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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NATIONAL COMMUNITY REINVESTMENT COALITION; CALIFORNIA REINVESTMENT COALITION,

Plaintiffs,

vs.

BRIAN P. BROOKS, Acting Director, Office of the Comptroller of the Currency, in his official capacity; OFFICE OF THE COMPTROLLER OF THE CURRENCY

Defendants.

Case No. 20-cv-04186-KAW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Hon. Kandis A. Westmore

November 5, 2020, 1:30 p.m.

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INTRODUCTION

Plaintiffs hereby oppose Defendants Office of the Comptroller of the Currency ("OCC") and Acting Comptroller of the Currency Brian P. Brooks' ("Defendants") motion to dismiss Plaintiffs' Complaint. ECF No. 25 ("Motion" or "Mot."). Plaintiffs respectfully ask the Court to deny Defendants' motion to dismiss in its entirety, or to defer decision until the administrative record is filed and the parties file cross-motions for summary judgment under Local Rule 16-5.

Plaintiffs challenge an arbitrary and capricious Final Rule, 85 Fed. Reg. 34,734 (June 5, 2020), that eviscerates protections against redlining and will decrease lending, investing, and services in LMI neighborhoods. Redlining systematically deprived low- and moderate-income ("LMI") communities and communities of color of capital for decades, with persistent negative effects on the ability of residents in those communities to build wealth. In 1977, Congress enacted the Community Reinvestment Act ("CRA") to address redlining and financial services discrimination by ensuring that banks provide credit and deposit services to their "entire communities," specifically including "low- and moderate-income neighborhoods." 12 U.S.C. §§ 2901(a)(1), 2903(a)(1). CRA exams and public input on bank performance help ensure that banks invest, lend, and provide other financial services to all the communities where they take in deposits, and particularly those that have the most difficulty accessing credit.

OCC's Final Rule guts the CRA's protections. Among other harmful changes, the Final Rule expands CRA-qualifying activities to include those with negligible benefits for LMI communities; alters assessment areas in ways that allow banks to avoid providing financial services to their entire communities; adds a ratio-based evaluation measure that privileges high-dollar projects at the expense of targeted lending and investments in LMI communities; and reduces transparency and public input into the CRA evaluation process. As explained by numerous commenters—including not only community organizations like Plaintiffs and their members, but also financial institutions and their trade associations—these changes will likely lead to disinvestment in the very communities the CRA was enacted to protect. The Final Rule declined to address significant comments, failed to explain many of the changes it adopted, and disregarded the text and purpose of the CRA. It therefore was arbitrary and capricious.

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The Final Rule was procedurally flawed as well. OCC rushed to issue the Final Rule only six weeks after the close of comments and in the middle of the COVID-19 pandemic, despite the fact that the majority of the thousands of comments were negative—and without the two other bank supervisory agencies, the Federal Deposit Insurance Corporation ("FDIC") and the Federal Reserve. The Final Rule made several significant changes that were not a logical outgrowth of the proposed rule, depriving affected entities of the opportunity to comment. And the rulemaking process was marred by attempts to stifle criticism, reflecting former Comptroller of the Currency Joseph Otting's longstanding aversion to the CRA and input from the communities it benefits. For all these reasons, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, the Final Rule must be held unlawful and set aside. *See* 5 U.S.C. § 706.

Defendants do not dispute that these allegations state claims for relief. Instead, they challenge only standing, ripeness, and the legal implications of select paragraphs in Plaintiffs' claims. At this early stage of the litigation, when Plaintiffs' allegations must be taken as true and Defendants have yet to share the full administrative record, Defendants' arguments in support of dismissal are unavailing. First, Defendants ignore significant portions of Plaintiffs' standing allegations and attack them based on misstatements of the law and disputed facts. Second, Plaintiffs' claims are ripe for judicial review, as banks may begin availing themselves of the new rules as soon as October 1, 2020. Third, Defendants' selective attack on three individual paragraphs of Plaintiffs' broader claims is impermissible under Rule 12(b)(6) and predicated on an unsupported and disputed view of the Final Rule's effect. In any event, these issues would be better decided on a motion for summary judgment supported by a full administrative record.

For these reasons, the Court should deny Defendants' Motion to Dismiss.

BACKGROUND

A. The Community Reinvestment Act

Congress passed the CRA in 1977 to address systemic discrimination in the provision of financial services to LMI neighborhoods and communities of color. ECF No. 1, Complaint ("Compl.") ¶ 2. In the decades prior to the CRA, systemic discrimination manifested in the practice of redlining, wherein "banks and savings and loans will take their deposits from a

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community and instead of reinvesting them in that community, they will actually or figuratively draw a redline on a map around the areas." Compl. ¶ 18 (citing Community Credit Needs: Hearings on S. 406 Before the S. Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 9, 123 Cong. Rec. 17630 (1977)); *see also id.* ¶¶ 15-17 & n.2 (further explaining practice of discriminatory redlining). Discrimination limited the flow of capital for homeownership and small businesses in LMI communities of color, and thereby denied residents and business owners in those neighborhoods opportunities for economic development. *Id.* ¶ 17.

To remedy the historic disinvestment in LMI neighborhoods and ensure the provision of capital to LMI neighborhoods, the CRA imposes on banks a "continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(a)(3). The CRA instructs the OCC, FDIC, and the Federal Reserve to evaluate CRA performance, with a given bank's charter dictating which agency assesses that bank. *Id.* § 2902(1). Specifically, OCC, FDIC, and the Federal Reserve "shall assess" a financial institution's "record of meeting the credit of its entire community, *including low- and moderate-income neighborhoods*." 12 U.S.C. §§ 2902(1)(A)-(C); 2903(a)(1) (emphasis added). These assessments must separately evaluate each metropolitan area in which a regulated bank maintains one or more branch office or deposit-taking facility (e.g., an ATM). *Id.* § 2906(b)(1)(B), (e)(1). The examining agencies must issue public reports assessing whether banks under their purview meet the CRA assessment criteria. *Id.* § 2906(b). Receipt of a low or failing grade can affect a bank's future applications for mergers or new branches. *Id.* § 2903(a)(2). The public and local governments also consider CRA ratings in determining which banks to patronize. *See* Compl. ¶ 36.

B. OCC, FDIC, and the Federal Reserve's Joint CRA Regulations

Consistent with the statute, OCC, FDIC, and the Federal Reserve have all—until now—acted in lockstep and jointly issued uniform, robust regulations consistent with CRA's text and purpose. Compl. ¶¶ 4, 26-28. In 1995, the agencies together issued a final rule after an extensive, multi-year rulemaking process designed "to emphasize performance rather than process, to promote consistency in evaluations, and to eliminate unnecessary burden." *Id.* ¶¶ 26-28 (citing 60 Fed. Reg. 22,158). FDIC and the Federal Reserve—because they refused to go along with the

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OCC's Final Rule—continue to evaluate banks under that regime. *Id.* ¶ 75. The three agencies also periodically issue interagency guidance on the CRA, including as recently as this year. *See id.* ¶ 75; *see also* 81 Fed Reg. 48,506, 48,506 (July 25, 2016) (summarizing prior joint guidance).

The CRA framework applied by FDIC and the Federal Reserve, and applied for decades by OCC prior to the enactment of the Final Rule, guides bank evaluations. Compl. ¶ 29. Evaluations begin with a determination of the community needs in the area where the bank does business, known as "performance context." *Id.* ¶ 33. The agencies then apply performance standards to evaluate each of the bank's assessment areas, with an assessment area typically being the community around a bank office, branch, and/or "deposit-taking ATMs." *Id.* ¶ 30; *see* 12 C.F.R. § 25.41.[1] Per statute, banks are evaluated in each assessment area to ensure that they meet the credit needs of the "entire community" that they serve. Compl. ¶ 30; *see* 12 U.S.C. § 2903(a)(1).

Principally, the agencies' joint performance standards rely on three criteria: the lending test, investment test, and service test. *Id.* ¶ 31.[2] The lending test evaluates the volume of a bank's mortgage, small business, small farm, community development, and some consumer lending activities, as well as the geographic distribution and income of borrowers. *Id.*; *see* C.F.R. § 25.22. The investment test evaluates a bank's community development activities by dollar amount, innovation, complexity, and responsiveness to community needs. Compl. ¶ 31; *see* C.F.R. § 25.23. The service test evaluates a bank's retail banking services, including financial education, the distribution of branches in LMI neighborhoods, and "the bank's record of opening and closing branches, particularly branches located in low- or moderate-income geographies or primarily serving low- or moderate-income individuals." C.F.R. § 25.24; *see* Compl. ¶ 31. Banks receive scores for each performance standard and an overall CRA rating. Compl. ¶ 34.

C. Plaintiffs' CRA-Related Missions and Programs

As discussed further *infra* Part II(A)(1), Plaintiffs NCRC and CRC are both nonprofit

[1] All citations to the Code of Federal Regulations are to the operative versions as of this date, republished January 1, 2020. As of October 1, 2020, they will be replaced by the Final Rule.

[2] The performance standards vary for smaller banks. For example, intermediate small banks are subject only to a lending test and a community development test. Compl. ¶ 32.

organizations focused on increasing financial investment in LMI communities, with CRC concentrated on California communities and NCRC working nationally. *Id.* ¶¶ 11-12. Both are membership associations, together comprising more than 900 community reinvestment organizations, community development financial institutions, minority- and women-owned business associations, and social service providers. *Id.* Plaintiffs and many of their members depend on CRA-qualifying grants and loans from OCC-regulated entities to provide lending, financial counseling, homeownership assistance, and other critical forms of investment in LMI communities. *Id.* ¶¶ 144-45, 156, 158. In addition, Plaintiffs expend substantial resources to negotiate with banks to obtain commitments to support the credit needs of LMI communities and communities of color, *id.* ¶¶ 138, 151; publish evidence-based reports developed from CRA data, *id.* ¶¶ 140, 147-48, 154, 160-61; and comment on banks' CRA performance and merger applications, *id.* ¶¶ 142, 154.

D. Proposal and Passage of the Final Rule

On September 8, 2018, OCC issued an Advance Notice of Proposed Rulemaking ("ANPR") on the CRA regulations. Compl. ¶¶ 38, 46 & Ex. D. NCRC and CRC, among many others, commented on the ANPR and cautioned that OCC's proposed approach would dilute benefits for LMI communities and diminish transparency. *Id.* ¶¶ 48-49.

Despite commenters' concerns, OCC and FDIC (but not the Federal Reserve) issued a Notice of Proposed Rulemaking ("NPR") in January 2020. *Id.* ¶ 51 & Ex. 2. This break from the existing unified framework prompted concern from the Federal Reserve Chair, Jerome Powell, that OCC's approach could "create confusion or … tension between the regimes," and the substance of the Proposed Rule led FDIC Director Martin J. Gruenberg to warn that it "would fundamentally undermine and weaken the Community Reinvestment Act." *Id.* ¶¶ 53, 56. In response to the NPR, Plaintiffs commented on the proposal's adverse effects on LMI communities and inconsistency with the CRA's statutory purpose, as did many of their members. *Id.* ¶ 58.

OCC received thousands of comments—the overwhelming majority of them negative—and numerous requests to extend the comment period due to the COVID-19 pandemic and assess whether the pandemic's impact on LMI communities affected OCC's analysis. *Id.* ¶¶ 61, 70-75.

Nevertheless, OCC released the Final Rule on May 20, 2020, only six weeks after the close of the comment period. *Id.* ¶ 61 & Ex. A. Both FDIC and the Federal Reserve declined to join the Final Rule. *Id.* ¶ 62.[3] In the Final Rule, OCC failed to meaningfully engage with, evaluate, and respond to significant concerns raised by thousands of comments, including from Plaintiffs. *See, e.g.*, *id.* ¶¶ 78, 82, 86-87, 89, 93, 95-97, 99, 105-06, 108, 114, 120, 121, 126, 131, 136. OCC instead largely adopted the approach it had chosen from the very beginning, *id.* ¶ 79—but with certain harmful changes on which the public had no opportunity to comment, *see, e.g.*, *id.* ¶¶ 90-91, 101, 107, 115.

Further, OCC failed to publish research it claimed supports issuance of the rule and data obtained in a request for information, and failed to provide any substantive records of calls Otting had with CEOs of 17 large banks. *Id.* ¶¶ 65-69. OCC also failed to address the changes to the economic landscape caused by COVID-19, let alone suspend its rulemaking to gather data about the economic impact of the global pandemic and its disproportionate effects on LMI communities. *Id.* ¶¶ 70-75. Otting resigned from OCC the day after the Final Rule was published. *Id.* ¶ 64.

E. The Final Rule's Impact on Plaintiffs and LMI Communities

1. The Final Rule Dilutes the CRA's Focus on LMI Communities

Several interrelated changes to the CRA framework in the Final Rule will materially reduce funding that previously flowed to LMI communities.

First, the Final Rule allows banks to claim credit for a wide array of activities that have negligible effects on LMI communities and funnel money away from those communities—the very neighborhoods the CRA was designed to protect. Compl. ¶¶ 82-96. For example, the Final Rule permits banks to claim credit for financing "essential infrastructure" and "essential community facilities." *Id.* ¶ 83; 85 Fed. Reg. at 34,794, 34,796. While infrastructure and other activities counted under the prior framework only if they "primarily benefit" LMI communities, the Final Rule now permits credit for these activities even where they only "partially" serve LMI communities. The Final Rule also broadened the range of essential infrastructure that can qualify

[3] On September 21, 2020, the Federal Reserve issued an Advance Notice of Proposed Rulemaking that bore little resemblance to OCC's Final Rule. *See* 85 Fed. Reg. ----, https://www.federalreserve.gov/aboutthefed/boardmeetings/files/cra-fr-notice-20200921.pdf.

to include, for example, bridges and even police stations. *Id.* ¶ 85. The Final Rule also allows banks to receive credit for any financial education efforts, regardless of whether the intended beneficiary is LMI, and for affordable housing not occupied by LMI individuals. *Id.* ¶¶ 87-88. Further, the Final Rule (in a change from the Proposed Rule) allows a bank to identify an area as a "CRA desert" and become eligible for a "multiplier" for any CRA activities in that area, with no opportunity for public comment or engagement on the bank's choice of CRA desert. *Id.* ¶ 90. It also increases the size of businesses that qualify for CRA-eligible small business loans, and the maximum size of the loans themselves. *Id.* ¶ 96. The net effect of these changes and others identified in the Complaint, *see id.* ¶¶ 92-96, is to reorient banks' CRA activities away from smaller and underserved communities in which they do business, particularly LMI communities.

Second, the Final Rule alters "assessment areas," the geographic areas around bank offices, branches, and deposit-taking ATMs where CRA examiners evaluate bank performance. *Id.* ¶¶ 97-108. Despite the statutory requirement that OCC evaluate all metropolitan areas where a bank maintains any "facility … that accepts deposits," 12 U.S.C. § 2906(b)(1)(B), (e)(1), the Final Rule included a last-minute change freeing banks from the requirement to designate assessment areas around deposit-taking ATMs. *Id.* ¶¶ 100-02. Additionally, despite the widespread adoption of Internet banking, OCC required banks to designate deposit-based assessment areas only if they received more than 50 percent of their domestic deposits from areas where they had no branches or ATMs, and even then only in geographic areas where they receive more than 5 percent of their retail deposits. *Id.* ¶¶ 103-04. Thus, even if a bank has a significant presence in a smaller city, if that bank maintains no branches there and is large enough that it does not take in more than 5 percent of its deposits in that area, the bank has no obligation to delineate an assessment area there and its CRA activities there (or lack thereof) will go unassessed. *Id.* ¶ 106. Further, in another last-minute change, OCC allowed banks to designate deposit-based assessment areas at the state level, rather than requiring evaluation of the specific communities where they obtained deposits, allowing banks to fulfill CRA obligations without lending a dime in smaller areas from which they received deposits and with LMI concentrations or that otherwise have been neglected. *Id.* ¶ 107. A 2017 Federal Reserve study showed that when CRA exams no longer assess a metropolitan area or

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county, lending in LMI census tracts declines by up to 20 percent. *Id.* ¶ 23. The Final Rule's assessment area changes make such declines likely on a large scale.

Third, the Final Rule replaces the CRA's focus on the needs of local communities with a presumptive, quantitative performance standard dominated by pass/fail ratios and thresholds. *Id.* ¶¶ 109-30. One component of the new performance standard for large banks is the "retail lending distribution test," which allows banks to succeed on a pass/fail basis based on peer or demographic comparators and is limited only to "major" lending product lines from the bank's perspective. *Id.* ¶ 113. The distribution test does not account for whether that line is major *to a particular LMI community*. *Id.* ¶¶ 114-15. The Final Rule also created a single ratio test, which OCC calls the "CRA evaluation measure," primarily composed of the dollar amount of CRA-qualifying activities divided by average deposits. *Id.* ¶ 117. As Federal Reserve Governor Lael Brainard has explained, that methodology creates significant problems for underserved communities: "an approach that combines all activity together runs the risk of encouraging some institutions to meet expectations primarily through a few large community development loans or investments rather than meeting local needs." *See* Gov. Lael Brainard, Federal Reserve, "Strengthening the Community Reinvestment Act by Staying True to Its Core Purpose" (Jan. 8, 2020) ("Brainard Speech") (cited at Compl. ¶¶ 54-55).[4] This approach is particularly concerning when paired with the Final Rule's allowance for high-dollar investments with "partial," negligible impact on LMI communities. Compl. ¶¶ 118, 120. Similarly, despite the importance of bank branches to lending and economic development in LMI communities, and their prominent status in the CRA, *see* 12 U.S.C. § 2906, the Final Rule did away with the service test, the main way that the previous regulations evaluated how banks serve communities' "need for credit services *as well as deposit services*," 12 U.S.C. § 2901(a)(2) (emphasis added). Instead, the Final Rule makes local branches barely one percent of banks' CRA score. Compl. ¶¶ 117, 121. Finally, the Final Rule allows banks to receive a "satisfactory" or "outstanding" rating even if, depending on the bank, it fails in 20 or *even 50 percent* of the areas in which the bank receives deposits. *Id.* ¶ 122.

[4] Available at: https://www.federalreserve.gov/newsevents/speech/brainard20200108a.htm.

The above changes—expanding CRA-qualifying activities in ways that dilute the focus on LMI communities, altering assessment areas to allow banks to go unexamined in areas where they have significant presences, and shifting the performance standard to focus on dollar value rather than impact—both individually and collectively enable banks to reduce their investments in LMI communities, yet still pass their CRA exams. In all of these ways, the Final Rule harms Plaintiffs and their members, whose operations rely on CRA-qualifying funding and other commitments from OCC-regulated banks. *See* Compl. ¶¶ 138-39, 144-45, 151, 156; *infra* Part II(A)(1).

2. The Final Rule Limits Public Input and Transparency

The Final Rule also reduces input from community groups and limits data available to the public and organizations like Plaintiffs that produce reports on CRA compliance. Compl. ¶¶ 56, 131-36. Specifically, the Final Rule eliminated the requirement that CRA examiners consider "any written comments *about the bank's CRA performance* submitted to the bank or the OCC." 12 C.F.R. § 25.21(b)(6) (emphasis added). Instead, the Final Rule requires examiners to consider only "written comments about assessment area needs and opportunities submitted to the bank or the OCC," removing opportunity for public input on bank performance. 85 Fed. Reg. at 34,803.

The Final Rule also no longer requires public dissemination of banks' small business and small lending ("SLBF") data at a county and census-tract level. *Id.* Nor does it require reporting of loan sizes by bank. *Compare* 12 C.F.R. § 25.42(b)(1), (h) *with* 85 Fed. Reg. at 34,807. This impairs NCRC's and CRC's ability to produce informed analyses of banks' CRA-qualifying activities. Compl. ¶¶ 140, 147-48. Under the Final Rule, it is no longer possible for Plaintiffs, their members, and the communities they serve to compare an individual bank's performance in a community against its peers under the OCC's data disclosures.

The Final Rule goes into effect October 1, 2020. 85 Fed. Reg. at 34,734, 34,784. All OCC-banks may avail themselves of the new CRA eligibility criteria for activities as of that date in preparing for their new exams, although banks with assets of $2.5 billion or less can request evaluation under the previous examination structure if they prefer it. *Id.*

F. Procedural Background

Plaintiffs filed their Complaint on June 25, 2020. On August 31, 2020, Defendants filed a

Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 25. On September 14, 2020, the Court declined to consolidate Defendants' motion with briefing on summary judgment, but indicated that it "may defer ruling on the motion to dismiss" if it finds that "the issues raised in the motion to dismiss are intertwined with the merits of the case." ECF No. 33 at 2.

I. LEGAL STANDARDS

A. 12(b)(1)

"To establish standing, a plaintiff must demonstrate (1) a concrete and particularized injury that is actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's challenged conduct; and (3) a likelihood that a favorable decision will redress that injury." *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 908 (9th Cir. 2020) (internal quotation marks omitted). "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted). Only one plaintiff needs to establish standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

Plaintiffs' burden varies with the stage of litigation. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice … ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). This burden is "not onerous." *NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1141 n.3 (D.C. Cir. 2011); *accord, e.g.*, *Core-Mark Int'l, Inc. v. Mont. Bd. of Livestock*, 701 F. App'x 568, 571 (9th Cir. 2017); *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1098 (D. Ariz. 2011) (citing *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010)).

While Defendants claim the Court need not presume Plaintiffs' allegations to be true, Mot. at 11, this is incorrect: "For purposes of ruling on a motion to dismiss for want of standing, both trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor off the complaining party." *Namisnak v. Uber Techs., Inc.*, 971 F.3d 1088, 1092 (9th Cir. 2020) (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir.

2011)). This is particularly so "[w]here jurisdiction is intertwined with the merits." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *see also Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) ("[W]here the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial."). Although the Court need not take as true "conclusory allegations which are contradicted by documents referred to in the complaint" or "legal conclusions," it otherwise must "assume the truth of the allegations in the complaint … unless controverted by undisputed facts in the record." *Warren*, 328 F.3d at 1139 (internal quotation marks and brackets omitted).[5]

B. 12(b)(6)

A motion to dismiss will be granted only if it appears that the plaintiff has not pleaded facts sufficient to show a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Federal Rule of Civil Procedure 8, a plaintiff is required to give a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a). The purpose of Rule 8(a) is to "give the defendant fair notice of what . . . the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 554 (internal quotations omitted). Although Defendants claim that the Court "need not presume the truthfulness of the plaintiffs' allegations," Mot. at 11 (quoting *White*, 227 F.3d at 1242), this is false: on a Rule 12(b)(6) motion, a court must "accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The court may dismiss a claim "only where there is no cognizable legal theory" or where there is an absence of "sufficient factual matter to state a facially plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

"A motion to dismiss under Rule 12(b)(6) cannot be directed to select portions of a claim."

[5] Defendants' misstatement of law is based on cases dealing with "factual" (as opposed to "facial") 12(b)(1) motions. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Defendants have not attempted to convert their motion to dismiss "into a factual motion by presenting affidavits or other evidence properly before the court." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Their challenge is thus a facial one.

United States ex rel. Begole v. Trenkle, No. 06-cv-1104, 2010 WL 11596170, at *11 n.3 (C.D. Cal. July 16, 2010); *see also Burrell v. City of Vallejo*, No. 19-cv-1898, 2020 WL 1532293, at *2 (E.D. Cal. Mar. 31, 2020) (a request "to dismiss specific subsections of a paragraph in a complaint, while not seeking to dismiss the entire claim[,] does little to challenge the legal sufficiency of the claim as required under Rule 12(b)(6)"). Where a party seeks to dismiss portions of a claim under Rule 12(b)(6), "a court may treat the improperly labeled motion to dismiss as a motion to strike" under Rule 12(f). *Hutchings v. Fed. Ins. Co.*, No. 08-cv-305, 2008 WL 4186994, at *2 (M.D. Fla. Sept. 8, 2008); *accord, e.g.*, *Edw. C. Levy Co. v. Int'l Union of Operating Eng'rs, Local 150, AFL-CIO*, No. 07-cv-153, 2007 WL 3046448, at *3 (N.D. Ind. Oct. 16, 2007). Rule 12(f) permits a court to strike "any redundant, immaterial, impertinent, or scandalous matter," but "does not authorize district courts to strike claims … on the ground that such claims are precluded as a matter of law." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010). "Motions to strike are generally disfavored and 'should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation.'" *Diamond S.J. Enter., Inc. v. City of San Jose*, 395 F. Supp. 3d 1202, 1216 (N.D. Cal. 2019) (quoting *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)).

II. ARGUMENT

Defendants' arguments are meritless, as Plaintiffs have plausibly alleged standing and ripe claims for relief. The Court should deny Defendants' motion in its entirety. In the alternative, because Defendants' arguments are inextricably intertwined with the merits of Plaintiffs' claims, the Court should defer ruling on Defendants' motion until Defendants have filed the administrative record and the parties have briefed summary judgment.

A. Plaintiffs Plausibly Allege Article III Standing

In their Complaint, NCRC and CRC set out at least four independent categories of injury that they and/or their members will likely suffer from the Final Rule: (1) they will face increased competition for CRA funding; (2) their mission-driven activities will become more expensive and they will need to divert more resources to certain activities; (3) they will lose information that they use in their regular activities; and (4) they will lose opportunities to comment on banks' CRA

evaluations. *See* Compl. ¶¶ 137-61.[6] Defendants neglect the first category of injury altogether, and oppose the others on the basis of incorrect legal standards, omission of allegations in the Complaint and changes in the Final Rule, and self-serving predictions about the consequences of the Final Rule. None of their arguments have merit.

1. Plaintiffs Plausibly Allege Threatened Injury

a. Plaintiffs Plausibly Allege Harm from Increased Competition

Under the doctrine of "competitor standing," "economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 950 (9th Cir. 2017) (quoting *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010)). A plaintiff need not show that it has actually or will certainly suffer a financial loss, because "the injury is the increase in competition rather than the ultimate denial of an application, the loss of sales, or the loss of a job." *Planned Parenthood of Greater Wash. & N. Ida. v. HHS*, 946 F.3d 1100, 1108 (9th Cir. 2020). Thus, "[a]n agency action that increases competition tilts the playing field for parties that were already competing, and those parties suffer an injury-in-fact." *Id.* This doctrine applies to plaintiffs that apply for grants, *e.g.*, *id.*, as well as plaintiffs who will need to vie with their new competitors in non-governmental markets, *e.g.*, *Int'l Bhd. of Teamsters*, 861 F.3d at 951.

Here, it is undisputed that the Final Rule will force NCRC, CRC, and their members "to compete with large-scale infrastructure and similar projects" when they seek funding for CRA activities from OCC-regulated banks. Compl. ¶ 153; *see also id.* ¶ 141. "The Final Rule expanded the range of activities for which banks could receive CRA credit, allowing them to obtain credit for infrastructure projects and similar activities whose benefits to LMI communities are attenuated and speculative at best, for providing financial education to upper-income individuals, for financing large corporate farms, and for financing housing that may be occupied by upper-income

[6] To be sure, Plaintiffs' and their members' interests in the appropriate implementation of the CRA go beyond these concrete interests; Plaintiffs and their members exist to reduce barriers to economic opportunity in disadvantaged communities, and their chief concern is for those communities' welfare. The injuries Plaintiffs focus on above are not necessarily the most significant, but merely the most clearly cognizable for standing purposes.

individuals." *Id.* ¶ 80(a); *see also id.* ¶¶ 83-89. For example, whereas the existing regulations define "[q]ualified investment" to mean "a lawful investment, deposit, membership share, or grant that has *as its primary purpose* community development," 12 C.F.R § 25.11(t) (emphasis added), the Final Rule allows credit for, among other things, "[e]ssential infrastructure that *partially or* primarily serves" LMI individuals, families, or areas, 85 Fed. Reg. at 34,796 (emphasis added). Defendants do not and could not dispute that the Final Rule will allow new competitors to compete for the pool of CRA funding on which Plaintiffs and their members rely.

As explained in the Complaint, NCRC, CRC, and their members all compete for OCC-regulated banks' CRA dollars. For example, NCRC's Housing Counseling Network comprises organizations that "often receive grants directly from banks to fund their services." Compl. ¶ 145. Similarly, "[m]any of [CRC's] member organizations receive direct grants from banks to fulfill their organizational missions to serve the economic development, financial, and credit needs of communities, as part of banks' CRA activities." *Id.* ¶ 158. *See also* Bynum Decl. ¶¶ 13-16; Morse Decl. ¶¶ 9-11; Dickerson Decl. ¶ 6; Hill Decl. ¶¶ 15-14; Beasley Decl. ¶ 10; Bruce Decl. ¶ 15 (all describing CRA-eligible funding received from banks).[7] And both NCRC and CRC, along with many of their members, "devote[] substantial resources to negotiating agreements with lenders to support the credit needs of LMI communities and communities of color." Compl. ¶ 138; *see also, e.g.*, *id.* ¶¶ 139, 151; Bynum Decl. ¶ 14; Morse Decl. ¶ 11; Hill Decl. ¶ 16. All of these core activities will now have to compete with investment opportunities that previously could not receive CRA credit. See Compl. ¶¶ 80, 83-89; *see also, e.g.*, Bynum Decl. ¶¶ 14, 17; Morse Decl. ¶¶ 12-17; Dickerson Decl. ¶¶ 8-9; Hill Decl. ¶ 17; Beasley Decl. ¶¶ 11-14; Bruce Decl. ¶¶ 11, 13 (all describing new competition and the effect it will likely have on Plaintiffs' members). Because the Final Rule "allow[s] increased competition against them," *Int'l Bhd. of Teamsters*, 861 F.3d at 950, Plaintiffs have standing on their own behalf and on behalf of their members to challenge it.

[7] As discussed further below, where a defendant disputes associational standing, plaintiffs may "provide[] declarations … in response to defendants' Rule 12(b)(1) motion to dismiss." *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1156 n.3 (9th Cir. 2019).

b. Plaintiffs Plausibly Allege Impairment of Their Ability to Provide Services

An organization may demonstrate standing "by showing that the challenged practices have perceptibly impaired their ability to provide the services they were formed to provide." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (internal quotation marks and brackets omitted). The organization must show that "independent of the litigation, the challenged policy frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways." *Id.* (internal quotation marks omitted). As with any injury, organizational injury can be "actual or threatened." *Coho Salmon v. Pac. Lumber Co.*, 61 F. Supp. 2d 1001, 1009 n.3 (N.D. Cal. 1999) (quoting *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)); *see also Spann*, 899 F.2d at 27 ("An organization has standing on its own behalf if it meets the same standing test that applies to individuals.").

As explained in the Complaint, "NCRC's mission is to help increase the flow of capital into underserved communities," and CRC's is "to aid low-income communities and communities of color throughout California in accessing affordable housing financing, community development funds, small business loans, mortgage loans, and bank services." Compl. ¶¶ 11-12. Among other core activities NCRC and CRC take to advance their missions, they "negotiat[e] agreements with lenders to increase lending to and investments in LMI communities"; "publish[] evidence-based reports to educate [their] members, policymakers, and the public about areas of need and ways to promote CRA investment"; "provide[] counseling to small business owners on how to secure loans and in some cases directly connect[] small business owners with lenders"; "help[] potential homeowners in LMI communities secure non-predatory mortgage loans"; and "assist[] immigrant families with obtaining access to small business loans and banking services." *Id.* ¶¶ 11-12, 144-45, 156. Their members undertake similar activities. *Id.* ¶¶ 158-59; Bynum Decl. ¶¶ 7-12; Morse Decl. ¶¶ 5-8; Dickerson ¶¶ 4-5; Hill Decl. ¶¶ 5-10; Beasley Decl. ¶¶ 4-9; Bruce Decl. ¶¶ 6-7, 15.

The Complaint plausibly alleges threatened impairment of these activities and "a consequent drain on resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 369 (1982). Most potently, the Final Rule gives banks ways to "fulfill CRA obligations through other means that are not focused on LMI communities" by broadening the range of activities that qualify for CRA

credit and devaluing evaluation measures that provide credit for the kinds of services Plaintiffs and their members provide. Compl. ¶ 141. Indeed, whereas banks were previously evaluated on their performance in all of their assessment areas, they can now "ignore entire LMI communities" without penalty. *Id.* As a result, the Final Rule "reduc[es] the incentives for banks to make small business loans" and other investments that Plaintiffs and their members were founded to facilitate, increasing the costs and decreasing the likelihood of obtaining those investments. *Id.* ¶ 144; *see also, e.g.*, *id.* ¶¶ 153, 157-59; Bynum Decl. ¶¶ 13-21; Morse Decl. ¶¶ 12-17; Dickerson Decl. ¶¶ 7-10; Hill Decl. ¶¶ 17-19; Beasley Decl. ¶¶ 11-15; Bruce Decl. ¶¶ 11, 13, 15.

The Final Rule harms Plaintiffs in other ways, as well. By restricting crucial lending information, the Final Rule will force Plaintiffs "to spend additional resources to undertake costly surveys or other means to approximate the data that is currently available." Compl. ¶ 149. The lack of this data and the decreased frequency of CRA evaluations will "mak[e] it far more difficult for NCRC to identify the communities most in need of CRA-qualifying investments," which will "increase[] the difficulty of and resources required for each effort NCRC undertakes, reducing the number of agreements NCRC can pursue" and otherwise impairing its efforts. *Id.* ¶ 140. And the severing of the previous unified framework among regulators will "multiply the resources NCRC spends to aggregate and compare data across banks [and] advise its members on the CRA requirements applicable to banks in members' service areas." *Id.* ¶ 146.

Defendants' attacks on this showing are based on either misstatements of law or factual disputes not fit for a Rule 12(b)(1) motion decided without the administrative record. They suggest that Plaintiffs must allege that they "have already diverted scarce resources," Mot. at 13, when in fact the test is whether the plaintiff has shown "actual *or threatened* injury." *United States v. City of Arcata*, 629 F.3d 986, 989 (9th Cir. 2010) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). "An allegation of future injury may suffice if … there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks omitted). The Final Rule's effective date is October 1, 2020, so of course the most problematic injuries will be future ones; but Plaintiffs need not wait until the effective date has arrived and their worst injuries have manifested to challenge a final promulgated

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rule. *See, e.g.*, *State of Ariz. v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398, 402 (9th Cir. 1981) (challenge ripe even though filed six months before statute's effective date).[8] Defendants' cases do not purport to unsettle the rule that plaintiffs may bring claims based on threatened injury; they merely explain that allegations of past diversion of resources suffice to establish standing. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039-42 (9th Cir. 2015); *Serv. Women's Action Network v. Mattis*, 352 F. Supp. 3d 977, 984-85 (N.D. Cal. 2018).

Defendants further argue that Plaintiffs' alleged injuries are not traceable to the Final Rule because they rely on the "independent business decisions of banks." Mot. at 18. But Defendants' principal case, *Lujan*, states in the very sentence Defendants quote that "standing is not precluded" in such cases. 504 U.S. at 562; *compare* Mot. at 18. Where plaintiffs plausibly allege "that third parties will likely react in predictable ways" to the challenged action, traceability is satisfied. *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2566 (2019); *see also, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (finding injury in fact from potential reduction in whale population where agency allowed third parties to hunt whales); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.) ("It is impossible to maintain[] … that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons."). The crucial question is not whether banks' actions are a link in "the chain of causation," but rather "the plausibility of the links that comprise the chain." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (internal quotation marks omitted).

On that front, Plaintiffs have plausibly alleged that banks will avail themselves of the opportunities Defendants created and shift their CRA activity toward more lucrative opportunities and away from the LMI-targeted investments on which Plaintiffs and their members focus. Defendants' argument to the contrary is based almost entirely on disputing Plaintiffs' allegations

[8] The Complaint did not discuss the resources Plaintiffs have *already* diverted to educating their members about the new regulations, researching and addressing members' questions, testifying before Congress about the Final Rule, submitting public comments, analyzing data and publishing reports about the changes, and otherwise devoting resources away from the other ways they serve their communities. Given the ample allegations regarding the injuries that the Final Rule threatens, such allegations are unnecessary. However, if the Court finds the Complaint wanting, Plaintiffs respectfully request leave to amend to add such backward-looking allegations. *See infra* Part II(F).

regarding the incentives created by the Final Rule and the risk that banks will take advantage of the Final Rule's more lucrative avenues to obtain CRA credit or the Final Rule's permission for banks to ignore many of their assessment areas. *See, e.g.*, Mot. at 19. Of course, this is not idle speculation by Plaintiffs; it was a common and urgent refrain in comments submitted and concerns voiced during the rulemaking process, including by members of the Federal Reserve and even banks themselves. *See* Compl. ¶¶ 57-60; *see also, e.g.*, Brainard Speech, *supra*; Comm'ty Dev. Bankers Ass'n, Comment Letter on Community Reinvestment Act Notice of Proposed Rulemaking (Apr. 1, 2020), https://beta.regulations.gov/comment/OCC-2018-0008-2412, at 14 ("For the largest banks, it will be a far easier financial decision to ignore many of their non-local Assessment Areas because there are no consequences.").

In any event, Defendants' claims as to the incentives created by the Final Rule are contrary to Plaintiffs' factual allegations, *see, e.g.*, Compl. ¶¶ 84-89, and should be resolved on the full administrative record. They are thus "intertwined with the merits." *Warren*, 328 F.3d at 1139. At this stage of the case, the Court must construe the Complaint's allegations about the likely effects of the Final Rule "in the light most favorable to the plaintiffs." *Id.* Defendants' attempt to argue their own view of the Final Rule's likely effects through a Rule 12(b)(1) motion is particularly inappropriate given their insistence that the Court proceed without the administrative record, which is necessary to evaluate whether Defendants' conclusions here and in the Final Rule are reasonable and consistent with a reasoned analysis of the commenters' concerns. *See* ECF No. 26.

Defendants' citations illustrate how far short their argument falls. In *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553, 560 (9th Cir. 2019), the plaintiffs assumed the agency would reissue a rule disapproved by Congress if the court invalidated the disapproval, but alleged "no facts raising a plausible inference" that the agency would do so. Here, the Complaint is replete with facts explaining why there is a reasonable probability that, beginning on October 1, banks will shift their CRA investments in the ways Defendants have allowed them to do. *Nuclear Information and Resource Service v. Nuclear Regulatory Commission*, 457 F.3d 941, 954 (9th Cir. 2006), is even less applicable, as the plaintiffs merely "speculate[d] that unregulated transportation of radioactive material in general—not this regulation in particular—may present unspecified

threats to their health." And in *La Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, the plaintiff failed to "assert *any* factual allegations regarding organizational standing in its complaint," attempting for the first time to establish standing at summary judgment. 624 F.3d 1083, 1088 (9th Cir. 2010) (emphasis added). By contrast, the Ninth Circuit found another plaintiff to have standing, apparently on the basis of a single sentence. *Id.* at 1089; *see also, e.g.*, *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (reversing dismissal because "general allegations" in complaint sufficed to allege plaintiff organization's injury).

Defendants go even further afield in arguing that "Plaintiffs fail to plead with specificity how exactly the Final Rule would actually result in *less* CRA activity addressing LMI communities' needs." Mot. at 19. As the Supreme Court has made clear, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal quotation marks and brackets omitted); *see also, e.g.*, *Cegavske*, 800 F.3d at 1040 ("[A] diversion-of-resources injury is sufficient to establish organizational standing at the pleading stage, even when it is 'broadly alleged.'" (quoting *Havens Realty*, 455 U.S. at 379)). Courts may not impose heightened pleading requirements where the Federal Rules do not. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). In any event, Plaintiffs' extensive allegations, discussed above, as to why the Final Rule harms them, and the comments and criticisms they incorporate, would clear any pleading standard.

c. Plaintiffs Plausibly Allege Harm from Lost Information

As part of the CRA evaluation process, agencies make public a substantial amount of information for use by organizations like Plaintiffs and their members. This primarily comes in two forms: the public section of written CRA evaluations, which must, inter alia, "discuss the facts and data supporting [the regulatory agency's] conclusions," 12 U.S.C. § 2906(b)(1)(A)(ii); and annual CRA Disclosure Statements that the OCC prepares based on data provided by the banks it supervises, 12 C.F.R. § 25.42(h). In issuing the Final Rule, the OCC eliminated significant portions of the information provided through these avenues, and arbitrarily rejected comments proposing alternatives that would have provided additional information. *See* Compl. ¶¶ 134, 136.

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Governmental action that impedes access to information can give rise to standing in either of two ways. First, where Congress has created a specific entitlement to information, as it did in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App'x 2, a plaintiff denied such information suffers injury in fact without needing to "allege any *additional* harm beyond the one Congress has identified." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Such injuries, consisting of the loss of information and nothing more, are known as "informational injuries." *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 867 (9th Cir. 2019). Second, where Congress has not created a specific entitlement to information but the government commits an alleged legal violation (such as a violation of the APA) that deprives a plaintiff of information, a plaintiff may sue if that deprivation causes a concrete and particularized injury, just as it can for any other type of violation. *See, e.g.*, *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (plaintiff can "ha[ve] standing even though it had no legal right to the … reports it sought"); *Nat'l Educ. Ass'n v. DeVos* ("*NEA*"), 345 F. Supp. 3d 1127, 1142 (N.D. Cal. 2018) ("[T]he deprivation of information to which plaintiffs have a regulatory right (as opposed to a statutory right) can constitute an injury in fact for the purposes of standing."). In these cases, the plaintiff cannot take advantage of the specialized, streamlined showing allowed in informational injury cases, but rather must make a full showing of some other injury in fact satisfying the traditional standing requirements.

Plaintiffs' injuries fall squarely within the latter category. The information that the Final Rule took away—such as OCC "delet[ing] its previous requirement that banks' small business and farm data be publicly disseminated at a county level and for income categories of census tracts," Compl. ¶ 136—is crucial to a number of their activities. For example, NCRC uses this SLBF data and other data the Final Rule eliminated "to prepare reports for members on mortgage lending, business lending, and branch locations in relevant census tracts, comparing data by income and race and visually mapping where a given bank's loans are going." *Id.* ¶ 147. NCRC's members, in turn, "use these evidence-based reports to understand a given bank's current CRA-qualifying activities in LMI communities, which informs members' discussions with banks about community

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credit needs and strengthens its own negotiations with banks for agreements to increase their CRA investments or lending or institute new programs or products." *Id.* ¶ 148; *see also id.* ¶¶ 140, 143, 152, 161 (identifying other ways Plaintiffs use the data). Because "the Final Rule will combine, or aggregate, all small business lending in a county[,] NCRC will no longer be able to analyze a specific bank's performance at the county level, let alone for income categories of census tracts as is currently possible." *Id.* ¶ 149. This will deprive NCRC of "information about a specific bank necessary for discussions and negotiations" and force it "to spend additional resources to undertake costly surveys or other means to approximate the data." *Id.*; *see also supra* Part II(A)(1)(b).

As numerous courts have held, such allegations establish injury. *See, e.g.*, *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094-95 (D.C. Cir. 2015) (finding standing where agency "deprived [plaintiff] of key information that it relies on to educate the public"); *Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986) (finding standing where denied information would "enhance [plaintiffs'] capacity … to refer members to appropriate services and to counsel members"); *Nat'l Women's Law Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66, 79 (D.D.C. 2019) (finding standing where stayed rule "would have made [plaintiff's] reports and advocacy more robust because they would have additional data and analysis," "enabled [plaintiff] to focus its efforts where intervention was most urgent," and reduced the costs of obtaining data for "efforts to enforce and redress workplace discrimination"); *NEA*, 345 F. Supp. 3d at 1147 (finding standing where plaintiffs "allege that they would review the Disclosures in deciding whether to apply or continue in their courses").

Defendants offer three arguments to dispute the sufficiency of Plaintiffs' allegations. First, Defendants argue that a claim involving the deprivation of information can *only* be brought where the information is specifically required by statute. Mot. at 16. That argument conflates the special category of "informational injury" applicable under FOIA, FACA, and similar statutes with the more general test applicable in cases such as this one. Defendants' own caselaw illustrates this mistake: in *Wilderness Society, Inc. v. Rey*, 622 F.3d 1252 (9th Cir. 2010), the Ninth Circuit held that the statute at issue did not provide a right to information comparable to FOIA—and then held

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not that standing was impossible, but merely that "[a] concrete and particular project must be connected to the procedural loss." *Id.* at 1258-59; *see also NEA*, 345 F. Supp. 3d at 1144 ("The Department intimates that the Ninth Circuit held in *Wilderness Society* … that only a statutory right to information can give rise to standing. Not so.").[9] Defendants similarly cite a D.C. Circuit case in which the plaintiff relied solely on the loss of information without alleging any concrete consequential harm, *see Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016), ignoring the D.C. Circuit's subsequent confirmation that a plaintiff can "ha[ve] standing even though it had no legal right to the … reports it sought," *Am. Anti-Vivisection Soc'y*, 946 F.3d at 619.[10]

Second, Defendants argue that Judge Beeler's decision in *NEA*, which squarely holds that a plaintiff has standing when a regulatory change deprives it of information that it would use for a concrete purpose, 345 F. Supp. 3d at 1146, is inapplicable because the Final Rule superseded the previous rule, under which Plaintiffs were entitled to the information. Mot. at 17. Defendants' argument appears to be that the mere act of changing a rule deprives affected entities of the right to challenge the change. To state that proposition is to refute it. If OCC had not issued the Final Rule, Plaintiffs would have been entitled to this information; because of the Final Rule, they are not. Defendants' argument would thwart the purpose of judicial review, preventing suit against agency actions whose effect is to take away a preexisting legal right.

Finally, Defendants insist that "the Final Rule actually increases transparency" because it increases the size of businesses and farms for which lending can receive CRA credit and thus "more loans" will be included in the aggregate SLBF data. Mot. at 17. To the contrary, this change may *reduce* the number of loans reported if banks make fewer, larger loans under the new cap. *See* Compl. ¶ 96. But more importantly, Defendants do not and cannot deny that they are eliminating county- and tract-level data, or that the loss of that information impedes Plaintiffs' activities. *See supra* p. 9. Defendants' self-serving and unexplained contention that aggregated data can take the

[9] Defendants also cite *Animal Legal Defense Fund*, which was a FOIA case that did not purport to speak to cases outside that context. *See* 935 F.3d at 869-70.

[10] Because no preexisting legal right is necessary, the arbitrary and capricious rejection of comments urging additional data requirements similarly provides standing. But the Court need not rely on that harm, given the plain injury caused by the weakening of the previous requirements.

place of county- and tract-level data is simply an attempt to contradict the allegations of the Complaint, despite the Court's obligation to "assume the truth of the allegations in the complaint … unless controverted by undisputed facts in the record." *Warren*, 328 F.3d at 1139. In any event, Defendants' argument is plainly "intertwined with the merits," *id.*, as to the effect of the Final Rule and whether it was arbitrary and capricious, and has no place in a motion to dismiss.

d. Plaintiffs Plausibly Allege Harm from Lost Opportunities to Comment

The Final Rule also deprives Plaintiffs of a right provided under the previous implementing regulations: the right to have CRA examiners consider "any written comments about the bank's CRA performance submitted to the bank or the OCC" when assessing a bank's CRA compliance. 12 C.F.R. § 25.21(b)(6); *see* Compl. ¶ 132. Without a reasoned explanation, OCC narrowed this right, requiring OCC to consider only "written comments about assessment area needs and opportunities submitted to the bank or the OCC." 85 Fed. Reg. at 34,803; *see* Compl. ¶ 132. This "directly frustrates CRC's CRA-related activities," as commenting on banks' CRA performance is a key tool CRC uses to "hold[] banks accountable to their CRA obligations in the communities that CRC and its members serve." Compl. ¶ 155.

Where an agency action denies entities "the ability to file comments," plaintiffs suffer cognizable injury if they can allege that their concrete interests are injured without that opportunity. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also, e.g.*, *Calif. v. Azar*, 911 F.3d 558, 571-72 (9th Cir. 2018). That is the case here: the guaranteed ability to comment on bank CRA performance and thus bring banks' poor performance to the attention of regulators provides Plaintiffs and their members with significant negotiating leverage in their efforts to convince banks to commit to increasing CRA funds in LMI communities and communities that have historically faced barriers to accessing such funds. Compl. ¶ 151.

Defendants respond with a non sequitur, arguing that this injury is "wholly speculative because the role of performance context is different under the two frameworks." Mot. at 15. As an initial matter, the Final Rule's use of performance context is flawed. *See* Compl. ¶¶ 127-30. More importantly for these purposes, it is irrelevant to the denial of an existing procedural guarantee that Plaintiffs use to advance their mission. Defendants also quote the Final Rule to suggest that

"public comments are still considered 'prior to the issuance of CRA ratings,'" Mot. at 15 (quoting 85 Fed. Reg. at 34,775), but the passage they quote referred only to "public comments about local needs and opportunities," 85 Fed. Reg. at 34,775. The passage pointedly does not state that OCC will consider comments "about the bank's CRA performance," as current regulations require, 12 C.F.R. § 25.21(b)(6), and the implication that it rebuts Plaintiffs' concern is misleading.

2. Plaintiffs May Bring Claims on Their Members' Behalf

Although the Court need not reach the issue because Plaintiffs amply allege organizational standing, Defendants' two general arguments against associational standing also fail.

First, they assert Plaintiffs were obligated to "name a *specific* member in the Complaint," and "particularize an injury with respect to [an] identified member" in the Complaint. Mot. at 15. But the Ninth Circuit has expressly stated that it is "not convinced" that "an injured member of an organization must always be specifically identified in order to establish Article III standing for the organization." *Cegavske*, 800 F.3d at 1041. Defendants' principal case involved the standard at summary judgment, and said nothing at all about motions to dismiss. *See Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194-95 (9th Cir. 2013).

In any event, the Ninth Circuit has made clear that plaintiffs can appropriately assert standing on their members' behalf by "assert[ing] representational standing in the [complaint] and provid[ing] declarations … in response to defendants' Rule 12(b)(1) motion to dismiss." *Am. Diabetes Ass'n*, 938 F.3d at 1156 n.3 (rejecting argument that plaintiffs were required to identify members in complaint). Together with this Opposition, Plaintiffs submit declarations from a sample of their hundreds of members explaining how the Final Rule concretely threatens their interests. This satisfies any requirement that individual members be identified.

Second, Defendants repeat their arguments regarding injury in fact and traceability. *See* Mot. at 16.[11] For the reasons discussed above, these arguments are without merit. They are particularly misplaced as to Plaintiffs' members who receive grants or other funding from banks

[11] Defendants also assert without explanation that Plaintiffs lack associational standing because their injuries are not redressable. *See* Mot. at 16. A "conclusory one-sentence argument" need not be considered. *Global Horizons, Inc. v. U.S. Dep't of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007).

for which the banks can receive CRA credit. *See supra* Part II(A)(1)(a)-(b) (citing declarations). Their injuries could hardly be clearer: under the Final Rule, they will face more competition for the funding that is their lifeblood, a classic case for competitor standing. *See supra* Part II(A)(1). Accordingly, NCRC and CRC may proceed both on their own behalf and their members'.

B. Plaintiffs Plausibly Allege Prudential Standing

Like their constitutional arguments, Defendants' prudential standing argument has no basis in the law. The zone of interests test "is not meant to be especially demanding," and allows courts to reject a plaintiff with Article III standing only if its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Plaintiffs "need only show that [their] interests share a 'plausible relationship' to the policies underlying each statute." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 861 (9th Cir. 2005). Courts must construe the relevant statute's "substantive provisions liberally" and ask only whether plaintiffs' interests "fall within the 'general policy' of the underlying statute." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004) (quoting *Graham v. FEMA*, 149 F.3d 997, 1004 (9th Cir. 1998)). "[T]he benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Plaintiffs' and their members' interests clearly meet the "lenient zone of interests test." *Ocean Advocates*, 402 F.3d at 861. The CRA's purpose is to "encourage [financial] institutions to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(b). Plaintiffs' mission is to "help increase the flow of capital into underserved communities," Compl. ¶ 11, "an objective that matches the aim of the [CRA]," *Ocean Advocates*, 402 F.3d at 861. *See also, e.g.*, 12 U.S.C. § 2903(a)(1). Indeed, Plaintiffs and their members receive funds for which banks obtain CRA credit, making them direct beneficiaries of the statute. *See* Compl. ¶¶ 145, 158; *supra* p. 14 (citing declarations); *see also, e.g.*, *Graham*, 149 F.3d at 1004 (individuals who receive emergency relief from states within Stafford Act's zone of interests, even though not directly regulated). And their members are, in many cases, part of the very communities the CRA serves. *See, e.g.*, Beasley Decl. ¶ 4; Bruce Decl. ¶¶ 3, 12.

Defendants' zone of interests argument relies on a proposition that their own authorities reject. They assert that it is "fatal to Plaintiffs' claims" that the CRA does not specifically "provide advocacy organizations, such as Plaintiffs, a role in supporting the purpose of CRA." Mot. at 23. As already explained, Plaintiffs and their members are not mere "advocacy organizations," but rather the recipients of CRA funding and the means by which communities use that funding. Even if that were not so, *Clarke* holds—in the sentence immediately following the one Defendants quote—that "there need be no indication of congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400. Neither of Defendants' other authorities are to the contrary. *East Bay Sanctuary Covenant* merely explained the circumstances that placed the plaintiffs there within the relevant zone of interests, 932 F.3d at 768-69, and *City and County of San Francisco v. U.S. Citizenship and Immigration Services*, 408 F. Supp. 3d 1057, 1117-18 (N.D. Cal. 2019), involved plaintiffs who did not even attempt to connect the statutory provisions to their mission.

Finally, Defendants argue that Plaintiffs' interests conflict with the statute's "implicit … flexibility" because Plaintiffs challenge OCC's decision to abandon the unified regime that it shared with the Federal Reserve and the FDIC. Mot. at 24. This mischaracterizes Plaintiffs' argument. Plaintiffs do not assert that OCC *could not* deviate from the other regulators—only that it did so arbitrarily and capriciously. *See, e.g.*, Compl. ¶ 165. Whatever implicit purpose Congress had to grant the CRA agencies flexibility, it did not intend them to exercise their power arbitrarily and without reasoned explanation. Plaintiffs' interest in not having the OCC fracture the regulatory regime without complying with the APA is fully consistent with Congress's design.[12]

C. Plaintiffs' Claims Are Ripe for Review

Like standing, ripeness has both constitutional and prudential components. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000). "The constitutional

[12] Defendants note that the Office of Thrift Supervision ("OTS"), at the time one of the agencies implementing CRA, deviated from the other regulators in 2004. Mot. at 25. What they fail to mention is that OTS began to reconsider that decision just two years later because "[c]onsistent standards will allow the public to make more effective comparisons of bank and thrift CRA performance." 72 Fed. Reg. 13,429, 13433 (Mar. 22, 2007). The comment that Defendants quote, *see* Mot. at 25, was *rejected* by OTS, for reasons that resemble some of Plaintiffs' concerns here.

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component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." *Id.* at 1138. Allegations that a threat to a "concrete interest is actual and imminent" suffice to allege "an injury in fact that meets the requirements of constitutional ripeness." *Bishop Paiute Tribe v. Inyo Cnty*, 863 F.3d 1144, 1154 (9th Cir. 2017).

As explained above, the Final Rule threatens the concrete interests of Plaintiffs and their members. *See supra* Part II(A)(1). This threat is actual and imminent because the Final Rule goes into effect on October 1, 2020, at which point banks will be able to claim CRA credit for the newly eligible activities. *See* 85 Fed. Reg. at 34,384, 34,784. Defendants focus on the fact that they issued the Final Rule without determining crucial benchmarks, Mot. at 21-22, but this is a red herring: the increased competition Plaintiffs and their members face, the substantial threat to their resources, the deprivation of data, and the loss of opportunities to comment all begin immediately.

The remaining ripeness component is "prudential, rather than jurisdictional." *Verizon Calif. Inc. v. Peevey*, 413 F.3d 1069, 1075 (9th Cir. 2005). The Supreme Court has cast doubt on the "continuing vitality" of the prudential ripeness doctrine. *Susan B. Anthony List*, 573 U.S. at 167. As a result, the Ninth Circuit considers prudential ripeness "disfavored" and in tension with "the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Fowler v. Guerin*, 899 F.3d 1112, 1116 (9th Cir. 2018). Courts in this district have declined to reach prudential ripeness when constitutional ripeness is satisfied. *See State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031 (N.D. Cal. 2018).

If the Court does consider prudential ripeness, it must consider two factors: fitness for review and the hardship to the parties of postponing review. *Verizon Calif.*, 413 F.3d at 1075; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Defendants do not even acknowledge these factors, presumably because both factors support judicial review of Plaintiffs' claims.

First, "challenges to a governmental agency's actions are ripe for review if the issues presented are purely legal, and the challenged action is final." *Duffy v. Riveland*, 98 F.3d 447, 452-53 (9th Cir. 1996). Taking the latter prong first, there can be no dispute that the Final Rule is final agency action. *See Safer Chems., Healthy Families v. EPA*, 943 F.3d 397, 417 (9th Cir. 2019)

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("Formally promulgated rules are the bread and butter of final agency actions."). Similarly, it is well settled that APA challenges to a rule present purely legal issues. *See, e.g.*, *Ctr. for Bio. Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009) ("[W]hether an agency action is arbitrary and capricious is a legal question that would not benefit from further factual development."). Moreover, because "plaintiffs challenge the . . . regulations on their face based on the administrative record as it existed when the regulations were adopted[,] … further factual development would be of little or no assistance." *Id.*

The second prudential ripeness factor, hardship, comes into play only if a "court has doubts about the fitness of the issue for judicial resolution." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006) (internal quotation marks and alterations omitted); *see Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) ("As Plaintiffs' claims are fit for review now, we do not reach the second factor of the prudential ripeness inquiry—hardship to the parties in delaying review."). If the Court reaches the hardship factor, it must assess whether "withholding review would result in direct and immediate hardship [to the parties] and would entail more than possible financial loss." *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 530 (N.D. Cal. 2017) (quoting *Winter v. Cal. Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989)) (internal quotation marks omitted). When "decisions to be made now or in the short future may be affected" by a challenged regulation, delayed review qualifies as a "palpable and considerable hardship." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983) (quoting *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1975)). This analysis "dovetails, in part, with the constitutional consideration of injury." *Thomas*, 220 F.3d at 1142.

As detailed above, Plaintiffs' Complaint alleges significant harm to Plaintiffs and their members, and any delay in judicial review will result in further hardship to them. *See supra* Part II(A)(1); Compl. ¶¶ 137-61. Defendants' contention that "any hardship asserted by Plaintiffs is premised on banks' compliance with the Final Rule," and banks are not "required to comply with the general performance standards until 2023," Mot. at 22, is once again a red herring, as banks may begin to avail themselves of the newly eligible opportunities as of October 1. *See supra* p. 27.

D. Plaintiffs Allege Facts Sufficient to State Claims for Relief

Defendants do not dispute that both counts of the Complaint state claims for which relief can be granted. They do not deny that Plaintiffs' central claims—that the Final Rule was arbitrary and capricious (Count One) and procedurally improper (Count Two)—are plausibly alleged; indeed, they hardly acknowledge those claims at all. Instead, they challenge certain language in three paragraphs in the first count of the Complaint. *See* Mot. at 25-33 (discussing Compl. ¶¶ 166, 168, 169). This attack can be rejected on its face, because "[a] motion to dismiss under Rule 12(b)(6) cannot be directed to select portions of a claim." *Begole*, 2010 WL 11596170, at *11 n.3.

To the extent Defendants' arguments are cognizable at all, it is as a motion to strike under Rule 12(f). *See Hutchings*, 2008 WL 4186994, at *2; *Edw. C. Levy*, 2007 WL 3046448, at *3. But Defendants do not and cannot allege that the paragraphs they discuss are "redundant, immaterial, impertinent, or scandalous," Fed. R. Civ. P. 12(f), and therefore the Court has no authority to strike them. *See Whittlestone*, 618 F.3d at 974 (Rule 12(f) "does not authorize district courts to strike claims … on the ground that such claims are precluded as a matter of law"). Accordingly, Defendants' arguments regarding the merits of Plaintiffs' claims are not cognizable.

Additionally, the paragraphs that Defendants seek to strike are relevant to Plaintiffs' core arbitrary and capricious claim. *See, e.g.*, Compl. ¶ 169 (alleging that the Final Rule's adverse effect on LMI communities makes it both "contrary to law" and "arbitrary and capricious"). Even if there were some dismissable defect in the theories Defendants challenge, the same allegations would remain in the case as part of Plaintiffs' chief claim. They therefore cannot be stricken because "clearly could have … possible bearing on the subject of the litigation." *Diamond S.J. Enter.*, 395 F. Supp. 3d at 1216 (quoting *Platte Anchor Bolt*, 352 F. Supp. 2d at 1057).

Moreover, Defendants ask the Court to "make a ruling on the merits of [Plaintiffs'] APA claim" without "consideration of the full administrative record." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 721 (9th Cir. 2011). These arguments are more appropriately considered on summary judgment after filing of the administrative record. *See, e.g.*, *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) ("Summary judgment … serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and

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otherwise consistent with the APA standard of review.").

If the Court does consider the substance of Defendants' merits arguments, it should reject them. Plaintiffs allege more than enough facts to state a claim that the Final Rule is "not in accordance with law," 5 U.S.C. § 706(2)(A); is "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C); and was the product of "an unalterably closed mind," *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1467 (9th Cir. 1987). Defendants' arguments ignore the relevant text of the CRA and the specific allegations in Plaintiffs' Complaint.

1. Plaintiffs Properly Allege That the Final Rule Is Contrary to the CRA

As part of Count One, Plaintiffs allege that the Final Rule contradicts a number of CRA provisions, including the requirements that OCC "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods," 12 U.S.C. § 2903(a)(1), and separately evaluate "each metropolitan area in which a regulated depository institution maintains one or more domestic branch offices," including any "facility … that accepts deposits," *id.* § 2906(b)(1)(B), (e)(1); *see* Compl. ¶ 166. Plaintiffs also allege that the Final Rule contravenes the CRA's "affirmative obligation [on banks] to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(a)(3); *see* Compl. ¶ 166.

The Complaint alleges in detail provisions of the Final Rule that contravene these statutory mandates. Instead of evaluating banks' performance in their entire communities, as Defendants admit, OCC will assign ratings to banks "based on performance in a portion of assessment areas." Mot. at 26. Indeed, the Final Rule permits some banks to achieve an "outstanding" rating even if they fail in 50 percent of their assessment areas. Compl. ¶¶ 122, 166; *see* 85 Fed. Reg. at 34,801. The Final Rule also eliminates the requirement that banks be evaluated in assessment areas based around deposit-taking ATMs, despite the statute's explicit inclusion of those areas. Compl. ¶¶ 100-02. It sets unjustifiably high thresholds for when a bank will be assessed on communities whose deposits it takes without maintaining a physical presence, and allows them to obtain credit for investments hundreds of miles from those communities. *Id.* ¶¶ 103-07.

Similarly, Plaintiffs allege that the Final Rule's general performance standard, combined with the other changes described above, "rewards large investments and allows banks to do far

less for LMI communities and still get a passing grade." Compl. ¶ 166; *see also id.* ¶¶ 118-21. This allows banks to receive "outstanding" evaluations while ignoring LMI communities, violating the CRA's central purpose of ensuring that banks "meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(a)(3).

These allegations are far from "naked assertions devoid of further factual enhancement" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 5556 U.S. 662, 678 (2009). Nonetheless, Defendants seek their dismissal, based on cherry-picking isolated portions of the Final Rule that retain *some* attention to LMI communities and their own self-serving predictions about the effects of the Final Rule. *See, e.g.*, Mot. at 29-32. This sort of factual dispute is inappropriate on a motion to dismiss—and particularly so here, where the Court does not have the benefit of the administrative record to shed light on how the Final Rule's provisions comport with the evidence before the agency and are likely to operate in practice.

Defendants also set up a strawman by arguing that Plaintiffs assert that the CRA prohibits regulators from using ratios. *See* Mot. at 27. This is a mischaracterization of Plaintiffs' claim. Plaintiffs do not allege or imply that use of any ratio *per se* violates the CRA. Rather, Plaintiffs contend that the *specific* measure OCC adopted does not ensure that banks meet the credit needs of LMI communities, thereby violating the CRA. *See* Compl. ¶¶ 120, 166. Defendants similarly dispute Plaintiffs' use of legislative history, Mot. at 27-29, but that misses the point: the Complaint's discussion of the ratio that Congress rejected when it passed CRA serves to substantiate Plaintiffs' concern that such a metric could lead CRA evaluations astray from their statutory purpose, not to suggest a blanket prohibition on ratios. *See, e.g.*, Compl. ¶¶ 119, 166.

2. Plaintiffs Properly Allege That Otting Had an Unalterably Closed Mind

Lastly, Plaintiffs allege that OCC's Final Rule should be vacated because then-Comptroller Otting had "an unalterably closed mind on matters critical to the disposition of the proceeding." *Alaska Factory Trawler Ass'n*, 831 F.2d at 1467; *see* Compl. ¶¶ 39-44, 46, 48-50, 168. Such a bias makes a rule arbitrary and capricious, and "is no different from prohibiting comments altogether." *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008). A rule should be

set aside if the evidence proves that decisionmakers were "never open to suggestions from members of" an affected group. *Habeas Corpus Res. Ctr. v. U.S. Dep't. of Justice*, No. 08-cv-2649, 2009 WL 185423, at *9 (N.D. Cal. Jan. 20, 2009); *see also Nehemiah*, 546 F. Supp. 2d at 847 (claim sufficiently pleaded where HUD Secretary "allegedly stated that HUD would approve the new rule even in the face of critical comments").

As the Complaint explains, Otting expressly stated that he had "very strong viewpoints" about the role of community groups in the CRA process, based on his personal experience facing criticism from CRC and others about the poor CRA compliance of a bank that he ran. Compl. ¶¶ 39-42. As a result, he "won't tolerate groups . . . disrupt[ing] the process and affect[ing] [OCC's] decisions." *Id*. ¶ 43. During the rulemaking, Otting's deputy tried to silence dissenting commenters, demanding that CRC stop criticizing OCC's proposal. *Id.* ¶¶ 48-50. This reflects a mind so unalterably closed to divergent points of view that it tried to prevent them from seeing the light of day. Otting then rushed to publish the rule only six weeks after the close of comments, in the middle of a global pandemic wreaking economic havoc on LMI communities, and despite FDIC abandoning the rulemaking. *Id.* ¶¶ 70-75. And, in line with Otting's personal views, the Final Rule stripped community groups of the right to comment on banks' performance. None of Defendants' cases concern allegations about an official's actions *during* the rulemaking. Here, Otting's actions demonstrate a consistent and unrelenting drive to approve the new rule "even in the face of critical comments." *Jackson*, 546 F. Supp. 2d at 847. Plaintiffs thus adequately allege an unalterably closed mind claim. In any event, Otting's views are relevant to understanding how and why the agency adopted the Final Rule, and thus to Plaintiffs' arbitrary and capricious claim. At a minimum, the Court should defer ruling until receiving the full administrative record to determine whether it contains further evidence of Otting's predetermined conclusion.

E. Defendants' Arguments Are Intertwined with the Merits

As the foregoing discussion makes clear, Defendants' arguments are inextricably intertwined with the merits of Plaintiffs' claims. Their standing arguments depend heavily on contestable assertions about the effects of the Final Rule that directly contradict the allegations in the Complaint and the evidence presented by numerous commenters in the administrative record.

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See, e.g., Mot. at 14 (asserting that it is "mischaracterization" to say "that the Final Rule will incentivize high-dollar activities"). Similarly, their Rule 12(b)(6) arguments (to the extent that they are cognizable at all) rely largely on the supposition that the Final Rule will not have the effects of which Plaintiffs and other commenters warned. *See, e.g.*, Mot. at 30 ("On the contrary, the Final Rule will *better* address redlining and disinvestment … .").

These arguments should be rejected for all the reasons explained above. But if there is any doubt, decision should be deferred until Defendants file the administrative record and the parties brief summary judgment. "[W]here the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine*, 704 F.2d at 1077. The soundness of Defendants' characterizations overlaps heavily with the question of whether the Final Rule was arbitrary and capricious, and cannot be evaluated without the administrative record. Thus, if the Court is not prepared to deny Defendants' motion, it should "defer ruling on the motion to dismiss." ECF No. 33, at 2.

F. If the Court Grants Defendants' Motion, It Should Do So Without Prejudice

Without elaboration, Defendants request dismissal "without leave to amend." Mot. at 1. This invites reversible error. "It is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile." *Cegavske*, 800 F.3d at 1041. Defendants have not even attempted to show that amendment would be futile. Therefore, if the Court concludes that any portion of Defendants' arguments require dismissal in whole or in part, Plaintiffs should be given an opportunity to amend.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to deny Defendants' Motion to Dismiss in its entirety. Alternatively, the Court should defer decision until the administrative record is filed and the parties file cross-motions for summary judgment. Should the Court grant Defendants' motion in whole or in part, such dismissal should be without prejudice.

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