ORAL ARGUMENT NOT YET SCHEDULED
Nos. 13-5247, 13-5248

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

State National Bank of Big Spring, *et al.*,
Plaintiffs-Appellants,

v.

Jacob J. Lew, *et al.*,
Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Columbia
No. 1:12-cv-001032-ESH, Honorable Ellen S. Huvelle

FINAL REPLY BRIEF OF PRIVATE PLAINTIFFS-APPELLANTS

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GLOSSARY

The Bank	State National Bank of Big Spring
CFPB	Consumer Financial Protection Bureau
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code)
FSOC	Financial Stability Oversight Council
Govt.Br.	Government’s Response Brief
GE Capital	GE Capital Unit of General Electric
OCC	Office of the Comptroller of the Currency
Plfs.Br.	Private Plaintiffs’ Opening Brief
SIFI	Systemically Important Financial Institution
UDAAP	Unfair, deceptive, or abusive acts or practices

SUMMARY OF ARGUMENT

This is not a hard case. The government concedes in its response brief ("Govt.Br.") that State National Bank ("Bank") is regulated by the Consumer Financial Protection Bureau ("Bureau"), and that the regulations to which the Bank is subject include ones that were promulgated while Mr. Cordray was serving as the Bureau's unconfirmed Director. The complaint and its supporting declarations plausibly allege that these regulations, as well as the Bureau's statutory enforcement authority, have forced the Bank to incur compliance costs and to alter its business practices in several ways. Private Plaintiffs' Opening Brief ("Plfs.Br.") 9-11, 23-24, 30-36. As explained in the opening brief, that is all that is required to establish standing.

In the face of these injuries, the government founds its argument on the novel proposition that the Bank cannot establish standing unless it identifies a Bureau regulation "that constrains behavior in which [it] would otherwise engage." Govt.Br.20. That is not the law. Precedent makes clear that the costs the Bank has incurred to ensure the Bank does not run afoul of the Bureau's regulations or the laws it interprets and enforces—by shouldering new compliance expenses, altering business practices, and foregoing profits—constitute constitutionally cognizable injuries sufficient to confer standing. The government's heavy reliance on *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), in an effort to label those injuries "self-inflicted," is misplaced. That decision by its own terms does not apply to a plaintiff "regulated by [a] relevant statute," *id.* at 1153, and the costs the Bank has incurred are a reasonable and predictable response to the looming threat of sanctions should the Bank fail to comply with the Bureau's dictates.

The government's argument that the Bank is not injured by the Financial Stability Oversight Council ("Council") fares no better. It disregards precedent, the pleadings, and myriad sources that recognize that the Council confers a subsidy on the Bank's competitors when it designates them systemically important financial institutions ("SIFIs"). Those designations injure the Bank, are traceable to the Council, and are redressable by this Court.

ARGUMENT

I. THE BANK HAS STANDING TO CHALLENGE THE BUREAU

The Bureau's authority over consumer financial services has caused the Bank to suffer several injuries-in-fact, including increased compliance costs, increased costs for remittance transfers and mortgage servicing, and a forced exit from—and inability to reenter—the consumer mortgage market.

A. The Bureau Has Forced the Bank to Incur Compliance Costs that Support Standing

1. The government does not deny that standing may be premised on compliance costs, Govt.Br.27-29,[1] which this Court has defined to include the increased time and expense necessary to monitor agency activities under new regulation or comply with the demands of an additional regulator. Plfs.Br.22-23; *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28-29 (D.C. Cir. 1990) (allegations of "concrete drains" on organization's "time and resources" "satisfy Article III's injury-in-fact requirement"); *Ass'n of Am. R.Rs. v. DOT*, 38 F.3d 582, 585-86 (D.C. Cir. 1994) (per curiam).

The government instead argues that the $10,000 the Bank spends annually to ensure compliance with the Bureau's interpretation of financial law is a "manufacture[d]" cost that cannot support standing because it is based only on "speculation that the Bureau might one day enact a regulation that proscribes an activity engaged in by the Bank." Govt.Br.28-29 (citing *Clapper*, 133 S. Ct. at 1151); Govt.Br.3 (arguing Bank has yet to face "direct regulation by the Bureau"). That is not correct. As Private Plaintiffs have previously demonstrated, the Bank *is*

[1] The government prudently does not defend the district court's alternative—and erroneous—rulings that the Bank lacks standing because (1) it might incur compliance costs under other statutes if Title X is invalidated, or (2) it supposedly could achieve compliance in a less-costly manner. Govt.Br.27-30; Plfs.Br.28-29 (describing errors).

already subject to direct regulation, including both (1) Bureau rules that govern the Bank's remittance and mortgage servicing practices, and (2) the Dodd-Frank Act's prohibition on unfair, deceptive, and abusive practices (the "UDAAP prohibition"), which the Bureau is charged with defining. Plfs.Br.23, 25-26, 28, 30-35. The government fails to address this showing, just as it ignores the Bureau's admissions that its regulations impose compliance costs on lenders like the Bank. Plfs.Br.26-27, 31 (quoting Bureau regulations).[2]

Moreover, the government's contention that the Bank's compliance costs are somehow "manufactured" is entirely off-base. As a financial services provider, the Bank is subject to heavy substantive regulation as well as the government's demand that it adopt compliance systems to ensure those regulations are obeyed. For example, the Office of the Comptroller of the Currency ("OCC")—the prudential regulator to which the Bureau may recommend enforcement against the Bank—has proclaimed that "the board of directors and management" of "all banks" "are required to monitor compliance with all applicable consumer protection laws and regulations" and "should create a compliance program" that

[2] Indeed, these Bureau-recognized compliance burdens have manifested themselves throughout the community banking industry, as documented by myriad reports and studies. *See, e.g.*, Hester Peirce et al., *How Are Small Banks Faring Under Dodd-Frank?* (Mercatus Center Working Paper No. 14-05, Feb. 2014); Tanya D. Marsh & Joseph W. Norman, *The Impact of Dodd-Frank on Community Banks* (May 2013).

"cover[s] all consumer laws and regulations." Comptroller's Handbook, *Community Bank Supervision* 19-20 (Jan. 2010). The Bureau similarly considers whether an institution has demonstrated "a proactive commitment … to use resources for the prevention and early detection of potential violations of consumer financial laws" and has a "robust compliance management system." CFPB Bulletin 2013-06, *Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation* 2-3 (June 25, 2013). Far from "manufactured," the Bank's compliance efforts are required by the government.

2. Courts—including this court—have repeatedly held that such costs support standing. Plfs.Br.23-26; *e.g.*, *Ass'n of Am. R.Rs.*, 38 F.3d 582; *Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013); *Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252 (4th Cir. 1995); *Pac. Legal Found. v. Goyan*, 664 F.2d 1221 (4th Cir. 1981). Unable to offer any serious argument that those decisions do not apply here, the government relegates them to a pair of footnotes and then proceeds to disingenuously misread them. Govt.Br.27 n.6, 30 n.7.

First, the government pretends *American Railroads* is a case about pre-enforcement review, not compliance costs, arguing that the Court "did not suggest that the railroads would have standing even if the [new regulator's] standards themselves would not cause any injury." Govt.Br.27 n.6. But that is precisely what the Court *held* when it ruled that the regulated entity "allege[d] sufficient injury-in-fact" to support standing when it "claim[ed] [that] the necessity of complying with two sets of regulations enforced by two federal agencies compounds [its] compliance burden, *regardless of the content of either set of regulations*." 38 F.3d at 585-86 (emphasis added); *see id.* ("dual regulation" is injury-in-fact). Whatever substantive standards a rule might impose, the administrative burden of ensuring compliance with the rule is an injury-in-fact. *Id.*; Plfs.Br.22-25.

The Fourth Circuit reached the same conclusion in a trio of cases the government attempts to dismiss as "involv[ing] costs attributable to a specific regulation." Govt.Br.30 n.7. The government's argument is both unclear and unpersuasive. First, any intended distinction between "regulation" and "statute" is belied by the precedents and the government's brief. The government acknowledges that *Chambers*, 52 F.3d 1252, "considered a *statute* that prohibited companies from disposing of waste" in certain circumstances. Govt.Br.30 n.7 (emphasis added). And *Liberty University* involved a challenge to a statutory mandate governing the provision of insurance. 733 F.3d at 84-85. This case, of course, involves the costs of ensuring compliance with both a statute (the UDAAP prohibition) and Bureau regulations (including the Remittance and Foreclosure

Rules). To the extent the government's footnote is a retread of the claim that the Bank is not yet directly regulated, therefore, it likewise must fail. *Supra* pp.3-4.

The government fares no better if it means to argue the Fourth Circuit's cases turn on the substantive requirements of particular regulations, rather than the administrative costs of ensuring compliance with the regulations generally. In *Chambers*, the court held the plaintiff had standing based on costs it incurred "monitoring the laws of other states" to ensure it did not violate a substantive limit on waste disposal. 52 F.3d at 1266. In *Liberty University*, the court similarly found standing based on "the administrative burden of assuring compliance" with the employer mandate, even if (as the government contended) the employer may have already met the law's requirements. 733 F.3d at 90. In this case, as well, the Bank has incurred significant administrative costs to ensure it complies with the Bureau's substantive regulation of financial law. Plfs.Br.25-27.

None of those decisions is (as the government claims of *Chambers*) "in … tension with *Clapper*." Govt.Br.30 n.7. In *Clapper*, the plaintiffs speculated the government might one day—if authorized by a judge—take non-regulatory action to monitor communications of others and thereby intercept plaintiffs' own communications. 133 S. Ct. at 1148, 1152. The Supreme Court distinguished that situation from one where the plaintiff itself was "unquestionably regulated by [a] relevant statute" and thus had standing. 133 S. Ct. at 1153. Here, too, the Bank is "unquestionably regulated" by the Dodd-Frank Act and the Bureau's regulations, and the costs necessary to ensure compliance with those authorities supplies standing.

3. Finally, the government suggests that, if the Bank has standing, the Court would have to find standing "any time a party spends money or uses its resources (including its in-house counsel) to identify its statutory obligations, or indeed to determine if it even has any." Govt.Br. 29-30. As explained above, precedent already dictates that the administrative costs of ensuring compliance with a governing statute or regulation constitute an injury-in-fact. The government provides no reason why a plaintiff should *not* have standing to challenge a law that forces it to spend $10,000 annually to ensure compliance with a new regulator and thousands of pages of rules governing the plaintiff's business. But even if the government were correct that compliance-cost standing should be limited, a plaintiff like the Bank, which is both unquestionably subject to Bureau regulation and *required* to adopt compliance systems to ensure all applicable consumer financial laws and regulations are obeyed, must be deemed to fall comfortably within it. *Supra* pp.4-5.

B. The Bureau Has Increased the Costs of Remittance Transfers and Mortgage Servicing

Contrary to the government's claims, the Remittance and Foreclosure Rules increase the Bank's costs and provide standing.

1. *The Remittance Rule*

a. The government does not dispute that, in order to ensure compliance with the Revised Remittance Rule's safe harbor, the Bank adopted a policy prohibiting employees from making more than 99 remittance transfers annually. Govt.Br.32. Nor does the government deny that the Bureau has recognized the real "cost" businesses incur in "counting remittance transfers (to ensure the conditions of the safe harbor are met)." Plfs.Br.31 (quoting Revised Remittance Rule). The government nonetheless argues the Bank is not injured by the rule because the Bank's past practice allegedly was not in danger of exceeding the safe harbor. Govt.Br.32. The government seems to argue that because the Bank previously satisfied safe harbor conditions, it need not shoulder the Bureau-recognized costs of ensuring it does so in the future. Govt.Br.32-33.

That argument fails as a matter of law and practice. To begin, the Fourth Circuit rejected a similar claim in *Liberty University*. There the government argued an employer lacked standing to challenge the employer mandate because the employer may have already satisfied the demands of the law. The court held the employer had standing because "[e]ven if the coverage [the employer] currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate." 733 F.3d at 89-90. Here, too, the administrative burden of ensuring the

Bank stays within the safe harbor constitutes an injury-in-fact even if the Bank's underlying conduct complies with the regulation.

The government's argument also fails as a matter of practice. The Bank can hardly be expected to chance compliance with federal law on (1) the fortuity that past practice may have fallen within the safe harbor, and (2) the assumption that its future practice will never exceed it. Indeed, given the compliance mandates issued by the OCC and Bureau, it strains credulity to believe regulators would accept such a laissez-faire approach as a defense to liability if the Bank were to exceed the safe harbor. The only way for the Bank to ensure it satisfies the law is to monitor and limit its transfers.

b. The government's argument that the Bank was not injured by the Original Remittance Rule, in place at the time of the initial complaint, is also flawed. The government first errs in asserting the original rule was a "proposed rule" with "speculative" effect. Govt.Br.34-35. The Bureau in fact issued a "Final rule; official interpretation," Original Remittance Rule, 77 Fed. Reg. 6,194, 6,194 (Feb. 7, 2012), imposing substantial disclosure and reporting requirements on "any person that provides remittance transfers in the normal course of its business," Plfs.Br.3 (quoting original rule); *see also* Plfs.Br.30-32; Govt.Br.33 (suggesting "normal course of business" was minimum of 25 transfers annually—which Bank previously exceeded).

The government nonetheless claims the Bank's consequent exit from the market was not "calculated to avoid certainly impending injury" under the rule because the Bureau "expect[ed] to" "flesh[] out" the normal-course-of-business exception before the rule was enforced. Govt.Br.34 (quotations omitted). But the government's suggestion that facially regulated entities confronted with the need to make present business decisions could count on later being exempted "ignore[s] the reality of the long-range economic planning involved in the sound management of an enterprise," *Great Lakes Gas Transmission Ltd. Partnership v. FERC*, 984 F.2d 426, 431 (D.C. Cir. 1993), and that entities cannot "reasonably rel[y]" on agencies "adopting any particular regulation" in future rulemakings, *Frederick Cnty. Fruit Growers Ass'n v. Martin*, 968 F.2d 1265, 1273 (D.C. Cir. 1992).

The government similarly errs in contending that the claims in the initial complaint were not ripe because the Bank was "seeking to challenge what was, in effect, a proposed rule." Govt.Br.35. There was no "proposed rule," only a "final rule" issued without a safe harbor. Furthermore, the Bank did not "challenge [a] rule" (Govt.Br.35); the Bank is challenging the constitutionality of the Bureau itself. Although this Court has declined to resolve a challenge to a regulation under review because the agency might "correct its own mistakes" in the "administrative process," *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (quotations omitted), no "administrative process" can rectify the constitutional violations alleged here. And the government does not deny that this Court has held a statute's constitutionality to be a "purely legal question" "appropriate for immediate judicial resolution" prior to agency enforcement of standards under the statute. *Ass'n of Am. R.Rs. v. DOT*, 721 F.3d 666, 672 n.6 (D.C. Cir. 2013); Plfs.Br.31-32. "[T]hat a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005); Plfs.Br.39. The Bank's claims were and remain ripe.

2. *The Foreclosure Rule*

The government does not deny that the Foreclosure Rule modifies the method by which lenders may foreclose in Texas. Govt.Br.36. Nor does it contest that the Bureau-mandated procedures impose additional costs on lenders, the kind of costs courts have held to support standing. Govt.Br.36-38; *see* Plfs.Br.32 (citing cases). Instead, the government argues—without citing a single case—that (1) the Bank failed adequately to allege injury from the rule, and (2) external evidence renders any injury speculative. Govt.Br.36-38. Neither argument has merit.

a. To begin, the government is simply wrong in contending the Bank failed to make "specific allegation[s]" about the Foreclosure Rule or "how its mortgage practices would be affected" by the rule. Govt.Br.36-37. The Bank expressly averred that it had "previously used the foreclosure-notice-posting process provided for" by Texas statute; "the Bank is now prohibited by the Bureau's new rule from doing so"; and the rule thus "*will increase the Bank's costs by drawing out the process by which the Bank may seek to recover on a defaulted loan*." JA109-10 (¶¶ 35-36), JA207 (¶ 12) (emphasis added).[3]

b. The government's second argument—that the Bank's allegations of injury are speculative, because the Bank cannot plausibly claim it "intends to engage in future foreclosure proceedings that would violate the rule" (Govt.Br.37-38)—similarly mischaracterizes the proceedings below and ignores precedent.

First, the government wrongly suggests the Bank "declined" to provide information about its injuries when given an unbounded "opportunity to adduce additional facts to support its arguments." Govt.Br.38. No such opportunity existed. During the motion-to-dismiss hearing, the district court authorized the Bank to submit only a "[v]ery, very limited" affidavit laying out "a couple of additional facts that [the court] would find useful" in making its decision (JA204)—none of which pertained to "when or how often" the Bank used the Texas foreclosure process (Govt.Br.38).

[3] To the extent the government is arguing that declarations are inadequate to support standing, that claim is foreclosed by precedent. Plfs.Br.33 (citing cases). So, too, is any argument that the Bank was required to cite specific foreclosure provisions in its complaint. Plfs.Br.32-33 (citing cases). The government offers no response to that precedent.

In any event, the record filings more than substantiate the Bank's injuries. The allegation that the Foreclosure Rule increases the Bank's servicing costs, JA109-10 (¶¶ 35-36), JA207 (¶ 12), necessarily reflects that the Bank's "mortgages are actually subject to this rule." Govt.Br.37. The Bureau's rule prohibits a practice the Bank has used and wishes to continue using, increasing current servicing costs and preventing the Bank from reentering the mortgage market. JA109-10 (¶¶ 35-36), JA207 (¶ 12). Both injuries provide standing. Plfs.Br.19, 35-36; *Chamber of Commerce v. SEC*, 443 F.3d 890, 896-97 (D.C. Cir. 2006) (standing to challenge barriers to entry); *Idaho Power Co. v. FERC*, 312 F.3d 454, 459-61 (D.C. Cir. 2002) (standing to challenge agency order dictating use of property).

Second, the government continues to rely on evidence it introduced in support of its motion to dismiss. Govt.Br.37. But it long has been settled that a plaintiff is protected against "an evidentiary attack on [its] asserted theory by the defendant" in a Rule 12(b)(1) motion. *Haase v. Sessions*, 835 F.2d 902, 907-08 (D.C. Cir. 1987); Plfs.Br.34.

Third, the government's evidence regarding the Bank's foreclosure statistics is not inconsistent with the Bank's claims of injury. The Bank alleged that it posted foreclosure notices shortly after default to spur payment, even when it did not foreclose (or intend to foreclose). JA109-10 (¶ 36); Plfs.Br.34-35. There is, moreover, no guarantee that the Bank's existing loans will remain current, and the Bank must make present business plans knowing it cannot use the efficient Texas procedure in the future—a barrier to reentering the market.

C. The Bank's Lost Profits in the Mortgage Market Provide Standing

The government does not contest that the creation and operation of the Bureau—including issuance of the Foreclosure, Ability-to-Repay, and Escrow Rules—have increased the costs and risks associated with consumer mortgage lending. Plfs.Br.35-36. Those costs and risks forced the Bank out of that previously profitable market and prevent the Bank from reentering it. *Id*. The government nonetheless contends the Bank has not suffered a cognizable injury. Govt.Br.38-45.

As explained below, none of the government's objections to the Bank's allegations of injury from particular rules or the Bureau's UDAAP authority has merit. But the government also makes a more general mistake: it repeatedly suggests the Bank has asserted injury only from the Bank's forced exit from the market. Govt.Br.21, 38-41. In fact, the Bank has consistently alleged that the Bureau's authority over consumer mortgages has created substantial barriers that prevent the Bank from *reentering* that market to this day. Plfs.Br.10-11, 34-36, 40. Those barriers are an injury-in-fact that supports standing. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 260-61 (2003) (standing based on intent to apply to school after "defendants cease the use" of unlawful considerations); *Comm. for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315-16 (D.C. Cir. 1995) (inability to competitively reenter market under current rules is injury-in-fact).

1. *The Escrow Rule*

The government does not deny that the district court failed to address the Escrow Rule. Govt.Br.40-41. It instead criticizes the Bank for "suggest[ing] that it exited the mortgage market in 2010 because of fears that the Bureau might take [escrow] actions years later." Govt.Br.41. As the Bank has stated, however, the Escrow Rule imposes burdens that are *barriers to reentering* the mortgage market. Plfs.Br.37; JA212. The Bureau has acknowledged these costs and their ability to keep lenders out of the market. Plfs.Br.37 (quoting Escrow Rule).

Rather than engage the issue on its merits, the government attacks the Bank's reliance on the Escrow Rule as a "belated submission," observing that it was not advanced in the Bank's complaints. Govt.Br.40-41. But the Bank raised the Escrow Rule in *court-ordered briefing* less than three weeks after the Bureau first limited the rural-lender exemption on which the Bank had previously relied.[4]

[4] The Bureau initially designated Howard County, Texas (the county in which the Bank primarily operates) a "rural" county, exempting the Bank from the Escrow Rule's requirements. Plfs.Br.4-5; http://www.consumerfinance.gov/blog/final-list-of-rural-and-or-underserved-counties-for-use-in-2013/. On July 2, 2013, the Bureau revoked Howard County's rural status. http://www.consumerfinance.gov/blog/final-list-of-rural-and-underserved-counties-for-use-in-2014/.

JA212. Far from "belated," therefore, the Bank timely raised the argument at its first authorized opportunity. Yet neither the district court nor the government has provided any ground for concluding the rule's *admitted* costs do not support standing. Plfs.Br.36-37.

2. *The Ability-to-Repay Rule*

The government next argues that the Bank cannot rely on the Ability-to-Repay Rule, reiterating much of the district court's flawed reasoning.[5] Govt.Br.42-44. The government is mistaken.

First, although the government objects that the "nature of the Bank's concern about the Ability-to-Repay Rule is not entirely clear" (Govt.Br.42), there has never been ambiguity on this point: the rule injures the Bank because it "subjects higher-priced mortgages—which include mortgages the Bank previously offered (JA206 (¶ 10))—to a serious threat of litigation by third parties or the government." Plfs.Br.10; Govt.Br.14 (reciting district court's description of same injury).[6] In particular, the Bureau defined safe-harbor limits such that the Bank

[5] The government sensibly does not defend the district court's erroneous rulings that (1) the Ability-to-Repay Rule cannot be considered because it was issued after the original complaint; and (2) injury from the rule is not redressable because another agency might issue a similar rule. Plfs.Br.37-39 (describing errors).

[6] To recap the opening brief: the ability-to-pay statute provides that a lender that issues a "qualified mortgage" is presumed to have adequately assessed a borrower's ability to repay. 15 U.S.C. § 1639c(a)(1), (b). In interpreting the

could no longer offer some of the mortgages it currently holds without significant liability risk. 12 C.F.R. § 1026.43(b)(4); JA206 (¶ 10).

Second, the government wrongly deems "conclusory and implausible" the Bank's allegation that the costs and risks imposed by the Ability-to-Repay Rule prevent it from reentering the mortgage market. Govt.Br.44. The Bureau has conceded (and the government does not deny) that the threat of liability posed by its safe-harbor limitations can cause lenders to "stop making mortgage loans altogether" or to "change their business models to avoid it." Revised Ability-to-Repay Rule, 78 Fed. Reg. 35,430, 35,478-79 (June 12, 2013). Thus, there is nothing implausible about the allegation that the Ability-to-Repay Rule (1) is a barrier to reentering the market; (2) has affected the Bank's business; and (3) thereby has injured the Bank. Plfs.Br.41-42 (citing cases); *Comm. for Effective Cellular Rules*, 53 F.3d at 1316 (barrier to entry injury-in-fact).

Third, the government errs in asserting that reliance on the Ability-to-Repay Rule renders the Bank's claims unripe. The Bank has "specif[ied] which aspects of the regulation are problematic." Govt.Br.44. Furthermore, Private Plaintiffs have shown that the case is ripe even if the government is correct that the rule is "a

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statute, however, the Bureau defined this "qualified mortgage" safe harbor to extend only to loans with interest rates less than 3.5 percentage points over the Average Prime Offer Rate. It gave only a "rebuttable presumption" of compliance to higher-rate loans, making them subject to costly litigation. Plfs.Br.4 (quoting Ability-to-Repay Rule).

work in progress," (*id*.). Plfs.Br.39-40. Private Plaintiffs raise a facial constitutional challenge to Title X of the Dodd-Frank Act, not the rule. That challenge is purely legal and "presumptively reviewable," *Nat'l Ass'n of Home Builders*, 417 F.3d at 1282, and no further factual development is necessary to determine if the statute is constitutional, *Ass'n of Am. R.Rs.*, 721 F.3d at 672 n.6. The government offers no response to those authorities.

3. *The "UDAAP" Authority*

Finally, the government errs in asserting the Bank is not injured by the Bureau's UDAAP authority.

a. The government's primary contention is that the Bank lacks standing because it does not allege "a credible threat of prosecution" under the UDAAP provision or "that it intends to engage in" conduct prohibited by the provision.[7] Govt.Br.23. That is incorrect.

First, the government's claim that there is no "credible threat of prosecution" under the Bureau's UDAAP authority is belied by the record and the government's

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[7] Despite the government's focus on "threat of prosecution" (Govt.Br.23), courts routinely hold that regulated parties have standing to challenge objectionable regulatory regimes without showing such a risk. In those cases, a party has standing if it (1) is subject to the contested regime, and (2) claims it would behave differently but for that regime. *E.g.*, *Comm. for Effective Cellular Rules*, 53 F.3d at 1315-16; *see* Govt.Br.3 (suggesting Bank would have standing if it "face[d] imminent enforcement action *or* direct regulation by the Bureau" (emphasis added)).

brief. The Bureau made clear that "complaints about … mortgages," including "the origination of high-priced mortgages" (which the Bank used to offer), are an enforcement priority. JA43-44 (¶¶ 83, 91); Plfs.Br.43-44. Furthermore, as the government acknowledges (Govt.Br.39-40), the Bank expressed its UDAAP concerns to OCC officials, who provided the Bank no assurance that it could remain in the market without fear of enforcement. JA107-08 (¶ 29). That constitutes a "credible" threat of prosecution. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (credible threat when statute prohibited "dishonest, untruthful, and deceptive" actions and government "ha[d] not disavowed any intention of invoking" provisions).

That threat is not mitigated by what the government characterizes as the Bureau's "limited scope of … authority over [the Bank's] activities." Govt.Br.24-25. The government understates the Bureau's supervisory authority over small lenders. *Id*. Title X gives the Bureau authority to use its own "examiners on a sampling basis" to review small-lender activities and "assess [their] compliance" with the law. 12 U.S.C. § 5516(c)(1); Govt.Br.6 (acknowledging Bureau has some "supervisory authority" over small lenders). Furthermore, the Bureau has more than the passive authority "to receive a 'written response'" to its enforcement recommendations (Govt.Br.24); the law affirmatively *requires* the recipient of such a recommendation to "provide a written response to the Bureau" "not later than 60 days" after receipt. 12 U.S.C. § 5516(d)(2)(A), (B). As the government declared in less-modest days, the Bureau is the "single authority with accountability to *ensure* that Federal consumer financial law is 'comprehensive, fair, and vigorously enforced.'" JA99 (emphasis added; footnote omitted). That is enough for standing. Plfs.Br.36 n.2 (citing cases).

The government also claims the Bank failed to identify conduct in which it would engage but for the UDAAP prohibition. Govt.Br.23, 45. But the Bank specifically alleged that, before Title X, it offered high-priced mortgages and "character loans" (based not only on ability to repay but also on the borrower's past performance with the Bank) it believed were at risk of enforcement. JA45 (¶ 94), JA106 (¶¶ 24-25), JA108 (¶ 32). The Bureau's focus on mortgages—particularly higher-priced mortgages—puts those practices squarely in its UDAAP crosshairs.

Even if the Bank had failed to specify threatened conduct, moreover, that would be the direct result of the Bureau's refusal to define what is covered by the UDAAP prohibition, which places all of the Bank's mortgage practices at risk for enforcement. Given the possibility of significant daily fines for violating that prohibition, the Bank reasonably determined it could not economically remain in the market. That suffices for standing. Plfs.Br.35-36, 43-44 (citing cases); *see Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C. Cir. 1995) (standing where petitioner alleged it abstained from activity "for fear that [agency] will impose upon it a new forfeiture").

b. The government also seems to suggest that the Bank must be subject to an enforcement action before raising its constitutional claims, and absent such action, its alleged injury is "speculative and implausible." Govt.Br.44-45. The government does not cite any authority for these propositions, nor could it. A long line of cases hold that the threat of adverse government action, even if never exercised, "undoubtedly influence[s]" a regulated entity and creates injury. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264-65 & n.13 (1991). The Supreme Court recently reiterated that a "'substantial risk' that [a] harm will occur" is sufficient for standing. *Clapper*, 133 S. Ct. at 1150 n.5. And this Court regularly permits preenforcement suits in cases similar to this one. Plfs.Br.36 n.2, 41-44; *Ass'n of Am. R.Rs.*, 721 F.3d at 672 & n.6; *Sabre, Inc. v. DOT*, 429 F.3d 1113, 1119 (D.C. Cir. 2005).

II. THE BANK HAS STANDING TO CHALLENGE THE UNCONSTITUTIONAL "RECESS" APPOINTMENT

The government appears to agree that the district court's dismissal of the challenge to Mr. Cordray's "recess" appointment rests on the same grounds the court gave for holding the Bank lacked standing to challenge the Bureau. Plfs.Br.45; Govt.Br.12 n.4, 25 n.5 (addressing issue only in footnotes). For the reasons stated above and in the opening brief, the court erred in reaching those conclusions. In addition, the government's vague allegation of "justiciability problems" provides no basis for holding Private Plaintiffs lack standing to challenge that appointment. *See* Plfs.Br.45 n.3. Also, to the extent the unspecified "problems" do not constitute an Article III bar on the exercise of jurisdiction, such arguments have been waived. *Fletcher v. Reilly*, 433 F.3d 867, 875 (D.C. Cir. 2006); Fed. R. Civ. P. 12(h)(1).

III. THE BANK HAS STANDING TO CHALLENGE THE COUNCIL

Government action that exposes an entity to "intensified competition" or otherwise "alter[s] the competitive environment[]" supplies standing. *Shays v. FEC*, 414 F.3d 76, 86 (D.C. Cir. 2005). The government concedes as much, Govt.Br.46, but argues the Bank has failed to demonstrate that the Council's SIFI designations benefit competitors, rendering the Bank's claims "general" and "speculative," Govt.Br.47. That is incorrect.

A. To begin, the government claims the Bank lacks standing because the challenged statutes do not "authorize any additional action or inaction" by the Bank's competitors, but rather impose additional regulation. Govt.Br.46-47. This Court has adopted no such rule, as the government elsewhere concedes. The question is not the number of regulations governing competitors but whether the government affected the competitive environment. Govt.Br.46 (standing when agency action results in "increased competition"). Thus, in *Exxon Co. USA v.*

FERC, 182 F.3d 30 (D.C. Cir. 1999), the Court held petitioner had standing to challenge an agency order governing a heavily-regulated pipeline that the petitioner did not itself use but on which a competitor shipped oil, because the order impacted the pipeline in a way that allegedly subsidized the competitor. *Id.* at 43; Plfs.Br.46-47. Other cases are in accord. *E.g.*, *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620-21 (1971) (standing to challenge regulations governing competitors' participation in market); *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1497-99 (D.C. Cir. 1996) (standing to challenge regulations governing approval of competing generic drugs).

The government similarly errs in suggesting there is no standing when other regulatory burdens allegedly offset challenged government benefits. Govt.Br.53; *see* Plfs.Br.50 (citing cases); *Shays*, 414 F.3d at 94 (competitor standing where plaintiff could potentially benefit from regulation); *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004) (standing to challenge disputed regulations that might benefit petitioner).

B. Next, the government replicates the district court's errors by relying on decisions involving final agency action, not motions to dismiss, to argue the Bank has failed to "establish" a "concrete" injury and show an economic interest that "has been perceptibly damaged." Govt.Br. 47-48 (emphasis omitted); *compare* Govt.Br.48 *with* Plfs.Br.48. At this motion-to-dismiss stage, it is enough to allege that the Council's designations have forced the Bank into competition with subsidized competitors. Plfs.Br.46-48 (citing cases).

In any event, the government's assertion that the Bank failed to "provide[] a plausible basis for the Court to conclude" that Council designation benefits its competitors borders on the absurd. Govt.Br.49. Private Plaintiffs have pointed to myriad sources confirming the SIFI subsidy. Plfs.Br.48 & n.4.[8] In response to that overwhelming evidence, the government grasps at straws:

First, the government suggests the Bank's injury is speculative because investors "may" react to SIFI status in different ways. Govt.Br.49-50. The government cites no source for that assertion, and it ignores decisions from this Court holding that "plaintiffs claiming that regulatory changes have caused competitive injury" have standing, "even though the harm resulted most directly from independent purchasing decisions of third parties." *Tozzi v. HHS*, 271 F.3d 301, 308-09 (D.C. Cir. 2001) (quotations omitted); Plfs.Br.49-50 (citing cases).

Second, the government points to different interest rates GE Capital and the Bank offered on deposit accounts to suggest they are not competitors. Govt.Br.50. As explained, those differences reflect (among other factors) higher rates GE

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[8] That showing distinguishes this case from *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013). The Bank does not advance a "boundless theory of standing" (Govt.Br.48) but instead alleges—and produces evidence—that SIFI designation directly subsidizes the Bank's competitors in shared markets, Plfs.Br.50.

Capital must offer *in order to be competitive* with entities like the Bank that offer consumers less risky accounts that have Federal Deposit Insurance Corporation backing. Plfs.Br.49. The deposit rates, moreover, tell the Court nothing about competition in the separate consumer loan market, in which the Bank has also alleged it competes with GE Capital. Plfs.Br.49; *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 13 (D.C. Cir. 2006) (entities need only compete "in some minor way" and in "some of the same markets").

Third, the government argues the Bank's sources "speculate" that SIFI designation results in a subsidy because they "do not isolate the effects of designation by the Council." Govt.Br.50-51. More specifically, the government claims that too-big-to-fail status existed before the Dodd-Frank Act, so the subsidy cannot be attributed to the Council. Govt.Br.50-51. The Bank, however, has alleged—and its academic support confirms—that formal designation benefits named SIFIs above and beyond any existing, unofficial status.[9] That injury is traceable to Council designations. Plfs.Br.51 (citing cases).

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[9] *See, e.g.*, David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* 8-9 (2011) (SIFI designation "singles out a group of financial institutions for special treatment" and "put[s them] in their own separate category"; thus, "[b]ecause they are special," those institutions receive a "competitive advantage" and can borrow "more cheaply").

C. Finally, and contrary to the government's claims (Govt.Br.53), the Bank's injury is redressable by this Court.[10] Precluding the Council from designating additional SIFIs would prevent further distortion of the Bank's markets. Vacating past designations will eliminate the burden of competing against formally-designated entities, and stripping formal labels from competitors will stop their further accrual of reputational benefits. Plfs.Br.52 (citing cases).

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment should be reversed and the motion to dismiss denied.

[10] The government prudently offers no defense of the district court's incorrect ripeness ruling. Plfs.Br.52.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the Order of this Court dated December 20, 2013 (Doc. No. 1471629), because this brief contains 5,971 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2010 version of Microsoft Word in fourteen-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on this 12th day of May 2014, I filed the foregoing brief with the Court in hard copy and electronically. I further certify that on this 12th day of May 2014, I served the foregoing brief on all counsel of record through the Court's CM/ECF system.

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