus without legal effect. Here that means that the underwriting provisions lacked force even prior to the Repeal Rule, that the Repeal Rule itself was superfluous, and that its vacatur would change nothing and redress nothing.[2]

B. The abstract possibility that the Bureau might one day reverse itself and attempt to ratify the underwriting provisions cannot support redressability.

NALCAB argues that it does not matter if *Seila Law* shows that the Bureau's pre-2020 actions were initially void, since the Bureau could cure any defect in the underwriting provisions by ratifying them.[3] There is just one problem: the Bureau already expressly declined to do so, when (in the wake of *Seila Law*) it reviewed every one of its prior actions and proceeded to ratify virtually all of them, while expressly withholding ratification of the underwriting provisions of the 2017 rule. *See* 85 Fed. Reg. 41,330, 41,330 (July 10, 2020); 85 Fed. Reg. 41,905-02, 41,905 (July

[2] There is no merit to NALCAB's assertion that this argument contradicts CFSA's position in its motion to intervene about the possible effects of this litigation. The intervention inquiry is premised on what will happen *if* the plaintiff prevails, and CFSA intervened here based on the harms to it that NALCAB's lawsuit is attempting to bring about, namely the restoration of the underwriting provisions. Whether NALCAB has standing to seek that result, including for reasons relating to redressability, is an entirely separate question.

[3] As noted in its motion, CFSA denies that mere ratification could cure such a constitutional defect. *See* CFSA Mot. Summ. J., ECF 80, *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 18-cv-00295 (W.D. Tex. Sept. 25, 2020); *cf. Seila Law*, 140 S. Ct. at 2208 (remanding to address "whether … ratification … is legally sufficient to cure the constitutional defect in the original [agency action]"). But *that* question is not at issue in this case because the Bureau has not even attempted to ratify the underwriting provisions.

13, 2020); CFSA Mot. at 3.[4] Indeed, far from ratifying those provisions, the Bureau (prior to *Seila Law*) had taken the opposite step of initiating a rulemaking to *repeal* them. Then it finalized that repeal. And now it seeks dismissal of this lawsuit challenging that repeal. It is literally impossible to imagine what further official action the agency could have taken to repudiate the underwriting provisions. The possibility that it would give up any effort to oppose this challenge to the Repeal Rule, initiate a new rulemaking to rescind the Repeal Rule, and then issue a new ratification to bless the underwriting provisions, is speculative if anything is.[5] But redress by a favorable decision must be "likely, as opposed to merely speculative," for there to be standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). So the abstract possibility of a cascade of course-reversals giving life to the underwriting provisions is no basis for finding standing here.

Besides gliding past the many ways in which the Bureau has opposed the underwriting provisions—which would make an abrupt reversal unlikely at best, and arbitrary and capricious at worst—NALCAB's main response is to lean on two precedents supposedly showing that in this case, "[t]he *availability*" of ratification "is enough to establish that NALCAB's and MEDA's injuries are redressable." Opp. at 42 (citing *FEC v. Akins*, 524 U.S. 11, 25 (1998), and *Bennett v.*

[4] NALCAB points out (at 42) that this "announcement[]" did not "tie the hands of a later Bureau director." But the question is not whether redress remains legally possible, but whether it is *likely*. *See infra* p. 12. And the Bureau's actions to date—including its refusal to ratify the underwriting provisions—show that it is not likely.

[5] The prospect of redress would not become "likely" just because vacatur of the Repeal Rule would, as NALCAB contends (at 45), eliminate "evidentiary and legal standards . . . that the Repeal Rule uses to disregard much of the information the 2017 rule treated as probative." True, vacatur would take those evidentiary and legal standards off the books, but that would not force the Bureau to affirmatively embrace the older standards, much less ratify the underwriting provisions on that basis. Nor would vacatur of the Repeal Rule make ratification likely by "remov[ing] the barrier to ratification that the Bureau earlier identified." Opp. at 43. Nowhere has the Bureau asserted that the bare existence of the Repeal Rule—as opposed to, say, the legal and policy considerations underlying it, which vacatur cannot touch—was "the critical factor" in the Bureau's decision not to ratify the underwriting provisions. *Id.* Indeed, the Repeal Rule was not final when the Bureau published its statement withholding ratification. *See* CFSA Mot. at 3.

Donovan, 703 F.3d 582, 589–90 (D.C. Cir. 2013)); *id.* at 44 (citing *Bennett*). These cases show nothing of the sort. Indeed, they show the opposite.

In *Akins*, a group of voters had filed an administrative complaint asking the Federal Election Commission to enforce certain statutory disclosure rules against an organization called the American Israel Public Affairs Committee (AIPAC). 524 U.S. at 13–14. The Commission dismissed the complaint on the basis that AIPAC was not a "political committee" subject to those rules. The voters sought judicial review, alleging that the Commission's order denied them access to information about AIPAC to which the disclosure rules entitled them. And the Court recognized their standing even though a favorable judicial decision (on the meaning of "political committee") would not *guarantee* access to that information, since the Commission could always exercise its prosecutorial discretion not to enforce the disclosure rules against AIPAC. Notably, though, the Court rested its standing decision on the fact that "we cannot know that the FEC would have exercised its prosecutorial discretion in this way." *Id.* at 25.

Akins thus reflects the basic rule that standing is based on what the government has actually done (i.e., denial of AICAP's application based on an error of law), and not on hypothetical circumstances that have not and may never occur (i.e., the possible future exercise of prosecutorial discretion). Here, by contrast, we know that the Bureau would decline to ratify the underwriting provisions—because it *already has*.[6] *Akins* would be analogous to this case only if the

[6] NALCAB attempts (at 8, 45) to make hay of the Bureau's March 23, 2021, statement that "the harms identified by the 2017 rule still exist" and that the Bureau will use its authority "to address these harms, including through vigorous market monitoring, supervision, enforcement, and, if appropriate, rulemaking." Dave Uejio, *Our Commitment to Protecting Vulnerable Borrowers*, Consumer Financial Protection Bureau Blog (Mar. 23, 2021), https://www.consumerfinance.gov/about-us/blog/our-commitment-to-protecting-vulnerable-borrowers. This deliberately vague and noncommittal press release—which does not even express an intent to adopt any rule, much less restore the underwriting provisions in particular—is no basis for a legal conclusion that NALCAB has standing here.

Commission there, in dismissing the complaint because AIPAC was not a "political committee," also declared in the alternative that it would (in its discretion) decline to enforce the disclosure rules against AIPAC in any event. But in that scenario, there is no doubt that the Court would have held that the voters lacked standing to challenge the Commission's determination of the meaning of "political committee," precisely because victory on that issue would not redress their alleged injury. *See Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 134 (D.D.C. 2012) (finding no standing where "[a]ny injury Plaintiff might attribute to [one agency action] could only be redressed by an order requiring [the agency] to re-open and ultimately [reverse another]"); *see also Pub. Citizen v. HHS*, 795 F. Supp. 1212, 1222 (D.D.C. 1992) (no standing where reversal of one action would not redress alleged injury without independent, discretionary action by lawmaking body).

Likewise, in *Bennett*, which found redressability where a favorable ruling would let an agency use its "tools" to remedy an alleged injury, the Court emphasized that relief was "likely, as opposed to merely speculative," as here. 703 F.3d at 589–90 (citation omitted). And relief was likely because the agency had not already rejected alternative paths to relief, as the Bureau has here.

Finally, and critically, in *Akins* and *Bennett* both, no one denied that the agency actions at issue *had real effect* from the beginning. They each created a genuine and distinct obstacle to the relief sought by the petitioners, and so their elimination would have made relief objectively more "probab[le]." *Town of Barnstable v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011). But here the Bureau's Repeal Rule had *no* effect from the start, because the Bureau had already declined to ratify the underwriting provisions. The Repeal Rule thus imposed no real obstacle, only the illusion of one. And so its vacatur offers only the illusion of redressing an injury.

C. NALCAB's suggestions that this Court put off the legal questions behind its redressability arguments are unsupported and contrary to law.

Unable to establish redressability, NALCAB urges the Court to leave for another day the legal questions raised by its redressability position. NALCAB cites several cases for the notion that "the question of whether the [underwriting provisions] 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." Opp. at 38; *see id.* at 38–39. But not one of those cases purports to *limit* courts to considering the legality of prior regulations in such a posture. Nor *could* those cases do so where the validity of an earlier rule is relevant to standing, given that jurisdiction is a "threshold question that must be resolved . . . before proceeding to the merits" of the challenge at hand. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998) (collecting cases).

NALCAB also asks this Court to defer to NALCAB on any legal conclusions underlying its case for redressability, pleading its "interpretation of the law" "need only be 'nonfrivolous'" at this stage. Opp. at 36 (citing *Sierra Club v. Jewell*, 764 F.3d 1, 8 (D.C. Cir. 2014)). But the support cited by NALCAB shows only that "[a] plaintiff's non-frivolous contention regarding the *meaning of a statute* must be taken as correct for purposes of standing," not that all its legal conclusions must be. *Jewell*, 764 F.3d at 9 (emphasis added). Apart from a plaintiff's statutory reading, while courts must assume the truth of the plaintiff's factual allegations and draw all reasonable inferences in its favor, "this tolerance does not extend to legal conclusions." *Resol. Tr. Corp. v. Driscoll*, 985 F.2d 44, 48 (1st Cir. 1993) (citation omitted); *see also* 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2021) ("[T]he court will not accept conclusory allegations concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from the pleader's description of what happened . . . ."). So the Court need not and should not simply assume for now that NALCAB is right about redressability and thus standing.

Finally, NALCAB warns ominously that if the Court were to hold that assessing "NALCAB's standing" requires it to "evaluate potential challenges to a predecessor rule," then "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." But NALCAB offers no examples to fill out this imagined parade of horribles. And it is hard to imagine many cases involving the peculiar features that make redressability here turn on the validity of a rule adopted before the one being challenged. That would occur only when the challenged rule repealed or altered an earlier rule that was necessarily invalid as a result of binding precedent and whose constitutional flaw had not been remedied by ratification or otherwise. CFSA has found no other case like that. And a parade of horribles with exactly one float is not much of a parade.

There is therefore no prudential or legal obstacle to consideration of CFSA's redressability challenge, and indeed there is an obligation to resolve it before proceeding to the merits. Fortunately, *Seila Law* makes that work easy, leaving no room to doubt that the Bureau's only unratified pre-2020 action is "constitutional[ly] defect[ive]," 140 S. Ct. at 2208, and hence void *ab initio*, which makes vacatur of the Repeal Rule incapable of redressing anything.

CONCLUSION

The Court should dismiss this action for lack of standing because NALCAB cannot show that it or its members have suffered a legally cognizable injury that is traceable to the Repeal Rule and capable of being redressed by that Rule's vacatur.

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Respectfully submitted,

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