AMERICAN FINANCIAL SERVICES ASSOCIATION
LAW COMMITTEE
PERSONAL LOAN COMMITTEE
REPORT ON RECENT DEVELOPMENTS
OCTOBER 20 – 22, 2019

1. Case Law Update (Tab 1)

a. CFPB Constitutionality

i. *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 923 F.3d 680, 682 (9th Cir . 2019)

<u>CFPB Brief:</u> *Petitioner contends (Pet. 18-25) that the structure of the Bureau, including the for-cause restriction on the removal of its single director, violates the Constitution's separation of powers. The United States previously informed this Court that it has also concluded the statutory restriction on the President's authority to remove the Director violates the Constitution's separation of powers, and that the question would warrant this Court's review in an appropriate case. See Gov't Br. in Opp., State Nat'l Bank of Big Spring v. Mnuchin (No. 18-307).*[1] ***The Director of the Bureau has since reached the same conclusion. This case presents a suitable vehicle for the Court's review of the question. The government thus agrees with petitioner that certiorari is warranted.*** (emphasis added).

Briefing also filed by the U.S. House of Representatives, a group of thirteen states with Republican Governors (TX, AR, GA, IN, KS, LA, NE, OK, SC, TN, UT, and WV), U.S. Chamber of Commerce, Southeastern Legal Foundation et. al., and others.

ii. *CFPB v. All American Check Cashing Inc. et. al., No. 3:16-cv-356-WHB-JCG* (S.D. Miss., May 11, 2016) – Petition for a Writ of Certiorari Before Judgement filed on September 30, 2019.

2. Payday Rule (Tab 2)

a. Status update on *Community Financial Services Association of America v. CFPB*, W.D. Tex., No. 18-cv-295

[1] *State National Bank of Big Spring v. Munchin, et al.*, No. 18-307 (U.S., *certiorari denied* 01/14/19) - *"Petitioner contends that the structure of the Bureau, including the for-cause removal restriction on its single director, violates the constitutional separation of powers. That question is important, and it warrants this Court's review in an appropriate case. This case, however, would be a poor vehicle for considering the constitutionality of the Bureau's structure because it is unlikely that the question would be considered by the full Court in this case and, even if it were, there is a substantial jurisdictional question that could prevent the Court from reaching the merits of this dispute. Further review of this case is therefore unwarranted."*

b. Letter from U.S. Senator Sherrod Brown to CFPB Director Kraninger requesting implementation of the Payment Provisions of the Rule.

3. **Safeguards Rule (Tab 3)**
   a. AFSA Comment Letter
      https://bit.ly/2VFDgrp

4. **Consumer Bankruptcy Report (Tab 4)**

   The American Bankruptcy Institute (the "ABI") conducted a two-and-a-half year study of the consumer bankruptcy system, following which they generated a Final Report containing recommendations on 48 discrete issues intended to improve the consumer bankruptcy system. https://s3.amazonaws.com/abi-consumercommission/final_report/FinalReportABICommissionOnConsumerBankruptcy.pdf

5. **Fed Real Time Payments (Tab 5)**

   The Board of Governors of the Federal Reserve System (the "Board") issued their Proposed Rule to Support Interbank Settlement of Faster Payments (the "Payments Rule" or the "Proposed Rule") on August 2, 2019 to aid in the development of a real time payments system within the United States. The Payments Rule outlines the Board's intention to develop a system that will facilitate the 24 hour a day, 7 day a week, 365 day a year processing in real time of the gross settlement of funds transfers via a new service to be called the FedNow Service, and expanding the availability of the existing Fedwire Funds Service and National Settlement Service to permit the same 24 hour a day, day a week, 365 days a year availability.
   https://www.federalreserve.gov/newsevents/pressreleases/other20190805a.htm
   https://www.federalreserve.gov/newsevents/pressreleases/files/other20190805a1.pdf

6. **State Exam Trends**
   a. Renewed focus on ancillary products?

7. **Payday Advance Products (Tab 7)**
   a. Earnin
      https://www.earnin.com/
      https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1908061

8. **Update on ADA Website Litigation (Tab 8)**
   a. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019) – Cert. Denied by the Supreme Court on October 7, 2019.
   b. *Haynes v. Dunkin' Donuts LLC, 741 F. App'x 752, 754(11th Cir. 2018)*
   c. *Gil v. Winn-Dixie Stores, Inc., 257 F.Supp.3d 1340 (S.D. Fla. June 12, 2017) –* Now on appeal before the 11th Circuit.

9. NCUA PALS II Rule (Tab 9)

- Allows a federal credit union to offer a PALs II loan for any amount up to $2,000;
- Requires PALs II loans to have a minimum term of one month with a maximum of 12 months;
- Allows a federal credit union to make a PALs II loan immediately upon the borrower's establishing membership; and
- Restricts a federal credit union to offering only one type of PALs loan to a member at any given time.

  All other requirements of the existing payday alternative loan program—a prohibition against rollovers, a limitation on the number of loans a single borrower can take in a given period, and full amortization—remain in effect.

https://www.ncua.gov/files/agenda-items/AG20190919Item4b.pdf

No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARY MCLEOD
General Counsel
JOHN R. COLEMAN
Deputy General Counsel
STEVEN Y. BRESSLER
Assistant General Counsel
Consumer Financial Protection Bureau
Washington, DC 20552

QUESTION PRESENTED

Whether 12 U.S.C. 5491(c)(3) violates the separation of powers by prohibiting the President from removing the Director of the Consumer Financial Protection Bureau except for "inefficiency, neglect of duty, or malfeasance in office."

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Consumer Financial Protection Bureau v. *Seila Law, LLC*, No. 17-cv-1081 (Aug. 25, 2017)

United States Court of Appeals (9th Cir.):

Consumer Financial Protection Bureau v. *Seila Law LLC*, No. 17-56324 (May 6, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 19-7

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 923 F.3d 680. The order of the district court (Pet. App. 9a-23a) is not published in the Federal Supplement but is available at 2017 WL 6536586.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2019. The petition for a writ of certiorari was filed on June 28, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376. The legislation provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No.

176, 111th Cong., 2d Sess. 2 (2010). Its overarching purpose was to "promote the financial stability of the United States" through the establishment of measures designed to improve accountability, resiliency, and transparency in the financial system. *Ibid.* As relevant here, the Act established the Consumer Financial Protection Bureau (Bureau) to ensure "that all consumers have access to markets for consumer financial products and services and that markets for [such] products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a).

a. The Dodd-Frank Act prohibits any "covered person"—generally an entity or person involved in "offering or providing a consumer financial product or service"—or any "service provider" from "engag[ing] in any unfair, deceptive, or abusive act or practice." 12 U.S.C. 5481(6)(A), 5536(a)(1)(B). The Act then authorizes the Bureau to issue regulations identifying such acts or practices and to take enforcement actions against "covered person[s]" and "service provider[s]" to prevent them from engaging in such acts or practices. 12 U.S.C. 5531(a)-(b). The Act also transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies, including the authority to prescribe regulations implementing the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Truth in Lending Act, and the Real Estate Settlement Procedures Act. 12 U.S.C. 5481(12) and (14), 5581. The laws administered by the Bureau are referred to collectively as "[f]ederal consumer financial law." 12 U.S.C. 5481(14).

The Bureau has authority to conduct investigations, initiate administrative adjudications, issue subpoenas, and sue in court. 12 U.S.C. 5562-5564. Before the Bureau institutes an enforcement proceeding, it may also issue a civil investigative demand (CID) to any person whom the Bureau has reason to believe "may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation" of federal consumer financial law. 12 U.S.C. 5562(c)(1). A person served with such a demand must provide the Bureau with the documentary material, tangible things, reports, written answers, or testimony that the demand requests. 12 U.S.C. 5562(c)(1)(A)-(E). If the person objects to all or part of the demand, he or she may petition the Bureau for an order modifying or setting it aside. 12 U.S.C. 5562(f)(1). And although the Bureau's CIDs are not self-enforcing, if the person refuses to comply, the Bureau may petition a district court to enforce the demand. 12 U.S.C. 5562(e)(1).

b. The Dodd-Frank Act established the Bureau as an "independent bureau" within the Federal Reserve System. 12 U.S.C. 5491(a). The Bureau is headed by a single Director, who is appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1)-(2). The only qualification required for the Director is that he or she be a United States citizen. 12 U.S.C. 5491(b)(3). The Director serves for a term of five years, although he or she may continue serving as Director "until a successor has been appointed and qualified." 12 U.S.C. 5491(c)(1)-(2). The President may not remove the Director except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

The Bureau's operations are largely funded from the combined earnings of the Federal Reserve System. Each quarter, the Board of Governors of the Federal Reserve is required to transfer "the amount determined by the

Director [of the Bureau] to be reasonably necessary to carry out the authorities of the Bureau," up to a set percentage of the Federal Reserve System's total 2009 operating expenses. 12 U.S.C. 5497(a)(1); see 12 U.S.C. 5497(a)(2)(A)-(B) (establishing a cap of 12% to be adjusted annually by any increase in the employment cost index). The Director may also request additional funds from Congress if necessary to carry out the authorities of the Bureau. See 12 U.S.C. 5497(e).

2. a. Petitioner is a law firm that provides "debt-relief services" to its clients. Pet. App. 1a. The Bureau issued a CID to petitioner, requesting written answers to interrogatories and the production of documents to aid the Bureau's investigation into whether debt-relief providers and others were "engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products." *Id.* at 10a (citation omitted). Petitioner asked the Bureau to modify or set aside the demand, which the Bureau's Director denied. *Ibid.* Petitioner responded to the demand, but the Bureau considered the response inadequate because it "improperly asserted general objections, failed to provide a privilege log for claims of attorney-client and attorney work product privilege, raise[d] untimely claims of privilege, withheld relevant documents based on assertions of 'confidentiality,' and otherwise provided incomplete or deficient responses." *Id.* at 10a-11a (citation omitted). After petitioner confirmed that it would not modify its response to comply with the Bureau's requests, the Bureau filed a petition to enforce the demand in district court. *Id.* at 11a.

The district court granted the petition to enforce in part. Pet. App. 9a-23a. As relevant here, the court rejected petitioner's claim that the Bureau's Director was unconstitutionally insulated from Presidential control because he could only be removed for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. 5491(c)(3). Pet. App. 12a-14a. It concluded that petitioner's challenge was governed by *Morrison* v. *Olson*, 487 U.S. 654 (1988), and that the restrictions on the Director's removal did not interfere "with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." Pet. App. 12a-13a (citation omitted). It further concluded that, even if the removal restriction unconstitutionally encroached upon Executive authority in some contexts, "the proper remedy would not be to refuse to enforce the CID." *Id.* at 13a-14a. It reasoned that "Congress unquestionably wields the subpoena power," and therefore the Bureau could at least lawfully execute that authority. *Id.* at 14a. The court largely rejected petitioner's statutory challenges to the CID, with the exception of one modification limiting the demand's request for information and documents concerning "services" and "other services" to mean the "advertising, marketing or sale of debt relief services or products." *Id.* at 23a; see *id.* at 14a-23a.

b. The court of appeals affirmed. Pet. App. 1a-8a. The court observed that the arguments for and against the constitutional challenge to the Director's removal restriction "have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc)." *Id.* at 2a. The court saw "no need to re-plow the same ground here" and instead only "explain[ed] in brief why [it] agree[d] with the conclusion reached by the *PHH Corp.* majority." *Ibid.*

The court of appeals acknowledged that "[t]he Director exercises substantial executive power similar to the power exercised by heads of Executive Branch departments," and that petitioner's challenge to the constitutionality of the statutory restriction on removing the Director "is not without force." Pet. App. 3a. But it concluded that the restriction was permissible under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Morrison*, *supra*. Pet. App. 3a. The court explained that the Director "is subject to the same for-cause removal restriction" that applied to the members of the Federal Trade Commission (FTC) in *Humphrey's Executor*, and that the Bureau and the FTC both "exercise[] quasi-legislative and quasi-judicial powers," such that the agencies may "discharge[] those responsibilities independently of the President's will." *Id.* at 4a.

The court of appeals found irrelevant any differences between the FTC and the Bureau. Pet. App. 4a-5a. It reasoned that, although the Bureau "possesses substantially more executive power than the FTC did back in 1935," the Court in *Morrison* upheld "a for-cause removal restriction for an official exercising one of the most significant forms of executive authority: the power to investigate and prosecute criminal wrongdoing." *Id.* at 5a. And while "[s]ome have found * * * dispositive" the fact that the Bureau is headed by a single head, instead of a multi-member commission, the court of appeals expressed the view that "the Supreme Court's decision in *Humphrey's Executor* did not appear to turn on" that fact. *Ibid.* And it concluded that *Morrison* "seems to preclude drawing a constitutional distinction between multi-member and single-individual leadership structures." *Id.* at 5a-6a.

The court of appeals also rejected petitioner's statutory objections to the CID. Pet. App. 6a-8a. It therefore affirmed the district court's order directing petitioner to comply with the demand. *Id.* at 8a. The court of appeals subsequently stayed the mandate for a 90-day period and, if petitioner sought certiorari, "until final disposition by the Supreme Court." C.A. Doc. 49 (June 18, 2019).

DISCUSSION

Petitioner contends (Pet. 18-25) that the structure of the Bureau, including the for-cause restriction on the removal of its single director, violates the Constitution's separation of powers. The United States previously informed this Court that it has also concluded the statutory restriction on the President's authority to remove the Director violates the Constitution's separation of powers, and that the question would warrant this Court's review in an appropriate case. See Gov't Br. in Opp., *State Nat'l Bank of Big Spring* v. *Mnuchin* (No. 18-307). The Director of the Bureau has since reached the same conclusion. This case presents a suitable vehicle for the Court's review of the question. The government thus agrees with petitioner that certiorari is warranted.

1. a. Article II of the Constitution provides that "[t]he executive Power shall be vested" in the President, § 1, Cl. 1, and that he shall "take Care that the Laws be faithfully executed," *id.* § 3. "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of Madison)). Just as the President's ability to "select[] * * * administrative officers is essential" to

the exercise of "his executive power," *Myers* v. *United States,* 272 U.S. 52, 117 (1926); see U.S. Const. Art. II, § 2, Cl. 2, so too is his ability to "remov[e] those for whom he can not continue to be responsible," *Myers*, 272 U.S. at 117; see *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (citation omitted).

"Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary." *Free Enterprise Fund,* 561 U.S. at 483. Indeed, the First Congress extensively debated the President's removal authority when creating the Department of Foreign Affairs (which later became the Department of State). "The view that 'prevailed' * * * was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not 'expressly taken away, it remained with the President.'" *Id.* at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *reprinted in* 16 *Documentary History of the First Federal Congress of the United States of America* 893 (Charlene Bangs Bickford et al. eds., 2004)). This view "soon became the 'settled and well understood construction of the Constitution.'" *Ibid.* (quoting *Ex parte Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839)).

This Court affirmed that established understanding in *Myers* and held that the President's executive power necessarily includes "the exclusive power of removal." 272 U.S. at 122. "[T]o hold otherwise," the Court explained, "would make it impossible for the President * * * to take care that the laws be faithfully executed."

Id. at 164. And the Court has recently reaffirmed that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enterprise Fund,* 561 U.S. at 513-514. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting *The Federalist No. 70,* at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

b. The Court has recognized only one limited exception to the President's authority under Article II to remove principal officers of the United States. See *Free Enterprise Fund*, 561 U.S. at 495.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court recognized a narrow exception to the general rule in upholding a provision establishing that FTC commissioners could be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620 (quoting 15 U.S.C. 41 (1934)). The Court's conclusion "depend[ed] upon the character of the office"—namely, that, in the Court's view at the time, the FTC commissioners were not "purely executive officers," *id.* at 631-632, because they "act[ed] in part quasi-legislatively and in part quasi-judicially," *id.* at 628. In particular, the Court understood the FTC to act as a continuing deliberative body, composed of several members with staggered terms to maintain institutional expertise and promote a measure of stability that would not be immediately undermined by political vicissitudes. See *id.* at 624-625, 628. The FTC was "called upon to exercise the trained judgment of a body of experts" and was "so arranged that the membership would not be subject to complete change at any one time." *Id.* at 624. Indeed, the direct relationship perceived between those structural features and the restriction on the President's removal power was underscored by the fact that they all were enacted in the same statutory section. See 15 U.S.C. 41 (1934) (quoted in *Humphrey's Executor,* 295 U.S. at 620).

Humphrey's Executor has been understood to authorize similar removal restrictions as applied to other multi-member commissions with features and functions similar to those of the FTC. See, *e.g.*, *Wiener* v. *United States,* 357 U.S. 349, 355-356 (1958) (holding that "[t]he philosophy of *Humphrey's Executor*" precludes at-will removal of members of the War Claims Commission, a three-member body that was charged with adjudicating war-related compensation claims); see also *Morrison* v. *Olson,* 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting) ("[R]emoval restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission, which engage substantially in what has been called the 'quasi-legislative activity' of rulemaking.") (citations omitted).[1]

---

[1] This Court also has upheld removal restrictions for at least some "purely executive" *inferior* officers. See *Morrison,* 487 U.S. at 689; cf. Pet. App. 5a-6a. But the sole basis for *Humphrey's Executor*'s exception for *principal* officers was the "'quasi-legislative and quasi-judicial'" nature of FTC Commissioners. See *Free Enterprise Fund,* 561 U.S. at 493-495 (explaining that *Humphrey's Executor* concerned Congress's authority to "confer[] good-cause tenure on the principal officers of certain independent agencies" while *Morrison* concerned "the status of inferior officers") (citation omitted).

As then-Judge Kavanaugh noted in his dissent in *PHH Corp.* v. *Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), "the multi-member structure of [such] independent agencies is not an accident." *Id.* at 186. Rather, it has been generally recognized that a removal restriction is concomitant of—indeed, "*inextricably bound together*" with—a continuing deliberative body. *Ibid.* (quoting Robert E. Cushman, *The Independent Regulatory Commissions* 188 (1941)). As an extensive study of independent agencies conducted in 1977 by the Senate Committee on Governmental Affairs concluded, "[t]he size of the commission, the length of [its members'] terms, and the fact that they do not all lapse at one time are key elements of the independent structure." Senate Comm. on Governmental Affairs, *Study on Federal Regulation, Volume V, Regulatory Organization*, S. Doc. No. 91, 95th Cong., 2d Sess. 35 (1977); see *id.* at 79 (concluding that the "[c]hief" consideration in determining whether to create an independent commission, rather than an executive agency, "is the relative importance to be attached to group decision-making").

c. A single-headed agency lacks the critical structural attributes that were thought to justify "independent" status for the multi-member commission in *Humphrey's Executor*.

First, a multi-member commission with staggered-term memberships is established as a "quasi-legislative" or "quasi-judicial" "body of experts" that is supposed to operate in an interactive and deliberative manner, and is "so arranged that the membership would not be subject to complete change at any one time." *Humphrey's Executor*, 295 U.S. at 624, 628. Restricting the President's power to remove the members of such commissions was thought to facilitate deliberative group decisionmaking and promote an inherent institutional continuity. An agency headed by a single officer, however, has none of those attributes.

To the contrary, a single-headed agency embodies a quintessentially executive structure. See *Clinton* v. *Jones,* 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (describing how the Founders "consciously decid[ed] to vest Executive authority in one person rather than several," in contrast with their vesting of legislative and judicial powers in multi-member bodies). It has long been recognized that "[d]ecision, activity, secre[c]y, and d[i]spatch will generally characterise the proceedings of one man in a much more eminent degree, than the proceedings of a greater number." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1414, at 283 (1833). The Constitution specifies the official who must exercise that sort of executive power: the President, acting either personally or through subordinate officers who are accountable to him and whose actions he can control. See *Printz* v. *United States*, 521 U.S. 898, 922 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.").

The attributes animating the exception in *Humphrey's Executor* thus are absent when Congress carves off a portion of quintessentially executive power and vests it in a single principal officer not removable at the President's will. And because the *rationale* for the *Humphrey's Executor* exception does not apply, even the same level of intrusion into the President's exercise of executive authority approved in *Humphrey's Executor* cannot be justified when imposed by a single-headed agency like the Bureau. See 295 U.S. at 632 (disclaiming any conclusion on the permissibility of applying removal restriction to any office other than ones "such as that here involved").

Second, a single-headed independent agency presents a greater risk than a multi-member independent commission of taking actions or adopting policies inconsistent with the President's executive policy. Unlike a multi-headed commission, which generally must engage in at least some degree of deliberation and collaboration, a single Director can decisively implement his own views and exercise discretion without those structural constraints. As noted, it is for such reasons that the Framers adopted a strong, unitary Executive—headed by the President—rather than a weak, divided one. Vesting such power in a single person not answerable to the President represents a stark departure from the Constitution's framework.

That difference in decisionmaking is reinforced by the difference in the timing and composition of appointments to the two types of agencies. For a multi-headed commission with staggered terms, the President is generally assured to have an opportunity to appoint at least some of its members, and the bipartisan-membership requirement that is common for such commissions further increases the likelihood that at least some of the holdover members share the President's views. By contrast, the statutory term of a single agency head may insulate that officer from Presidential control for a significant portion of the President's term in office. And where a single agency head has a term greater than four years, a President may never have the opportunity to appoint that officer. Cf. 12 U.S.C. 5491(c)(1) (Bureau's Director to serve a five-year term). An agency over which the President lacks control of both back-end removal and front-end appointment represents a further departure from the constitutional design.

To be sure, the frequency with which the threat of departures from the President's executive policy materializes will depend on the particular circumstances, but the "added" risk of such departures "makes a difference." *Free Enterprise Fund,* 561 U.S. at 495. In *Morrison*, the interference with executive power was found to be mitigated because it applied only to an inferior officer with "limited jurisdiction and tenure" and the lack of any "policymaking or significant administrative authority." 487 U.S. at 691. And a multi-member structure, like that of the FTC in *Humphrey's Executor*, may afford the President the opportunity to appoint at least some members, and facilitate deliberation and interaction among its members. Here, however, the interference with executive power caused by the removal restriction on the Bureau's Director is exacerbated by both the Bureau's single-headed nature and its wide-ranging policy making and enforcement authority over private conduct.

Third, unlike multi-member independent commissions, a single-headed independent agency like the Bureau is a relatively novel innovation. See *PHH Corp.*, 881 F.3d at 173-176 (Kavanaugh, J., dissenting). In the separation-of-powers context, "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enterprise Fund*, 561 U.S. at 505 (citation omitted); see *NLRB* v. *Noel Canning,* 134 S. Ct. 2550, 2559 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President.") (quoting *The Pocket Veto Case,* 279 U.S. 655, 689 (1929)). In *Free Enterprise Fund,* for instance, the Court declined to extend *Humphrey's Executor* to the "novel structure" of requiring "an unusually high standard" of cause for a principal officer to remove an inferior officer, when the principal officer, in turn, could only be removed for cause. *Free Enterprise Fund,* 561 U.S. at 496, 502-503. The Court has rightly been reluctant to expand *Humphrey's Executor* to "new situation[s] not yet encountered by the Court." *Id.* at 483.

Finally, there would be no meaningful limiting principle if *Humphrey's Executor* were extended beyond certain multi-member commissions to a single-headed agency like the Bureau. The functions, rather than the structure, of the FTC cannot alone justify the characterization as "quasi-legislative" or "quasi-judicial," because, as the Court later acknowledged in *Morrison*, "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citation omitted); accord *Bowsher*, 478 U.S. at 733 ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."). The terms "quasi-legislative" and "quasi-judicial" thus must be understood to reflect the interactive and deliberative mode of decisionmaking that is expected of multi-member legislative and judicial bodies.

Given "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials" based on function alone, *Morrison*, 487 U.S. at 689 n.28, the *PHH* court provided little basis for distinguishing even most Cabinet officers. See 881 F.3d at 106-107. And, indeed, the *PHH* majority opinion emphasized Congress's authority to restrict the President's ability to remove "financial regulators," without providing a sound basis for preventing Congress from similarly restricting the President's ability to remove the Secretary of the Treasury. *Id.* at 91; see *id.* at 78-79, 91-92, 106-107.

For these reasons, neither *Humphrey's Executor* nor *Morrison* controls, and the Court should hold that the removal restriction in 12 U.S.C. 5491(c)(3) impermissibly infringes the separation of powers fundamental to our constitutional structure.[2]

d. The proper remedy for the constitutional violation is to sever the provision limiting the President's authority to remove the Bureau's Director. As explained in *Free Enterprise Fund,* when "'confronting a constitutional flaw in a statute,'" courts generally "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" 561 U.S. at 508 (quoting *Ayotte* v. *Planned Parenthood of N. New England,* 546 U.S. 320, 328-329 (2006)). In that case, the Court held unconstitutional only the removal restriction pertaining to members of the Public Company Accounting Oversight Board, even though Congress had not enacted a severability clause, and went on to hold that the proper remedy was to invalidate the removal restriction, leaving the board members removable at will. *Id.* at 509. The Court reasoned that the Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, would "remain[] 'fully operative as a law'

---

[2] If this Court were to conclude that *Humphrey's Executor* or *Morrison* requires upholding the removal restriction, it should consider whether those cases should be overruled in part or in whole. That issue is fairly encompassed in the question presented. Pet. I; see Pet. 24.

with these tenure restrictions excised," and no evidence suggested that Congress "would have preferred no Board at all to a Board whose members are removable at will." *Free Enterprise Fund*, 561 U.S. at 509 (citation omitted).

The same result follows *a fortiori* here. Absent the for-cause removal provision, the Dodd-Frank Act and its Bureau-related provisions will remain "fully operative." *Free Enterprise Fund,* 561 U.S. at 509 (citation omitted). And, as in *Free Enterprise Fund,* there is no evidence that Congress would have preferred no Bureau at all to a Bureau with a Director who is removable at will. See *ibid.* Moreover, unlike the statute at issue in *Free Enterprise Fund*, the Dodd-Frank Act includes a severability clause, providing that if one of the Act's provisions is "held to be unconstitutional," the remainder of the Act "shall not be affected thereby." 12 U.S.C. 5302. While it may be possible to conceive of other ways to remedy the constitutional violation, "such editorial freedom * * * belongs to the Legislature, not the Judiciary." *Free Enterprise Fund,* 561 U.S. at 510.

2. This case presents a suitable vehicle for resolving the important question presented, which involves serious separation-of-powers issues and raises the constitutionality of an Act of Congress. The issue was fully briefed by the parties in the courts below, and squarely decided by the court of appeals. See Pet. App. 1a-8a. The court of appeals offered no alternative grounds for enforcing the Bureau's CID, and petitioner presents only the constitutional question to this Court. Pet. 17. The court of appeals has stayed its mandate until final disposition of the case by this Court, C.A. Doc. 49 (June 18, 2019), removing any possibility that the question could become moot during the Court's consideration.

And there are no other apparent impediments to the Court's resolution of the question presented.

a. In the court of appeals, the Bureau argued that even if the removal restriction were unconstitutional, petitioner would not be entitled to relief because the former Director's issuance of the CID was ratified by the Bureau's then-Acting Director, who could be removed by the President at will. See Resp. C.A. Br. 13-19. But the court of appeals did not address this remedial issue, and it would not prevent the Court's resolution of the question presented. The Court has often observed that it is "a court of final review and not first view" and therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citations omitted). The Court has previously declined to address whether a ratification has cured a constitutional infirmity when the court of appeals had not first addressed that question. See *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.6 (2018). There are compelling reasons to follow a similar course here.

First and foremost, the separation-of-powers question presented here is important, has broad implications for the President's ability to supervise the Executive Branch, and creates uncertainty that undermines the Bureau's ability to fulfill its mission. Until this Court resolves the constitutionality of the Bureau's structure, those subject to the agency's regulation or enforcement can (and often will) raise the issue as a defense to the Bureau's efforts to implement and enforce federal consumer financial law. Cf. Pet. 18. There is no sound reason for case-specific questions surrounding ratification to deter the Court from resolving the question presented.

That is particularly true here, where petitioner raised both constitutional and factual objections to the

Bureau's ratification argument below. See Pet. C.A. Reply Br. 6 (arguing that "the unconstitutional CFPB cannot ratify its own unconstitutional structure or conduct"); *id.* at 3 (disputing whether the Acting Director, as matter of fact, "has ratified [the Bureau's] actions with respect to the CID"). Resolving the ratification question thus would not enable the Court to avoid resolving a constitutional question. And it would be unusual for this Court to resolve in the first instance any factual dispute about the Acting Director's ratification. The parties also disputed below whether the Acting Director's ratification was effective after the Acting Director was replaced by a Senate-confirmed Director who was subject to the challenged removal restriction. C.A. Oral Argument at 4:42-6:30, 10:14-12:55. That too provides a reason for this Court not to address the ratification issue in the first instance.

b. The district court alternatively concluded that, even if the removal restriction unconstitutionally encroached upon Executive authority, it would not do so in the context of the Bureau's efforts to enforce a CID. Pet. App. 13a-14a. The court reasoned that "Congress unquestionably wields the subpoena power" itself, and "Congress may properly establish offices that 'perform duties . . . in aid of those functions that Congress may carry out by itself.'" *Id.* at 14a (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976) (per curiam)). That alternative rationale for enforcing the CID, however, provides no impediment to resolving the question presented.

As an initial matter, the Bureau's CID was issued in aid of a potential enforcement action of federal financial consumer law, see Pet. App. 10a, not in aid of any legitimate congressional investigation. See *Quinn* v. *United States*, 349 U.S. 155, 161 (1955) ("[Congress's] power to investigate must not be confused with any of the powers of law enforcement."). And any effort to recast the Bureau as a congressional office would raise its own constitutional difficulties, given the President's unilateral (albeit restricted) authority to remove the Director. Cf. *Bowsher*, 478 U.S. at 723 ("A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers."). In any event, this Court will affirm on grounds that have not been raised below "only in exceptional cases." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009) (citation omitted). Here, the Bureau expressly abandoned the district court's secondary rationale in the court of appeals. See Resp. C.A. Br. 22 n.4.

3. In the court of appeals, the Bureau defended the constitutionality of the statutory removal restriction. See 12 U.S.C. 5564 (granting the Bureau independent litigating authority in the lower courts). Since the court of appeals issued its decision, however, the Director has reconsidered that position and now agrees that the removal restriction is unconstitutional. For that reason, if the Court grants review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

MARY MCLEOD
General Counsel
JOHN R. COLEMAN
Deputy General Counsel
STEVEN Y. BRESSLER
Assistant General Counsel
Consumer Financial Protection Bureau

SEPTEMBER 2019

No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THOMAS H. BIENERT, JR.
ANTHONY BISCONTI
BIENERT KATZMAN PC
903 Calle Amanecer, Suite 350
San Clemente, CA 92673

KANNON K. SHANMUGAM
Counsel of Record
MASHA G. HANSFORD
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

In the Supreme Court of the United States

No. 19-7

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The government has acquiesced in the granting of certiorari in this case. The government agrees that this case presents an exceptionally important question: whether the structure of the Consumer Financial Protection Bureau violates the separation of powers. See Br. 7-16. It agrees that the question warrants the Court's immediate review, in light of the ongoing "uncertainty" that "undermines the Bureau's ability to fulfill its mission." Br. 18. And it agrees that this case is an appropriate vehicle in which to consider and decide the question—including the subsidiary question of the "proper remedy" for any constitutional violation. See Br. 16-20.

Since the government's acquiescence, two unusual petitions for certiorari have been filed presenting substantively identical constitutional questions—one by parties that actually prevailed on that question below, the other by parties that are seeking the extraordinary remedy of certiorari before judgment. See *Collins* v. *Mnuchin*, No. 19-422 (docketed Sept. 30, 2019); *All American Check Cashing, Inc.* v. *CFPB*, No. 19-432 (docketed Oct. 2, 2019). Neither of those petitions offers a colorable reason to delay the granting of review in this case, especially given the urgent need for the Court to answer the question presented in light of the government's position that the CFPB's structure is unconstitutional. The petition for a writ of certiorari should therefore be granted.

1. This case is an optimal vehicle in which to consider the question of the CFPB's constitutionality. It squarely and cleanly presents the question, which was fully briefed in the court of appeals and constitutes the sole ground supporting the judgment below. As the government has recognized (Br. 17-20), there are no valid impediments to the Court's review here. In particular, this case arises from the CFPB's effort to enforce a civil investigative demand, which the CFPB issued in aid of a potential enforcement action under federal consumer-financial law. As the government has explained (Br. 19-20), the CFPB was thus exercising core executive authority, and it expressly abandoned any alternative justification for enforcing the civil investigative demand below.

This case will also afford the Court with the opportunity to consider the full range of remedial options in the event it holds the CFPB's structure unconstitutional. Throughout this litigation, petitioner has consistently argued that the appropriate remedy is to "invalidate the CFPB as a whole," or, at a minimum, to hold that the civil investigative demand is unenforceable. Pet. C.A. Br. 30-32; see D. Ct. Dkt. 20, at 7-8. And in its brief before this Court, the government has made clear that it intends to argue that the "proper remedy" for any constitutional violation is to "sever the provision limiting the President's authority to remove the Bureau's director." Br. 16-17. There is thus no doubt that the parties to this case will join battle on, and fully brief and argue, the remedial issues if the Court grants review.

The *All American* petitioners contend (at 5, 27-30) that the Court "would not be able to reach the remedial issue[s]" in this case, seemingly on the ground that the petition in this case does not break out the remedial question as a second question presented. That is a puzzling contention. Parties do not seek this Court's review on constitutional questions for kicks; they do so in order to obtain meaningful relief. Accordingly, when the Court hears constitutional cases, it routinely proceeds to consider and decide the appropriate remedy upon finding a constitutional violation, regardless of whether the petition itself presented a separate remedial question.*

2. The *Collins* petitioners identify two purported vehicle problems with this case. Both are insubstantial.

First, the *Collins* petitioners contend (at 20-22) that it is "doubtful" the court of appeals had jurisdiction over this case because the district court's order was not final. That contention verges on the frivolous. The Consumer Financial Protection Act expressly authorizes the CFPB to ini-

* In the last year and a half alone, this Court has had two such cases in which the petitioners were represented by the same law firm as the *All American* petitioners. See *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018); *Murphy* v. *NCAA*, 138 S. Ct. 1461 (2018). In each case, the petition did not present a separate remedial question, yet the parties briefed the remedial issues extensively at the merits stage and the Court addressed them. Compare Pet. at i with Pet. Br. at 42-57, *Lucia, supra* (No. 17-130), and Pet. at i with Pet. Br. at 53-56, *Murphy, supra* (No. 16-476).

tiate an action in federal court to enforce a civil investigative demand, and, as is relevant here, it expressly provides that any final order entered in such an action "[is] subject to appeal pursuant to [28 U.S.C. 1291]." 12 U.S.C. 5562(e)(1), (h)(1)-(2). The CFPB filed a petition to enforce its civil investigative demand, expressly invoking that authority. See D. Ct. Dkt. 1, at 2. After narrowing the demand, the district court granted the CFPB's petition and closed the case the same day. See D. Ct. Dkt. 25. Whatever the appealability of interlocutory discovery orders in ordinary civil litigation, therefore, Congress created a stand-alone proceeding for the CFPB to obtain orders such as the one at issue here and then eliminated any ambiguity as to whether those orders are appealable. Unsurprisingly, the CFPB cited those provisions in acknowledging below that the court of appeals had jurisdiction. See Resp. C.A. Br. 3.

Second, the *Collins* petitioners contend (at 22-23) that the need to appoint an amicus curiae to defend the CFPB's constitutionality is a vehicle problem. But this Court routinely appoints amici in similar circumstances; indeed, it did so in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), after the government conceded a similar separation-of-powers violation. In addition, both the House of Representatives and a group of members of Congress have since signaled that they would be willing to present oral argument in defense of the judgment below. See H. Rep. Br. 10-11; Letter from Elizabeth Wydra, counsel for Senator Sherrod Brown et al., to the Clerk 1 (Oct. 1, 2019).

3. The petition for certiorari in this case should be granted without delay. The recently filed petitions present no additional questions that warrant the Court's review. Accordingly, consistent with its usual practice, the Court should hold those petitions pending the resolution of this one.

To begin with, as discussed above, this case presents not just the constitutional question, but also the subsidiary question of the appropriate remedy for any constitutional violation. See pp. 2-3, *supra*. The petitioners in the recently filed cases do not identify any remedial option that petitioner has not advanced, and the Court therefore need not grant review in any additional case in order to ensure that it can fully address the remedial issues.

The *All American* petitioners suggest (at 27-30) that their case presents the additional question whether the CFPB's then-Acting Director validly ratified the actions of a former Director. That is not a virtue, but a vice. As the government has explained, the ratification question does not independently warrant the Court's review. See Br. 18-19. There is no circuit conflict on the validity of ratification, and the Court recently denied review on that question. See *Gordon* v. *CFPB*, 137 S. Ct. 2291 (2017). And precisely because the *All American* petitioners are seeking certiorari before judgment, the court of appeals in that case has not had the opportunity to pass on the ratification question they now want answered. There is no reason for this Court to consider that fact-intensive and case-specific question in the first instance, particularly because it could interfere with the Court's ability to reach the more broadly significant constitutional question. Cf. *Lucia*, 138 S. Ct. at 2055 n.6.

4. In light of the concession by the government, and now by the CFPB itself, that the CFPB's structure is unconstitutional, the need for review is beyond urgent. By the government's own admission (Br. 18), the lingering legal doubt over the CFPB's constitutionality casts a cloud over every action that the Bureau takes. To put it bluntly, it is unclear whether the CFPB can continue to "act as an enforcer when its lone director—who is ultimately responsible for all of [its] decisions—has acknowledged that

she believes she was appointed under an unconstitutional provision." Alison Frankel, *CFPB Just Told SCOTUS It's Unconstitutional. What Does That Mean For Its Mission?*, Reuters (Sept. 18, 2019) <tinyurl.com/cfpbmission>.

Under these circumstances, where the case for further review is so compelling, the Court should not delay. The appropriate course is to grant the petition in this case and hold the recently filed petitions pending the Court's decision. That will enable the Court to have the cleanest opportunity to address the constitutional question and any remedial issues, without the complications posed by the extraordinary circumstances under which the other cases come to the Court.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS H. BIENERT, JR.
ANTHONY BISCONTI
BIENERT KATZMAN PC
903 Calle Amanecer, Suite 350
San Clemente, CA 92673

KANNON K. SHANMUGAM
MASHA G. HANSFORD
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

OCTOBER 2019

No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF THE JUDGMENT BELOW

DOUGLAS N. LETTER
General Counsel
Counsel of Record
TODD B. TATELMAN
Deputy General Counsel
MEGAN BARBERO
Associate General Counsel
JOSEPHINE MORSE
Associate General Counsel
ADAM A. GROGG
Assistant General Counsel
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Counsel for Amicus Curiae

In the Supreme Court of the United States

SEILA LAW LLC,
Petitioner,
v.
CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF OF UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

Pursuant to Supreme Court Rules 21.1 and 37.2, the United States House of Representatives respectfully seeks leave to file a brief as amicus curiae in support of the judgment below after the deadline for filing such briefs.[1] The House has notified all parties of its intent to file this motion and amicus brief. Petitioner Seila Law LLC and respondent Consumer

[1] The Bipartisan Legal Advisory Group voted to authorize the filing of this amicus brief. The Bipartisan Legal Advisory Group comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the U.S. House of Representatives (116th Cong.). The Republican Leader and Republican Whip dissent from this filing.

Financial Protection Bureau (CFPB) do not oppose the filing of this brief out of time.

On September 17, 2019, the CFPB notified Speaker of the House Nancy Pelosi and undersigned Counsel pursuant to 28 U.S.C. § 530D that the CFPB would no longer defend the constitutionality of 12 U.S.C. § 5491(c)(3), which provides that the CFPB's Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." The CFPB had defended the constitutionality of this provision in the court of appeals, which agreed with the CFPB's prior position—and the conclusion of the en banc court of appeals for the D.C. Circuit—that this for-cause removal protection is constitutional. *See PHH Corp. v. CFPB*, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc).

On the same day that the House received the CFPB's Section 530D letter, the Department of Justice—which had not represented the CFPB in the court of appeals—filed a brief in this Court for the CFPB as respondent, arguing that this for-cause removal restriction "violates the Constitution's separation of powers." Resp. Br. 7 (Sept. 17, 2019). The Solicitor General therefore urged this Court to grant review. He pointed out that the CFPB's change of position left no party to defend the constitutionality of Section 5491(c)(3), and noted that the Court "may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals." *Id.* at 20.

A timely amicus brief opposing the petition and in support of the judgment below would have been due on September 18, 2019, the day after the House received the CFPB's Section 530D letter. *See* S. Ct. R.

37.2(a). Because the House received notice of the CFPB's change in position the day before the amicus brief deadline, the House seeks leave to file its brief out of time.

This case presents an issue of significant importance to the House: the constitutionality of the for-cause removal protection that Congress enacted to provide the CFPB Director with a measure of independence, consistent with the agency's functions as a financial regulator. The Solicitor General has decided not to defend this Act of Congress, and the House should be allowed to do so as an amicus.

For the foregoing reasons, this motion should be granted.

DOUGLAS N. LETTER
General Counsel
TODD B. TATELMAN
Deputy General Counsel
MEGAN BARBERO
Associate General Counsel
JOSEPHINE MORSE
Associate General Counsel
ADAM A. GROGG
Assistant General Counsel

OCTOBER 4, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

SEILA LAW LLC,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF THE JUDGMENT BELOW

INTEREST OF THE UNITED STATES HOUSE OF REPRESENTATIVES[1]

This case concerns the constitutionality of 12 U.S.C. § 5491(c)(3), which provides that the Director of the Consumer Financial Protection Bureau (CFPB) may be removed from office by the President only for "inefficiency, neglect of duty, or malfeasance in office." The Department of Justice ordinarily defends the constitutionality of Acts of Congress against challenges in court. Here, however, the Solicitor General has determined that the Department will not defend this statutory limitation on removal, even though the CFPB had prevailed in defending the

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund this brief's preparation or submission.

constitutionality of the provision in the court of appeals.

The United States House of Representatives, therefore, has a significant interest in defending the for-cause removal protection that Congress enacted to provide the CFPB Director with some independence from the President. Indeed, this Court has long recognized that "Congress is the proper party to defend the validity of a [federal] statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983); *see also* 28 U.S.C. § 530D(b)(2).

The statutory removal provision challenged here reflects Congress's considered judgment about how to properly structure the CFPB. As the court of appeals here and the en banc D.C. Circuit recognized in upholding the constitutionality of this provision, "Congress established the independent CFPB to curb fraud and promote transparency in consumer loans, home mortgages, personal credit cards, and retail banking." *PHH Corp. v. CFPB*, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc); *see* Pet. App. 2a-3a. To ensure a measure of agency independence, Congress chose to protect the Director from at-will Presidential removal using "the very same" removal provision that this Court "approved for the Federal Trade Commission (FTC) back in 1935." *PHH*, 881 F.3d at 78 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 619 (1935)).

Because the Solicitor General has determined not to defend the constitutionality of the statutory limitation on removal for the CFPB Director, the

House has a compelling interest in participating in this case.

DISCUSSION

Petitioner Seila Law LLC and respondent the Consumer Financial Protection Bureau contend that the CFPB Director's statutory tenure protection violates the separation of powers. The court of appeals correctly rejected this argument. The decision below adopts the position then advanced by the CFPB that this limited restriction on the President's authority to remove the CFPB Director is consistent with the constitutional separation of powers. In reaching this conclusion, the court of appeals joined the en banc court of appeals for the D.C. Circuit, the only other circuit to have addressed this question. *See PHH*, 881 F.3d 75. The court of appeals' decisions do not conflict with any decision of this Court or any other court of appeals. Indeed, the court of appeals concluded that its decision was controlled by this Court's precedent. *See* Pet. App. 6a (citing *Humphrey's Executor*, 295 U.S. 602, and *Morrison v. Olson*, 487 U.S. 654 (1988)). Further review is not warranted.

1. a. The court of appeals correctly held that "the CFPB's structure is constitutionally permissible." Pet. App. 3a. As the court of appeals noted here, "[t]he arguments for and against" the constitutionality of the for-cause removal protection for the Director of the CFPB "have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc)." Pet. App. 2a. The court of appeals agreed with the majority of the en banc D.C. Circuit that the for-cause removal provision is constitutional, concluding that this "Court's separation-of-powers decisions, in

particular" *Humphrey's Executor* and *Morrison*, demonstrate "that the CFPB's structure is constitutionally permissible." Pet. App. 3a; *see also* Pet. App. 6a.

Congress established the CFPB in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), in response to the 2008 financial crisis. Congress created the CFPB to "help protect consumers from unfair, deceptive, and abusive acts that so often trap them in unaffordable financial products" and to "end[] the fragmentation" of the then-current regulatory system by combining the authority of several federal agencies "involved in consumer financial protection in the CFPB, thereby ensuring accountability." S. Rep. No. 111-176, at 11 (2010). The CFPB is charged with, among other things, "implement[ing] and, where applicable, enforc[ing] Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a).

Congress provided for a single CFPB Director to be appointed by the President, with the advice and consent of the Senate. 12 U.S.C. § 5491(b)(1)-(2). As the en banc D.C. Circuit observed, Congress chose the single-Director design to "imbue the agency with the requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance." *PHH*, 881 F.3d at 81 (citing S. Rep. No. 111-176, at 11).

The CFPB Director generally serves a five-year term, except that a Director may continue to serve after her term "until a successor has been appointed and qualified." 12 U.S.C. § 5491(c)(1)-(2). Congress further provided that "[t]he President may remove the Director for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). The court of appeals upheld this statutory provision for a five-year term of office subject to removal for cause as a permissible limitation on the President's removal authority under this Court's precedent. *See* Pet. App. 6a.

b. This Court "has long recognized that, as deployed to shield certain agencies, a degree of independence is fully consonant with the Constitution." *PHH*, 881 F.3d at 78. Indeed, this Court "has never struck down a statute conferring the standard for-cause protection at issue here," *id.*, and there is no reason for the Court to break new ground in this case.

In *Humphrey's Executor*, this Court unanimously upheld an identical limitation on the President's authority to remove Commissioners of the Federal Trade Commission (FTC) "for inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619 (quoting 15 U.S.C. § 41 (1934)); *see id.* at 631-32. The Court explained that in administering the Federal Trade Commission Act, the FTC "acts in part quasi legislatively and in part quasi judicially." *Id.* at 628. The Court concluded that the President's "illimitable power of removal" does not extend to officers of such an agency. *Id.* at 629. Instead, where Congress creates agencies like the FTC and "require[s] them to act in discharge of their duties independently of executive control," Congress has the authority to fix terms of office and "forbid their removal except for cause in the meantime." *Id.* As this Court cautioned (more than eighty years ago), "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*

The court of appeals here correctly determined that this Court's reasoning in *Humphrey's Executor* "applies equally to the CFPB, whose Director is subject to the same for-cause removal restriction at issue [there]." Pet. App. 4a. As the en banc D.C. Circuit explained in *PHH*, the FTC was "charged with the enforcement of no policy except the policy of the law," 881 F.3d at 79 (quoting *Humphrey's Executor*, 295 U.S. at 624), and "could be independent consistent with the President's duty to take care that the law be faithfully executed," *id.* So too with the CFPB. The agency's "focus on the transparency and fairness of financial products geared toward individuals and families falls squarely within the types of functions granted independence in precedent and history." *Id.*; *see also Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (holding that the "intrinsic judicial character of the task with which the [War Claims] Commission was charged" precluded the President from removing the Commissioners at will); *Morrison*, 487 U.S. at 724-25 (Scalia, J., dissenting) ("[R]emoval restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission, which engage substantially in what has been called the 'quasi-legislative activity' of rulemaking[.]" (citations omitted)).

In *Morrison*, this Court upheld the good-cause removal protection for a special Independent Counsel tasked with investigating and prosecuting high-ranking federal officials for violations of federal criminal law. *See* 487 U.S. at 660, 662-63 (describing relevant provisions of the Ethics in Government Act of 1978). The Court in *Morrison* explained that its characterization of the "quasi-legislative" and "quasi-judicial" offices in *Humphrey's Executor* and *Wiener* was "used to describe the circumstances in which Congress might be more inclined to find that a degree of independence from the Executive, such as that afforded by a 'good cause' removal standard, is necessary to the proper functioning of the agency or official." *Id.* at 690-91 & n.30. The "real question," as *Morrison* framed it, is whether restrictions on the President's authority to remove an official "are of such a nature that they impede the President's ability to perform his constitutional duty." *Id.* at 691. Although the Independent Counsel performed traditionally "executive" functions, this Court held that the removal protection for her was constitutional, explaining that it was "essential, in the view of Congress, to establish the necessary independence of the office." *Id.* at 691, 693.[2]

Morrison thus confirmed that *Humphrey's Executor* allows Congress to provide limited protection against removal for the heads of Executive agencies who are "intended to perform their duties 'without

---

[2] CFPB stresses that *Morrison* involved the removal restriction of "*inferior* officers." Resp. Br. 10 n.1. But as the en banc D.C. Circuit detailed in *PHH*, the distinction between principal and inferior officers "is not ground for distinguishing *Morrison* from this case." 881 F.3d at 96 n.2.

executive leave and . . . free from executive control.'" *Id.* at 687 n.25 (quoting *Humphrey's Executor*, 295 U.S. at 628). As the en banc D.C. Circuit summarized in *PHH*, "the Constitution admits of modest removal constraints where 'the character of the office' supports making it somewhat 'free of executive or political control.'" 881 F.3d at 88 (quoting *Morrison*, 487 U.S. at 687, 691 n.30).

By contrast, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), this Court invalidated a "highly unusual" removal restriction for the inferior officers of the Public Company Accounting Oversight Board that "sharply circumscribed" the grounds on which a Board member could be removed and specified "rigorous procedures that must be followed prior to removal." *Id.* at 505. This provision was one of "two layers of for-cause tenure," *id.* at 501—the restrictive layer that protected the Board members and the more ordinary for-cause protection applicable to the Commissioners of the Securities and Exchange Commission, which supervises the Board. This Court invalidated the restrictive limitation on removal of Board members in part because of the two-layered removal protection, where the Commissioners themselves enjoy the same tenure protection that Congress has provided for the CFPB Director. *See id.* at 487 (noting parties' agreement that the Commissioners could only be removed under the *Humphrey's Executor* standard).

c. In urging this Court to grant review, petitioner and respondent principally argue that this Court's precedent upholding limitations on the President's authority to remove agency heads should be limited to multi-member agencies. *See* Pet. 19-24; Resp. Br. 11-16. The court of appeals correctly rejected this argument, concluding that any difference between multi-member agencies and agencies with a single head was not "dispositive for separation-of-powers purposes." Pet. App. 5a-6a.

Petitioner's and respondent's attempts to cabin *Humphrey's Executor* and its progeny to multi-member agencies finds no support in those cases. In upholding the identical for-cause removal restriction for members of the FTC in *Humphrey's Executor*, this Court "made no mention of the agency's multi-member leadership structure." Pet. App. 5a. This Court referred in passing to the FTC as a "body of experts," Resp. Br. 11 (quoting *Humphrey's Executor*, 295 U.S. at 624), but that description "arose in the course of the Court's statutory holding, not its constitutional analysis," *PHH*, 881 F.3d at 98. Moreover, as both the court below and the en banc D.C. Circuit in *PHH* stressed, *Morrison* "upheld a for-cause removal restriction for a prosecutorial entity headed by a single independent counsel." Pet. App. 6a; *see PHH*, 881 F.3d at 96.

Indeed, where an agency is headed by a single individual, the lines of Executive accountability—and Presidential control—are even more direct than in a multi-member agency. If the President determines that the CFPB Director is failing in her duty to enforce the consumer protection laws, the President can remove and replace the Director. *See* 12 U.S.C. § 5491(c)(3). And unlike in multi-member agencies, removal of "a single officer" will "transform the entire CFPB and the execution of the consumer protection laws it enforces." *PHH*, 881 F.3d at 98; *see also* Pet. App. 6a.[3]

The court of appeals here joined the en banc majority of the D.C. Circuit in *PHH*—the only other court of appeals to have addressed the question—in upholding the constitutionality of the modest protection from removal that Congress afforded the CFPB Director. The courts of appeals are correct in their agreement that this Court's precedent governs the outcome here, and further review is not warranted.[4]

2. The House urges the Court to deny review for the reasons discussed above and in the courts of appeals' careful decisions on the question presented. If, however, this Court were to determine that the petition for a writ of certiorari should be granted, as

---

[3] In a footnote, the Solicitor General suggests that, if this Court concludes that the statutory for-cause removal protection for the CFPB Director is constitutional under the rationale of *Humphrey's Executor* and *Morrison*, the Court "should consider whether those cases should be overruled in part or in whole." Resp. Br. 16 n.2. While the Solicitor General might prefer an Executive Branch without any independent regulatory agencies, there is no sound reason for this Court to overrule eighty years of precedent that has played a significant role in shaping our modern system of government. Nor is there any basis for this Court to strip Congress of its authority to create agencies with a measure of independence from Presidential control, where such a structure "is necessary to the proper functioning of the agency or official." *Morrison*, 487 U.S. at 691 n.30.

[4] If this Court were to grant review and hold that the CFPB Director's for-cause removal protection is unconstitutional, the proper remedy would be to sever the removal restriction, leaving the Director removable at will. *See Free Enter. Fund*, 561 U.S. at 508-09; *see also* Resp. Br. 16-17.

the Solicitor General has noted, the Court "may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals." Resp. Br. 20. The House respectfully requests that, if the Court grants review, it consider appointing the House as amicus curiae, represented by the House General Counsel as counsel of record, to defend the judgment below. As this Court has recognized, each House of Congress has a significant interest in defending the constitutionality of an Act of Congress where the Solicitor General has determined not to defend the statute. *See, e.g.*, *Chadha*, 462 U.S. at 940; 28 U.S.C. § 530D(b)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS N. LETTER
General Counsel
TODD B. TATLEMAN
Deputy General Counsel
MEGAN BARBERO
Associate General Counsel
JOSEPHINE MORSE
Associate General Counsel
ADAM A. GROGG
Assistant General Counsel

OCTOBER 2019

No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, Tennessee, Utah, and West Virginia.[1] As this Court has long recognized, States have "special solicitude" to challenge unlawful federal Executive Branch actions. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Such solicitude is necessary because States, whose law may be preempted by federal agencies run amok, stand in a unique position to guard "the public interest in protecting separation of powers by curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

In this case, the Consumer Financial Protection Bureau (CFPB) has wielded its unchecked power to compel Seila Law LLC, a private law firm, to provide information as part of an investigation into whether Seila Law has violated the Telemarketing Sales Rule, 16 C.F.R. pt. 310, while providing debt-relief services to its clients. States enforce robust consumer protections, including limitations on unfair trade practices and law firms' marketing activities. If Congress wishes to permit federal agencies to assist or preempt States in protecting consumers and policing deceptive trade practices, it must do

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

so in a manner consistent with Article II of the Constitution. For the reasons set out below, the CFPB's structure violates the Constitution.

INTRODUCTION

I. The "ultimate purpose" of our Constitution's separation of powers "is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). That is why the Framers "viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). This case calls upon the Court to vindicate that principle by striking down the unlawful action of an administrative agency built around a single unaccountable and unchecked administrator.

That agency—the CFPB—was created in 2010 under the Dodd-Frank Act. The Act "transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies." Brief for the Respondent in Opposition at 2, *State Nat'l Bank of Big Spring v. Mnuchin*, 139 S. Ct. 916 (2018) (No. 18-307) [hereinafter "*State Nat'l* BIO"]. Unlike the federal agencies the CFPB replaced, however, the CFPB is headed neither by a group of commissioners nor by an individual who is removable at will by the President. Instead, the CFPB is headed by a single director, who is appointed by the President, with the advice and consent of the Senate, to a five-year term.

12 U.S.C. § 5491(b), (c). He may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

The CFPB's structure is virtually unprecedented. To date, "[n]o independent agency exercising substantial executive authority" that has come before this Court "has ever been headed by *a single person*." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 7, 165 (D.C. Cir. 2018) (en banc) (Kavanagh, J., dissenting) (emphasis in original). As one member of this Court has noted, "the Director of the CFPB possesses more unilateral authority—that is authority to take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government." *Id.* at 165-66. Indeed, "other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government." *Id.* at 166.

Not even the United States still maintains that such a structure is constitutional. *State Nat'l* BIO at 13.[2] And with good reason: The Constitution forbids entrusting concentrated, unchecked authority to a sole, unaccountable director of an administrative agency charged with wielding executive power. This Court has permitted multi-member commissions on the basis that such a structure poses less of a threat to individual liberty than

[2] *See also* En Banc Supplemental Brief of Defendant-Appellees Federal Housing Finance Agency and Joseph M. Otting at 3, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Jan. 14, 2019) (declining to defend Federal Housing Finance Authority (FHFA)).

a single-headed commission. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935); *see also* 51 Cong. Rec. 10,376 (1914) (Federal Trade Commission "would have precedents and traditions and a continuous policy and would be free from the effect of . . . changing incumbency."). An agency built around a sole director, by contrast, is unchecked by the constraints of group decisionmaking among members appointed by different presidents. *PHH Corp.*, 881 F.3d at 166, 178 (Kavanaugh, J., dissenting) (citing SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATIONS, S. DOC. NO. 95-91, vol. 5, at 35 (1977)). A single director thus "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, then a multimember independent agency does." *Id.* at 166.

In this case, the CFPB brought that unchecked power to bear on Seila Law to compel a private law firm to participate in the investigation of potentially improper marketing of debt-relief services. Pet. App. at 10a. It has done so free from any executive oversight. The CFPB had no power to undertake that investigation.

II. The Court should use this case to resolve the nagging question of whether Congress may assign responsibility for setting federal economic policy to a single individual who is not accountable to the President. Although the CFPB has continued to defend its own constitutionality in lower courts, all parties agree that the "question is important, and it warrants this Court's review in an appropriate case." *State Nat'l* BIO at 9.

This is that appropriate case. The question is presented cleanly: If the CFPB's structure is constitutional, Seila Law must provide the requested information. If the CFPB's structure is not constitutional, the civil investigative demand is invalid, and Seila Law is under no such obligation. During all stages of this litigation, the legality of the CFPB has been vigorously argued by the parties and squarely ruled upon by the courts. Though there is no disagreement among the circuit courts at present,[3] delay will not assist this Court in its consideration of the CFPB's constitutionality. The legal issues have been exhaustively examined; unanimity has been achieved only because of a common misunderstanding of this Court's prior precedent. Delay will serve only to prolong confusion over who sets policy in the multi-billion-dollar market in consumer financial products.

ARGUMENT

The CFPB has the power to "seek to implement and, where applicable, enforce Federal consumer financial law" as a means of ensuring that "all consumers have access to markets for consumer financial products and services" and that the markets for such products and services are "fair, transparent, and competitive." 12 U.S.C. § 5511(a). The CFPB may also prescribe rules imple-

---

[3] In *Collins v. Mnuchin*, a panel of the Fifth Circuit held that the FHFA, whose structure is substantively identical to the CFPB, did not pass constitutional muster. 896 F.3d 640, 666 (5th Cir. 2018) (per curiam); *see also id.* at 677-78 (Stewart, C.J., dissenting) (noting that "similar structure" between two agencies made *Collins* and *PHH* indistinguishable). That opinion has been withdrawn pending en banc review. *Collins v. Mnuchin*, 908 F.3d 151 (5th Cir. 2018).

menting consumer-protection laws; conduct investigations of market actors; and enforce consumer-protection laws in administrative proceedings in federal court. *See, e.g., id.* §§ 5511(c), 5562, 5563, 5564.

The Ninth Circuit followed the majority of a highly fractured D.C. Circuit in upholding the CFPB's structure based on a flawed understanding of this Court's jurisprudence. The Court should grant certiorari and hold that the Constitution does not permit Congress to consolidate such sweeping executive powers in an administrative agency headed by a sole director whom the President may remove only for cause.

I. The CFPB's Structure Violates the Constitution's Separation of Powers.

The Constitution vests "[t]he executive power" in the President and compels him to "take care that the laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. Precedent provides that removal restrictions such as those applicable to the CFPB are permissible only for multi-member commissions—not for those headed by a single director.

A. The President Must Retain the Power to Remove at Will Individuals Who Wield Executive Power.

Article II bestows "[t]he executive power" in a single, unitary executive. It makes "emphatically clear from start to finish" that "the president would be personally responsible for his branch." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005). The Framers demanded "unity in the Federal Executive" to guarantee "both vigor and accountability." *Printz v.*

United States, 521 U.S. 898, 922 (1997). This unitary executive further promotes "[d]ecision, activity, secre[c]y, and d[i]spatch" in ways that a "greater number" cannot. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1414, at 283 (1833).

Of course, as a practical matter, the President cannot carry out the full scope of "the executive power" on his own. This is why, "as part of his executive power," the President "select[s] those who [are] to act for him under his direction in the execution of the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). Selecting assistants and deputies lies at the heart of "the executive power," which necessarily includes "the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (remarks of James Madison)).

The President's essential power to select administrative officials necessarily includes the power to "remov[e] those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117; *see also PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) ("To supervise and direct executive officers, the President must be able to remove those officers at will."); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1215 (2014) ("The text and structure of Article II provide the President with the power to control subordinates within the executive branch.").

Since the Founding, it has been understood that the removal power is necessary "to keep [executive] officers accountable." *Free Enter. Fund,* 561 U.S. at 483. This view "soon became the 'settled and well understood construction of the Constitution.'" *Id.* at 492 (quoting *Ex parte Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839)).

After all, if the President could not remove agents, then a "subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) (citing *Bowsher v. Synar,* 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.")) (quotation marks omitted). That, in turn, would intolerably impinge on the President's duty to execute the law. *Id.* And it would upend the chain of command upon which the Executive Branch relies to function properly. *See Free Enter. Fund,* 561 U.S. at 513-14. Put simply, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484.

The Court recognized this common-sense understanding in *Myers v. United States*, when it struck down as unconstitutional a statutory provision that restricted the President's power to remove certain executive officers. 272 U.S. at 176. The Court held: "[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122. If the President lacked the exclusive power of removal, he could not "'take care that the laws be faithfully executed.'" *Id.* at 164.

This Court has repeatedly reaffirmed the *Myers* rule to the present day. It did so most recently in *Free Enterprise Fund*, reiterating that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. 561 U.S. at 513-14. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting THE FEDERALIST No. 70, at 478 (Alexander Hamilton) (J. Cooke ed. 1961)).

B. Congress May Restrict the President's Removal Power As to Independent, Multi-Headed Commissions.

There is only one narrow exception to the general rule in *Myers*. In 1935, this Court held that Congress could create "independent" agencies headed by commissions or boards whose members were not removable at will and would operate free of the President's supervision and direction. *Humphrey's Ex'r*, 295 U.S. at 625, 631-32.

Humphrey's Executor concerned President Franklin Roosevelt's dispute with a commissioner of the Federal Trade Commission. President Roosevelt attempted to fire the commissioner, but the commissioner contested his removal, claiming that he was protected against firing by the FTC's for-cause removal provision. *Id.* at 621-

22. Before this Court, the Roosevelt Administration relied in "chief" on *Myers* and its articulation of the Article II executive power. *Id.* at 626.

This Court rejected that argument and held that Article II did not forbid Congress to create an independent agency "wholly disconnected from the executive department." *Id.* at 630. The Court deferred to the FTC's "nonpartisan" nature and its charge to "act with entire impartiality" while "exercis[ing] the trained judgment of a body of experts appointed by law and informed by experience." *Id.* at 624 (quotation marks omitted). Where those two features are present, this Court held, Congress may validly limit the President's power to remove the commissioners. *Id.* at 628-30.

Predictably, following *Humphrey's Executor*, independent agencies came to populate all corners of the federal government. These agencies "play[] a significant role in the U.S. Government" and "possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy." *PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting). Several of these agencies impact the daily lives of countless Americans in significant ways, including the Federal Reserve Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the National Labor Relations Board, the Consumer Product Safety Commission, and many others. *Id.* at 173.

Importantly, those independent agencies share the two features recognized in *Humphrey's Executor*:

(1) leadership comprised of multiple members who (2) are appointed at staggered terms. As this Court observed in *Humphrey's Executor*, the FTC had five members with staggered terms, and no more than three of them could be of the same political party. 295 U.S. at 619-20. The Court thus held that the Commission was a "body of experts" deliberately "so arranged that the membership would not be subject to complete change at any one time." *See id.* at 624. Those features have come to be regarded as the *Humphrey's Executor* exception to the general rule announced in *Myers*. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (upholding the removal provisions of the three-member War Claims Commission); *see also Free Enter. Fund*, 561 U.S. at 483 ("In *Humphrey's Executor* . . ., we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

There are two reasons why the Constitution may tolerate limits on the President's power to remove the heads of independent agencies headed by multiple members serving staggered terms. *First*, "[i]n the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head." *PHH Corp.*, 881 F.3d at 183 (Kavanaugh, J., dissenting). That is, "[t]he multi-member structure thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty." *Id.* That basic structure makes it harder for the independent agency to impinge on individual freedom. *See id.* It further discourages arbitrary, unsound agency actions driven by the whims of one individual. *Id.* Each commissioner or board member, in other words, acts as a check on the others through the process of "deliberative decision making." Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013).

Second, multi-member independent agencies have a historical tradition since *Humphrey's Executor*. *PHH Corp.*, 881 F.3d at 182-83 (Kavanaugh, J., dissenting); *see also id.* at 178 (citing, *e.g.*, *Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting)). In "separation of powers cases not resolved by the constitutional text alone, historical practice matters." *Id.* at 182-83. For example, in *National Labor Relations Board v. Noel Canning*, this Court relied on "[l]ong settled and established practice" to reach "a proper interpretation of constitutional provisions regulating the relationship between Congress and the President." 573 U.S. 513, 524 (2014) (quotation marks omitted).

In sum, only independent agencies with several directors serving staggered terms can possibly fall within the *Humphrey's Executor* exception to the *Myers* rule.

C. The CFPB's Structure Unconstitutionally Vests Unchecked Power in a Single Director Removable Only for Cause.

As the United States has now conceded, this Court's precedent makes clear "that the statutory restriction on the President's authority to remove the Director [of the

CFPB] violates the constitutional separation of powers." *States Nat'l* BIO at 13.

Unlike the multi-member boards approved in *Humphrey's Executor* and its progeny, the CFPB is headed by a single director. 12 U.S.C. § 5491(b). He serves a term of five years and may be fired only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c). And he wields "unmistakably executive responsibilities," including "criminal investigation and prosecution." *PHH Corp.*, 881 F.3d at 80 (majority op.).

The director wields that executive power over *nineteen* different federal consumer-protection statutes. 12 U.S.C. § 5512 (b)(1). He may examine and investigate individuals and entities to assess their compliance with those statutes. *Id.* §§ 5514(b), 5515(b), 5516(c). He may (as he did in this case) issue "civil investigative demand[s]." *Id.* § 5562(c). He may institute enforcement actions and conduct "adjudication proceedings." *Id.* § 5563(a). And he may sue in state or federal court to enforce consumer-protection laws. *Id.* § 5564.

Those facts reveal the fundamental flaw in the Ninth Circuit's conclusion that this case is "control[led by the] standard enunciated in *Morrison v. Olson*." Pet. App. at 12a. As the Court explained in *Free Enterprise Fund*, it "considered the status of inferior officers in *Morrison*," including whether Congress may limit an agency head's ability to terminate an inferior officer at will. 561 U.S. at 494. The Court concluded that Congress may do so in light of the inferior officer's "limited jurisdiction and tenure and lack[] [of] policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. But the

Court said nothing about whether Congress may also limit the President's ability to remove a principal officer who has "all but exclusive power to make and enforce rules" under 19 federal statutes, *PHH Corp.*, 881 F. 3d at 153 (Henderson, J., dissenting), on topics "covering everything from home finance to student loans to credit cards to banking practices." *Id.* at 165 (Kavanaugh, J., dissenting); *cf. Free Enter. Fund*, 561 U.S. at 494-95 (limiting *Morrison* to its facts).

Instead, the extent of the CFPB's ability to set and enforce federal economic policy demonstrates why this case is controlled by this Court's original *Myers* rule. *Myers* provides that the President's subordinates must be removable at will. *Humphrey's Executor* creates a narrow exception for multi-director independent agencies with directors serving staggered terms. Because the CFPB has a sole director, appointed for a term of five years and removable only for cause, its structure violates Article II by preventing the President from carrying out the executive power.

II. This Case Is an Ideal Vehicle to Decide the CFPB's Lawfulness.

This Court should grant review in this case to definitively resolve the persistent question of whether Congress may limit the President's ability to remove the sole director of an agency empowered to set and enforce significant areas of federal policy. Review is warranted for at least three reasons.

First, the legality of the CFPB presents a question of vital importance that the parties agree can be resolved only by this Court. As this Court has long recognized, "[s]eparation of powers was designed to implement a fundamental insight: Concentration of powers in the hand of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see also, e.g., Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) ("No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." (quoting THE FEDERALIST No. 47, at 301 (James Madison) (C. Rossiter ed. 1961))) (alterations omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty.").

The threat to liberty posed by the CFPB is uniquely acute. In a supposed effort to protect consumers, the Dodd-Frank Act deliberately stripped power that had been spread across "seven different federal regulators" as well as their state-law counterparts. *See* S. REP. 111-176, at 10 (2010) (asserting a purpose to reduce "fragmentation" and supposed "regulatory arbitrage between federal regulators and the [S]tates"); *id.* at 16-17 (discussing history of State regulation of areas relating to consumer financial products). Rather than shift that power to an existing Department overseen by a cabinet Secretary, however, the Act concentrated that power in the hands of a bureaucrat who need not seek the approval either of the electorate or an elected official.

The United States conceded last year that this concentration of power poses a threat to our constitutional system and presents "an important [question] that warrants this Court's review in an appropriate case." *State Nat'l* BIO at 10. Indeed, "although the Bureau itself has continued to defend the constitutionality of its structure in lower courts," even the CFPB "agrees" that the question "will ultimately need to be settled by this Court." *Id.*

Second, this is an "appropriate case" for the Court to consider whether Congress may insulate huge swaths of economic regulation from presidential accountability. The prudential concerns and jurisdictional defects that previously counseled against this Court's review are absent. *See State Nat'l* BIO at 10-12 (raising concerns regarding the Court's jurisdiction given status of particular petitioner and arguing that the Court should wait to consider the question until nine Justices could participate). The question presented to this Court was also fully briefed by the parties and squarely ruled upon by the court below. Pet App. 2a-6a.

Moreover, the question is presented cleanly: Because the CFPB's structure is unconstitutional, any action it takes is necessarily invalid. In *Free Enterprise Fund*, after concluding that the Public Company Accounting Oversight Board's structure was constitutionally impermissible, this Court declared that the challengers were entitled to relief "sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." 561 U.S. at 513 (citing *Bowsher*, 478 U.S. at 727 n.5).

The outcome in this case should be the same. If the CFPB is constitutional, Seila Law must provide information in response to the CFPB's civil investigative demand. If the CFPB is not constitutional, Seila Law is under no such obligation. *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 827-28 (D.C. Cir.

1993); *accord Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2055 (2018) ("This Court has held that 'one who makes a timely challenge to the constitutional validity of the appoint of an officer who adjudicates his case 'is entitled to relief." (quoting *Ryder v. United States*, 515 U.S. 177, 182 (1995)).

Third, any further delay in definitively resolving the CFPB's legality will prolong a period of regulatory confusion without appreciable benefit to this Court. Due to its sprawling mandate, the CFPB interacts directly with innumerable participants in American economic life from law firms such as Petitioner to large financial institutions to individual consumers. For example, in addition to its rulemaking activity, the CFPB has received more than 1.5 million complaints and obtained more than $12 billion in relief from enforcement actions during its lifespan. CFPB, http://www.consumerfinance.gov/ (last updated June 4, 2018). That number grows every day. *See, e.g.*, *Enforcement Actions*, CFPB, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ (last visited July 23, 2019) (listing subset of enforcement actions made public). These economic actors need to understand the rules of the road if the multi-billion-dollar market in consumer financial products is to function.

Until this Court definitively decides whether the CFPB has authority to set those rules, effective regulation of consumer financial products will be hampered both at the federal and state levels. As discussed above (at 13), the CFPB is the only federal entity with a current statutory mandate to propound regulations and enforce policy under nineteen separate federal statutes relating to consumer financial products. Moreover, to the extent that the CFPB has acted within the scope of a valid congressional mandate, its rules have preempted inconsistent state law. *Cf., e.g.*, *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1, 17-18 (2002). Until this Court determines whether the CFPB has *any* permissible statutory mandate, both regulators and the regulated will remain uncertain regarding their scope of permissible action. Litigation will inevitably result.

At the same time, this is not a case where the Court will appreciably benefit from further development of the law in lower courts. As the Ninth Circuit correctly noted, the arguments involved in this constitutional debate have been "thoroughly canvassed" in hundreds of pages of published opinions. Pet. App. 2a; *see generally PHH*, 881 F.3d at 75-200; *Consumer Fin. Protection Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018) (appeal pending); *Collins*, 896 F.3d at 640-93 (discussing FHFA) (en banc review pending). Even those courts that have sided with the CFPB have acknowledged significant concerns about its structure, but they have stated that they are bound by their (incorrect) understanding of this Court's prior precedent. *See* Pet. App. 6a ("In short, we view *Humphrey's Executor* and *Morrison* as controlling here. . . . The Supreme Court is of course free to revisit those precedents, but we are not."); *PHH Corp.*, 881 F.3d at 113 (Tatel, J., concurring) ("PHH is free to ask the Supreme Court to revisit *Humphrey's Executor* and *Morrison*, but that argument has no truck in a circuit court of appeals."). It is extremely unlikely that any further circuit court ruling will aid this Court's consideration of the issue.

This Court should grant review of this important constitutional issue now and hold that Congress may not insulate a principal officer with authority to set wide-ranging federal economic policies from presidential oversight.

[Remainder of page intentionally left blank.]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of
Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

LESLIE RUTLEDGE
Attorney General of
Arkansas

CHRISTOPHER M. CARR
Attorney General of
Georgia

CURTIS T. HILL, JR.
Attorney General of
Indiana

DEREK SCHMIDT
Attorney General of
Kansas

JEFF LANDRY
Attorney General of
Louisiana

DOUG PETERSON
Attorney General of
Nebraska

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

HERBERT H. SLATERY III
Attorney General and Reporter,
State of Tennessee

SEAN REYES
Attorney General of
Utah

PATRICK MORRISEY
Attorney General of
West Virginia

JULY 2019

No. 19-7

In The
Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

KAREN R. HARNED
LUKE A. WAKE
NFIB SMALL BUSINESS LEGAL CENTER
1201 F St., NW, Ste. 200
Washington, D.C. 20004

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org

Counsel for Amici Curiae

July 29, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *Amicus Curiae* briefs with this Court about issues of agency overreach and deference. *See*, *e.g.*, *Kisor v. Wilkie*, 204 L. Ed. 2d 841 (2019).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C.,

---

[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; *Amici* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *Amicus* briefs in cases that affect small businesses.

Amici's direct interest here stems from their profound commitment to protecting America's legal heritage. That heritage includes the separation of powers enshrined in the Constitution, a vital component of the Nation's laws and a critical safeguard of political liberty. This case is about a separation of powers violation because of the unrestrained power vested in the single-Director led Bureau of Consumer Financial Protection.

SUMMARY OF ARGUMENT

Congress violated the separation of powers principle when it created the Bureau of Consumer Financial Protection (CFPB) and gave CFPB's Director unilateral and unchecked power to legislate, execute, and adjudicate nineteen federal consumer protection statutes. *Amici* agree with Petitioners[2] that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1998), should be overruled or limited.[3] But we write separately to emphasize how

[2] *See* Pet. at 24.

[3] *Humphrey's Executor* held that there is no separation of powers problem with independent agencies in which a governing

separation of powers concerns are ultimately about safeguarding individual liberties. More specifically, *Amici* believe that this case warrants review because the Ninth Circuit failed to consider individual liberty in its analysis. In so doing, the court of appeals divorced separation of powers doctrine from the fundamental principles embedded in our Constitution and often considered by this Court.

As Lord Acton once observed, "power corrupts." *See generally* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 451 (1991). Recognizing this and following the established thought of Montesquieu, the Framers carefully delineated our three branches of government (with clear and defined spheres of authority), and provided checks to discourage any branch from

multi-member board is insulated from control from either Congress or the President. 295 U.S. at 626-32. But federalists and anti-federalists alike expressed deep concern over vesting any semblance of federal power in the hands of anyone who would not be accountable to the electorate, or to the direct authority of the President, who is personally accountable to the American people. *See* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause,* 80 Tex. L. Rev. 807, 823-25 (2002) (extensively detailing contemporary views on republican ideals at the time of ratification and citing extensively from both federalists like Alexander Hamilton and anti-federalists like Patrick Henry). They were united in a zeal for republican ideals that abhorred the idea that any single man might wield power over life and liberty without consent of the people. And they would no more have a king (even one with authority over a single subject) than a board of unelected and unaccountable despots.

encroaching upon the prerogatives of another. In following the historical consensus, the Framers acknowledged that the separation of powers principle was needed to protect the liberty interest. And in following the constitutional framework, this Court has often acknowledged the need for heightened safeguards that protect the liberty interest whenever congressional or executive action threaten to dilute the principle.

The single-Director CFPB exercises legislative, executive, and judicial functions, while removed from any restraints that would provide for the checking, diversity, and accountability necessary to protect individual liberty. Thus, in creating the CFPB, Congress ignored the separation of powers and failed to impose any checks or safeguards to compensate for the resulting constitutional violation. The wholesale dismissal of the liberty analysis as unmoored is inconsistent with the Constitution, and in turn, this Court's treatment of the issue.

ARGUMENT

Failure to consider the CFPB's impact on individual liberty not only contradicts Supreme Court precedent, but also threatens our constitutional structural and fundamental procedural safeguards.

The CFPB "wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010)). Through the Dodd-Frank Act of 2010, Congress gave the CFPB's Director the power to unilaterally enforce nineteen federal consumer protection statutes, "covering everything from home finance to student loans to credit cards to banking practices." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). The Director "*alone* [] decide[s] what rules to issue . . . how to enforce, when to enforce, and against whom to enforce the law . . . [and] what sanctions and penalties to impose on violators of the law." *Id.* The CFPB's unfettered authority over the U.S. economy, encompassing executive, legislative, and judicial powers, removes all constitutional checks, eliminates a diversity of opinions, and leads to a lack of accountability anathematic to the republican principles on which our Constitution was founded.

The Constitution secures the individual liberty interest within each branch of government. In structuring the legislative body, the Framers saw fit to include two separate bodies, which secured both a diversity of opinions and accountability. The Federalist Nos. 61-62, at 370-80 (Alexander Hamilton; James Madison) (Clinton Rossiter ed., Signet Classics 2003) (discussing the House of Representatives and Senate). To ensure executive accountability, the Framers mandated a nationally elected President that remained accountable to the people. *See* The Federalist No. 10 (James Madison) (Clinton Rossiter ed., Signet Classics 2003); *see also Myers v. United States*, 272 U.S. 52, 123 (1926) (stating that "The President elected by all the people is rather more representative of them all than are the members of either body of the Legislature. . . ."). And while Article III does not mention an impartial decisionmaker, the Court has mandated impartiality as a part of its Article III analysis largely because it "promot[es] [] participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted). In stark contrast, structure of the CFPB promises no accountability to the electorate.

The single-Director agency stands in juxtaposition to the divided government of enumerated powers the Framers envisioned. Our Founding Fathers created a government with limited power, both as compared to the states[4] and with respect to its own branches.[5] "Separation of powers and federalism form the fundamental matrix or Euclidian plane of our constitutional law." Redish & Cisar, 41 Duke L.J. at 451 n.8 (citing Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. Phil. & Pol'y 196 (1991)). "In structuring their unique governmental form, the Framers sought

[4] "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce." The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

[5] "In order to form correct ideas . . . it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability." *Id.* at 451. As Justice Frankfurter reminded us in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the purpose of the separation of powers principles is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." *Id.* at 629 (Frankfurter, J., concurring). This is because the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 594.

Under these principles, any action taken by one branch of the federal government that presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to the preservation of liberty. "Political liberty . . . is there only when there is no abuse of power." 1 Charles de Secondat Montesquieu, The Complete Works of M. de Montesquieu 197 (London: T. Evans, 1777). " 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' or, 'if the power of judging be not separated from the legislative and executive powers.' " The Federalist No. 47, at 299. As Montesquieu explained:[6]

---

[6] Quoting Montesquieu in The Federalist No. 47, James Madison explained that these passages "sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author." *Id.* at 300.

> When the legislative and executive powers are united . . . in the same body . . . , *there can be no liberty*; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. . . . Were it joined with the legislative, the life and liberty of the subject would be *exposed to arbitrary control*; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Montesquieu, at 199 (emphasis added). "In a government, where the liberties of the people are to be preserved . . . the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government, Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787 108 (rev. ed. 1966); *see* The Federalist Nos. 47-51, at 297-322 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). *See id.* at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

This Court once explained that "[it has] not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *INS v. Chadha*, 462 U.S. 919, 959 (1983). In his concurrence, Justice Powell took this idea a step further and acknowledged outright the fundamental importance of analyzing individual liberty:

> The House and the Senate argue that the legislative veto does not prevent the executive from exercising its constitutionally assigned function. Even assuming this argument is correct, it does not address the concern that the Congress is exercising unchecked judicial power *at the expense of individual liberties*. It was precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers.

Id. at 963 n.4 (Powell, J., concurring) (emphasis added).

On several other occasions, this Court has acknowledged the inextricable link between the separation of powers principle and preservation of liberty. For example, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court explained that the judicial independence contemplated by Article III and mandated by the separation of powers doctrine helped protect "primarily personal, rather than structural, interests." *Id.* at 848. To this end, the Court engaged in an analysis of the personal interests at stake to find no due process concern because the interested party voluntarily subjected himself to the agency's jurisdiction. *Id.* at 848-50.

Similarly, the Court engaged in a thorough liberty analysis in *Morrison v. Olson*, 487 U.S. 654, when it addressed whether the Special Division, a "specially created federal court," *id.* at 676, encroached on the "executive power or upon the prosecutorial discretion of the independent counsel." *Id.* at 682. After finding that none of the Special Division's powers and duties at issue intruded upon executive branch powers, *id.* at 677-83, the Court considered whether those powers threatened the "impartial and independent federal adjudication of claims within the judicial power." *Id.* at 683 (quoting *Schor*, 478 U.S. at 850). The Court examined whether the Special Division had the power to review executive actions taken by the very executive officers it appointed (independent counsel), whether there was a "risk of partisan or biased adjudication of claims[,]" and whether the Special Division could review judicial proceedings about the independent counsel's exercise of its duties. *Id.* at 683-84. The text of Article III does not mention or require an "impartial" or "independent" judiciary. Instead, those requirements derive from the need to preserve liberty. As this Court has explained, "entitl[ing] a person to an impartial and disinterested tribunal . . . *safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.*" *Jerrico*, 446 U.S. at 242 (citation omitted) (emphasis added). *See* The

Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").[7] Following these principles, the Court ultimately found the Special Division constitutional, reasoning, in part, that it was "sufficiently isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any taint of the independence of the Judiciary." *Morrison*, 487 U.S. at 684.

This Court applied a similar liberty analysis in *Mistretta v. United States*, 488 U.S. 361 (1989), where it addressed the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission – an independent commission of the judicial branch created by an act of Congress. *Id.* at 362-68. The plaintiff there alleged, among other things, that the Act violated the separation of powers principle because it gave the President the power to appoint and remove members of the Commission. *Id.* at 408-09. While the Court ultimately found those arguments "fanciful," *id.* at 409, it stressed the importance of preserving liberty. The Court reasoned that the President's

[7] *See also* The Federalist No. 78, at 468 ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

appointment and removal powers did not risk "compromis[ing] the impartiality of Article III judges serving on the Commission and, consequently, [there is] no risk that the Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies." *Id.* at 411. Thus, while the methods for preserving liberty depend on the functions at issue (legislative, executive, or judicial), the purpose of the liberty analysis is the same – to ensure the presence of other checks to counteract the threat to the liberty interest when the separation of powers doctrine is infringed.

While separation of powers was fundamental to the structure of government established by the Framers, the insistence of checks and balances – a principle that inherently contemplates a breach of separation of powers – highlights that even the Framers were aware of situations in which a strict adherence to the doctrine was impractical.[8] Still, both the Framers and this Court have sought to limit the negative impact that separation of powers violations have on individual

[8] James Madison highlighted his concerns about a potential infringement of the separation of powers principles in The Federalist Papers: "Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? . . . [E]xperience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary. . . ." The Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

liberty. In the context of independent agencies, the traditional "checks" that the Court has found sufficient to counteract some denigration of the principle does not exist within the CFPB. The CFPB structure lacks the "concepts of control and accountability" which "define the constitutional requirement . . . " of separation of powers and delegation of powers. *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971).[9]

Ignoring these constitutional safeguards, the en banc D.C. Circuit which the Ninth Circuit agreed with, *CFPB v. Seila Law, LLC*, 923 F.3d 680, 682 (9th Cir. 2019), declared that "[l]iberty analysis is no part of the [separation of powers] inquiry" *PHH Corp.*, 881 F.3d at 106. Looking only to the President's removal power, the en banc D.C. Circuit left unacknowledged the grave impact of the CFPB on individual liberty. As Judge Kavanaugh explained in his *PHH* dissent, "the Director enjoys significantly more *unilateral* power than any single member of any other independent agency." *Id.* at 171 (Kavanaugh, J., dissenting). For example, the CFPB Director unilaterally created a new

---

[9] While the district court in *Connally* found appropriate a broad delegation of legislative functions to the executive branch, even here, the district court stressed the importance of imposing "limitation on the President's power to take action in particular industries or sectors." 337 F. Supp. at 747. This highlights the concern for individual liberty and the need for due process that arises when the separation of powers principle is abrogated. The district court, following Supreme Court precedent, was willing to sustain the delegation because of limitations that protected individual liberty, such as "preclud[ing] . . . from singling out a particular industry or sector. . . ." *Id.* (quotations omitted).

interpretation of the reinsurance policy, unilaterally enforced that interpretation, and unilaterally levied heavy fines based on that interpretation and enforcement. *Id.* at 170.

The lack of any restraints – such as multi-member bodies, OMB review, or appropriation requirements – on the Director's powers for just this one example and the resulting violation of separation of powers, allow one person to encroach on the liberty interests of countless Americans. Given the CFPB's broad jurisdiction over enforcement of nineteen consumer protection statutes, the impact on individual liberty is endless. And when combined with the unilateral authority afforded the CFPB Director, Title X of the Act becomes "the very definition of tyranny" our Founding Fathers feared. The Federalist No. 47, at 298 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). *Id.* To ignore such consequences, ignores the fundamental safeguards embedded in the Constitution.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *Amicus Curiae* brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

KAREN R. HARNED
LUKE A. WAKE
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St., NW, Ste. 200
Washington, D.C. 20004

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL
FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@
southeasternlegal.org

Counsel for Amici Curiae

July 29, 2019

No.

IN THE

Supreme Court of the United States

ALL AMERICAN CHECK CASHING, INC., ET AL.,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

THEODORE B. OLSON
Counsel of Record
HELGI C. WALKER
JOSHUA S. LIPSHUTZ
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Petitioners

QUESTIONS PRESENTED

The questions presented are:

1. Whether the structure of the Consumer Financial Protection Bureau violates the separation of powers.

2. Whether a successful separation-of-powers challenger who is subject to an enforcement action by an unconstitutionally structured agency is entitled to meaningful relief, such as dismissal of the action, due to the agency's constitutional defect.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. The parties to the proceedings below were as follows:

Petitioners All American Check Cashing, Inc.; Mid-State Finance, Inc., d/b/a Thrifty Check Advance; and Michael E. Gray were defendants in the district court and appellants before the court of appeals.

Respondent Consumer Financial Protection Bureau was the plaintiff in the district court and appellee before the court of appeals.

2. Counsel for petitioners certifies that All American Check Cashing, Inc. and Mid-State Finance, Inc. d/b/a Thrifty Check Advance have no parent companies, and no publicly traded corporation owns 10% or more stock in either. Michael E. Gray is an individual.

RULE 14.1(b)(iii) STATEMENT

Petitioners are aware of the following related cases:

- *CFPB* v. *All American Check Cashing, Inc.*, No. 3:16-cv-356-DPJ-JCG (S.D. Miss.);
- *CFPB* v. *All American Check Cashing, Inc.*, No. 18-60302 (5th Cir.).

Petitioners are unaware of any other directly related cases in this or any other Court, within the meaning of Rule 14.1(b)(iii). Petitioners do note, however, that similar issues as those raised in this petition are presented in *Seila Law LLC* v. *CFPB*, No. 19-7 (U.S.) (cert. pending), and *Collins* v. *Mnuchin*, No. 19-__ (U.S.) (cert. pending).

TABLE OF CONTENTS

TABLE OF CONTENTS *(continued)*

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioners All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively, "All American") respectfully petition for a writ of certiorari before judgment to review a decision of the United States District Court for the Southern District of Mississippi. The decision of the District Court is currently pending in the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's opinion, Pet. App. 8a-18a, order certifying the case for interlocutory appeal, Pet. App. 4a-7a, and the court of appeals' order certifying the case for interlocutory appeal, Pet. App. 1a-2a, are not reported.

JURISDICTION

The district court issued its decision on March 21, 2018, and certified the case for interlocutory appeal on March 27, 2019. Pet. App. 7a, 18a. The Fifth Circuit accepted the appeal, Pet. App. 1a-2a, and docketed the appeal on April 24, 2018 as No. 18-60302. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions are reproduced in the Appendix. Pet. App. 72a-77a.

STATEMENT

All American respectfully requests that this Court exercise its authority and discretion under Supreme

Court Rule 11 to grant a writ of certiorari before judgment to the United States Court of Appeals for the Fifth Circuit, which has not yet rendered a decision in this pending appeal.

This case presents two exceptionally important questions: (1) Is the structure of the Consumer Financial Protection Bureau ("CFPB") constitutional in light of the statutory restrictions on the President's power to remove the Director, as well as other anomalous features of the agency; and (2) if not, what is the proper judicial remedy to redress that structural constitutional violation.

The importance of the question concerning the CFPB's constitutionality is beyond doubt. The Solicitor General recently recognized the need for this Court to resolve the validity of the CFPB's structure and urged the Court to take up that question in response to a pending petition for a writ of certiorari. *See* U.S. Br. 7, *Seila Law LLC* v. *CFPB*, No. 19-7 ("U.S. *Seila Law* Br."). This case presents that same question but, unlike *Seila Law*, indisputably involves the exercise of core executive power by the CFPB: the initiation of a federal court civil enforcement action against All American on the merits. Although the Fifth Circuit has not yet rendered a decision, there is nothing to be gained by waiting: The case for the constitutionality of the agency, pro and con, has already been exhaustively explored in the circuit courts in numerous thoughtful opinions, beginning with *PHH Corp.* v. *CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). *See, e.g.*, *CFPB* v. *Seila Law LLC*, 923 F.3d 680, 682 (9th Cir. 2019) (the arguments "have been thoroughly canvassed" and there is "no need to re-plow the same ground here").

This case also presents the equally important question of what remedy follows from a structural separation-of-powers violation. The CFPB now *acknowledges* that it has been unconstitutionally structured from the start, *see* U.S. *Seila Law* Br. 20, but it insists that, through a combination of severance of the removal restriction and "ratification" of its initial decision to file suit, the CFPB may escape any consequences in this case for that constitutional violation. While this enforcement action was pending, Mick Mulvaney, the Director of the Office of Management and Budget ("OMB"), was appointed Acting Director of the CFPB in November 2017. Asserting that he was removable at will by the President, Mulvaney purported to "ratify" the enforcement action against All American. The CFPB contended that this purported ratification deprived All American of *any* remedy for the now-conceded constitutional violation, and that All American—a defendant in a civil enforcement action brought by the CFPB—is not even entitled to raise the agency's unconstitutionality as a defense. Accepting that position would mean that even successful separation-of-powers challengers will receive no practical relief, and their matters will proceed *as if nothing ever happened*. But actions taken by unconstitutionally structured agencies are nullities and cannot be ratified.

The answer to the remedial question is an essential piece of the constitutional puzzle: It matters little if this Court declares the CFPB unconstitutional but prevailing challengers, such as All American, receive no meaningful relief in their case. A principal aim of the separation of powers is "to preserve individual freedom." *Morrison* v. *Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). If the separation of powers can be evaded through an unconstitutional agency's maneuvering or judicial refusal to award relief to the successful challenger at bar, that structural guarantee will become meaningless, and injured parties will have no incentive to raise separation-of-powers challenges.

The law on separation-of-powers remedies, including in the context of restrictions on the President's removal authority, is deeply unsettled, with judges diverging wildly on this important issue. In the interest of judicial efficiency, the Court should resolve the remedial issue now to provide clarity on this important practical issue, together with the constitutional merits, rather than addressing the issues piecemeal. *See, e.g., FOMB* v. *Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019) (granting separate petitions on separation-of-powers question and associated remedies question regarding *de facto* officer doctrine). The CFPB and the United States have "urged" the position, in this Court and before Congress, that it is in the government's "interests to obtain a final resolution" of the agency's constitutionality "as soon as possible." Letter from Kathleen L. Kraninger, Director, CFPB to Hon. Nancy Pelosi, Speaker of the U.S. House of Representatives at 2 (Sept. 17, 2019) ("Kraninger Ltr.").[1] It is equally in the public interest to address the proper remedy as soon as possible. If this Court declines to resolve the remedial question now, that will only create *more* uncertainty for courts, litigants, and other regulated parties as to what should happen, as a practical matter, in cases involving the CFPB. Each question presented here independently demands this Court's consideration and resolution now.

---

[1] https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Pelosi-letter.pdf.

Seila Law, however, does not present the remedial question. The petitioner in *Seila Law* sought review only on the merits question of the CFPB's constitutionality, not on what remedies should apply for that structural violation, leaving out this key practical issue. Moreover, *Seila Law* does not present the issue of ratification, because it is factually disputed in that case whether the CFPB actually purported to ratify the action involving Seila Law. *See* U.S. *Seila Law* Br. 18-19 (noting that petitioner raised "factual objections to the Bureau's ratification argument below"). Thus, if this Court were to resolve the constitutional issue in *Seila Law*, it would not be able to reach the remedial issue or the question of ratification, if it so desired. Thus, even if the Court reversed the Ninth Circuit on the merits, that ruling would not be outcome determinative. Instead, on remand the CFPB would simply argue that this Court's decision makes no difference because the Ninth Circuit's decision was supported on the independent grounds of ratification. Without resolving the ratification issue, even a landmark decision may have no ultimate effect on the outcome in *Seila Law*.

By contrast, this case cleanly presents the remedial issues. All American petitions for review on the remedies question, and there are no factual disputes on whether there has been a purported ratification in this case. Pet. App. 25a-26a. The Court should therefore grant this petition for a writ of certiorari before judgment to consider the CFPB's constitutionality and the associated remedial question. At bare minimum, the Court should grant All American's petition alongside *Seila Law* as a companion case, which would eliminate all possible vehicle problems with that case and allow the Court to address the merits and the equally important remedy questions simultaneously.

1. The CFPB is an unprecedented agency, combining sweeping unilateral executive, legislative, and judicial authority over a wide swath of the United States economy with unparalleled insulation from democratic accountability.

In 2010, Congress enacted the Consumer Financial Protection Act ("CFPA") as part of the Dodd-Frank Act. The CFPA established the CFPB as an "independent" agency responsible for overseeing 18 consumer-protection statutes previously administered by other agencies. *See* 12 U.S.C. §§ 5481(12), 5491(a), 5581. Additionally, the CFPB may bring enforcement actions for "unfair, deceptive, or abusive act[s] or practice[s]," *id.* § 5531(a); *see id.* § 5536(a), and "may prescribe rules" to define those terms, *id.* § 5531(b). The CFPB is headed by a single Director who serves a five-year term and may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(b), (c).

In addition to these broad powers, the Director may unilaterally request up to twelve percent of the Federal Reserve System's annual operating budget to the CFPB for its sole use, which "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." *See* 12 U.S.C. § 5497(a). The President also has no input on the CFPB's funding, because the OMB lacks "any jurisdiction or oversight over the affairs or operations of the Bureau." *Id.* § 5497(a)(4)(E).

2. For nearly two decades, All American, a company founded by Michael Gray, offered check-cashing and lending services in Mississippi, Louisiana, and

Alabama. Its business practices were heavily regulated by state law. *See, e.g.*, Miss. Code §§ 75-67-517, -519; La. Stat. § 9:3578.4; Ala. Code §§ 5-18A-12, -13. In 2014, Mississippi brought a regulatory enforcement action against All American. Two years later, the CFPB brought a parallel enforcement action against All American in the Southern District of Mississippi on the same grounds as the state enforcement action, for allegedly engaging in "unfair," "deceptive," and "abusive" acts and practices under 12 U.S.C. § 5531(a). *See* Pet. App. 44a. The state enforcement matter was settled on June 8, 2017, Pet. App. 31a, with All American paying $889,350 in fines and closing its Mississippi stores, Pet. App. 33a. Mr. Gray subsequently sold the rest of his business and no longer works in the financial-services industry. Nonetheless, the CFPB continues to pursue him.

All American moved for judgment on the pleadings, arguing that the CFPB's enforcement action was void because, among other reasons, the CFPB's structure violates the Constitution. While that motion was pending, the CFPB Director, Richard Cordray, resigned and the President appointed Mick Mulvaney as Acting Director under the Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq*. The CFPB then purported to "ratify" this enforcement action on the theory that Acting Director Mulvaney was removable at will by the President during his limited tenure as head of the CFPB, and that therefore his purported ratification "remedied any constitutional problem with the initiation of this case." Pet. App. 21a.

The district court denied All American's motion for judgment on the pleadings, adopting the reasoning of the D.C. Circuit's en banc majority in *PHH*, 881 F.3d 75, which upheld the CFPB's structure against a constitutional challenge, Pet. App. 12a. All American then moved to certify the case for immediate appeal. The CFPB argued that the Acting Director's ratification mooted the constitutional question. Pet. App. 20a. All American responded that ratification of the unconstitutional agency's decision to bring this enforcement action was impossible. Dkt. 232. The District Court concluded that "the immediate appeal of this question will materially advance the ultimate termination of the litigation because the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." Pet. App. 6a. "A decision that the case cannot proceed at this time would avoid the anticipated two week jury trial, which, in turn, would prevent the parties' incurring addition litigation expenses and would prevent the expenditure of judicial resources." *Ibid.* The District Court accordingly certified the case for immediate review. Pet. App. 7a. The court then stayed all proceedings pending resolution of the constitutional question on appeal. Pet. App. 3a.

The Fifth Circuit accepted the appeal. Pet. App. 1a-2a. Before oral argument in the Fifth Circuit, the President nominated and the Senate confirmed a new Director of the CFPB, Kathleen Kraninger. A panel of the Fifth Circuit heard oral argument on March 12, 2019. The case remains pending. On September 17, 2019, Director Kraninger announced she had reevaluated the agency's position, and now agreed that the CFPB is unconstitutionally structured. Kraninger Ltr. 2. In informing Congress of her decision, she assured the Senate Majority Leader and the Speaker of the House that, despite the agency's admitted unconstitutionality, courts would simply sever the removal restriction, and pending actions would be otherwise unaffected. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED ARE OF THE UTMOST IMPORTANCE.

"The very essence of civil liberty … consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). And "where there is a legal right, there is also a legal remedy." *Ibid.* (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). The questions presented in this petition test these twin principles.

The first question concerning the CFPB's constitutionality is of the highest importance. The CFPB and the United States both agree that its structure flouts the very foundations of our constitutional order. U.S. *Seila Law* Br. 20. The agency exercises sweeping executive, legislative, and judicial authority over vast swaths of the National economy—yet it is entirely unaccountable to the American People. The Constitution requires that executive officers such as the head of the CFPB be removable at will by the President, and the CFPB fails to meet the few narrow and limited exceptions in this Court's precedents to the general rule requiring at-will removal. Finally, the CFPB's other structural features, together with the limitation on the President's removal power, combine to exacerbate its constitutional defects. The agency cannot be squared with the Constitution.

But the second question of remedies is equally important—if not more so. From day one, Mr. Gray, a small businessman who has already paid a heavy price in the related state proceedings, has had the boot of a blatantly unconstitutional federal agency on his throat. The CFPB lacked the authority to exercise the awesome powers of the Executive Branch against petitioners because the agency is itself unconstitutionally designed. Yet the CFPB asserts that the removal restriction should simply be severed and its invalid acts ratified, thus insulating the agency from any consequences and depriving individual litigants like All American of any meaningful relief.

That approach cheapens the separation of powers. Just last Term, this Court made clear that remedies for separation-of-powers violations must advance both the "structural purposes" of our Constitution and "create incentives" to bring such challenges in the first place. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). If unconstitutional agencies are permitted to avoid the award of any meaningful relief for the party at bar, no "rational litigant" will bring structural constitutional challenges going forward. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014).

The question of what remedy flows from the CFPB's unconstitutional structure is of paramount importance to parties embroiled in CFPB enforcement actions and to lower courts that must resolve challenges to those actions. This Court should exercise its discretion under Supreme Court Rule 11 to grant certiorari before judgment.

A. The CFPB's Structure Violates The Separation Of Powers.

1. The Constitution places the executive power of the United States in the hands of a single individual who is directly accountable to the people. *See Free En-*

ter. Fund v. *PCAOB*, 561 U.S. 477, 499 (2010) ("Constitution requires that a President chosen by the entire Nation oversee the execution of the laws"). Article II "vest[s]" "[t]he executive Power" "in a President" who alone has the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. These provisions "make emphatically clear from start to finish" that the President is "personally responsible for his branch." Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005).

But the President cannot act alone. He depends on executive officers to help discharge his constitutional duties. So, to preserve the principle of accountability to the people for the faithful execution of the laws, the Constitution also requires that the President possess "unrestricted power of removal" over those officers. *Myers* v. *United States*, 272 U.S. 52, 176 (1926). This means that the President must possess the "importan[t]" power to "remov[e]" based even on "simple disagreement" over "policies or priorities." *Free Enter. Fund*, 561 U.S. at 492, 499, 502. This direct accountability is the only way "We the People" can ensure that "the Executive Branch, which now wields vast power and touches almost every aspect of daily life," does not "slip from the Executive's control, and thus from that of the people." *Id.* at 499.

For almost a century, this Court has recognized that officers of the United States who exercise executive authority must normally be removable at will by the President. The "landmark" decision of *Myers* firmly established the "general" rule on this matter: The Constitution grants the President "power to oversee executive officers through removal," and "the Legislature has no right to diminish or modify" this "Presidential oversight." *Free Enter. Fund*, 561 U.S. at 492, 500.

A decade later, this Court established an exception to the "general" *Myers* rule. In *Humphrey's Executor* v. *United States*, the Court confronted a for-cause removal restriction insulating the five commissioners of the Federal Trade Commission ("FTC") from presidential influence. The FTC was established as a "nonpartisan" "body of experts" that was meant to act with "entire impartiality." 295 U.S. 602, 624 (1935). The Court held that the FTC may constitutionally be insulated from at-will removal by the President because it was a "quasi legislative and quasi judicial" multi-member commission that exercises "no part of the executive power vested by the Constitution in the President." *Id.* at 628, 629. There is, however, a "field of doubt" between the *Myers* rule that executive officers are subject to the President's "unrestrictable," "exclusive[,] and illimitable power of removal," on the one hand, and the FTC on the other. *Id.* at 627, 632. The Court accordingly "le[ft] such cases as may fall within it for future consideration and determination as they may arise." *Id.* at 632.

In *Free Enterprise Fund*, this Court conducted the very "future consideration" that *Humphrey's Executor* contemplated. There, the Court struck down Congress's attempt to depart from the structure of traditional independent agencies led by a multi-member commission whose members are protected by a single level of for-cause removal. 561 U.S. at 483. The *Free Enterprise* Court declined to extend *Humphrey's Executor* to "a new situation" it had "not yet encountered." *Id.*

Free Enterprise Fund confirmed the rule that, when a court confronts a "novel structure," it must examine whether that structure results in a "diffusion of authority" that prevents "the President" from being "held fully accountable" to the people for the actions of the Executive Branch. 561 U.S. at 496, 514. Democratic accountability is the touchstone. "The people do not vote for the 'Officers of the United States.'" *Id.* at 497-98. Rather, they "look to the President to guide" those "subject to his superintendence." *Id.* at 498. Where novel acts of Congress diminish the ordinary "clear and effective chain of command," the public is stripped of the ability to place "blame" where it belongs, and such measures violate the separation of powers. *Ibid.* Under this test, Congress may not "immuni[ze] from Presidential oversight" the "regulator of first resort" over "a vital sector of our economy." *Id.* at 497, 508.

The CFPB—in which Congress granted sweeping rulemaking, enforcement, and adjudicative powers to a single individual who is removable by the President only for cause—is precisely such a "new situation" resulting in not just an "[un]clear" and "[in]effective chain of command," but *no accountability at all.* Because "[t]he people do not vote for" the CFPB's director, *Free Enter. Fund*, 561 U.S. at 483, 497, if the electorate objects to the way the Director wields these awesome powers, they have no recourse, because no democratically elected actor has any modicum of political influence over the agency. This Court should decline to extend *Humphrey's Executor*'s "limited" exception here, where, as in *Free Enterprise Fund*, the Court is faced with a "novel structure" that does not merely "add" to the independence of a multi-member commission, but rather "transforms" a single-member agency head into the supreme leader of consumer finance in the United States. *Free Enter. Fund*, 561 U.S. at 496. Moreover, to the extent *Humphrey's Executor* could be read to authorize the CFPB's structure here, the decision is inconsistent with the Constitution's separation of powers and should be overruled.

If the CFPB's structure were upheld as constitutional, there would be no limiting principle on the range of executive authority that Congress could assign to a similarly structured agency. Congress would be free to make cabinet heads such as the Secretaries of Treasury, Labor, Commerce, Energy, Transportation, or the Interior removable only for cause. Equally, sustaining the CFPB's structure would mean that agencies such as the FTC, the Securities and Exchange Commission, the Federal Elections Commission, the Federal Communications Commission, and the National Labor Relations Board all could be headed by a single, partisan director who does not have to answer to the Executive. Indeed, Congress could divest the President of the power to execute a whole range of laws, from environmental to financial, and place that authority in the hands of a single unelected and democratically insulated Director.

This Court should strike down the novel structure of the CFPB, which wholly insulates the CFPB from political accountability.

2. The CFPB has additional features that render it even more clearly unconstitutional when combined with its single unaccountable Director.

In *Humphrey's Executor*, the Court allowed diminished presidential control in light of increased *congressional control*, as the FTC was to "report" to Congress and act "quasi legislatively" and "in aid of the legislative power … as a legislative agency." 295 U.S. at 628. Here, by contrast, Congress eliminated *all* checks on the Director by abdicating its *own* core responsibilities over the CFPB. Whereas the FTC, like nearly all other administrative agencies, has always been subject to the appropriations process, the Director has sole authority to set the CFPB's budget and to demand more than half a billion dollars from the Federal Reserve System's operating expenses, 12 U.S.C. § 5497(a)(2)(A)[2]—a demand *exempt* from "review by [Congress's] Committees on Appropriations," *id.* § 5497(a)(2)(C).

Under the Constitution, however, Congress has the exclusive power of the purse, and "*No Money* shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7 (emphasis added). Congress's "power over the purse" is "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people" and provides a "bulwark" that is "particularly important as a restraint on Executive Branch officers." *U.S. Dep't of Navy* v. *FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). Indeed, "[t]he Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power. *Noel Canning* v. *NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014).

---

[2] CFPB, *Financial Report of the CFPB* 54 (Nov. 15, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_financial-report_fy17.pdf (over $600 million transferred from Federal Reserve to CFPB in 2017).

The Director's ability to requisition her own funds also limits her accountability to the President. "Lest it be forgotten, the Presentment Clause gives the President the power to veto" appropriations bills. *PHH*, 881 F.3d at 147 (Henderson, J., dissenting). The CFPB's independent funding mechanism thus frees it not only from "Congress's most effective means [of oversight] short of restructuring the agency," but also "from a powerful means of *Presidential* oversight." *Id.* at 138 (emphasis added).

There are, accordingly, no circumstances here that could justify encroaching on the President's removal power. *Free Enter. Fund*, 561 U.S. at 483-84. Unlike the FTC, the CFPB is free from the congressional appropriations process, is not "an agency of the legislative ... department[]," and Congress is not its "master." *Humphrey's Ex'r*, 295 U.S. at 628. Quite the opposite, the CFPB combines vast authority for the Director with unprecedented insulation.

***

The CFPB's structure violates the separation of powers.

B. Successful Separation-of-Powers Challengers Are Entitled To Meaningful Relief.

Even though the CFPB now concedes that it has been unconstitutionally structured since inception, the CFPB nevertheless insists that any remedy for that violation has *no* effect whatsoever on pending enforcement actions. Instead, the CFPB asserts, courts should sever the removal restriction and, as here, the agency can purport to ratify its past invalid acts and continue on its way. *See* Kraninger Ltr. 3. The CFPB assumes that *no* litigant will receive *any* meaningful remedy for actions the unconstitutional agency has taken in violation of the separation of powers. But that is incorrect. As the district court recognized, if the CFPB is unconstitutionally structured, "the case would not be able to proceed." Pet. App. 6a.

The question of remedy is just as important as the question of the CFPB's constitutionality, and requires this Court's immediate attention. What good is it for a party to prevail on a constitutional ground if doing so does not change the outcome of the court's judgment on the challenged action being reviewed? If Congress and executive agencies are permitted to violate the separation of powers with impunity, litigants will be deprived of any "incentives to raise" these challenges in the first place. *Lucia*, 138 S. Ct. at 2055 n.5; *see also* Barnett, *supra* at 518. Thus, when litigants timely and successfully challenge the actions of an unconstitutional entity, they are entitled to a judicial remedy that provides them real relief, especially where they have sought relief from past agency action, not merely prospective relief. Here, if All American is correct that the CFPB is unconstitutionally structured, that means that this enforcement action is void and All American's motion for judgment on the pleadings must be granted. *See FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (when a litigant raises a "constitutional challenge as a defense to an enforcement action," courts may not "declare the Commission's structure unconstitutional without providing relief to the [challengers] in th[at] case"). Otherwise, the court's opinion would be merely "advisory." *Teague* v. *Lane*, 489 U.S. 288, 315, 316 (1989) (plurality).

The question of remedy is a critical issue that independently warrants this Court's review.

1. The CFPB asserts that the Court should simply sever the removal provision, leaving the rest of the CFPA intact, and allow the agency to continue all of the unconstitutional actions that the invalid agency had initiated. But severance is not an adequate remedy.

As an initial matter, it is not clear that Article III of the Constitution allows courts to "strike" a provision from a statute. *See Murphy* v. *NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) ("Early American courts did not have a severability doctrine" because "[t]hey recognized that the judicial power is, fundamentally, the power to render judgments in individual cases."). Rather, "when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *Id.* at 1486; *see also Collins* v. *Mnuchin*, --- F.3d ---, No. 17-20364, 2019 WL 4233612, at *41 (5th Cir. Sept. 6, 2019) (en banc) (Oldham, J., concurring in part and dissenting in part, joined by Ho, J.) (traditionally, Article III courts "decline to enforce" unconstitutional statutes and "enjoin their future enforcement").

But even under severance analysis, no severance would be warranted here: The Director's removal provision cannot be severed without inflating the President's power relative to Congress and transforming the CFPB into something Congress never would have created.

Severability turns on whether "the statute will function in a manner consistent with the intent of Congress," *Alaska Airlines Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted), and whether it will result in legislation that Congress "would not have enacted," *Murphy*, 138 S. Ct. at 1482. In *Free Enterprise*

Fund, for instance, the Court severed the removal provision only because it was able to conclude that "nothing in the statute's text or historical context" suggested that Congress "would have preferred no Board at all to a Board whose members are removable at will." 561 U.S. at 509.

Here, on the other hand, there is ample evidence that Congress never would have created an entity like the CFPB without insulating it from all democratic influence, in particular the influence of the President. Congress sought to create an agency "completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority." 156 Cong. Rec. H5239 (2010) (Rep. Maloney); *see also PHH*, 881 F.3d at 162 (Henderson, J., dissenting) (listing numerous other examples from Dodd-Frank's legislative history). Accordingly, the U.S. Code defines the CFPB as "an independent bureau." 12 U.S.C. § 5491(a); *see also* 44 U.S.C. § 3502(5) ("independent regulatory agency"). "In other words, section 5491(a) ties the CFPB's very existence to its freedom from the President." *PHH*, 881 F.3d at 161 (Henderson, J., dissenting).

Moreover, Congress's willingness to insulate the agency from congressional control depended on insulating it from presidential control as well. There is no reason to think that Congress would have given up its own appropriations and oversight powers while granting the President *increased* power over 18 preexisting federal consumer-protection statutes. But that is exactly what severing the statute would do. In fact, most of those statutes were previously administered not by the President but exclusively by independent agencies like the Federal Reserve and the FTC, so severing would *increase* the President's authority well beyond the level it was at before the CFPB's creation. *See PHH*, 881 F.3d at 162 (Henderson, J., dissenting). "Some delegations of power to the Executive or to an independent agency may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685. Here, severing only the for-cause removal provision would fundamentally "alter[] the balance of powers between the Legislative and Executive Branches" in a manner that Congress never intended. *Ibid.*

Severing only the removal provision while leaving the CFPB independent from congressional appropriations and oversight—thereby dramatically expanding presidential power at the expense of Congress—"would have seemed exactly backwards" to Congress. *Murphy*, 138 S. Ct. at 1483. In *Murphy*, this Court declined to sever an unconstitutional provision that prevented states from authorizing private gambling from a provision banning states from running their own gambling operations. *Ibid.* These two "similar restrictions" "were obviously meant to work together," and Congress would not "have wanted the former to stand alone" because they were "meant to be deployed in tandem." *Ibid.* In the same way here, the "similar restrictions" on congressional and presidential oversight were meant to work "in tandem" to insulate the CFPB from any democratic influence. *See also Bowsher* v. *Synar*, 478 U.S. 714, 734-36 (1986) ("[S]triking the removal provision[] would lead to a statute that Congress would probably have refused to adopt."); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936) ("[T]o hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.").

Moreover, a severability clause is "not an inexorable command." *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). Such clauses typically are "little more than a mere formality," 2 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction*, § 44:8, at 627 (7th ed. 2009), and Dodd-Frank's boilerplate severance clause is no exception. It "[a]ppear[s] in the mega Dodd-Frank legislation 574 pages before" the removability clause and "says nothing specific about Title X, let alone the CFPB's independence, let alone for-cause removal, let alone the massive transfer of power inherent in deleting section 5491(c)(3), let alone whether the Congress would have endorsed that transfer of power even while subjecting the CFPB to the politics of Presidential control." *PHH*, 881 F.3d at 163 (Henderson, J, dissenting). While a severability clause creates a rebuttable "presumption" that Congress did not want the validity of an entire statute to depend on the constitutionality of each individual part, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). All of the provisions that make the Director unaccountable are central to the CFPB's structure. Picking and choosing which ones to keep would not fix an existing agency; it would create a new one.

But even assuming the removal provision was severable, that would only address the constitutional problem going forward. It would do *nothing* to ameliorate All American's past injury from being subject to an enforcement action initiated and prosecuted against it by an unconstitutional agency. That core injury requires judicial redress—grant of the motion for judgment, *i.e.*, dismissal of the action.

2. The CFPB further asserts in this and numerous other proceedings that ratification by the Acting Director alleviates all constitutional harm. But actions by an agency that is structured unconstitutionally—in contrast to defects in a particular officer-holder's title—are null and cannot be ratified. As this Court has held, "[a]n unconstitutional act is not a law"; rather, "it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby Cty.*, 118 U.S. 425, 442 (1886). Where the entity does not "legally exist[]," then "no validity can be attached" to its acts. *Id.* at 449. Thus, a lawful entity "[can]not ratify the acts of an unauthorized body." *Id.* at 451. "Ratification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved of the agent's prior unauthorized acts." *CFPB* v. *RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018). But unlike an Appointments Clause challenge, All American has challenged "the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *Ibid.*; *see also Newman* v. *Schiff*, 778 F.2d 460, 467 (8th Cir. 1985) ("Ratification serves to authorize that which was unauthorized. Ratification cannot, however, give legal significance to an act which was a nullity from the start.").

Lucia also forecloses the CFPB's argument. There, the SEC issued a "ratification" while the case was pending, 138 S. Ct. at 2055 n.6, yet this Court reached the merits and ordered an appropriate remedy. Declining to address a serious structural constitutional challenge based on a purported ratification would provide no relief at all, let alone "appropriate" relief. *Ryder* v. *United States*, 515 U.S. 177, 183 (1995). Indeed, the CFPB's ratification theory ignores this Court's instruction that structural constitutional remedies must "create incentives" for those challenges to be brought. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations omitted). Allowing ratification to "cure" the CFPB's structural constitutional deficiency would nullify the significant structural safeguards of liberty served by our Constitution's separation of powers and "would create a disincentive to raise" structural challenges. *Ryder*, 515 U.S. at 183.

Moreover, even if this action could be ratified, the Acting Director's purported ratification was ineffective because the CFPB cannot satisfy the independent requirement for ratification: "that the party ratifying" was able "to do the act ratified at the time the act was done." *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994).[3] The CFPB "lack[ed] authority to bring this enforcement action" in the first place because it has been unconstitutionally structured from its inception. *NRA Political Victory Fund*, 6 F.3d at 822. Therefore, it did not have the power "to do the act ratified"—namely filing this enforcement action—"at the time th[at] act was done" on May 11, 2016, and so the Acting Director cannot ratify it now. *NRA Political Victory Fund*, 513 U.S. at 98.

***

If the CFPB's position prevails, Mr. Gray, a defendant in a live enforcement action, and many others like him, could be denied any meaningful relief. The Court should grant certiorari here to uphold the fun-

---

[3] All American raised additional arguments against ratification before the Fifth Circuit and the district court, including that ratification cannot moot that action, and that the statute of limitations prevented the CFPB from ratifying at the time it did. C.A. Br. 48-61; C.A. Reply Br. 19-30.

damental principle that for every right, there is a remedy, including liberty-protecting rights guaranteed by the separation of powers.

II. THE QUESTIONS PRESENTED HAVE BEEN THOROUGHLY VETTED, YET CONFUSION REMAINS AMONG THE LOWER COURTS.

Certiorari is appropriate here because both questions presented have fully percolated in the lower courts, yet confusion and division remains. The questions are integrally connected and should be considered together by granting this petition.

1. As to the merits of the separation-of-powers claim, awaiting further decisions by the lower courts, including the Fifth Circuit here, is not necessary. As the Ninth Circuit put it in *Seila Law*, "[t]he arguments for and against that view have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp.* v. *CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). We see no need to re-plow the same ground here." 923 F.3d at 682. The district court in this case also simply adopted the majority position from *PHH* in denying All American's motion for judgment on the pleadings. Pet. App. 12a ("For the same reasons stated in *PHH Corp.*, this Court rejects the arguments raised by Defendants, and likewise finds that the Bureau is not unconstitutional based on its single-director structure."). In *RD Legal Funding*, 332 F. Supp. 3d at 784, the Southern District of New York struck down the CFPB, simply "disagree[ing] with the holding of the *en banc* court and instead adopt[ing] Sections I-IV of Judge Brett Kavanaugh's dissent." The Fifth Circuit's recent en banc decision as to the Federal Housing Finance Agency—which is structured identically to the CFPB—also adopted the analysis of the *PHH* dissenting opinions. *Collins*, 2019 WL 4233612, at *22 ("reinstat[ing]" the panel decision); *see* 896 F.3d 640, 659 (5th Cir. 2018) (panel opinion) (adopting *PHH* dissenting views). The issue of the CFPB's constitutionality has been fully ventilated, both pro and con, and there is nothing to be gained by waiting for another opinion in this case: This Court has a full record of analysis in the lower courts to inform its consideration of the issue.

2. The Court should also grant this petition to consider the interrelated remedial question together with the merits question. The Court recently reiterated that remedies for separation-of-powers violations must advance both the "structural purposes" of our Constitution and "create incentives" to bring such challenges in the first place. *Lucia*, 138 S. Ct. at 2055 n.5. But further guidance is needed because lower-court judges are in disarray as to *how* structural constitutional violations should be remedied.

For instance, in *PHH*, although Judges Henderson, Randolph, and then-Judge Kavanaugh all dissented on the merits and would have held the CFPB unconstitutional, Judge Henderson wrote at length as to why the for-cause removal provision could not simply be severed, 881 F.3d at 139 (Henderson, J., dissenting), while then-Judge Kavanaugh and Judge Randolph would have held that the correct remedy was to simply sever the offending provision, *see id.* 198-99 (Kavanaugh, J., joined by Randolph, J.). Other cases in the D.C. Circuit, meanwhile, have held that an unconstitutionally structured agency "lacks authority to bring [an] enforcement action because its composition violates the Constitution's separation of powers," and have refused to apply any doctrine that would have the court "declare the Commission's structure unconstitutional without providing relief to the appellants in this case." *NRA Political Victory Fund*, 6 F.3d at 828.

Similarly, the U.S. District Court for the Southern District of New York struck down the CFPB as unconstitutional for the reasons articulated by then-Judge Kavanaugh's dissenting opinion in *PHH*. *RD Legal Funding*, 332 F. Supp. 3d at 784. But the district court agreed with Judge Henderson on severance, and thus held that the entire CFPA was unconstitutional. *Ibid.* Furthermore, in *RD Legal*, the CFPB also attempted to ratify its past actions through a notice of ratification. *Id.* at 784-85. But the court held that "the CFPB's Ratification does not address accurately the constitutional issue raised in this case," because despite the purported ratification, "the relevant provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." *Id.* at 785.

Disagreement reigns among the judges of the Fifth Circuit as well. The en banc Fifth Circuit recently decided that the FHFA was unconstitutionally structured, for the same reasons that the CFPB's design is unconstitutional. *Collins*, 2019 WL 4233612, at *22 (Willett, J., joined by Jones, Smith, Owen, Elrod, Ho, Duncan, Engelhardt, Oldham, JJ.). But the judges that joined that opinion then splintered on remedy, with a different coalition of judges forming a majority to hold that violations of Article II involving "[r]estrictions on removal" do not result in the invalidation of past agency actions because such officials "exercise authority that is properly theirs." *Id.* at *27 (Haynes, J., joined by Stewart, C.J., Dennis, Owen, Southwick, Graves, Higginson, Costa, Duncan, JJ.). That same majority also held that the for-cause removal restriction over the FHFA's director could be severed. *Ibid.* Seven other judges, however, would have held that the FHFA's past actions *had to be invalidated. Id.* at *54-55 (Willett, J. joined by Jones, Smith, Elrod, Ho, Engelhardt, and Oldham, JJ., dissenting in part). And two judges would have held that the for-cause removal provision cannot be severed, *id.* at *39-41 (Oldham, J., joined by Ho, J., concurring in part and dissenting in part). A petition from that case is pending before the Court.

Disunity is thus pervasive among the lower courts on how to redress structural constitutional violations. The Court should not wait further to resolve this confusion, but should take up the remedial question alongside the merits question so that both can be decided together. Indeed, if this Court declines to resolve the remedial question at this time, that will only create *more* uncertainty for courts, litigants, and other regulated parties as to what should happen, as a practical matter, in cases involving the CFPB. Many litigants may not be willing or able to continue to pursue the question of remedies in another round of costly litigation that may not produce any real relief.

III. THIS CASE PRESENTS THE IDEAL VEHICLE TO RESOLVE THESE TWO SIGNIFICANT ISSUES.

Like *Seila Law*, this case involves the validity of the CFPB's structure. But unlike *Seila Law*, this case also presents the question of remedies and, in particular, whether an Acting Director can ratify actions taken by an unconstitutional agency and thereby deprive the victims of that invalid entity any relief.[4]

[4] The challengers in *Collins* v. *Mnuchin* have filed a petition for certiorari regarding the proper remedy for an unconstitutional removal restriction in light of the en banc Fifth Circuit

On November 24, 2017, the President designated Mick Mulvaney to serve as the CFPB's Acting Director pursuant to the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d. Pet. App. 19a-20a. Over the next several months, Acting Director Mulvaney purported to ratify several agency actions taken while Director Richard Cordray governed the CFPB, including the CFPB's decision to bring this lawsuit. Pet. App. 26a. The CFPB argued below that the Acting Director was removable at will, and that his ratification therefore cured any constitutional problem with the case's initiation. Dkt. 231, at 2-3.

In response, All American explained in detail why the purported ratification was invalid. Dkt. 232, at 2-7. After this briefing, the district court denied All American's motion for judgment on the pleadings, but granted immediate appeal regarding the constitutionality of the CFPB's structure. Pet. App. 4a-7a. In that order, the district court implicitly refuted the CFPB's ratification arguments. As the district court concluded, immediate appeal was appropriate because "the immediate appeal of this question will materially advance the ultimate termination of the litigation." Pet. App. 6a. This is because "the case would not be

---

holding the FHFA unconstitutional. *Collins* v. *Mnuchin*, No. 19-__. All American agrees that guidance is needed on this remedial issue, *id.* at 23-28, and that it is "independently certworthy," *id.* at 7 n.1. But *Collins* was brought under the Administrative Procedure Act, and the challengers argue that it provides an adequate and independent basis for setting aside the FHFA's action. *Id.* at 8, 29; *see* 5 U.S.C. § 706 (providing that when an "agency action" is "contrary to constitutional right," "the reviewing Court shall ... set aside" that action). All American's case, on the other hand, presents the remedies question purely in the context of a motion for judgment with no statutory grounds for vacatur.

able to proceed in the event the CFPB is not a constitutionally authorized entity." *Ibid.* "A decision that the case cannot proceed at this time would avoid the anticipated two week jury trial, which, in turn, would prevent the parties' incurring addition litigation expenses and would prevent the expenditure of judicial resources." *Ibid.* In the face of the CFPB's ratification arguments, the district court still ruled that the case "would not be able to proceed" if All American is correct on the constitutional question. The ratification question is squarely presented here, as further evidenced by the fact that both sides briefed the issue extensively before the Fifth Circuit. *See* All American C.A. Br. 48-66; All American C.A. Reply Br. 19-33. Indeed, the CFPB's chief argument before the Fifth Circuit below is that "defendants are not entitled to judgment on the pleadings because an official who is removable at will ratified the complaint." CFPB C.A. Br. 11 (capitalization removed).

The ratification question is *not* presented in *Seila Law*, however. As here, the CFPB in *Seila Law* argued in the alternative that even if Seila Law were to prevail on the constitutional issue, it would not affect the merits because the Acting Director's ratification of the civil investigative demand ("CID") cured any defect stemming from the CFPB's unconstitutional structure. CFPB C.A. Br. 13, *CFPB* v. *Seila Law LLC*, 2018 WL 1511440 (9th Cir.). In fact, this was the CFPB's chief argument before the Ninth Circuit. *Ibid.* But neither the Ninth Circuit nor the U.S. District Court for the Central District of California addressed the ratification issue. Thus, even if this Court were to grant certiorari in *Seila Law* and reverse the Ninth Circuit in a landmark constitutional opinion, on remand the CFPB would simply argue that this Court's ruling had no effect on the Ninth Circuit's judgment, because it was supported by the alternative grounds of ratification.

Moreover, this Court could not cleanly reach the ratification issue in *Seila Law* even if it wanted to address that question without the benefit of either lower court's consideration of the matter. Seila Law argued that there is no evidence that the Acting Director actually ratified the CID.[5] As the Solicitor General recognized, there was a "factual dispute about the Acting Director's ratification." U.S. *Seila Law* Br. 19. Thus, on remand a lower court would need to determine, as an evidentiary matter, whether the Acting Director actually purported to ratify the CID, and then must decide whether that ratification cured the constitutional defects stemming from the CFPB's defective structure.

As the Solicitor General details, there are other aspects of *Seila Law* that may present vehicle problems. The district court in *Seila Law* had held that the issuing of a CID may be an adjunct to Congress's investigative power, and therefore the removal restriction did not encroach on the President's power in that case. U.S. *Seila Law* Br. 18-19. The agency action at issue here, on the other hand, indisputably involves the exercise of core executive power: an enforcement proceeding to execute the laws of the United States. "[U]nilateral authority to bring law enforcement actions against private citizens" is "the core of

---

[5] Oral Argument, *CFPB* v. *Seila Law LLC*, No. 17-56324, United States Court of Appeals for the Ninth Circuit, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014915 (at 10:35).

the executive power and the primary threat to individual liberty posed by executive power." *PHH*, 881 F.3d at 174 (Kavanaugh, J., dissenting).

Finally, petitioners in *Collins* point out that it is unclear whether the order enforcing a CID in *Seila Law* was a final appealable judgment. Pet. 20-22, No. 19-__. No jurisdictional problems are implicated here. The *Collins* petitioners also observe that *Seila Law* presents "the separation of powers issue" only in an "abstract way." *Id.* at 23. All American's case presents no such problem: Mr. Gray is staring down the barrel of a trial against the government if the motion for judgment is not granted. Pet. App. 3a. This petition presents the constitutional question starkly, directly, and in the most concrete of terms.

Granting certiorari here would allow the Court to address both the merits and the remedies, and thereby resolve the confusion on both issues that is roiling lower courts.[6]

IV. ALTERNATIVELY, THE COURT SHOULD GRANT CERTIORARI HERE TO CONSIDER THIS CASE AS A COMPANION CASE TO *SEILA LAW*.

At minimum, the Court should grant All American's petition as a companion case to *Seila Law* in the event it grants that petition. This Court has repeatedly granted certiorari before judgment when, as here, a complementary companion case offers the op-

---

[6] Moreover, it makes sense to consider the remedies question presented here the same Term as the Court is considering remedies questions in the context of other structural constitutional violations. *See Aurelius*, 139 S. Ct. 2735 (granting petition to review whether the *de facto* officer doctrine applies to violations of the Appointments Clause and the separation of powers).

portunity to decide all aspects of an important question of constitutional law. This case presents the same separation-of-powers question presented in *Seila Law*, a question of undeniable, fundamental national importance. But it also presents the equally important remedial question, which is not presented in *Seila Law*. The Court should grant both petitions in order to consider the merits and remedies questions together if the Court is not inclined to review All American's case alone.

This Court may grant certiorari before judgment "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11; *see also* 28 U.S.C. § 1254(1) (writ of certiorari may be granted "upon the petition of any party ... before or after rendition of judgment"); 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment ... may be made at any time before judgment."). That standard is satisfied when a case pending in a court of appeals is a valuable companion to another case that the Court has decided to review. And that is particularly true in cases like this one that involve significant constitutional challenges to governmental action.

For example, the Court granted certiorari before judgment in *United States* v. *Fanfan*, 542 U.S. 956 (2004), so that the Court could hear the case together with *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* presented a constitutional challenge to the federal sentencing guidelines, and *Fanfan* additionally presented the question whether the offending portions of the guidelines were severable. *See id.* at 267. Hearing the two cases together allowed the Court to resolve both the constitutional and severability questions at the same time, rather than piecemeal. *See id.* at 229.

Similarly, the Court granted certiorari before judgment in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), to hear the case together with *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). While *Grutter* involved an equal-protection challenge to the admissions policy at University of Michigan's law school, *Gratz* involved a similar challenge to the University's policy for admitting undergraduates. *Gratz* thus allowed this Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." 539 U.S. at 260.

This has been the Court's consistent practice for more than half a century in significant cases. In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which involved the scope of the National Labor Relations Act, the Court also granted certiorari before judgment in a companion case that "present[ed] the question in better perspective." *Id.* at 16. In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Court granted certiorari before judgment in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), allowing it to hold that the desegregation requirements of the Fourteenth Amendment also applied to the District of Columbia under the Fifth Amendment. And in *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946), the Court granted certiorari before judgment "by reason of the close relationship of the important question raised to the question presented in" *Porter* v. *Lee*, 328 U.S. 246 (1946).

This case is an ideal companion to *Seila Law*, and is essential to resolving both the CFPB's constitutionality and the remedial consequences of the CFPB's constitutional defects—just as granting certiorari before judgment in *Fanfan* alongside *Booker* allowed the Court to address both the merits of the constitutional issue and "the remedial question" of severance, *Booker*, 543 U.S. at 263. Failure to resolve that question will mean that even a decision declaring the CFPB's structure unconstitutional may have no effect in the numerous pending cases raising the issue. Then, the Court would have to wait for another petition in the future—perhaps even a petition from *Seila Law* or this case—to decide whether its merits decision provides litigants any actual relief. The Court's statutory authority to grant certiorari before judgment exists precisely to avoid this sort of scenario.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
HELGI C. WALKER
JOSHUA S. LIPSHUTZ
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Petitioners

September 30, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. AND CONSUMER SERVICE ALLIANCE OF TEXAS, PLAINTIFFS,	§	
V.	§	CAUSE NO. A-18-CV-0295-LY
CONSUMER FINANCIAL PROTECTION BUREAU AND KATHLEEN KRANINGER, IN HER OFFICIAL CAPACITY AS DIRECTOR, CONSUMER FINANCIAL PROTECTION BUREAU, DEFENDANTS.	§	

ORDER

Before the court is the above styled and numbered cause. The court stayed litigation in this action and stayed the compliance date of August 19, 2019, for the Consumer Financial Protection Bureau's ("Bureau") "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule ("Rule"). *See* 82 Fed. Reg. 54,472 (Nov. 17, 2017). Additionally, the court ordered the parties to file periodic joint status reports informing the court about proceedings related to the Rule and this action. By way of background, the Bureau initiated a rulemaking process that revisits one aspect of the Rule–the underwriting provisions–but not the payment provisions of the Rule. *See* 84 Fed. Reg. 4252 (Feb. 14, 2019) (proposing to rescind underwriting provisions); 84 Fed. Reg. 4298 (Feb. 14, 2019) (proposing to delay August 19, 2019 compliance date for underwriting provisions to November 19, 2020).

Pending before the court is the parties' periodic Joint Status Report filed August 2, 2019 (Clerk's Document No. 63). The parties inform the court that on June 6, 2019, the Bureau issued a final rule that delayed the compliance date for the underwriting provisions until November 19, 2020. *See* 84 Fed. Reg. 27907 (published June 17, 2019) (effective August 16, 2019). The report provides that the Bureau continues to make progress on its other rulemaking, which proposed to rescind the underwriting provision. Neither party requests the court to lift the stay of litigation or the stay of the compliance date at this time.

Having considered the case file, the Joint Status Report filed August 2, 2019, and the applicable law,

IT IS ORDERED that the stay of litigation and the stay of the compliance date are continued in full force and effect.

IT IS FURTHER ORDERED that the parties file a Joint Status Report informing the court about proceedings related to the Rule and this litigation as the parties deem appropriate, **but no later than Friday, December 6, 2019.**

SIGNED this 6th day of August, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., and CONSUMER SERVICE ALLIANCE OF TEXAS, *Plaintiffs,* v. CONSUMER FINANCIAL PROTECTION BUREAU and KATHLEEN KRANINGER, in her official capacity as Director, Consumer Financial Protection Bureau, *Defendants.*	Civil Action No. 1:18-cv-295

<u>JOINT STATUS REPORT</u>

Plaintiffs Community Financial Services Association of America, Ltd., and Consumer Service Alliance of Texas, together with Defendants the Consumer Financial Protection Bureau and Kathleen Kraninger, in her official capacity as Director of the Bureau, (collectively, the "Parties") submit this Joint Status Report pursuant to the Court's Order dated May 30, 2019 (ECF No. 60).

In this litigation, Plaintiffs challenge the Bureau's "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule ("Payday Rule" or "Rule"). The Rule contains two primary components—underwriting provisions requiring lenders to assess borrowers' ability to repay before making covered loans and payments provisions governing lenders' withdrawing payments for covered loans from consumers' bank accounts. The Rule established August 19, 2019 as the compliance date for these provisions, but this Court stayed the compliance date by order dated November 6, 2018 (ECF No. 53).

As the Parties previously reported to the Court, the Bureau published two notices of proposed rulemaking in the Federal Register on February 14, 2019: one that proposed to rescind the Rule's underwriting provisions, 84 Fed. Reg. 4252 (Feb. 14, 2019), and one that proposed to delay the compliance date for those provisions, 84 Fed. Reg. 4298 (Feb. 14, 2019).

On June 6, 2019, the Bureau issued a final rule that delayed the compliance date for the underwriting provisions until November 19, 2020. That final rule was published in the Federal Register on June 17, 2019, and will take effect on August 16, 2019. 84 Fed. Reg. 27907 (June 17, 2019). The Bureau is continuing to make progress on its other rulemaking, which proposed to rescind the underwriting provisions.

The parties are not requesting that the Court lift the stay of litigation or lift the stay of the compliance date at this time.

Dated: August 2, 2019

Respectfully submitted,

MARY McLEOD
General Counsel

JOHN R. COLEMAN
Deputy General Counsel

STEVEN Y. BRESSLER
Assistant General Counsel

/s/ Kristin Bateman
KRISTIN BATEMAN (Cal. Bar No. 270913)
KEVIN FRIEDL (NY Bar No. 5240080)
Attorneys
Consumer Financial Protection Bureau
1700 G Street, NW
Legal Division
Washington, D.C. 20552
Telephone: (202) 435-7821
Fax: (202) 435-7024
Kristin.Bateman@cfpb.gov

Counsel for Defendants Consumer Financial Protection Bureau and Kathleen Kraninger

/s/ Michael A. Carvin
MICHAEL A. CARVIN
D.C. Bar No. 366784
Admitted *pro hac vice*
macarvin@jonesday.com
CHRISTIAN G. VERGONIS
D.C. Bar No. 483293
Admitted *pro hac vice*
cvergonis@jonesday.com
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

LAURA JANE DURFEE
Texas Bar No. 24069653
ldurfee@jonesday.com
JONES DAY
2727 North Hardwood Street
Dallas, TX 75201
Telephone: (214) 220-3939
Facsimile: (214) 969-5100

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Michael A. Carvin
Christian G. Vergonis
Jones Day
51 Louisiana Ave., NW
Washington, DC 20001-2113

Laura Jane Durfee
Jones Day
2727 N. Harwood
Dallas, TX 75201

/s/ Kristin Bateman
Kristin Bateman
Counsel for Defendants

United States Senate
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
WASHINGTON, DC 20510-6075

August 14, 2019

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Director Kraninger:

I write to request that the Consumer Financial Protection Bureau (CFPB or Bureau) implement the "payment" provisions of the 2017 Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (Payday Rule) by the scheduled August 19, 2019, compliance date. The Bureau has not initiated a rulemaking to delay or rescind this portion of the Payday Rule. As the Bureau argued in court filings, there is no legal basis to delay the scheduled August 19, 2019, compliance date.

The Payday Rule generally prohibits two types of unfair and abusive lender practices. First, the Payday Rule makes it an unfair and abusive practice for a lender to make certain loans without determining that the consumer has the ability to repay the loans.[1] Second, the Payday Rule prohibits lenders from attempting to withdraw payments from consumers' accounts for certain loans after two prior attempts to withdraw funds failed due to a lack of funds.[2]

The Payday Rule that the Bureau issued on October 5, 2017, would have provided substantial and much needed protections to consumers from predatory payday lenders. But just three months after finalizing the Payday Rule, the Bureau—under then Acting Director Mick Mulvaney—sided with industry and began efforts to repeal the Rule. In January 2018, the Bureau announced that it would initiate a rulemaking process to reconsider the Payday Rule.[3] In April 2018, Bureau political appointees met with an industry trade group for payday lenders to discuss a lawsuit or potential repeal of the Payday Rule.[4] A few days later, payday lenders filed their lawsuit against the Bureau challenging the Payday Rule.[5]

---

[1] 12 C.F.R. § 1041.4.
[2] 12 C.F.R. 1041.7.
[3] *See* Jan. 16, 2018 CFPB Statement on Payday Rule, *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/.
[4] *See* https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html.
[5] *Cmty. Fin. Svcs. Ass'n v. CFPB*, Case No. 1:18-cv-295 (W.D. Tex. Apr. 9, 2018).

From the outset, the Bureau has been joined at the hip with the payday lender plaintiffs to delay the implementation of the Payday Rule. On May 31, 2018, the Bureau and the payday lender plaintiffs submitted a joint filing asking the court to stay the litigation *and* the August 19, 2019 compliance date for the Payday Rule. The Court initially stayed the litigation, but refused to stay the August 19, 2019, compliance date.

On October 26, 2018, the Bureau announced that it would initiate a rulemaking to delay the compliance date and revisit the mandatory underwriting provisions, but not the payment provisions, of the Payday Rule.[7] Based on the proposed rulemaking, on November 6, 2018, the court also stayed the compliance date for the Payday Rule.[8] On February 14, 2019, the Bureau initiated a rulemaking to rescind the mandatory underwriting provisions of the Payday Rule and delay the compliance date for these provisions to November 19, 2020.[9] The Bureau's rulemaking did not seek to delay the compliance date or repeal the payment provisions of the Payday Rule.

On March 8, 2019, the Bureau and the payday lender plaintiffs filed a joint update with the court. The payday lender plaintiffs argued that the court should continue to stay the compliance date for both the mandatory underwriting provisions and the payment provisions of the Payday Rule, even though the Bureau's rulemaking only sought to delay and repeal the mandatory underwriting provisions.[10] The Bureau disagreed:

> [T]he possibility that the Bureau may revise the payments provisions does not justify continuing to stay the compliance date of those provisions . . . . And, in any event, even definitive plans to undertake a rulemaking process do not by themselves justify staying the *compliance date* of a rule (as opposed to litigation over a rule). Rather, a stay of a compliance date is warranted only if the plaintiff can show various factors, including a likelihood of success on the merits, or at least a "substantial case on the merits" . . . . Plaintiffs have not attempted to make that showing in asking the Court to keep the compliance date for the payments provisions stayed until the Bureau completes its rulemakings that address the separate underwriting provisions.[11]

In sum, the Bureau argued that there is no legal basis to stay the compliance date for the payment provisions. But the Bureau then decided that it would not seek to lift the stay.[12] Since then,

[7] Oct. 26, 2018 CFPB Statement on Payday Rule, *available at* https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.
[8] *CFSA v. CFPB*, Nov. 6, 2018 Order (Doc. 53).
[9] *See* 84 Fed. Reg. 4252, 4298.
[10] *CFSA v. CFPB*, Mar. 8, 2019 Joint Status Report at 3-5 (Doc. 57).
[11] *Id.* at 7 (emphasis in original).
[12] The court captured the absurdity in its order. According to the Bureau, the plaintiff payday lenders "would only be entitled to a stay if Plaintiffs can show various factors, including a likelihood of success on the merits, or at least a 'substantial case on the merits.'" *CFSA v. CFPB*, Mar. 19 2019 Order at 2-3

including in its most recent court filing on August 2, 2019, the Bureau has continued to refuse to request that the court lift the stay of the compliance date for the payment provisions of the Payday Rule.[13]

The Bureau's refusal to request to lift the stay of the compliance date for the payment provisions makes no sense and exposes consumers to continued withdrawal requests, resulting in unnecessary fees. On the one hand, the Bureau argues there is no legal basis to stay the compliance date for the payment provisions. On the other hand, the Bureau is not challenging the stay. The Bureau's inaction is also contrary to the plain language of the Administrative Procedures Act, which provides that a court may only postpone the effective date of an agency action "to the extent necessary to prevent irreparable injury" or "to preserve status or rights pending conclusion of review proceedings."[14] Here, as the Bureau itself argued, the payday lender plaintiffs have not even attempted to show that they would be irreparably harmed by the implementation of the payment provisions.

I strongly urge you to immediately request that the court lift the stay of the August 19, 2019, compliance date for the payment provisions of the Payday Rule. As the Bureau explained—there is no legal basis for a stay. Implementing this provision would protect consumers by reducing the fees they are charged and other harms they suffer from lenders' unsuccessful attempts to withdraw funds from their accounts.[15] Consumers should not have to wait any longer for these important protections.

Please respond by August 19, 2019—the scheduled compliance date for the payment provisions of the Payday Rule—if the Bureau will lift the stay and implement the payment provisions of the Payday Rule. If so, please provide a timeline for implementation. If the Bureau will not request that the court lift the stay, please explain the legal basis for the decision.

Sincerely,

Sherrod Brown

Sherrod Brown
United States Senator

(Doc. 58). But, the court noted, "no party is seeking to lift the compliance-date stay for the payment provisions." *Id.*

[13] *CFSA v. CFPB*, Jun. 10, 2019 Joint Status Report (Doc. 62); Aug. 2, 2019 Joint Status Report (Doc. 63).

[14] 5 U.S.C. § 705; *see also Scripp-Howard Radio v. FCC*, 316 U.S. 4, 10 (1942) (a court can only stay agency action pending court review to "prevent irreparable injury to the parties or to the public resulting from premature enforcement of a determination that may later be found to have been wrong").

[15] 82 Fed. Reg. 54,847-48.

AFSA
Protecting Credit Since 1916
American Financial Services Association

August 2, 2019

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Standards for Safeguarding Customer Information
16 CFR Part 314, Project No. 145407

Dear Commissioners:

The American Financial Services Association (AFSA)[1] respectfully requests that the Federal Trade Commission (FTC) make substantial changes to the proposal (Proposed Rule) to amend the Standards for Safeguarding Customer Information (Safeguards Rule or Rule) before it is finalized.

I. Introduction.

AFSA members do their best to protect their customers' information, as they have every incentive to do. No financial institution wants to be the next headline for a massive data breach. Thus, we support the FTC's goal of safeguarding consumers' information. We believe that the FTC can meet that goal and maintain the flexibility that is a crucial part of the current Rule by incorporating several changes to the Proposed Rule. First, we ask that the FTC include a safe harbor in the Rule. Second, we encourage the FTC to ask Congress for the authority to preempt state laws. Third, we suggest that the FTC broaden the exemption for smaller financial institutions. And lastly, we ask that the FTC use a risk-based approach in the Rule. The Safeguards Rule must continue to strike the right balance between providing guidance to financial institutions and preserving flexibility to address threats.

II. AFSA members have every incentive to do their absolute best to protect their customers' information.

AFSA understands and agrees with the importance of safeguarding customer information. Cybersecurity remains a top priority for AFSA's members. Given the well-known risks of reputational damage and financial costs resulting from data breaches, every financial institution has a strong incentive to protect its customers' information.

Financial institutions expend significant resources to safeguard consumer data and protect against cyber-attacks. Both large and small financial institutions develop and use information-security plans and they deploy all manner of defensive software. Larger financial institutions may spend over $500 million per year to do so.

A great deal of time and attention is invested in complying with state and federal information security regulations. In addition to developing and using protective software, financial institutions engage in extensive employee

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

919 18th Street NW, Suite 300, Washington, D.C., 20006 | (202) 296-5544 | www.afsaonline.org | @AFSA_DC

information security training and monitoring. Interestingly, some financial institutions report that just under half of corporate information security activities are not security-oriented, but rather compliance-oriented.[2]

III. Including a safe harbor in the Proposed Rule will preserve flexibility while maintaining strong safeguards.

The Proposed Rule states that, "The Commission continues to believe that a flexible, non-prescriptive Rule enables covered organizations to use it to respond to the changing landscape of security threats, to allow for innovation in security practices, and to accommodate technological changes and advances."[3] AFSA agrees that flexibility in the Rule is crucial to enable financial institutions to use innovation to respond to new threats.

Moreover, the FTC writes, "The proposed amendments are designed to preserve that flexibility while doing more to ensure that financial institutions develop information security plans that are appropriate, reasonable, and designed to protect customer information. Although the Commission believes the proposed approach is sufficiently flexible, it seeks comment on whether the approach creates unintended consequences for businesses…"[4]

In order to better meet the dual goals of ensuring that financial institutions have information security plans that protect customer information and preserving flexibility in the Rule, AFSA urges the FTC to include a safe harbor in the Rule. Specifically, the Rule should include a safe harbor for companies complying with one or more of the following standards: the Federal Financial Institutions Examination Council (FFIEC) Interagency Guidelines, the cybersecurity regulations issued by the New York Department of Financial Services (Cybersecurity Regulations), or the Payment Card Industry Data Security Standard (PCIDSS).

The inclusion of a safe harbor will reduce the compliance burden on financial institutions while still providing protection for consumers. We suggest that because the FTC modeled the Proposed Rule on the Cybersecurity Regulations, the safe harbor cover financial institutions complying with the Cybersecurity Regulations. Additionally, including the FFIEC Interagency Guidelines and the PCIDSS in the safe harbor is appropriate because requirements in those standards are strong and approved by prudential banking regulators with safety and soundness concerns. If regulators concerned with a bank's safety and soundness believe that the safeguards included in the FFIEC Interagency Guidelines and the PCIDSS sufficiently protect consumers, we see no reason why the FTC would disagree.

Thus, AFSA strongly encourages the FTC to include a safe harbor in the Rule.

IV. A national data security rule may be appropriate, but only if it preempts state laws.

While AFSA recognizes the role states have in consumer protection—indeed most AFSA member companies operate subject to state licensure and regulation—we believe data security and privacy is so significant a public policy issue that it transcends state borders, and that consumers and industry alike are best served by a transparent, non-duplicative regulatory regime.

---

[2] PwC, "Global State of Information Security Survey 2016. Oct. 9, 2015. Available at: http://www.pwc.com/gx/en/issues/cyber-security/information-security-survey.html.
[3] 84 FR 13160.
[4] *Ibid.*

Operational and compliance issues arise when an individual state promulgates requirements unique to that state without demonstrating a security challenge unique to that state. In reality, information processing flows across state borders—often on the cloud—and protecting privacy and enhancing information security is not only a multi-state, but a global, transnational issue.

Along with existing federal law, regulation, and agency guidance, practical data security and privacy are based on national standards developed by the FFIEC and the U.S. Department of Commerce's National Institute of Standards and Technology (NIST) Cybersecurity Framework. Additionally, self-regulatory and standards-setting bodies draft standards on an often global basis. See, for example, the PCIDSS, which imposes comprehensive control objectives relating to information security.

AFSA strongly supports a single, federal, risk-based standard that preempts state law. Inconsistent state laws regarding data security and the lack of a national standard for businesses have resulted in uneven consumer protection, as well as higher compliance costs for financial institutions.

We realize, of course, that the Gramm-Leach-Bliley Act (GLBA) does not grant the FTC the authority to preempt state law. AFSA believes that Congress should give the FTC the authority to preempt state laws before the FTC's Safeguards Rule becomes a floor for state data breach laws and not a ceiling.

While some existing federal laws relating to privacy do not preempt state law, federal preemption in this area is not uncommon.

Currently, three federal privacy statutes preempt state law: the Children's Online Privacy Protection Act of 1998;[5] the CAN-SPAM Act of 2003;[6] and the 1996 revision of the Fair Credit Reporting Act, as well as further updates to that statute enacted in the 2003 Fair and Accurate Credit Transactions Act.[7]

V. Smaller financial institutions should be exempt from an amended Safeguards Rule.

In the commentary to the Proposed Rule, the FTC writes, "As to the commenters that stated that the current Rule works well and that companies have already developed compliance programs under it, the Commission does not believe the proposed new requirements would require an overhaul of existing compliance programs."[8]

To the contrary, the Proposed Rule would require financial institutions, particularly smaller financial institutions, to implement a multitude of changes to their information security programs. While financial institutions have data security standards in place, they are scaled to the size of the institution. The Proposed Rule would impose national bank data security standards on companies with only a few branch offices.

For these institutions, the Proposed Rule would create significant compliance issues and increased costs, which may not be necessary. Such financial institutions would have to: create a new Chief Information Security Officer position and employ such a person, protect additional information (not just sensitive information), increase encryption levels, increase storage/server ability, create a different way to allow access to information, create

[5] 15 USC §6502(d).
[6] 15 USC §7707(b)(1).
[7] 15 USC §§ 1681m(a), 1681m(b), and 1681s-2.
[8] 84 FR 13160.

brand new audit trails, purge software systems in a way never done before, and increase internal audits and audit staff to do the additional work.

Basically, these smaller financial institutions would have to hire a top-level IT person in-house, presumably one at the same level as national financial institutions. Given the current demand for such personnel, such an individual's salary level, plus the costs of additional support staff, along with adding, updating, or replacing information security software and procedures and the situation quickly becomes unduly expensive for small institutions. The Proposed Rule would allow financial institutions to designate a service provider to fulfill this role, but that too is a significant expense. And of course, because the financial institution is still responsible for its own information security, someone must oversee the service provider. For the oversight to be effective, the person overseeing the service provider would still need extensive IT experience.

It took companies thousands of hours to comply with the Cybersecurity Regulations, hours that smaller companies simply do not have. The FTC recognizes that some of the requirements in the Proposed Rule would place an undue burden on smaller financial institutions. However, the proposed exemption is too narrow. Currently, the exemption would apply to financial institutions that maintain customer information concerning fewer than 5,000 customers. The California Consumer Privacy Act applies to entities that have the personal information of 50,000 or more consumers. We suggest that the FTC adopt that standard.

VI. The Rule should incorporate a risk-based approach, which leads to better privacy protection than a prescriptive, one-size-fits-all standard.

AFSA recommends that the FTC reevaluate the prescriptive standards outlined in the Proposed Rule. Prescriptive standards run the risk of becoming a mere "check the box" exercise, as opposed to truly enhancing security. Through the implementation of the flexible standard currently laid out in the Safeguards Rule, financial institutions have developed different administrative controls to satisfy information security objectives.

Financial institutions should be able to use a risk-based approach to focus on the likelihood that an event will occur and what the resulting impact would be. By taking this information into account, institutions can prioritize information security activities.[9] A risk-based approach enables organizations to make informed decisions about information security expenditures and develop methods to handle the unique risks faced by different institutions. Regulations that allow for flexibility give institutions the ability to mitigate, transfer, avoid, or accept risk, depending on the potential impact.

Inflexible requirements, on the other hand, could prevent financial institutions from taking advantage of new technologies or methods that may provide better protection. Prescriptive requirements undermine the ability of information security personnel to prioritize sensitive or vulnerable information systems and significant threats. They force institutions to reallocate limited resources to fulfilling regulatory obligations and away from targeting high-priority information security issues. Any final rule should not require firms to implement specific technology methods that may be superseded or may be infeasible, especially where there are equally secure compensating controls.

---

[9] For example, some financial institutions, such as installment lenders or vehicle finance companies, do not hold customer deposits and do not offer open lines of credit or credit cards. Unauthorized access to a customer account at such a financial institution certainly has privacy implications, but is unlikely to result in financial harm to the consumer as there can be no unauthorized withdrawals from or charges to a customer account at such a financial institution.

We outline our specific suggestions to achieve a risk-based approach below.

A. The Proposed Rule should be limited to sensitive information that is stored electronically.

Primarily, the Proposed Rule should be limited to sensitive information and electronic information. It should not apply to all customer information, nor should it apply to paper records.

The definition of "customer information" in the Proposed Rule includes both sensitive and non-sensitive information. It would be impractical to apply several sections of the Proposed Rule to non-sensitive information. Specifically, non-sensitive information does not need to be encrypted or disposed of in the manner outlined in the Proposed Rule. Moreover, customers should not be required to use multi-factor authentication to access non-sensitive information. AFSA asks that the FTC clarify that these requirements apply only to sensitive information.

Similarly, parts of the Proposed Rule would be impractical if they applied to customer information in both paper and electronic form (*e.g.,* multi-factor authentication and monitoring). It should be clarified that the requirements apply only to electronic information.

B. AFSA recommends several changes to the Proposed Rule.

Our recommendations are outlined by section below.

Section 314.4(c)(2)—This requires financial institutions to identify and manage the data, personnel, devices, systems, and facilities that enable an institution to achieve business purposes in accordance with their relative importance to business objectives and risk strategy. AFSA recommends that this section be removed because it is not clear what the management standard would be.

Section 314.4(c)(4)—This requires that all customer information held or transmitted, both in transit over external networks and at rest, be encrypted. Currently, financial institutions encrypt sensitive information in transit over external networks. Also, it should be necessary to encrypt only sensitive information. There is no reason to encrypt all information.

The FFIEC Cybersecurity Assessment Tool, which is based on the FFIEC Information Technology Examination Handbook (IT Handbook) and the NIST Cybersecurity Framework, as well as industry accepted information security practices, does not require encryption of data at rest, other than passwords. It suggests that only financial institutions with a higher risk profile that triggers the most burdensome advanced information security maturity level determine if encryption of data at rest is justified.

Section 314.4(c)(6)—This requires financial institutions to implement multi-factor authentication for any individual accessing customer information. As noted above, this section should be limited to sensitive information for the convenience of the customer. Customer convenience needs to carefully be weighed against the value of safeguarding all information. Furthermore, while many large financial institutions already require multi-factor authentication for customers, smaller ones do not. Multi-factor authentication is an unnecessary safeguard for smaller institutions and so this requirement should be limited to larger institutions.

In addition, this section should be limited to individuals accessing the financial institution's internal networks from an external network. It would be unnecessary and costly to require multi-factor authentication for individuals accessing an internal network from an internal network (*i.e.,* multi-factor authentication should not be required for a financial institution's employees to access its own internal networks from an internal network, but should be required to access the financial institution's internal networks from an external network).

Section 314.4(c)(7)—This requires financial institutions to include audit trails within an information security program designed to detect and respond to security events. It is crucial that this requirement either be removed or appropriately tailored. The cost to maintain audit trails on all parts of a business over many years would be enormous and would not add particular value to the information security program.

Audit trails should be maintained in accordance with a financial institution's risk assessments. AFSA suggests that the FTC limit the size and scope of the requirement. For example, audit trails should not be required to be kept for more than one year. The Cybersecurity Regulations data retention period has resulted in an exponential increase in data retention, with a significant implementation burden and no material improvement to information security. It would require costly modifications to institutions' legacy systems, which are not designed to record information relating to every financial transaction. We suggest that the FTC only require preservation of data that the institution itself decides needs to be maintained in order to fulfill auditing needs. In addition, this requirement should not be imposed on smaller institutions.

Section 314.4(c)(8)—This requires financial institutions to develop, implement, and maintain procedures for the secure disposal of customer information in any format that is no longer necessary for business operations or for other legitimate business purposes. This requirement exceeds federal banking standards. The FFIEC Cybersecurity Assessment Tool does not require destruction of customer information once it is no longer necessary for business operations or for other legitimate business purposes. It requires only that financial institutions have "data is disposed of or destroyed according to documented requirements and within expected time frames." Requiring targeted disposal will be technically infeasible in many circumstances due to the manner in which information is maintained within individual systems, particularly legacy systems and those where data is commingled. Data stored on magnetic tapes and commingled data on servers presents significant feasibility challenges with respect to any requirement for data destruction. Accordingly, we ask that this requirement be revised to recognize that financial institutions may retain data pursuant to the records retention policy of the business or where disposal is not reasonably feasible. In addition, this requirement should not apply to non-sensitive information.

Section 314.4(c)(10)—This requires financial institutions to implement policies, procedures, and controls designed to monitor the activity of authorized users and detect unauthorized access or use of, or tampering with, customer information by such users. This section should apply only to information stored electronically. It would be impossible to monitor the activity of users accessing paper files.

Section 314.4(d)(1)—This requires financial institutions to regularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems, and procedures, including those to detect actual and attempted attacks on, or intrusions into, information systems. Because it would be impossible, and because it is not as vulnerable to theft, this requirement should not apply to paper files, but should apply instead only electronic data.

Section 314.4(e)—This requires financial institutions to implement appropriate training and education, including verifying that personnel take steps to maintain current information security knowledge and use qualified security personnel. The FTC should acknowledge that meeting these requirements will look very different for a small financial institution than a large, multi-national one.

Section 314.4(f)—This expands the requirement to oversee service providers to require financial institutions to periodically assess such service providers based on the information security risk they present. The FTC needs to better define which service providers need to be overseen. For example, under the current definition, the three large credit bureaus could be defined as service providers, but of course a small financial institution could not assess the security risk one of the bureaus presents. AFSA suggests that if a service provider is directly supervised by a federal financial regulator, it be exempt from being overseen by this requirement.

C. The FTC should delay the effective date.

The Proposed Rule puts forward an effective date of six months after publication of the final rule. While this may be possible for larger institutions who are already complying with the Cybersecurity Regulations, it is inconceivable for smaller institutions. Those institutions would have to: employ or designate and train a chief information security officer, encrypt all customer information, implement multi-factor authentication, set up audit trails, redo disposal procedures, etc. within half a year.

During this timeframe, financial institutions are also coming into compliance with other standards, such as the California Consumer Privacy Act and the Nevada internet privacy law.

We respectfully request that the FTC provide an implementation period of two years. There were a number of problems that financial institutions faced complying with the Cybersecurity Regulations. The FTC could prevent, or at least reduce, these implementation issues with a longer timeframe in which to comply.

VII. Conclusion.

AFSA understands that the FTC has issued the Proposed Rule in an attempt to provide more detailed guidance as to what an appropriate information security program entails, while still giving companies with flexibility. AFSA suggests that that the FTC can better achieve that balance with some modifications to the Proposed Rule. Perhaps most importantly, the FTC should include a safe harbor in the Rule for compliance with certain data security standards. Additionally, the FTC should exempt financial institutions from the Rule if they serve less than 50,000 customers. We also believe that the FTC should modify the proposed rule so that it strikes a better balance between providing guidance to financial institutions and preserving flexibility to address threats. And lastly, we believe that such a strong, federal standard should preempt a potential myriad of state laws.

If you have any questions, please do not hesitate to contact me by phone at 202-776-7300 or e-mail at cwinslow@afsamail.org.

Sincerely,

Celia Winslow

Celia Winslow
Vice President, Legal & Regulatory Affairs
American Financial Services Association

Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy

The Bankruptcy Code is more than 40 years old, and its last major amendments, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, are 14 years old. In that time, the amount of debt Americans now hold has increased, how they incur that debt has changed, and the types of problems that debt can create have evolved. Technological changes also have transformed how Americans find information about legal options and professional services available to them.

The ABI Commission on Consumer Bankruptcy was created in December 2016 to research and recommend improvements to the consumer bankruptcy system that can be implemented within its existing structure. The Commission's Final Report contains recommendations for amendments to the Code and Rules designed to make the consumer bankruptcy system more accessible and efficient for both financially struggling Americans and the professionals who serve them. After soliciting public feedback, Commission members identified nearly 50 discrete issues for study and divided these issues among three advisory committees composed of 52 bankruptcy professionals. The commissioners and committee members represent all diverse stakeholders in the bankruptcy system.

Some of the issues and recommendations addressed in the Final Report include:

Issue	Recommendation
Student Loans	Student loan debt significantly depresses U.S. economic activity, and current bankruptcy law ineffectively addresses it. The Commission recognizes that recent graduates should generally be required to repay government-made or guaranteed student loans, but it recommends statutory amendments to discharge student loans that are • made by nongovernmental entities; • incurred by a person other than the person receiving the education; • being paid through a five-year chapter 13 plan; or • first payable more than seven years before a chapter 7 bankruptcy is filed. In addition, the Commission recommends administrative procedures and interpretations of current law to facilitate reasonable relief from student loan indebtedness.

Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy

Remedies for Discharge Violation	Current law presents difficulties both in enforcing the discharge injunction and in determining its scope. Most courts allow enforcement of the discharge only through contempt proceedings, which may not provide effective relief. The Commission recommends: • the creation of a statutory private right of action for violations of the discharge, like the action for violations of the automatic stay, which would provide the full range of sanctions, including costs, attorney fees, and punitive damages; and • amendments to the Bankruptcy Rules allowing motions to determine whether particular creditor conduct would violate the discharge.
Protection of Interests in Collateral Repossessed Prepetition	The circuit courts are divided on the question of whether collateral seized by a creditor before a bankruptcy filing must be returned to the party entitled to possession afterward. To balance the need of the debtor for return of the collateral, often a vehicle, and the need of the creditor for adequate protection, the Commission's principal recommendation is: • § 362(a)(3) should be amended to provide expressly that a creditor's retention of estate property violates the automatic stay, but only if proof of insurance or other security is provided for property subject to loss of value.
Chapter 7 Attorney's Fees	Current law largely prohibits collection, after the bankruptcy case is filed, of unpaid attorney fees for a chapter 7 debtor's representation. This often leads either to delayed filings so that the anticipated fee can be paid in advance, or to the filing of chapter 13 cases simply to ensure fee payment. The Commission recommends: • several steps to reduce the overall fees needed for chapter 7 representation, allowing prompter advance payment; and • consideration of changes in the debtor's discharge to allow the collection of unpaid fees postpetition, including: — delay of discharge to allow collection of attorney fees; and — an exception from discharge, with judicial oversight.
Attorney Competency and Remedying Lawyer Misconduct	There are well-established rules of conduct governing attorney conduct in bankruptcy cases. The Commission recommends: • vigorous enforcement of these rules by the responsible entities; • the formation of committees or other bodies at the local level to investigate and resolve complaints against offending attorneys; • the publication of all disciplinary orders; and • the award of enhanced fees, as authorized by § 330(a)(3)(E), for board-certified or otherwise demonstrably skillful and experienced practitioners.

Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy

<table>
<tr><td>Credit Counseling and Financial Management Course</td><td>The Commission recommends:
• eliminating prepetition credit counseling, because requiring individuals to receive a credit counseling briefing as a prerequisite for any bankruptcy filing imposes costs in money, time, and complexity that are not outweighed by any benefit in helping them avoid unnecessary filings;
• eliminating the requirement for a course in financial management in chapter 7, but retaining it in chapter 13, with further study of its effectiveness.; and
•amending the Fair Credit Reporting Act to require consumer reporting agencies to report the debtor's successful completion of a financial management course, so that the effectiveness of the course may be measured by changes in the debtor's credit rating.</td></tr>
<tr><td>Means Test Revisions & Interpretations</td><td>The means test assesses a debtor's ability to repay debt by calculating the debtor's disposable income—total income less defined living expenses. The means test determines both whether a debtor should be presumed to be abusing chapter 7 and so barred from relief under that chapter, and whether a debtor's chapter 13 plan may be denied confirmation because it provides for inadequate payments on unsecured claims. The test incorporates numerous detailed provisions for determining both income and allowed deductions. The Commission recommends retaining the means test, but amending it
• to require reduced documentation from debtors with below-median income;
• to exclude from income public assistance, government retirement, and disability benefits, capped by the maximum allowed Social Security benefit;
• to remove the presumption of abuse if the debtor shows special circumstances, even if the circumstances arose voluntarily; and
• to allow certain statutory expense deductions from income only to the extent actually incurred by the debtor and necessary for the support of the debtor and debtor's dependents.</td></tr>
<tr><td>Chapter 13 Debt Limits</td><td>To expand the availability of relief under chapter 13 and reduce the need for individuals to file under chapter 11, the Commission recommends:
• increasing the chapter 13 debt limit to $3 million, eliminating the distinction between secured and unsecured debts; and
• for married couples, applying the limit separately to each spouse and not aggregating the spousal debt, even in joint cases.</td></tr>
</table>

Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy

Racial Justice in Bankruptcy	The Commission finds, based on substantial empirical evidence, that African Americans are both disproportionately more likely to file chapter 13 cases than debtors of other races and disproportionately less likely to obtain a discharge. To ensure that all individuals have equal access to justice, the Commission recommends several actions, including: • organizational training programs for bankruptcy professionals aimed at reducing implicit racial bias; • amendment to 28 U.S.C. § 159 requiring both the collection of race and ethnicity information on bankruptcy petitions and the dissemination of that data by the Administrative Office of U.S. Courts; and • in the absence of such an amendment, consideration of collecting race and ethnicity information on bankruptcy filers through official bankruptcy forms, with appropriate privacy protections.
Reserve Fund in Chapter 13 Cases	Reflecting the advice of nearly all financial management professionals, the Commission finds that chapter 13 debtors should be allowed and encouraged to maintain a reasonable reserve fund, held by the trustee, to address unanticipated expenses. The Commission recommends: • amendments to § 1322(b) to allow such a reserve fund, not to exceed one month of scheduled expenses, subject to restoration to the extent drawn upon, excluded from disposable income, and payable to meet unanticipated expenses on notice and an opportunity to object; and • consistent amendments to the relevant bankruptcy rules and forms. In the absence of these amendments, the Commission recommends that current law be interpreted to allow the creation of such a limited reserve fund through the debtor's plan, with provisions for disbursement from the fund on notice and opportunity to object, and for differing disposition of the fund at the conclusion of the case depending on the debtor's income level: payment of the fund balance to debtors with below-median income, and for above-median debtors, payment to the unsecured creditors.
Chapter 7 Trustee Compensation	The Commission finds that chapter 7 trustees are substantially undercompensated. The Commission recommends statutory amendments that would: • increase the trustees' base compensation from $60 to $120 in each case, with the increase coming from existing fees rather than an increase in filing fees or a reduction in payments to creditors; and • increase the commission allowed under § 326(a) by increasing the levels of distributions to creditors at which lower percentages of the distributions are paid to the trustee.

Press Release

August 05, 2019

Federal Reserve announces plan to develop a new round-the-clock real-time payment and settlement service to support faster payments

For release at 1:30 p.m. EDT

Share

The Federal Reserve Board on Monday announced that the Federal Reserve Banks will develop a new round-the-clock real-time payment and settlement service, called the FedNow℠ Service, to support faster payments in the United States.

The rapid evolution of technology presents a pivotal opportunity for the Federal Reserve and the payment industry to modernize the nation's payment system and establish a safe and efficient foundation for the future. The Federal Reserve believes faster payment services, which enable the near-instantaneous transfer of funds day and night, weekend and weekdays, have the potential to become widely used and to yield economic benefits for individuals and businesses by providing them with more flexibility to manage their money and make time-sensitive payments.

Since its founding more than a century ago, the Federal Reserve has provided payment and settlement services, alongside and in cooperation with the private sector, as part of its core function of promoting an accessible, safe, and efficient U.S. payment system. The Federal Reserve has established over its history a broad reach as a provider of payment and settlement services to the more than 10,000 financial institutions across the country. That reach will help the FedNow Service support a nationwide infrastructure on which the financial services industry may develop innovative faster payment services for the benefit of all Americans.

"Everyone deserves the same ability to make and receive payments immediately and securely, and every bank deserves the same opportunity to offer that service to its community," said Federal Reserve Board Governor Lael Brainard. "FedNow will permit banks of every size in every community across the country to provide real-time payments to their customers."

In 2018, the Board requested public comment on potential services that could be developed by the Federal Reserve to support faster payments. Of the more than 350 comments that took a position on whether the Federal Reserve should develop a new service for faster payments, over 90 percent supported the Federal Reserve operating a round-the-clock real-time payment and settlement service alongside services provided by the private sector.

The Board is now requesting comment on how the new service might be designed to most effectively support the full set of payment system stakeholders and the functioning of the broader

U.S. payment system. The Board anticipates the FedNow Service will be available in 2023 or 2024.

In addition, the Board is announcing its intention to explore the expansion of Fedwire Funds Service and National Settlement Service hours, up to 24x7x365, to facilitate liquidity management in private-sector real-time gross settlement services for faster payments and to support a wide range of payment activities, beyond those related to faster payments.

The Board's *Federal Register* notice and a list of frequently asked questions are attached. Comments are requested within 90 days of publication in the Federal Register, which is expected shortly.

For media inquiries, call 202-452-2955

Federal Register notice (PDF)

FAQs

Related Content

Board Votes

Last Update: August 09, 2019

FEDERAL RESERVE SYSTEM

Docket No. OP – 1670

Federal Reserve Actions to Support Interbank Settlement of Faster Payments

AGENCY: Board of Governors of the Federal Reserve System

ACTION: Notice and request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has determined that the Federal Reserve Banks (Reserve Banks) should develop a new interbank 24x7x365 real-time gross settlement service with integrated clearing functionality to support faster payments in the United States. The new service would support depository institutions' provision of end-to-end faster payment services and would provide infrastructure to promote ubiquitous, safe, and efficient faster payments in the United States. In addition, the Federal Reserve intends to explore expanded hours for the Fedwire® Funds Service and the National Settlement Service, up to 24x7x365, to support a wide range of payment activities, including liquidity management in private-sector real-time gross settlement services for faster payments. Subject to the outcome of additional analysis of relevant operational, risk, and policy considerations, the Board will seek public comment separately on plans to expand hours for the Fedwire Funds Service and the National Settlement Service.

DATES: Comments on the proposed actions must be received on or before [INSERT 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. OP – 1670, by any of the following methods:

- Agency Website: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.

- Email: regs.comments@federalreserve.gov. Include docket number in the subject line of the message.
- FAX: (202) 452-3819 or (202) 452-3102.
- Mail: Ann Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments will be made available on the Board's website at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue, NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT:

Kirstin Wells, Principal Economist (202-452-2962), Mark Manuszak, Assistant Director and Chief (202-721-4509), Susan V. Foley, Senior Associate Director (202-452-3596), Division of Reserve Bank Operations and Payment Systems; or Gavin Smith, Senior Counsel, Legal Division (202 452-3474), Board of Governors of the Federal Reserve System. For users of Telecommunications Device for the Deaf (TDD), contact (202-263-4869.)

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. payment system faces a critical juncture in its evolution. Advances in technology have created an opportunity for significant improvements to the way individuals and businesses make payments in today's economy. Smartphones, high-speed computing and cloud capabilities, extensive communication networks, and other innovations allow individuals and businesses to send and receive messages, post and consume content online, search for and obtain information, and conduct myriad other activities almost immediately and at any time. Similarly, today's technology presents a pivotal opportunity for the Federal Reserve and the payment industry to modernize the nation's payment system to establish a safe and efficient foundation for the future.

A. Background

Services to conduct "faster payments" have begun to emerge to address shortcomings of traditional payment methods. Faster payments allow individuals and businesses to send and receive payments within seconds at any time of the day, on any day of the year, such that the receiver can use the funds almost instantly.[1] Faster payment services are growing in popularity, but typically require users to all participate in the same specific service to exchange payments. However, there is broad consensus within the U.S. payment community that, just as immediate services available around the clock have become standard for other everyday activities, faster payment services have the potential to become widely used, resulting in a significant and positive impact on the U.S. economy.

Faster payments can yield real economic benefits beyond speed and convenience. Through faster payments, individuals and businesses can have more flexibility to manage their money and can make time-sensitive payments whenever needed. For a small business, the ability to receive payments immediately may result in better cash flow management. More broadly,

[1] Consistent with the concept of a faster payment in this notice, and reflecting improvements to retail payment systems around the world, the Committee on Payments and Market Infrastructures (CPMI) has defined a "fast payment" as "a payment in which the transmission of the payment message and the availability of 'final' funds to the payee occur in real time or near-real time on as near to a 24-hour and seven-day (24/7) basis as possible." Final funds are funds received such that the receiver has unconditional and irrevocable access to them, meaning that the receiver can use the funds without the risk that they will be recalled. *See* Committee on Payments and Market Infrastructures, Bank for International Settlements, "Fast payments – Enhancing the speed and availability of retail payments," (November 2016). Available at https://www.bis.org/cpmi/publ/d154.pdf.

faster payments may provide businesses with considerable opportunity to improve efficiency and reduce costs of payments relative to paper checks and other existing payment methods. For individuals, the ability to both send and receive payments more quickly may help alleviate mismatches between the time that incoming funds are received and the time that spending needs to occur. This improved ability to manage their money can enable some individuals to avoid high-cost borrowing and penalties, such as overdraft or late fees.

In light of these potential benefits, an appropriate foundation is essential to support the development of faster payment services that are safe, efficient, and broadly accessible to the public. This foundation involves creating an infrastructure that connects banks across the country, paving the way for innovative faster payment services.[2] This infrastructure would allow individuals and businesses to exchange funds in their accounts almost instantly to make payments for goods, services, or other purposes. A key function of this infrastructure is the movement of information and funds between banks, also known as interbank clearing and settlement.[3]

Since its founding, the Federal Reserve has played a key operational role in the nation's payment system by providing such infrastructure.[4] The importance of this role has been broadly

---

[2] Throughout this notice, the term "bank" will be used to refer to any type of depository institution. Depository institutions include commercial banks, savings banks, savings and loan associations, and credit unions.

[3] Three types of services are typically required to complete a payment between two individual or business bank accounts: end-user services, clearing services, and interbank settlement services. End-user services support the exchange of information between a bank and its customer (that is, an individual or business). Clearing services directly or indirectly support the exchange of payment information between banks. Interbank settlement services discharge financial obligations between and among banks arising from payments by adjusting balances in settlement accounts. Depending on the arrangement, some or all of these levels can be provided by distinct entities or integrated in a single entity.

[4] Additional information about the Federal Reserve's role in the payment system is available in "The Federal Reserve System Purposes & Functions: 6. Fostering Payment and Settlement System Safety and Efficiency," (October 2016). Available at https://www.federalreserve.gov/aboutthefed/pf.htm.

recognized, with independent reviewers concluding that the payment system and its users have benefited over the long run from the Federal Reserve's operational involvement.[5] This key role, given by Congress, stems from the Federal Reserve's unique ability, as the nation's central bank, to provide interbank settlement without introducing liquidity or credit risks.[6] In fulfilling this role, the Reserve Banks operate services, including check, automated clearinghouse (ACH), and funds transfer services, that provide core infrastructure for financial transactions.[7] Throughout its history, the Federal Reserve has provided these services alongside, and in support of, similar services offered by the private sector.

In the past, the Federal Reserve's provision of payment and settlement services has helped to advance fundamental improvements in the nation's payment system.[8] The potential exists today to achieve once again such improvements through upgrades to the payment capabilities of both the Federal Reserve and the private sector. In terms of current Federal Reserve services supporting the U.S. payment system, those services have served the nation's economy well but were not designed to support 24x7x365 real-time retail payments.[9] Advances

---

[5] *See e.g.*, U.S. Gov't Accountability Off., GAO-16-614, "Federal Reserve's Competition with Other Providers Benefits Customers, but Additional Reviews Could Increase Assurance of Cost Accuracy" (2016). Available at https://www.gao.gov/products/GAO-16-614.

[6] In particular, settlement through the Federal Reserve does not involve liquidity or credit risk with respect to the Federal Reserve as the settlement institution. *See* Committee on Payment and Settlement Systems, Bank for International Settlements, "The Role of Central Bank Money in Payment Systems" (August 2003). Available at https://www.bis.org/cpmi/publ/d55.pdf.

[7] As authorized by the Federal Reserve Act, these payment and settlement services involve transferring funds between and among accounts held at the Reserve Banks. Specific services offered by the Reserve Banks include the Fedwire Funds Service, the National Settlement Service, and FedACH® services. Throughout this notice, these services operated by the Reserve Banks will generally be referred to as Federal Reserve services.

[8] Improvements achieved through these operational roles include facilitating efficient nationwide clearing of checks, supporting the development of the ACH system, encouraging the nation's transition to a virtually all-electronic check-processing environment, and establishing a real-time interbank funds transfer system for wholesale payments.

[9] Retail payments typically involve lower-value transfers, such as those among individuals or between an individual and a business, that yield a large number of payments. *See* Committee on Payments and Market Infrastructures,

in technology provide the ability to develop Federal Reserve services with the operating hours, processing capacity, and overall functionality needed to support 24x7x365 real-time capabilities for the payment system. Similar considerations have led central banks in various countries to develop improved infrastructure to support faster payments.[10]

The Board views support for faster payments as requiring modernization of, and upgrades to, Federal Reserve services alongside broader modernization of the payment industry as a whole. Beginning in 2013, the Federal Reserve launched the Strategies for Improving the U.S. Payment System (SIPS) initiative, a collaborative effort with stakeholders to foster improvements to the nation's payment system. As part of the SIPS initiative, the Federal Reserve convened the Faster Payments Task Force (FPTF), comprising a wide range of industry stakeholders, to identify and evaluate alternative approaches for implementing safe and ubiquitous faster payment capabilities in the United States.

The FPTF published in 2017 a set of consensus recommendations focused on actions to support improvements to the nation's payment system.[11] These recommendations were intended to help achieve the FPTF's vision of ubiquitous faster payment capabilities in the United States that would allow any end user (that is, an individual or business) to safely, efficiently, and seamlessly send a faster payment to any other end user, no matter which banks or payment services they use. Among the FPTF's consensus recommendations were requests for the Federal Reserve (i) to develop a 24x7x365 settlement service to support faster payments and (ii) to

Bank for International Settlements, "A Glossary of Terms Used in Payments and Settlement Systems," (October 2016). Available at https://www.bis.org/cpmi/publ/d00b.htm.

[10] For a discussion of global developments related to faster payments, see "Fast payments – Enhancing the speed and availability of retail payments," *supra* note 1.

[11] *See* Faster Payments Task Force, "Final Report Part Two: A Call to Action," (July 2017). Available at https://fedpaymentsimprovement.org/wp-content/uploads/faster-payments-task-force-final-report-part-two.pdf.

explore and assess the need for other Federal Reserve operational role(s) in faster payments. The U.S. Treasury subsequently recommended that "the Federal Reserve move quickly to facilitate a faster retail payments system, such as through the development of a real-time settlement service, that would also allow for more efficient and ubiquitous access to innovative payment capabilities."[12]

Following publication of the FPTF's final report, the Federal Reserve began to pursue the FPTF's recommendations in considering settlement and broader operational support to facilitate the advancement of faster payments in the United States.[13] In addition, the Board approved in 2017 final guidelines for evaluating requests for joint accounts at the Reserve Banks intended to facilitate settlement between and among banks participating in private-sector payment systems for faster payments.[14] The impetus for allowing broader use of joint accounts was to facilitate private-sector developments in faster payments. In an arrangement using a joint account, real-time settlement occurs on an internal ledger maintained by a private-sector operator, supported by funds that are held in an account at a Reserve Bank for the joint benefit of the service's participants. To support settlement through such a service, each participant bank ensures

[12] The U.S. Treasury also noted that "[i]n particular, smaller financial institutions, like community banks and credit unions, should also have the ability to access the most-innovative technologies and payment services. While Treasury believes that a payment system led by the private sector has the potential to be at the forefront of innovation and allow for the most advanced payments system in the world, back-end Federal Reserve payment services must also be appropriately enhanced to enable innovations." U.S. Treasury, "A Financial System That Creates Economic Opportunity: Nonbank Financials, Fintech, and Innovation," (July 2018) at 156. Available at https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi.pdf.

[13] *See* The Federal Reserve System, "Federal Reserve Next Steps in the Payments Improvement Journey," (September 6, 2017). Available at https://fedpaymentsimprovement.org/wp-content/uploads/next-step-payments-journey.pdf.

[14] Board of Governors of the Federal Reserve System, "Guidelines for Evaluating Joint Account Requests," (Issued 2017). Available at https://www.federalreserve.gov/paymentsystems/joint_requests.htm. In 2016, Federal Reserve staff received a request from a private-sector service provider to open a new joint account for that organization's proposed faster payment system. The use of a joint account at a Reserve Bank to support settlement mitigates certain risks by reproducing, as closely as possible, the risk-free nature of settlement in central bank money.

sufficient funding in the joint account to cover its payment obligations on a 24x7x365 basis. Without the Federal Reserve's actions related to joint accounts, other providers alone would be unable to provide real-time interbank settlement services for faster payments supported by a joint account at a Reserve Bank.

B. 2018 Federal Register Notice on Potential Federal Reserve Actions

In November 2018, the Board published a *Federal Register* notice (2018 Notice) seeking public comment on potential actions that the Federal Reserve could take to advance the development of faster payments and support the modernization of payment services in the United States.[15] In considering the goal of ubiquitous, safe, and efficient faster payments, the Board proposed that a real-time gross settlement (RTGS) infrastructure would provide the safest and most efficient method for interbank settlement of faster payments and, therefore, would be the most appropriate strategic foundation for faster payments in the United States.[16] Further, the Board expressed the view that the private sector alone may face significant challenges in providing equitable access to an RTGS infrastructure with nationwide reach, which in turn would jeopardize the development of ubiquitous, safe, and efficient end-user faster payment services.[17]

[15] "Potential Federal Reserve Actions To Support Interbank Settlement of Faster Payments, Request for Comments," 83 FR 57351 (Nov. 15, 2018). Available at https://www.federalregister.gov/d/2018-24667. The comment period ended on December 14, 2018.

[16] RTGS involves interbank settlement occurring in real time on a payment-by-payment basis. As described in the 2018 Notice, RTGS for faster payments implies that settlement occurs prior to the provision of final funds to the receiver with settlement of individual payments possible at any time, on any day. In the 2018 Notice, the Board noted that certain end-user services currently rely on deferred interbank settlement to complete a payment. In deferred settlement arrangements, interbank settlement information is collected, stored, and sometimes netted before interbank settlement occurs. Because faster payments involve the immediate provision of final funds to the receiver, deferred interbank settlement of faster payments inherently involves interbank settlement risk. Although faster payment systems that rely on deferred settlement can incorporate certain measures to mitigate this risk, those measures may be complex and costly to implement. By contrast, RTGS structurally removes interbank settlement risk because the receiver only receives final funds after interbank settlement has occurred.

[17] Throughout this notice, the terms "nationwide reach" and "nationwide scope" will be used to refer to a payment service or infrastructure that is accessible to virtually all banks nationwide. In this context, the term "nationwide" reflects various dimensions of accessibility, including geography and institution size and type.

The Board specifically discussed two potential services that could be developed by the Reserve Banks: (i) an interbank 24x7x365 RTGS service with integrated clearing functionality to support faster payments and (ii) a liquidity management tool that would enable transfers between accounts held at the Reserve Banks on a 24x7x365 basis to support services for real-time interbank settlement of faster payments.

The Board explained that a Federal Reserve RTGS service for faster payments, alongside private-sector RTGS services, would provide the infrastructure needed to achieve ubiquitous, safe, and efficient faster payments in the United States. Other parties, such as banks, payment processors, and providers of payment services, could develop end-user and auxiliary services that build upon the core functionality of an interbank settlement service provided by the Federal Reserve. The Board further explained that a liquidity management tool, in turn, could help alleviate liquidity management issues for banks engaged in RTGS-based faster payments. In particular, such a tool would enable movement of funds between accounts at the Reserve Banks during hours when traditional payment and settlement services are currently not open to allow liquidity to be moved, when needed, to an account or accounts used to support real-time settlement of faster payments. The 2018 Notice proposed that the tool could be provided by expanding operating hours of current Federal Reserve services or through a new service.

In the 2018 Notice, the Board requested comment on the appropriateness of real-time gross settlement as the strategic foundation for faster payments in the United States and the public benefits, implications, and challenges of the Federal Reserve taking either, both, or neither of the potential actions. The Board also sought feedback on other specific topics to inform these

---

At present, one RTGS service for faster payments, operated since November 2017 by a private-sector entity, exists in the United States. Section III presents a full analysis of the landscape of RTGS services for faster payments in the United States.

potential actions, such as potential demand for faster payment services and adjustments that the payment industry would need to make in a 24x7x365 real-time settlement environment.

C. *Planned Actions*

1. *The FedNow[SM] Service*

After considering the comments received in response to the 2018 Notice and analyzing the implications of the potential actions, the Board has determined that the Reserve Banks should develop a new interbank 24x7x365 real-time gross settlement service with integrated clearing functionality, called the FedNow Service, to support faster payments. The Board's determination is based on the public benefits that the service would provide and the Board's assessment that such a service would meet the requirements of the Depository Institutions Deregulation and Monetary Control Act of 1980 (MCA), as well as the Board's criteria for new or enhanced Federal Reserve payment services.[18]

The planned service would conduct real-time, payment-by-payment, final settlement of interbank obligations through debits and credits to banks' balances in accounts at the Reserve Banks. The service would incorporate clearing functionality, allowing banks, in the process of settling each payment, to exchange information needed to make debits and credits to the accounts of their customers. The service's functionality would support banks' (or their agents') provision of end-to-end faster payments to their customers.

The Federal Reserve's provision of the FedNow Service would provide core infrastructure to promote ubiquitous, safe, and efficient faster payments in the United States.

[18] "Depository Institutions Deregulation and Monetary Control Act of 1980," Pub. L. No. 96-221 (Mar. 31, 1980), available at https://fraser.stlouisfed.org/title/1032; Board of Governors of the Federal Reserve System, "The Federal Reserve in the Payments System," (Issued 1984; revised 1990). Available at https://www.federalreserve.gov/paymentsystems/pfs_frpaysys.htm.

Historical experience with the development of other payment systems in the United States indicates that other providers alone will face significant challenges establishing such infrastructure, in part because of the complexity of the nation's banking system.[19] A landscape where the Federal Reserve operates a 24x7x365 RTGS service alongside private-sector services, which aligns with most payment systems in the United States, is most likely to create an RTGS infrastructure with nationwide reach for faster payment services.

Significantly, the Board expects that the recently established private-sector RTGS service is likely to remain the sole private-sector provider of RTGS services for faster payments in the United States. Such an outcome would have significant implications for the Board's policy objectives regarding the accessibility, safety, and efficiency of the nation's payment system.

Based on its analysis and comments received in response to the 2018 Notice, the Board expects that a single private-sector provider of such services is unlikely to connect to the thousands of small and midsize banks necessary to yield nationwide reach, even in the long term. No traditional payment system, including checks, ACH, funds transfers, or payment cards, has ever achieved nationwide reach through a single private-sector provider. The Federal Reserve, however, has long-standing relationships with, and has built a nationwide infrastructure to provide service to, more than 10,000 depository institutions (or their agents) across the country, which would provide a key channel to reach thousands of smaller institutions in the United States that might otherwise not have access to an RTGS infrastructure for faster payments.

Additionally, a single provider of RTGS services for faster payments without competition is likely to create undesirable outcomes for pricing, innovation, service quality, and reach.

[19] The United States has more than 10,000 depository institutions that vary greatly in terms of size, level of technical capabilities, operational practices, and customers and communities served.

Conversely, provision of the FedNow Service alongside private-sector RTGS service would give banks the option of choosing a service or connecting to more than one service, a choice they have today for all existing payment services. Indeed, Federal Reserve and private-sector payment services operating alongside one another would be consistent with the structure of other existing payment systems. The presence of multiple RTGS services for faster payments could yield efficiency benefits such as lower prices, higher service quality, and increased innovation.

A market outcome with a single RTGS service for faster payments would also create a single point of failure. An additional RTGS service for faster payments would promote resiliency through redundancy, a common solution in many retail payment systems. Serving an operational role in the payment system also allows the Federal Reserve to provide stability and support to the banking system and the broader economy in normal times and in times of stress.

Finally, the Federal Reserve does not have plenary regulatory or supervisory authority over the U.S. payment system and instead has traditionally influenced retail payment markets through its role as an operator.[20] Therefore, as has been the case with other retail payment systems, the Federal Reserve's operational role as a provider of interbank settlement is the most effective approach to improve the prospects of ubiquitous, safe, and efficient faster payments in the United States. Serving such an operational role would be consistent with the Federal Reserve's historical role as a provider of payment services alongside the private sector.

[20] To the extent that the current private-sector RTGS service for faster payments could be considered subject to the Bank Service Company Act (BSCA) by providing services to federally supervised depository institutions, the Board and other federal banking agencies would have authority to examine the performance of those services as if the depository institution were performing the service itself on its own premises. 12 U.S.C. 1867. The BSCA, however, does not grant enforcement authority to the Board or other federal banking agencies over the third party service providers. In addition, that authority does not appear applicable to public benefit, competitive equity, effectiveness, or scope—key criteria that the Board considers with regard to Federal Reserve payment services.

Recognizing that time-to-market is an important consideration for industry participants related to faster payment services, the Federal Reserve is committed to launching the FedNow Service as soon as practicably possible. Pending engagement with the industry, the Board anticipates the FedNow Service will be available in 2023 or 2024. However, the Board believes that achievement of true nationwide reach, as opposed to initial availability of a service, is a critical measure of success for faster payments. The Board expects that it will take longer for any service, including the FedNow Service or a private-sector service, to achieve nationwide reach regardless of when the service is initially available. The Federal Reserve will engage quickly with industry participants to gather input for finalizing the initial design and features of the service. Once specific design and features of the FedNow Service have been finalized, the Board will publish a final service description in a subsequent *Federal Register* notice, with additional information provided through existing Reserve Bank communication channels.

2. Expanded Operating Hours for Current Services

The Board has further determined that the Federal Reserve should explore the expansion of hours for the Fedwire Funds Service and the National Settlement Service (NSS), up to 24x7x365, subject to additional analysis of relevant operational, risk, and policy considerations. The Board believes that expanded hours for the Fedwire Funds Service and NSS would be the most effective way to provide the liquidity management functionality described in the 2018 Notice and could provide additional benefits to financial markets broadly, beyond support for faster payments. Subject to the outcome of analyzing the relevant operational, risk, and policy considerations, the Board will seek public comment separately on plans to expand hours for the Fedwire Funds Service and NSS.

D. Organization of This Notice

This notice is organized in two parts. Part One contains a high-level discussion of the comments received by the Board in response to the 2018 Notice (Section II), an assessment of the planned FedNow Service pursuant to the requirements of the MCA and the Board's criteria for new services and major service enhancements (Section III), and a discussion of potential benefits of expanded service hours for the Fedwire Funds Service and NSS (Section IV).

Part Two contains a service description of the planned FedNow Service, outlining the proposed features and functionality (Section V) and the Board's initial competitive impact analysis of the service (Section VI). The Board is seeking public comment on all aspects of this service.

PART ONE

II. Summary of Comments

The Board received 405 comment letters in response to the 2018 Notice.[21] Several comment letters were signed by multiple parties, bringing the total number of entities responding to the 2018 Notice to 812.[22] Comments were submitted by a wide variety of stakeholders in the U.S. payment system corresponding to the following segments: small and midsize banks, large banks, individuals, consumer organizations, merchants, service providers, private-sector operators, fintech companies, trade organizations, and other interested parties.[23] Overall, banks

[21] The Board also received over 150 additional comment letters that suggested the Board should select a specific service or business as the provider of Federal Reserve services. The Board considered these comments to be outside the scope of its request for comment.

[22] Many of the comment letters signed by multiple parties represented small and midsize banks. The Board considered comment letters signed by multiple parties as a single response for the purposes of this notice, but the additional signatures are noteworthy in evaluating the commenters' perspectives and overall industry engagement on the Board's request for comment.

[23] "Banks" include any type of depository institution, such as commercial banks, savings banks, savings and loan associations, and credit unions. "Service providers" are entities, such as core payment processors, that provide

were the largest group of respondents, with small and midsize banks comprising approximately 60 percent of the total comments—the largest individual segment—and representing institutions from 34 states. Trade organizations submitted letters representing several commenter segments, including small and midsize banks, large banks, merchants, fintech companies, and service providers. Trade organization comments often aligned with those submitted individually by their members. However, some trade organization comments presented varied opinions based on disparate views within their membership, such as contrasting views among banks of different sizes.

The following subsections provide a summary of general themes from comments received in response to the 2018 Notice. A detailed discussion of specific themes raised by the commenters can be found in Sections III, IV, and V.[24]

A. Faster Payments

Commenters provided feedback on topics broadly related to faster payments, in addition to the specific questions posed by the Board. A number of commenters noted that faster payments are likely to become a significant part of the nation's payment system in the future. Some commenters argued that the United States is lagging behind other nations with respect to payment innovation, noting that several countries have already implemented faster payment services. Other commenters, particularly small and midsize banks, noted that customer

---

payment services, processing, or operational and technical support to financial institutions. "Private-sector operators" are entities that operate payment systems, such as the operator of the current private-sector RTGS service for faster payments and payment card networks. "Other interested parties" include payment standards organizations, a congressional member organization, research and academic groups, and a foreign central bank. For the purposes of this notice, a "small bank" is defined as having assets of less than $10 billion and a "large bank" is defined as having assets of more than $50 billion, while a "midsize bank" is defined as having assets between $10 billion and $50 billion.

[24] In addition to addressing the potential actions raised by the Board, commenters addressed a number of other topics, for example, encouraging the Federal Reserve to review the applicability of existing regulations to faster payments and to continue serving as a leader for industry collaboration.

expectations are shifting towards the real-time capabilities of faster payments and that the ability to implement faster payment services for customers will affect the long-term viability of small and midsize banks. Several commenters also argued that widespread adoption of faster payments could improve financial inclusion, in addition to helping reduce fees that lower income households often face, such as overdraft and late fees.

Approximately 90 commenters, from most commenter segments, addressed topics related to demand for faster payments in the United States, often focusing on whether demand would be sufficient to support the Federal Reserve's development of a 24x7x365 RTGS service.[25] More than 70 of these commenters identified potential sources for such demand, with most expecting the greatest initial demand to come from low-dollar person-to-person payments or consumer-to-business payments. Some of these commenters also noted the possibility of demand related to business payments, such as payroll, vendor payments, or benefit disbursement, with some noting that demand could vary across businesses of different sizes or types.

B. Real-Time Gross Settlement of Interbank Obligations

Nearly 150 commenters addressed whether RTGS is the appropriate strategic foundation for interbank settlement of faster payments.[26] Of these, approximately 140 commenters from all segments agreed that RTGS is the appropriate strategic foundation for interbank settlement of faster payments. Approximately 10 commenters, from a number of segments, did not support RTGS as the strategic foundation for interbank settlement of faster payments.[27]

---

[25] These commenters included small and midsize banks, large banks, individuals, consumer organizations, merchants, service providers, fintech companies, trade organizations, and other interested parties.

[26] Some commenters addressed RTGS as the appropriate strategic foundation for interbank settlement of faster payments without taking a position, typically citing a lack of consensus among their membership.

[27] These commenters were from the following segments: small and midsize banks, large banks, individuals, service providers, private-sector operators, and trade organizations.

Of those commenters supporting RTGS as the appropriate strategic foundation, many echoed the considerations outlined in the 2018 Notice. Most notably, many of these commenters stated that, by matching the speed of settlement with the speed of payment, RTGS better mitigates interbank settlement risk compared with other settlement arrangements. A number of commenters further stated that the use of RTGS for interbank settlement of faster payments is consistent with industry expectations and aligns with the FPTF's criteria for an effective faster payment solution.[28] Some commenters also noted that RTGS is the approach taken by other countries for interbank settlement of faster payments.

Commenters not supporting RTGS as the appropriate strategic foundation for faster payments argued that deferred settlement can similarly serve as an appropriate foundation for such payments. These commenters stated that, compared with an RTGS arrangement for faster payments, a deferred settlement arrangement has lower costs, is less complex for participating banks, and requires less liquidity.

A few commenters, although supportive of RTGS as the appropriate strategic foundation for faster payments, expressed concern about the need for increased liquidity to conduct immediate settlement and avoid payments failing because of insufficient liquidity. Some commenters also stressed the importance of resiliency to mitigate RTGS service disruptions.

[28] In order to evaluate possible faster payment services, the FPTF developed a set of effectiveness criteria that addressed various features of a faster payment service. With respect to interbank settlement, the FPTF considered a faster payment service to be "very effective" if, among other things, interbank settlement occurs within 30 minutes of the completion of a faster payment for end users. *See* Faster Payments Task Force, "Faster Payments Effectiveness Criteria," (January 26, 2016). Available at https://fedpaymentsimprovement.org/wp-content/uploads/fptf-payment-criteria.pdf.

C. Federal Reserve RTGS Service and Liquidity Management Tool

More than 350 commenters addressed whether the Federal Reserve should develop an RTGS service for faster payments.[29] Approximately 320 commenters, from all segments, supported the Federal Reserve developing an RTGS service for faster payments. Approximately 30 commenters, mostly comprising large banks and private-sector operators, including many that have been involved in the recent development of a private-sector RTGS service for faster payments, were not supportive of the Federal Reserve's development of such a service.

Commenters that supported the Federal Reserve's provision of an RTGS service for faster payments pointed to a number of factors underlying their support. Many commenters argued that the Federal Reserve would provide equitable access to banks of all sizes and facilitate nationwide reach for faster payments. Many commenters also discussed the importance of safety for faster payments, stating that the Federal Reserve is a trusted entity with a record of stability during periods of crisis and that a Federal Reserve RTGS service for faster payments could enhance resiliency and reduce risks in the payment system. Some commenters discussed the potential efficiency benefits of such a service, including increased competition, decreased market concentration, lower costs, and greater innovation.

Commenters not supportive of the Federal Reserve developing an RTGS service for faster payments argued that such a service was unnecessary given actions taken by the private sector, including the recent development of a private-sector RTGS service for faster payments. Several of these commenters specifically questioned whether the Federal Reserve could meet the

---

[29]Approximately 50 additional commenters raised issues related to the Federal Reserve's development of an RTGS service for faster payments but did not take a position on whether the Federal Reserve should offer such a service. Many of these commenters cited a lack of consensus among their membership, while others advocated for enhancement of current Federal Reserve payment services but did not take a position on the provision of an RTGS service for faster payments.

Board's criteria for the provision of new services.[30] Other commenters argued that the Federal Reserve's decision to consider an RTGS service for faster payments is slowing the adoption of faster payments. These commenters argued that some industry participants may decide not to offer faster payments until after a final decision from the Federal Reserve or may further wait until after implementation of a Federal Reserve service, in the event of such a decision.

Approximately 230 commenters addressed whether the Federal Reserve should develop a liquidity management tool.[31] Approximately 225 commenters, from all segments, supported the Federal Reserve developing such a tool. Fewer than 5 commenters were not supportive of the Federal Reserve developing a liquidity management tool.[32]

Commenters that supported development of a liquidity management tool discussed the importance of liquidity management in RTGS services for faster payments. Several commenters indicated that such a tool could help with managing liquidity in the recently introduced private-sector RTGS service. Commenters that did not support the Federal Reserve developing a liquidity management tool indicated that the private sector could develop methods on its own to manage liquidity for faster payments.

III. Assessment of the FedNow Service

In 1984, the Board established criteria for the consideration of new or enhanced Federal Reserve payment services in its policy "The Federal Reserve in the Payments System."[33] The

[30] *See* "The Federal Reserve in the Payments System," *supra* note 18. The Board's criteria for new services and related comments are discussed in Section III.

[31] At least one additional commenter raised issues related to a liquidity management tool but did not express a view about whether the Federal Reserve should offer such a tool.

[32] These commenters were from the following segments: private-sector operators, fintech companies, and other interested parties.

[33] *See* "The Federal Reserve in the Payments System," *supra* note 18. As stated in the policy, the Board, in its sole discretion, determines when the process outlined in the policy is applicable and makes all decisions related to the process.

policy incorporates the cost recovery requirements of the MCA and the MCA's objective of achieving an adequate level of service nationwide. In expressing the Board's overall expectations for the Federal Reserve's provision of payment services, the policy takes into account longstanding public policy objectives to promote the safety and efficiency of the payment system and to ensure the provision of payment services to banks nationwide on an equitable basis, and the importance of achieving these objectives in an atmosphere of competitive fairness.

The policy specifically addresses the introduction of new services or major service enhancements in light of the Board's overall expectations and requires all of the following criteria to be met:

- The service should be one that other providers alone cannot be expected to provide with reasonable effectiveness, scope, and equity. For example, it may be necessary for the Federal Reserve to provide a payment service to ensure that an adequate level of service is provided nationwide or to avoid undue delay in the development and implementation of the service. (*Other Providers Criterion*)
- The Federal Reserve must expect that its providing the service will yield a clear public benefit, including, for example, promoting the integrity of the payments system, improving the effectiveness of financial markets, reducing the risk associated with payments and securities-transfer services, or improving the efficiency of the payments system. (*Public Benefits Criterion*)
- The Federal Reserve must expect to achieve full recovery of costs over the long run. (*Cost Recovery Criterion*)

The following sections provide a detailed assessment of the FedNow Service under these three criteria. The assessment uses a similar set of measures to evaluate each criterion. In particular, the *Other Providers Criterion* and the *Public Benefits Criterion* both consider measures related to the Federal Reserve's broader objectives of promoting the accessibility, safety, and efficiency of the nation's payment system. However, the Board's policy requires considering whether public policy goals would be achieved according to these measures in two different situations: one where a service may be provided by other providers alone (*Other Providers Criterion*), and a second where the Federal Reserve develops a new service or major service enhancement (*Public Benefits Criterion*).

In the assessment that follows, the Board applies the common set of measures first in evaluating the *Other Providers Criterion* and then again in evaluating the *Public Benefits Criterion*. Such an approach creates overlap and some repetition in the analysis of each criterion. The Board believes that this approach is necessary to ensure a comprehensive assessment. Specifically, this approach allows a more systematic assessment of whether, relative to other providers, the Federal Reserve's provision of a service can be expected to advance desirable outcomes in the payment system that are consistent with public policy goals and might otherwise not be achieved by other providers alone.

The Board's policy also requires a forward-looking evaluation of the probable or likely future state of the payment system over the long run, with or without Federal Reserve action.[34] Therefore, when assessing new services or major service enhancements, the Board focuses on expected long-term outcomes and does not require a determination that each of the criteria is satisfied at present or will be with certainty in the future. Requiring such certainty would prevent

[34] The Board's focus on expected long-term outcomes predates both the MCA and the Board's policy for assessing new services or major service enhancements. For example, the Federal Reserve undertook efforts to pilot ACH services in the late 1960's because of the expected long-term potential of those services for improving the payment system. These services were fully operational in the early 1970s and were intended, in part, to address growing paper check volumes, which the Board expected would eventually exceed 50 billion items 15 years later, in the mid-1980s.

the Federal Reserve from acting until after negative consequences occur, making any detrimental effects more difficult, if not impossible, to remedy. For example, as noted in the Board's policy, it may be necessary for the Federal Reserve to provide a payment service to avoid an undue delay in the development and implementation of the service. Waiting until undue delay had already occurred, however, would render ineffective the Federal Reserve's objective of providing such a service to facilitate its timely development and implementation.

A. *Other Providers Criterion: The service should be one that other providers alone cannot be expected to provide with reasonable effectiveness, scope, and equity. For example, it may be necessary for the Federal Reserve to provide a payment service to ensure that an adequate level of service is provided nationwide or to avoid undue delay in the development and implementation of the service.*

The Board's *Other Providers Criterion* balances the important role that the private sector plays in providing payment services to the public with the Federal Reserve's overall mission to promote the accessibility, safety, and efficiency of the nation's payment system. Therefore, the Board first considers whether the payment services that other providers alone can be expected to offer sufficiently advance the Federal Reserve's overall objectives in the payment system absent any Federal Reserve action.[35] In the context of the FedNow Service, the Board's assessment of this criterion involves consideration of whether other providers alone can be expected to offer RTGS services for faster payments that advance the Federal Reserve's objectives according to the measures outlined below.

[35] As noted previously, the Federal Reserve has already taken actions to support the ability of other providers to offer RTGS services for faster payments. In particular, the Board approved in 2017 guidelines for evaluating requests for joint accounts at the Reserve Banks intended to facilitate settlement between and among banks participating in private-sector payment systems for faster payments. One such account has been provided to a private-sector operator. Without these actions, other providers alone would be unable to provide RTGS services for faster payments , supported by a joint account at a Reserve Bank, that reproduce, as closely as possible, the risk-free nature of settlement in central bank money.

1. Relevant Measures

The Board's policy for assessing new services or major service enhancements considers three measures to evaluate expected outcomes under the *Other Providers Criterion*: scope, equity, and effectiveness.

a. Scope and Equity

The measures of scope and equity in the Board's *Other Providers Criterion* reflect the Federal Reserve's objective of ensuring the adequate provision of payment services nationwide on an equitable basis. Taken together, these measures reflect the Federal Reserve's broader mission of promoting accessibility in the nation's payment system, as also considered in the *Public Benefits Criterion.*

The measure of scope takes into account the Federal Reserve's policy goal, and an objective of the MCA, to achieve an adequate level of payment services nationwide. Providing payment services that are accessible to virtually all U.S. banks benefits all payment system participants by facilitating ubiquitous payment services and allowing the full realization of network effects.[36] Therefore, the *Other Providers Criterion* includes consideration of whether other providers alone can be expected to provide a service that is accessible to banks nationwide and on terms that are equitable and facilitate broad participation.

The measure of equity reflects the Federal Reserve's objective to ensure the provision of payment services to banks on an equitable basis. The availability of payment services to banks on an equitable basis promotes competition and a level playing field in the payment industry overall. Equity comprises a number of elements, including whether a service is broadly accessible to banks on reasonable terms and in comparable quality, whether a service is provided

[36] When network effects are present, the value of a service to each user increases as the total number of users grows.

in a transparent manner, and whether a service has adequate measures in place to take into account the interests and needs of virtually all industry stakeholders. Moreover, equity considerations can affect banks' decisions to join a payment service, which can feed back into the measure of scope.

b. Effectiveness

The measure of effectiveness addresses the extent to which other providers alone can be expected to advance desirable outcomes in the U.S. payment system. In the context of the *Other Providers Criterion*, effectiveness can be viewed through the elements of safety and efficiency, key objectives that the Federal Reserve seeks to promote in the U.S. payment system.

The element of safety reflects the Federal Reserve's objective to promote the safe functioning of the U.S. payment system.[37] The safety of a payment system depends on many factors, including the security of individual transactions, the general resiliency of end-user services, and resiliency mechanisms for addressing specific events, such as bank failures, operational outages, or natural disasters and other systemic events. A safe payment system is crucial to economic growth and financial stability because the effective operation of markets for virtually every good and service is dependent on the smooth functioning of the nation's banking and payment systems.

The element of efficiency reflects the Federal Reserve's objective to promote the efficient functioning of the U.S. payment system.[38] Efficiency encompasses a number of factors, including whether a service is provided in a cost-efficient manner, whether it results in efficiency

[37] The element of safety may be referred to as integrity in other contexts.

[38] Improvements in the efficiency of the payment system were a central motivation when Congress originally established an operational role in the payment system for the Federal Reserve. Congress's decision to make the Federal Reserve an active participant in the payment system when it passed the Federal Reserve Act in 1913 was, in part, a response to inefficiencies that resulted from the circuitous routing of checks in the early 1900s to avoid presentment fees.

gains brought about by competition and innovation, and whether it achieves sufficient scope to realize the efficiency benefits of network effects. An efficient payment system facilitates and encourages economic activity, whereas an inefficient payment system can result in frictions and costs that could hinder economic activity and dampen growth.

2. *Public Comments*

a. *Scope and Equity*

More than 200 commenters expressed views on whether other providers alone will provide RTGS services for faster payments with reasonable scope and equity.[39] Approximately 175 commenters, representing a wide variety of distinct interests, raised concerns that other providers alone will not be able to implement services that can achieve nationwide scope or to provide broadly accessible RTGS services for faster payments on an equitable basis.[40] In contrast, approximately 30 commenters, mostly comprising large banks and private-sector operators, expressed views indicating that the private sector can provide RTGS services for faster payments built for banks of all sizes in the United States with reasonable scope and equity.

Many commenters focused on the private-sector RTGS service for faster payments, established in November 2017 and owned by the largest banks in the United States. Commenters that expressed a critical view of this service argued that a private-sector operator without the experience or infrastructure necessary for working with the majority of banks in the United States would face substantial challenges in establishing new connections and relationships with such banks. Some of these commenters argued that the process of doing so could take many

[39] Approximately 35 additional commenters raised issues related to scope and equity but did not express a view about whether the other providers alone will be able to achieve nationwide scope or provide services with reasonable equity.

[40] These commenters included small and midsize banks, individuals, consumer organizations, merchants, fintech companies, service providers, and trade organizations.

years, with a few commenters suggesting it could take at least a decade or more, and others questioning whether such connections and relationships would ever be possible. These commenters frequently argued that a private-sector service, particularly one provided by an operator that they believe has been historically focused on serving large banks, will not adequately account for the unique challenges facing smaller banks and may struggle to scale its services to allow access for the nation's more than 10,000 banks. Some commenters also expressed doubt that use of service providers, acting as agents for banks that do not wish to connect to the service directly, will allow private-sector services to achieve nationwide reach.

Some commenters also indicated that perceived equity concerns may further affect the ability of private-sector RTGS services to achieve reasonable scope. In particular, as described later, approximately 100 commenters, mostly from small and midsize banks and trade organizations, raised equity concerns related to private-sector RTGS services, indicating they may avoid joining such services in light of those concerns.

Other commenters, comprising private-sector operators and large banks, argued that the existing private-sector RTGS service for faster payments was on course to reach almost half of U.S. deposit accounts by the end of 2018. These commenters further stated that the service has a credible plan for reaching near ubiquity at the end of 2020 by, among other things, using service providers to facilitate participation of small and midsize banks. These commenters also argued that the service should have time to demonstrate its ability to achieve nationwide scope. These commenters further argued that, by publicly announcing the possibility of developing an RTGS service for faster payments, the Federal Reserve has stalled progress that the service could otherwise make towards achieving ubiquity.

Finally, some commenters expressed the view that, if a single private-sector operator were the only provider of a nationwide RTGS service in the United States, this outcome could adversely affect the environment for private-sector innovation and the development of new use cases. These commenters argued that an RTGS operator with a dominant market position would have substantial impact on the emergence of potentially innovative uses of faster payments through its policies and prices, such that it could limit uses of faster payments that were not in its business interest or the interest of its owners. In contrast, other commenters argued that the existing private-sector RTGS service for faster payments has the ability to support a wide variety of use cases and can serve as a platform for innovation in end-user payment services.

With respect to equity, many small and midsize banks, as well as commenters that would be end users of faster payment services settled via RTGS, such as individuals and merchants, expressed concern that the private-sector RTGS service is unlikely to be delivered in an equitable manner. Small and midsize banks in particular argued that it is likely that smaller banks, which are not owners of the private-sector service, will be unable to gain access to the service on reasonable terms and in a transparent manner over the long run. Some commenters noted the stated commitment of the service's operator to address equity concerns through its pricing and access policies but questioned whether it will maintain these commitments in the future, arguing that doing so may not be in the long-term business interest of the operator's owner banks. In particular, commenters questioned whether the operator would maintain a uniform pricing structure, especially if it achieves a dominant market position.

Several small and midsize banks expressed further concerns, unrelated to pricing, that an RTGS service for faster payments established by competitors with a business profile different than their own will not provide them with equitable service. Many smaller banks argued that the service's operator will not understand their business needs and will be unlikely to take into account their interests, particularly if they are excluded from its governance processes. For example, some commenters argued that non-owner banks have no meaningful role in the service's rulemaking or pricing decisions compared with the service's owner banks. In addition, several commenters expressed concerns that joining the service could grant their competitors a competitive advantage by allowing them access to detailed information about their payment operations and customer base.

Other commenters, mostly private-sector operators and large banks, argued that the operator of the private-sector RTGS service for faster payments has demonstrated its willingness to accommodate the interests and needs of a wide variety of prospective participants and has taken concrete steps to facilitate near-universal access on equitable terms. In particular, these commenters emphasized that the service's pricing terms, including a uniform pricing structure without minimum volume requirements or volume discounts common in other payment systems, do not favor any particular type of bank and demonstrate the equitable and impartial provision of the service. These commenters also argued that the service's use of service providers facilitates access for banks of all sizes and promotes equitable access to the service. Several of these commenters also stated that the service operates in a transparent manner, for example, by making its rules publicly available. Finally, these commenters noted that the service's operator plans to incorporate input from small and midsize banks, as well as other stakeholders, through advisory panels and other types of engagement, and argued that such measures should be sufficient to assure non-owner banks that they will receive access to the service on an equitable basis, today and in the future.[41]

b. Effectiveness

Overall, more than 200 commenters raised issues related to the safety and efficiency of settlement arrangements for faster payments. Approximately 180 commenters, representing a wide variety of distinct interests, raised topics that indicate safety or efficiency concerns may result from other providers alone providing settlement arrangements for faster payments.[42] In contrast, around 30 commenters, comprising large banks, trade organizations, and private-sector operators, indicated that the provision of such services by other providers alone would promote a safe and efficient payment system.

Whether RTGS services for faster payments offered by other providers alone will be reasonably effective in promoting the efficiency of the U.S. payment system depends in large part on whether such services achieve nationwide reach. As discussed in the context of scope, many commenters expressed concerns about the ability of private-sector RTGS services for faster payments to achieve nationwide reach, which commenters suggested would prevent an RTGS infrastructure from fully realizing potential efficiency benefits.[43]

Many commenters also addressed potential efficiency concerns if an RTGS infrastructure for faster payments attains nationwide reach but is provided by a single dominant private-sector operator. In particular, approximately 120 commenters, representing a wide variety of distinct

[41] As discussed in detail later, the service's operator announced changes in early 2019 intended to reinforce its intention to be inclusive and equitable.

[42] These commenters included small and midsize banks, individuals, consumer organizations, merchants, fintech companies, service providers, trade organizations, and other interested parties.

[43] Such benefits would stem primarily from the full realization of network effects with virtually all banks participating in the RTGS infrastructure for faster payments.

interests, noted various ways in which a dominant private-sector RTGS operator could use its market power to harm efficiency.[44] Many commenters noted that payment markets with either limited competition or a dominant private-sector operator often exhibit monopolistic pricing. Other commenters expressed concerns that, in the long term, evolution of such a service could be driven primarily by the desire of the dominant operator to retain its position in the market and forestall entry of other potential providers, to the detriment of competition and efficiency gains that might result from competition. Some commenters, particularly individuals and merchants, specifically pointed to issues with payment cards as examples of challenges that the market may face with a dominant operator. For example, these commenters raised concerns about high prices and impediments to competition and innovation that they believe occur in the payment card market.

Approximately 30 commenters, mostly large banks and private-sector operators, argued that a single provider of RTGS services for faster payments would be able to serve the market adequately and that the presence of multiple RTGS services could lead to market inefficiencies such as fragmentation and increased connection costs. As discussed in the context of scope, these commenters argued that the private-sector RTGS service for faster payments is on course to achieve nationwide reach, which would allow it to realize efficiency gains through participants' ability to exchange payments with a wide range of counterparties. A few of these commenters argued that, should the service achieve nationwide reach, additional entrants would not be able to generate incremental benefits to justify their setup and operational costs from an efficiency perspective. Many of these commenters further expressed concerns that should multiple RTGS

[44] These commenters included small and midsize banks, individuals, consumer organizations, merchants, fintech companies, service providers, and trade organizations.

services for faster payments enter the market, but not be able to interoperate, banks would either need to incur high costs of connecting to multiple RTGS services or would need to choose to connect to just one of multiple RTGS services, resulting in an inefficient, fragmented faster payment market. These commenters argued that, as a result, a single provider is the most efficient way to provide RTGS services for faster payments.

With respect to innovation in a market with a single dominant private-sector RTGS service for faster payments, some commenters argued that a lack of competition would curtail innovation in the nascent market for faster payments, resulting in higher costs and an inferior product. These commenters expressed the view that the provider would innovate to meet the needs of a narrow group of banks at the expense of smaller banks or certain end users. In contrast, other commenters expressed the view that the private sector is best positioned to foster innovation in faster payments, arguing that the private sector can quickly respond to market demand, in contrast to public-sector entities that need to follow a formal process to propose and implement certain types of operational changes. These commenters pointed to the clearing capabilities of the private-sector RTGS service for faster payments and its ability to support a variety of payment types, such as business-to-business or consumer-to-business payments, arguing that the service is a platform for innovation.

Many commenters expressed safety and resiliency concerns about the potential outcome of a nationwide RTGS infrastructure for faster payments being provided by just one private-sector operator, particularly as the prominence of faster payments grows over the long term. Many commenters specifically expressed concerns about the market being served by a single private-sector provider in the event of a systemic event or natural disaster. Several commenters argued that such an operator would be ineffective at providing resiliency and stability to the faster payment ecosystem in times of crisis, particularly if the operator did not have previous experience managing disruptions that may occur across a wide range of banks or geographic areas. Some commenters expressed concern that a single private-sector operator would serve as a single point of failure in the faster payment market. Finally, some commenters expressed concerns that, if private-sector RTGS services for faster payments are unable to achieve nationwide reach, some banks may be unable to offer faster payment services to their customers altogether. The commenters further expressed concern that such a result would lead customers to adopt services provided outside of the banking industry, involving institutions that the commenters viewed as insufficiently regulated and potentially unsafe.

A few commenters, mostly from large banks and private-sector operators, noted that the operator of the private-sector RTGS service provides other payment services that have proven to be resilient in times of stress, including the financial crisis and natural disasters. These commenters stated that the operator has similarly designed its RTGS service for faster payments to be highly resilient.

3. Board Analysis

The Board finds that substantial uncertainty exists about the long-term success of RTGS services for faster payments, despite actions already taken by the private sector. As articulated in the 2018 Notice, the Board continues to believe that RTGS is the appropriate strategic foundation for interbank settlement of faster payments. However, certain challenges may prevent other providers alone from implementing a nationwide RTGS infrastructure for faster payments that provides a basis for ubiquitous, safe, and efficient faster payments in the United States.

The magnitude of the task involved in achieving any large-scale improvement in the U.S. payment system, such as establishing a new foundational infrastructure for faster payments, is significant. The banking industry plays a key role in the U.S. payment system, which necessitates the industry's involvement in payment system improvements.[45] However, the United States has a highly complex banking system with more than 10,000 depository institutions, including commercial banks, savings banks, savings and loan associations, and credit unions.[46] As a result, the U.S. banking system (and, by extension, the payment ecosystem) is extremely diverse, with a wide variety of market participants and stakeholders that have heterogeneous circumstances, interests, and needs.

This diversity inherently creates significant coordination challenges that, along with the high fixed costs necessary to develop RTGS services for faster payments, are likely to limit the number and type of entrants in the market.[47] Indeed, only one private-sector RTGS service for faster payments has been established in the nearly six years since the Federal Reserve launched the SIPS initiative and articulated the goal of a ubiquitous, safe, and efficient faster payment

---

[45] In the United States, deposits in accounts with banks comprise the monetary asset that is most widely held by the public to conduct payments. As of June 2019, the value of transferable deposits held by the public, including demand deposits and other checkable deposits, was $2.17 trillion, while the value of currency in circulation outside banks was $1.66 trillion. *See* Board of Governors of the Federal Reserve System, "Money Stock and Debt Measures—H.6 Release, Table 5," (July 11, 2019). Available at https://www.federalreserve.gov/releases/h6/current/default.htm.

[46] As noted previously, these institutions vary greatly in terms of size, level of technical sophistication, and operational practices, as well as the customers and communities served. Institutions also vary with respect to the connections and relationships that they have with payment operators, service providers, and other intermediaries, such as bankers' banks and corporate credit unions.

[47] Specifically, with respect to coordination challenges, the diverse nature of the nation's banking system results in disparate operational and use-case needs, which can be difficult to accommodate. These disparate views and the large number of parties holding them make coordination challenging for any single entity attempting to establish a service that represents the interests and needs of diverse institutions. As a result, new services are likely to be developed by small groups of institutions with closely aligned interests, which may make such services less attractive to other types of institutions. Coordination between numerous institutions is also necessary to obtain funding because of the high fixed costs typically involved in the development of a new payment service. Such coordination is especially challenging when numerous institutions with limited resources try to assemble sufficient funds to develop their own services. As a result, new services are likely to be developed by small groups of institutions with significant resources.

system.[48] Comments received by the Board support the expectation that this service is likely to remain the sole private-sector provider of RTGS services for faster payments in the United States.

Given this likely outcome, and in light of the comments received, historical context, and economic analysis, the Board does not expect that other providers alone will provide an RTGS infrastructure for faster payments with reasonable effectiveness, scope, and equity. Two issues in particular present significant obstacles: achieving nationwide scope on an equitable basis, and efficiency and safety issues likely to arise in a single-provider market.

a. Scope and Equity

Achieving nationwide scope has been a recurring challenge for the U.S. payment system, and, to date, no single private-sector payment service provider of traditional payment services, such as check, ACH, funds transfer, or payment card services, has done so alone. Although the importance of network effects may give operators an incentive to pursue broad reach for new payment services, the cost and difficulty of reaching virtually all banks in an environment as complex as the U.S. banking industry means that many operators are unlikely to invest the resources and effort necessary to achieve true nationwide scope. Extending access to a few thousand banks, let alone the more than 10,000 diverse depository institutions necessary to achieve true nationwide scope, is especially costly and time-consuming for operators with limited relationships with and connections to these institutions. For this reason, private-sector operators have historically tended to concentrate on providing payment services to a subset of institutions, and existing payment systems, such as those for checks, ACH payments, funds

---

[48] Faster payment services were established even earlier in some jurisdictions internationally. For example, the Faster Payment Service in the United Kingdom began operating in 2008, nearly 10 years before the U.S. payment industry began attempting to establish broadly accessible faster payment services. *See* "Fast payments – Enhancing the speed and availability of retail payments," *supra* note 1.

transfers, and payment cards, all achieved nationwide reach with multiple providers of payment and settlement services.

A single operator of a new service aiming to achieve nationwide reach is likely to find that establishing costly new connections and providing adequate support to the significant number of smaller banks in the U.S. market is much harder than doing so for the few hundred largest banks or even a few thousand institutions. The benefit to a private-sector operator of ensuring access to the "long tail" of small banks in the United States is unlikely to outweigh the cost that it would incur to reach them. Given the small number of deposit accounts that each additional small bank would bring to the service, the diminishing returns generated by onboarding and supporting these banks are unlikely to offset the cost of doing so. Ultimately, the cost-benefit calculation of a single private-sector operator could lead it to forgo pursuing true nationwide scope, particularly if establishing new relationships with and connections to the large number of small banks proves more challenging or costly than anticipated.

The recently established private-sector RTGS service endeavors to achieve nationwide reach by extending access to banks of all sizes. Although the service can attain substantial reach across deposit accounts simply through connections with all of its large owner banks, measuring reach in terms of deposit accounts does not accurately reflect true reach across the nation's substantial number of smaller banks. Attaining such reach across deposit accounts through a small number of large banks would still leave the vast majority of the nation's 10,000 banks without access to the service. In fact, by the middle of 2019, banks that had joined the service represented less than one percent of the institutions in U.S. banking system.

For a number of reasons, it is unlikely that the private-sector RTGS service for faster payments alone will reach the thousands of small banks necessary to yield nationwide scope, even in the long term. Given its traditional focus on providing services primarily to a small number of large banks in the United States, the operator of the private-sector RTGS service would need to develop significant expertise to handle the large number and substantial diversity of U.S. banks. It would further need to expand and adapt its logistical support, currently geared towards its existing bank customers, for smaller and more diverse banks. Although the service plans to use service providers to extend reach to small and midsize banks, many commenters expressed concerns that building such connections to the service will nevertheless take many years. This problem may be exacerbated by the fact that many small and midsize banks do not currently have relationships with the service providers that work with the private-sector RTGS service or any relevant service provider.

The challenge of achieving nationwide scope for an RTGS infrastructure is likely to be further exacerbated by concerns of numerous commenters, representing large segments of the U.S. payment market, about whether access extended by the private-sector RTGS service for faster payments will be equitable. The operator of the service has looked to address these concerns by taking concrete steps to assure market participants of equitable treatment, now and in the future. In particular, it has publicly stated its commitment to a transparent and uniform pricing regime. In addition, the private-sector operator has taken measures to incorporate perspectives from non-owner stakeholders in its governance processes, including recent measures that involved adding seats for community banks and credit unions to the service's business committee and announcing business principles intended to guide the operation and maintenance of the service.[49]

---

[49] On March 28, 2019, the service's operator announced that it had added four seats for community banks and credit unions to the service's business committee in an effort to expand the type and number of banks providing input to the service. At the same time, the service's operator also announced a set of business principles intended to guide the

Despite these steps, equity concerns may persist for a number of reasons. First, although the operator has stated its commitment to equitable pricing, nonprice measures can be equally important in determining whether services are provided equitably. For instance, an RTGS service for faster payments designed with a focus on large, technologically sophisticated banks may not be easily adopted by smaller banks, regardless of pricing structure.[50] Second, a service owned by a small group of institutions with closely aligned interests will confront persistent concerns from other market participants that the service will not equitably represent the interests and needs of the broader payment industry. In particular, potential participants in the service may have concerns, as expressed by commenters, that its operator will have incentives to take actions that favor its owner banks at the expense of non-owner banks.[51]

Concerns about future treatment may be particularly pronounced if it is perceived that the operator could alter its current commitments to equitable access in response to changing market conditions, such as the operator achieving a dominant position in the market for RTGS services for faster payments or, alternatively, facing the increased prospect of competition from other

---

operation and maintenance of the service as long as the service remains the nation's sole provider of faster real-time interbank clearing and settlement.

The principles include, for example, making rules publicly available, periodically soliciting input on rules, disclosing major decisions to relevant stakeholders, maintaining flat fees that do not include volume discounts, and making the service available to all institutions that meet the service's eligibility requirements. Available at https://www.theclearinghouse.org/payment-systems/articles/2019/03/-/media/080a875636784eec87bfc13ddf0ef6a4.ashx

[50] Examples of RTGS design features that could disadvantage smaller, less sophisticated banks with standard operating hours include the need to prefund separate settlement accounts on a 24x7x365 basis, as well as reliance on 24x7x365 computer-to-computer connections that are commonly used by larger banks with significant payment volume.

[51] Such a possibility could reflect what is known as "vertical foreclosure." Under vertical foreclosure, the operator of an RTGS service for faster payments, as the provider of a key input into banks' provision of payment services to their customers, may have an incentive to limit access to non-owner banks in order to allow its owner banks to attract customers and gain market share. Although such an operator has countervailing incentives, particularly early on, to allow broad access to the service in order to increase its value through network size, a more established service may be more likely to limit equitable access to non-owner banks, especially if the service does not face direct competition from other service providers.

parties. These concerns may be especially persistent if such commitments can be changed unilaterally and are not subject to a public and transparent process whereby all interested parties have the opportunity to provide input.

Ultimately, these concerns about the ability to access the private-sector RTGS service for faster payments on an equitable basis over the long run are likely to cause significant uncertainty among small and midsize banks about the value of connecting to the service. This uncertainty may cause small and midsize banks to choose not to join the service and to consider instead alternative non-RTGS-based arrangements for faster payments. The result would only further complicate the challenges that the private-sector RTGS service will face in achieving nationwide reach.

b. Effectiveness

Economic analysis, historical context, and the comments received all identify market structure, the number of providers in the market, and the nature of competition between those providers as key drivers of effectiveness, as viewed through the lens of safety and efficiency. Competition generates incentives for firms to offer products that broadly appeal to customers, at prices close to the cost of making those products, and to continually innovate and improve their products in the hope of attracting customers from their competitors. Compared with firms facing competition, a monopoly firm can charge higher prices, causing customers to pay more than the actual cost and to buy less than is socially desirable. Without competitors, a monopoly firm can also limit supply to certain segments of the market. Finally, customers who can only buy a product from one firm may have no choice but to accept products, even if they are lower quality. Economic theory and real-world experience both demonstrate that, although setting up and operating additional firms is often costly, the resulting competition leads to societal efficiency gains that outweigh such costs, generating outcomes that are better for the public than if a single firm serves a market.[52]

These considerations are important in the context of the market for RTGS services for faster payments, which is likely to involve a single private-sector provider, for reasons discussed previously. Although a single-provider market structure avoids duplicating the substantial development and operating costs of additional RTGS services, it is likely to have a detrimental effect on the efficiency and safety of the faster payment market. As described earlier, a likely market outcome is that only a portion of banks in the United States would actually connect to the sole private-sector RTGS service. In such a scenario, the remaining, likely smaller, banks would either not join any faster payment services or would explore alternative arrangements, such as services based on a deferred settlement model.[53] The resulting fragmentation of the end-user faster payment market between those end users with access to RTGS-based faster payment services, those with access to faster payment services based on deferred settlement, and those without any access to faster payment services through their banks could prevent end users and

---

[52] For example, in its 2016 report, the GAO found that competition by the Federal Reserve in payment markets has generally had a positive impact, with benefits that include lowered cost of processing payments for end users. *See* "Federal Reserve's Competition with Other Providers Benefits Customers, but Additional Reviews Could Increase Assurance of Cost Accuracy," *supra* note 5.

From an economic perspective, an exception to the efficiency-through-competition argument is a "natural monopoly." In this situation, the cost of setting up and operating a firm is so high that it can be more efficient for a single firm to supply the whole market, although achieving efficiency usually requires that the natural monopolist be regulated. With respect to such regulation of payment systems, as described previously, the Federal Reserve does not have plenary regulatory or supervisory authority over the U.S. payment system.

[53] The widespread availability of traditional payment systems, which can enable deferred settlement for faster payments, may make faster payment services based on deferred settlement an appealing alternative to RTGS-based services. A number of commenters, mostly small banks, voiced concerns that if they were unable to meet customer demand for faster payment services, they would be placed at a significant competitive disadvantage, which could eventually jeopardize their continued operation. Should such banks expect that they would not be able to gain equitable access to private-sector RTGS services, they could instead adopt faster payment services based on deferred settlement in an effort to remain competitive, undermining an RTGS infrastructure's ability to reach nationwide scope and potentially increasing risk in the payment system.

the U.S. payment industry as a whole from realizing fully the benefits associated with nationwide RTGS-based faster payments.

Furthermore, a single provider of RTGS services for faster payments may not advance other desirable outcomes in the U.S. payment system with respect to competition, innovation, and efficiency. As described earlier, a single service provider without competition can yield undesirable outcomes for faster payments, such as lower service quality or higher prices, which may result in reduced adoption rates of RTGS services for faster payments by banks. Such undesirable outcomes could limit adoption of faster payments by end users, which could in turn curtail efficiency benefits to the broader economy.

Notably, a single provider of RTGS services for faster payments may not provide a neutral foundation for innovative, competitive end-user faster payment services. Instead, a single provider may focus on specific use cases that do not promote the potential for faster payments to be used in a wide variety of ways. For example, an RTGS service could eschew innovation in use cases that undermine its owners' existing interests and profits from traditional payment methods. Moreover, the RTGS service's owners could favor their end-user products at the expense of other competing products by inhibiting the ability of competing products to use the RTGS service. Such limitations on access to the RTGS service could further reduce potential competition and innovation for end-user services.

With respect to payment system safety, a market outcome with a single RTGS service for faster payments would make it difficult and costly for faster payment services to achieve resiliency through redundancy. Such redundant connections have been a common solution in many retail payment markets, suggesting that many banks find the resiliency benefits outweigh the cost of connecting to multiple services. For example, a number of banks connect to two ACH services in pursuit of resiliency, despite the fact that achieving nationwide reach requires connecting to just a single ACH service. In a market without redundancy, a sole provider may serve as a single point of failure for RTGS-based faster payments.

There exist alternative retail payment methods with nationwide reach, such as the ACH or payment card systems. However, those payment methods differ from RTGS-based faster payments in important ways, such as speed, message types, and technology. As a result, substitution between those payment methods and RTGS-based faster payments could create significant operational, technical, cost, and timing challenges for banks seeking to use such substitutes as a backup for faster payments. These challenges may make such alternative payment methods inadequate for resiliency purposes related to faster payments.

All of the challenges described above regarding scope, equity, and effectiveness are likely to pose significant obstacles to other providers that might attempt to implement an RTGS infrastructure that would provide the foundation for ubiquitous, safe, and efficient faster payments in the United States. Therefore, the Board believes that, on balance, other providers alone cannot be expected to provide the service with reasonable effectiveness, scope, and equity.

Furthermore, as described previously, the Federal Reserve does not have plenary regulatory or supervisory authority over the U.S. payment system and instead has traditionally influenced retail payment markets through its role as an operator. As a result, the Federal Reserve having an operational role in the settlement of faster payments would be the most effective approach to address the challenges faced by other providers alone and would yield a clear public benefit.

B. *Public Benefits Criterion: The Federal Reserve must expect that its providing the service will yield a clear public benefit, including, for example, promoting the integrity of the payments system, improving the effectiveness of financial markets, reducing the risk associated with payments and securities-transfer services, or improving the efficiency of the payments system.*

The Board's *Public Benefits Criterion* requires that a new service yield long-term benefits to the public and the economy as a whole. Therefore, in determining whether the Federal Reserve should develop the FedNow Service, the Board has considered the expected public benefits and potential offsetting costs of the service.

1. Relevant Measures

The *Public Benefits Criterion* focuses on whether the service is expected to provide a clear public benefit. In the context of payments, public benefits result from a payment system that is accessible, safe, and efficient. Such a payment system is a key component of commerce and economic activity. The criterion also provides specific examples of potential public benefits related to safety (promoting the integrity of the payment system, reducing the risk associated with payments and securities-transfer services) and efficiency (improving the efficiency of the payment system).

Therefore, in evaluating a new service under the *Public Benefits Criterion*, the Board considers three measures consistent with the Federal Reserve's longstanding public policy objectives: accessibility, safety, and efficiency. The measure of accessibility is closely related to those of scope and equity, as considered in the context of the *Other Providers Criterion*. In particular, a payment service is generally more accessible if it is available to banks on equitable terms. Moreover, a service that is broadly accessible should more easily achieve nationwide scope in the long term. The measures of safety and efficiency are identical to those considered in the context of the effectiveness measure in the Board's *Other Providers Criterion*.

2. *Public Comments*

a. Accessibility

Approximately 130 commenters addressed whether a Federal Reserve RTGS service would affect accessibility in the faster payment market.[54] Approximately 110 commenters, from most commenter segments, expressed the view that the Federal Reserve developing an RTGS service for faster payments would help ensure equal access for banks nationwide.[55] In contrast, around 20 commenters, comprising large banks and private-sector operators, expressed the view that the Federal Reserve's involvement would hinder development of faster payments in the United States in the short term.

Many commenters, in particular small and midsize banks, stated that a Federal Reserve RTGS service would provide banks of all sizes the ability to access an RTGS infrastructure for faster payments. Some of these commenters noted that most banks already have relationships with the Federal Reserve, including access to Federal Reserve accounts, either directly or through a correspondent banking relationship, that could be used for faster payments and would lower barriers to participation compared to other services without such existing relationships. Commenters, comprising small and midsize banks, merchants, service providers, fintech companies, and trade organizations, noted that the Federal Reserve's history of providing services to banks on fair and equitable terms would facilitate similar access to RTGS services for faster payments. Many of these commenters argued that, unlike the private sector, the Federal

[54] Approximately 15 additional commenters raised issues related to accessibility but did not express a view about whether a Federal Reserve RTGS service would affect accessibility in the faster payment market.

[55] These commenters included small and midsize banks, individuals, merchants, service providers, fintech companies, and trade organizations.

Reserve has a unique mission and demonstrated history of providing nationwide access to payment services, noting the Federal Reserve's check and ACH services as specific examples.

Other commenters, comprising private-sector operators and large banks, argued that a Federal Reserve RTGS service is unnecessary to ensure access for all banks because industry participants are already in the process of implementing the private-sector RTGS service for faster payments. These commenters argued that the private-sector RTGS service has mechanisms in place to allow all banks to access the service and that the service's operator has already committed to providing access on equitable and impartial terms.

Commenters also argued that the Federal Reserve's existing connections and relationship would not necessarily facilitate accessibility of RTGS services for faster payments, noting that such connections are not easily extended to handle faster payments, as they are not equipped to support the volumes, speeds, and redundancies required for an RTGS service. In addition, many of these commenters expressed concern that a Federal Reserve RTGS service could be detrimental to achieving nationwide reach of an RTGS infrastructure. Several commenters argued it would take the Federal Reserve too long to build such a service. Other commenters stated that a market with multiple RTGS services may require banks to connect to multiple services to achieve nationwide reach and that only the largest banks would do so because of the significant costs of additional connections.

Finally, more than 130 commenters, from all commenter segments, discussed the importance of interoperability for achieving nationwide access to an RTGS infrastructure for faster payments.[56]

[56] Topics related to interoperability are further discussed in the Board's analysis of accessibility.

b. Safety

More than 80 commenters expressed views on whether a Federal Reserve RTGS service would promote the safety of faster payments.[57] Nearly all of these commenters argued that the Federal Reserve would improve the safety of faster payment through the development of an RTGS service for faster payments.[58] A few commenters expressed doubt that a Federal Reserve RTGS service would have any significant impact on the safety of faster payments.[59]

Commenters that expressed views on safety emphasized the importance of resiliency for RTGS services. Many of these commenters, especially small and midsize banks, argued that development of a Federal Reserve RTGS service for faster payments would be consistent with the Federal Reserve's role in promoting the safety of the payment system. Commenters argued that because of this role, the Federal Reserve would be committed to a higher level of safety than private-sector service providers. A few commenters specifically argued that, unlike private-sector service providers, the Federal Reserve would focus on broader public policy objectives rather than returns on investment when considering the safety of faster payments. Many small and midsize banks argued that the Federal Reserve's operational role provides stability in the financial system during a time of crisis, citing the Federal Reserve's role following the terrorist attack on September 11, 2001, as an example. Some commenters also suggested that having multiple RTGS services for faster payments in the market could increase faster payment

[57] Approximately 60 additional commenters raised issues related to safety but did not express a view about whether a Federal Reserve RTGS service would promote the safety of faster payments.

[58] These commenters included small and midsize banks, individuals, consumer organizations, merchants, service providers, fintech companies, trade organizations, and other interested parties.

[59] Commenters expressing this view included those from the following segments: large banks, private-sector operators, and individuals.

resiliency through redundancy, similar to other retail payment systems for which there are multiple operators.

A few commenters expressed doubts about whether a Federal Reserve RTGS service for faster payments would improve safety and resiliency. Large banks in particular argued that, although integration with a second RTGS service may bring marginal improvements to the safety of faster payments, these improvements would come at a high cost. Finally, at least one commenter expressed concerns that adopting a second RTGS service would divert bank resources, which could instead be used to improve resiliency and security of the private-sector RTGS service.

c. *Efficiency*

Approximately 120 commenters expressed views about whether a Federal Reserve RTGS service would promote efficiency in the faster payment market.[60] Approximately 100 commenters, from nearly all segments, argued that a Federal Reserve RTGS service would promote efficiency in the faster payment market.[61] In contrast, approximately 20 commenters, mostly comprising large banks and private-sector operators, argued that such a service would not improve efficiency and could create additional burdens for banks with limited resources.

Commenters that argued a Federal Reserve RTGS service for faster payments would promote efficiency generally discussed how such a service would enhance competition, promote innovation, or reduce costs. These commenters, comprising merchants and small and midsize banks, argued that historically, the Federal Reserve's presence as an operator has improved

---

[60] Approximately 20 additional commenters raised issues related to efficiency but did not express a view on whether a Federal Reserve RTGS service would promote efficiency.

[61] These commenters included small and midsize banks, individuals, consumer organizations, merchants, service providers, fintech companies, trade organizations, and other interested parties.

competition and efficiency, leading to lower prices and accelerated payment system improvements, such as the shift from paper to electronic payments. Some commenters further cited the payment card market as an example where concentration of market power in the absence of the Federal Reserve having an operational role led to inefficiencies in the market, such as high fees and restrictive rules that limit competition and innovation. At least one commenter argued that by the time such inefficiencies began to emerge in the early 2000s, it was too late for the Federal Reserve to provide a service to the market as an operator. Many small and midsize banks also stated that a Federal Reserve RTGS service would enhance competition in the broader banking market by allowing small and midsize banks to remain competitive with large banks and new entrants like fintech companies.

Other commenters argued that a Federal Reserve RTGS service for faster payments would not offer any measurable efficiency benefits over the current private-sector service and could distort the market. Many of these commenters argued that a Federal Reserve RTGS service would be costly to develop and that banks would need to expend additional resources to connect to multiple RTGS services for faster payments. A few of these commenters also suggested that the Federal Reserve's long-run cost recovery mandate is less demanding than the challenges facing the private sector, including scrutiny from shareholders and auditors, and may discourage private-sector entities from developing competing services. Finally, a few commenters also argued that cost-based pricing could stifle innovation by forcing RTGS service providers to divert resources away from developing new features.

3. *Board Analysis*

The Board expects that the Reserve Banks providing the FedNow Service would yield a clear public benefit. In particular, the Board's analysis suggests that, by serving an operational role, the Federal Reserve can help to create an accessible, safe, and efficient RTGS infrastructure for faster payments. This role would align with the Federal Reserve's history of providing services for most other payment systems alongside, and in support of, similar services offered by the private sector. The expected public benefit stems in large part from contributions the FedNow Service would make towards achieving nationwide reach of an RTGS infrastructure for faster payments, promoting the safety and resiliency of that infrastructure, and encouraging competition between payment services.

a. Accessibility

Enabling virtually all banks to gain access to a nationwide RTGS infrastructure for faster payments would support the core objective of ubiquitous faster payment services for individuals and businesses in the United States. However, as discussed with respect to the Board's *Other Providers Criterion*, the breadth and diversity of the U.S. banking system makes it difficult to implement an RTGS infrastructure that connects virtually all banks in the United States. The Board expects that the Federal Reserve's provision of the FedNow Service would help address this challenge in a number of ways, enhancing the accessibility of an RTGS infrastructure for faster payments and allowing that infrastructure to achieve nationwide reach.

In light of the significant heterogeneity in the nation's banking system, achieving nationwide reach will inevitably be challenging for any provider of RTGS services for faster payments, including the Federal Reserve. However, since its inception, an underlying public policy rationale for the Federal Reserve's involvement in the payment system has been to provide services in a safe and efficient manner to banks nationwide. Because of this long-standing policy commitment to promoting nationwide access, the Federal Reserve has historically extended access to banks of all sizes, including smaller banks in rural and remote areas of the country. Applied to the FedNow Service, this longstanding policy commitment would result in a service that is similarly accessible to banks of all sizes, ultimately increasing the long-term likelihood of such banks both accessing an RTGS infrastructure and implementing faster payment services.

As a provider of payment services to thousands of banks today, the Federal Reserve is in a unique strategic position to promote accessibility of an RTGS infrastructure for faster payments.[62] For small and midsize banks seeking to implement faster payment services, an RTGS service provided by the Federal Reserve is likely to be particularly important. The relatively high cost and difficulty of onboarding such institutions to an RTGS service is likely to constitute a significant obstacle for private-sector operators. Regardless of any investments in developing clearing and settlement technology, a private-sector operator without existing relationships would nevertheless have to incur substantial costs to build connections and customer service capabilities before it could onboard the significant number of smaller banks needed to achieve true nationwide reach.[63] The Federal Reserve, however, has already made substantial investments in such capabilities, including connections and customer support systems, and have significant experience and expertise in providing services to smaller banks. The associated long-standing relationships with and connections to thousands of banks across the country provide a solid foundation for the FedNow Service to facilitate those banks gaining access to an RTGS infrastructure for faster payments. The FedNow Service therefore can reasonably be expected to reach thousands of smaller banks in the United States that might

[62] The payment services that the Federal Reserve provides to banks today allow for settlement directly in banks' accounts held at the Reserve Banks or in settlement accounts held by other banks through a correspondent relationship.

[63] The use of service providers is unlikely to resolve this obstacle fully because some banks may prefer to use a direct connection or may already have relationships with service providers that are not connected to a private-sector RTGS service.

otherwise not have access to an RTGS infrastructure. The resulting widespread access to an RTGS infrastructure for faster payments would benefit small and midsize banks and the communities they serve.

Furthermore, the FedNow Service may serve as an impetus for many small and midsize banks to implement faster payment services. Although small and midsize banks responding to the 2018 Notice generally indicated an interest in adopting faster payment services, thousands of other banks may face significant uncertainty about the overall benefits of offering such services and the appropriateness of RTGS-based settlement arrangements for smaller institutions. The Federal Reserve's commitment to promoting payment system improvements through its provision of modernized infrastructure may decrease such uncertainty for those banks. With more certainty about the benefits of joining an RTGS infrastructure for faster payments, small and midsize banks may be more likely than they otherwise would have been to upgrade their capabilities and offer RTGS-based faster payment services to their customers.

Finally, the Board has also considered as part of its analysis the possible relationships between the FedNow Service and the private-sector RTGS service, and the resulting effect on nationwide reach. In a payment system with multiple operators, banks would have a choice whether to join a single service or multiple services such that an RTGS infrastructure for faster payments could achieve nationwide reach in two main ways.

First, interoperability via direct exchange of payments between RTGS infrastructure operators could allow payments originated by a participant of one service to be received by a participant of another service. If multiple services are interoperable in such a way, no single service needs to achieve nationwide reach on its own. This situation exists today with the nation's ACH system.

Second, banks could participate in multiple services that are not interoperable, but nationwide reach could still be achieved through at least one service achieving nationwide reach on its own. This situation exists today with large-value funds transfer systems. In this environment, banks could benefit from the existence of multiple services despite the lack of interoperability. A bank that participates in multiple services could choose which service to use for transactions, depending on any number of factors, such as fees, functionality, and the counterparties that a particular service can reach.

Many commenters described interoperability as important in the case of RTGS services for faster payments, with some commenters noting that interoperability could be developed in incremental steps. Commenters also expressed the view that the Federal Reserve would be well positioned to facilitate interoperability between RTGS services for faster payments. Commenters comprising large banks and private-sector operators, however, expressed significant concerns that interoperability poses potentially insurmountable technical and operational challenges.

The Board agrees with commenters that interoperability between RTGS services for faster payment services is a desirable outcome but also recognizes that it may be difficult to achieve, especially early on. As opposed to interoperability in and of itself, the Board views nationwide reach as a key objective for an RTGS infrastructure. Such reach does not inherently depend on interoperability between RTGS services, because there are other paths to achieving this objective.

During its engagement with the industry, the Federal Reserve intends to explore both interoperability and other paths to achieving nationwide reach. Although direct exchange of payments between RTGS infrastructure operators may not be an initial element of the FedNow Service, as standards, technology, and industry practices change over time and the relationship between RTGS services for faster payments evolves, interoperability will continue to be a desirable outcome that the Board pursues.

b. Safety

As the use of faster payment services increases in the future, the safety of such services will be crucial to the long-term safety of the overall payment system. The Federal Reserve has a long-standing focus on promoting the safety of the U.S. payment system. Recognizing that a safe payment system is crucial to the nation's economic growth and financial stability, the Federal Reserve has historically played an important role in promoting the safety of the U.S. payment system by providing liquidity and operational continuity in times of crisis. Serving an operational role in the payment system has allowed the Federal Reserve to take action in response to financial turmoil, terrorist attacks, natural disasters, and other crises. Indeed, comments in response to the 2018 Notice indicate that industry stakeholders and the public look to the Federal Reserve to use the tools at its disposal to provide support when needed, actions that might not be possible if the Federal Reserve were not in an operational role. As the prominence of faster payments in the United States grows, the development of the FedNow Service would allow the Federal Reserve to retain its ability to provide stability and support to the banking system and the broader economy in times of crisis.

Providing the FedNow Service would also allow the Federal Reserve to facilitate the safety of faster payments in the United States. Because of their irrevocable, real-time nature, the overall safety of faster payments depends in part on how well fraud can be detected and prevented. As the operator of the FedNow Service, the Federal Reserve would be in a position to promote the development and implementation of industry-wide standards, as has been the case in other payment systems where the Federal Reserve has played an operational role.[64] This ability to promote industry-wide standards would be particularly important in the development and adoption of standards to mitigate fraud. Moreover, if the Federal Reserve were to play an operational role, competition among RTGS services for faster payments may increase innovation related to fraud prevention, contributing to a safer faster payment environment.

Finally, the development of the FedNow Service could also enhance the safety of the U.S. payment system by promoting resiliency through redundancy. In particular, the availability of multiple RTGS services for faster payments would allow banks to connect to more than one such service, as a number do today for wire, ACH, and check services. Although connecting to multiple services could result in additional costs and operational complexity, the choice to connect would lie with the banks, many of which have expressed a desire historically to connect to multiple services for contingency purposes. These banks may instead look to achieve resiliency by using existing retail payment methods, for example ACH or payment cards. Over time, however, such alternatives will likely not provide adequate substitutes for RTGS-based faster payments from a cost, technological, operational, or end-user perspective.

c. *Efficiency*

The efficiency benefits associated with the FedNow Service are likely to come from two sources. First, by providing banks with an alternative RTGS service with integrated clearing functionality and by improving the prospect of banks' gaining access to a nationwide RTGS infrastructure for faster payments, the FedNow Service could allow more banks and their

[64] For example, in the early 2000s, using its operational role in the check system, the Federal Reserve was able to support and encourage the industry's transition from paper to more efficient electronic check processing. Similarly, the Federal Reserve was able to improve speed and reduce risks associated with ACH payments in the early 1990s by facilitating electronic origination and receipt of ACH transactions processed by the Federal Reserve. *See* Federal Reserve Bank of New York, "All-Electronic ACH Proposal," (Jan. 9, 1991). Available at https://fraser.stlouisfed.org/files/docs/historical/ny%20circulars/nycirc_1991_10424.pdf#pdfjs.action=download.

customers to reach one another. Such enhanced ability to reach one another would increase the benefits to each bank participating in the RTGS infrastructure, with the resulting network effects leading to improved efficiency in the faster payment market. Even banks that would already have joined the private-sector RTGS service could benefit from the broader reach that would result from the FedNow Service, because they would be able to join a service that provides access to counterparty banks that they would otherwise be unable to reach. Furthermore, as discussed in the context of the Board's *Other Providers Criterion* for evaluating new services, competition among RTGS services for faster payments could yield efficiency benefits by leading to lower prices and higher service quality.

Second, the development of the FedNow Service could indirectly generate efficiency benefits at the level of end-user faster payment services. A nationwide RTGS infrastructure would make the development of new faster payment services based on real-time settlement more attractive, increasing innovation and competition in the market for end-user faster payment services. Because the Federal Reserve seeks to encourage payment system improvements, the FedNow Service could serve as a neutral platform for private-sector entities to offer competitive and innovative faster payment services to end users based on transfers between banks.

Finally, the Board recognizes that the FedNow Service would generate societal costs that may reduce the net efficiency benefit of the service. In particular, the FedNow Service would require societal resources to develop in the short term and to operate in the long term. Further, banks that choose to connect to multiple RTGS services for faster payments in pursuit of broader reach or resiliency through redundancy may incur additional connection costs.[65] However, the

[65] The need to connect to multiple RTGS services in pursuit of broader reach would occur if the FedNow Service and private-sector RTGS services were not interoperable.

Board expects that the benefits of the FedNow Service, as discussed earlier, would ultimately outweigh these additional costs. Therefore, the Board expects that overall the FedNow Service will yield a clear public benefit in the areas of accessibility, safety, and efficiency.

C. Cost Recovery Criterion: The Federal Reserve must expect to achieve full recovery of costs over the long run.

The Board's *Cost Recovery Criterion* accounts for the requirements in the MCA. In evaluating whether a new service or major service enhancement can be expected to achieve full cost recovery, the Board further considers its policy, "Principles for the Pricing of Federal Reserve Bank Services" (pricing principles), and its previous application of those principles to existing services.[66]

1. Relevant Measures

a. The MCA

The MCA required the Board to adopt a set of pricing principles for Federal Reserve services and a schedule of fees pursuant to those principles. The MCA specified certain principles on which fees must be based, including the principle that "(o)ver the long run, fees shall be established on the basis of all direct and indirect costs actually incurred in providing the Federal Reserve services."[67] In addition, the MCA provided that the pricing principles "shall give due regard to competitive factors and the provision of an adequate level of such services nationwide."[68]

---

[66] Board of Governors of the Federal Reserve System, "Principles for the Pricing of Federal Reserve Bank Services," (Issued 1980). Available at https://www.federalreserve.gov/paymentsystems/pfs_principles.htm.

[67] These costs include imputed costs that a private-sector firm would incur if it were to provide the services. *See* Pub. L. No. 96-221, *supra* note 18. This imputed cost is referred to as the private-sector adjustment factor.

[68] *See* Pub. L. No. 96-221, *supra* note 18.

b. The Pricing Principles

The pricing principles incorporate the statutory requirements of the MCA and include additional provisions consistent with the purposes of the MCA.[69] Although Congress intended the MCA to stimulate competition to promote the provision of services at the lowest cost to society, Congress was also concerned about achieving an adequate level of services nationwide and avoiding the reemergence of undesirable banking practices — such as nonpar banking or circuitous routing of checks — that the Federal Reserve's operational role in the payment system was intended to eliminate.[70] Therefore, like the Board's policy for evaluating new services, the pricing principles balance the importance of competitive fairness in the Federal Reserve's provision of services with the Federal Reserve's objectives to promote the accessibility, safety, and efficiency of the payment system.[71] Three pricing principles are relevant in considering this balance.

First, pricing principle 3 directly incorporates relevant provisions from the MCA requiring that over the long run, fees shall be established on the basis of all direct and indirect

[69] For example, the Board's principles 1 and 2 mirror the MCA's statutory requirements that all covered Federal Reserve services must be explicitly priced and available to nonmember banks at the same price as member banks. In adopting the pricing principles, however, the Board noted that "the Monetary Control Act and its legislative history recognize the importance of the Federal Reserve maintaining an operational presence in the nation's payments mechanism, providing an adequate level of service nationwide and encouraging competition." The Board explained that "in the light of these considerations, the Federal Reserve has developed additional pricing principles that build on those of the Act." Therefore, other pricing principles reflect policy determinations by the Board intended to provide guidance on the pricing policies and strategies the Federal Reserve will follow, such as principle 6's expectation that the Federal Reserve should be sensitive to the changing needs for services in particular markets. *See* Board of Governors of the Federal Reserve System, "Federal Reserve Bank Services; Proposed Fee Schedules and Pricing Principles," 45 FR 58689, 58690–58692 (Sep. 4, 1980). Available at https://cdn.loc.gov/service/ll/fedreg/fr045/fr045173/fr045173.pdf.

[70] *See* "Principles for the Pricing of Federal Reserve Bank Services," *supra* note 66.

[71] Specifically, in preparing the pricing principles, the Board stated that the principles and future fee schedules take into account "the objectives of fostering competition, improving the efficiency of the payment mechanism, and lowering costs of these services to society at large. At the same time, the Board is cognizant of, and concerned with, the Federal Reserve's continuing responsibility for maintaining the integrity and reliability of the payment mechanism and providing an adequate level of service nationwide." "Principles for the Pricing of Federal Reserve Bank Services," *supra* note 66.

costs actually incurred in providing the services priced. In doing so, principle 3 includes the MCA's requirement to give due regard to competitive factors and the provision of an adequate level of such services nationwide.

Second, although the MCA mandates cost recovery for Federal Reserve services as a whole, pricing principle 5 specifies that the Board further intends fees to be set so that revenues for major service categories match costs, including a private-sector adjustment factor. However, principle 5 also notes that, during an initial start-up period, new operational requirements and variation in volume may temporarily change unit costs for some service categories. Principle 5 states that, in such a situation, the Federal Reserve intends to match revenues and costs as soon as possible.[72]

Finally, pricing principle 7 states that fee structures may be designed to reflect desirable long-run improvements in the nation's payment system. Principle 7 also states that the Board will seek public comment when changes in fees and service arrangements are proposed that would have significant long-run effects on the nation's payment system.

2. *Public Comments*

Approximately 20 commenters addressed cost recovery in response to the 2018 Notice.[73] Approximately 15 commenters believed the Federal Reserve would be able to recover the costs of developing and operating an RTGS service for faster payments, pointing to the Federal

[72] Principle 5 explains that the Board will monitor progress in meeting this goal by reviewing regular reports submitted by the Reserve Banks. In the event that the Board authorizes a fee schedule for a service below cost in the interest of providing an adequate level of services nationwide, principle 5 states that the Board will announce its decision. *See* "Principles for the Pricing of Federal Reserve Bank Services," *supra* note 66.

[73] Approximately 15 additional commenters raised issues related to cost recovery but did not express a view about whether a Federal Reserve RTGS service could recover its costs.

Reserve's ability to achieve cost recovery goals in the past for other services.[74] Fewer than 10 commenters argued that the Federal Reserve may not be able to recover costs for a new RTGS service, generally noting the significant cost of developing and operating such a service.[75]

3. Board Analysis

The Board believes that the provision of the FedNow Service would satisfy the *Cost Recovery Criterion.* In particular, the Board expects that the FedNow Service would achieve full recovery of costs over the long run, although the first instance of long-run cost recovery is expected to occur outside the 10-year period that the Board typically applies to existing, mature services. The Board's view that the service would satisfy the *Cost Recovery Criterion* is based on its consideration of the MCA's requirements regarding long-run cost recovery, the Board's pricing principles as they relate to new services compared with mature services, the Federal Reserve's public policy objectives, including the provision of an adequate level of service nationwide, and the previous application of these considerations to other Federal Reserve services.

The MCA does not specify the "long-run" period over which Federal Reserve services must recover costs, nor does the legislative history of the MCA indicate that Congress intended a specific length of time for the cost recovery period. The Board has typically used a rolling ten-year period when assessing long-run cost recovery of existing services (10-year cost recovery).[76] The Board views this standard 10-year cost recovery expectation as appropriate for assessing the

[74] These commenters included small and midsize banks, individuals, consumer organizations, and trade organizations.

[75] These commenters included large banks, trade organizations, and other interested parties.

[76] Notwithstanding the Board's standard 10-year long-run cost recovery period for existing services, the Board has previously needed to balance competing considerations in determining long-run cost recovery for those services. For example, efforts to modernize Federal Reserve check services in the early 2000s resulted in intermittent under-recovery of the service's costs during certain 10-year cost recovery periods.

long-run cost recovery of mature services, which generally have stable and predictable volumes, costs, and revenues.

However, a new service, such as the FedNow Service, differs from mature services in a number of important ways. By its nature, a new service generally involves high development costs. Moreover, unlike mature services, a new service may not initially have a critical mass of customer participation and, as a result, is likely to have low and unpredictable initial volumes. Certain specific circumstances — such as the length of time to develop the service, the use of the service by certain customer segments, or changes to the market landscape — may affect volumes and, thus, the costs and revenues of a new service. Taken together, these factors imply that, unlike mature services, a new service is unlikely to have stable costs and revenues when it is first deployed, making cost recovery challenging in the time frame that the Board has typically applied to mature services.

Given these considerations, the Board believes that the 10-year period used to evaluate cost recovery for mature services is an inappropriate standard for evaluating the long-run cost recovery of a new service similar to the FedNow Service. Applying such a standard could limit the Federal Reserve's ability to develop new services or undertake major service enhancements that support the provision of an adequate level of services nationwide or induce desirable long-term changes in the payment system.

The Federal Reserve's ACH service, the last new retail payment service developed by the Federal Reserve, provides an illustrative historical example of the importance of these considerations for cost recovery of new services. In evaluating the expected cost recovery of the FedACH service, the Board determined that, compared with the time frame for existing services, an extended cost recovery time frame was appropriate. It did so to encourage the development of an electronic funds transfer system for retail payments and to foster the development of efficient new technologies that would benefit the public in the long run.[77] Based on the service's anticipated long-term benefits, the Board determined, both before and after passage of the MCA, that the nascent service's fees should be based on the costs associated with mature volume estimates.[78] As volume grew, the service first achieved annual cost recovery nearly 15 years after launching a pilot in 1972, and achieved 10-year cost recovery after more than 20 years of operation.[79]

Like the Federal Reserve's ACH service, the Board expects that the FedNow Service will take significant time to mature, as the industry takes steps to adopt the service. Ultimately, although the Board expects the service's first instance of long-run cost recovery to occur outside

[77] In partnership with the private sector, the Federal Reserve began piloting ACH services in the late 1960s. The Federal Reserve determined that ACH services had the potential to yield long-term improvements to the payment system because of concerns related to rapidly growing paper check volumes. For example, in 1971, the Federal Reserve's "Statement of Policy on the Payments Mechanism" explained that "(i)ncreasing the speed and efficiency with which the rapidly mounting volume of checks is handled is becoming a matter of urgency. Until electronic facilities begin to replace check transfer in substantial volume, the present system is vulnerable to serious transportation delays and manpower shortages." Board of Governors of the Federal Reserve System, "Statement of Policy on the Payments Mechanism," (June 18, 1971). Available at https://fraser.stlouisfed.org/files/docs/publications/frbrichreview/rev_frbrich197107.pdf. The first ACH pilot service became fully operational in the early 1970s. The Federal Reserve worked with the industry and the U.S. Treasury to expand the service during the 1970s and 1980s.

[78] In establishing fees for the Federal Reserve's ACH service, the Board allowed fees to be set based on costs of operating a mature service instead of current costs. *See* Board of Governors of the Federal Reserve System, "Adoption of Fee Schedules and Pricing Principles for Federal Reserve Bank Services," 46 FR 1338, 1343 (Jan. 6, 1981). Available at https://cdn.loc.gov/service/ll/fedreg/fr046/fr046003/fr046003.pdf.

After passage of the MCA, the Board approved a fee schedule that recovered 40 percent of the service's current costs and required the service to increase its cost recovery targets 20 percent each year thereafter until the service achieved 100 percent cost recovery. *See* Board of Governors of the Federal Reserve System, "Fee Schedules for Federal Reserve Bank Services," 47 FR 53500 (Nov. 26, 1982) available at https://cdn.loc.gov/service/ll/fedreg/fr047/fr047228/fr047228.pdf; Board of Governors of the Federal Reserve System, "Fee Schedules for Federal Reserve Bank Services," 50 FR 47624, 47625 (Nov. 19, 1985) available at https://cdn.loc.gov/service/ll/fedreg/fr050/fr050223/fr050223.pdf. The Board does not believe it is appropriate at this time to similarly set a specific year in which the new FedNow Service would recover costs, as was done for the ACH service. This is largely because the ACH service was not an entirely new service at the time the principles were adopted and, for a new service in a dynamic market, the likelihood of accurately forecasting when cost recovery will occur is low. The Board will annually review the appropriateness of setting such an expectation for the FedNow Service.

[79] The ACH service became fully operational in 1974. *See* "The Federal Reserve System Purposes & Functions," *supra* note 4.

the 10-year cost recovery period typically applied to mature services, the service is nevertheless expected to achieve full recovery of costs over the long run in compliance with the Board's *Cost Recovery Criterion*. This expectation is based on certain conditions related to demand for faster payments, overall expansion of the market over the long term, time to market for the service, and direct or indirect participation in the service by banks of all sizes.

Expected long-run cost recovery for the FedNow Service outside the traditional 10-year cost recovery period for mature services may also affect aggregate cost recovery of Federal Reserve priced services, which would comprise the new FedNow Service and existing mature services. As noted above, although the Board's pricing principles impose an objective of full cost recovery for each service line, the cost recovery objective specified in the MCA only requires overall cost recovery of Federal Reserve services as a whole. Combining the revenues and costs of the FedNow Service with those of mature services may create the appearance of under-recovery for Federal Reserve services overall. Therefore, the Board believes it would be most appropriate to report the FedNow Service's cost recovery independently of mature Federal Reserve services until the FedNow Service reaches maturity.

The Board believes that an approach to cost recovery for the FedNow Service, as a new service, that does not rely on the standard applied to mature services is consistent with the language and purpose of the MCA and the Board's pricing principles for a number of reasons.

First, this approach is consistent with the MCA's requirement, incorporated in pricing principle 3, for the Federal Reserve to give due regard to the provision of an adequate level of service nationwide. As described above with respect to the Board's *Other Providers Criterion* and *Public Benefits Criterion*, in the absence of the FedNow Service, the objective of achieving an adequate level of service nationwide to support the development of ubiquitous RTGS-based faster payments in the United States is unlikely to be realized.

Second, this approach is consistent with pricing principle 5 as it relates to the start-up period for a service. In explaining its adoption of principle 5, the Board specifically noted the need for pricing flexibility during an initial start-up period when low and potentially variable volumes and high fixed costs could result in prohibitively high service fees, negatively affecting service usage and policy goals.[80] Such issues could arise for the FedNow Service if the Board required cost recovery over the same period as mature services.

Finally, this approach is consistent with pricing principle 7. Specifically, in adopting principle 7, the Board explained that pricing flexibility may be necessary to induce desirable long-run changes in the payment system and to foster development of services that will ultimately benefit the public.[81] Given that a nationwide RTGS infrastructure for new faster payments is a desirable long-run improvement, and in light of the benefits that would be likely to occur with the FedNow Service, as discussed under the *Public Benefits Criterion*, the Board believes that an expected cost recovery period of longer than 10 years is appropriate.

As part of this approach to cost recovery, the Board will regularly disclose the service's cost recovery beginning the year the service is available to participating banks and will monitor progress toward matching revenues and costs.[82] The Board will regularly confirm the expectation that the service will meet cost recovery objectives over the long run. As would be applicable to any Federal Reserve service, if it becomes clear that the FedNow Service is no longer expected to achieve long-run cost recovery or that the service will challenge the cost

[80] *See* "Adoption of Fee Schedules and Pricing Principles for Federal Reserve Bank Services," *supra* note 78.

[81] *See id.*

[82] Costs would include those related to development of the service and ongoing operations.

recovery of Federal Reserve priced services overall, the Board would reassess whether to continue providing the service. Such a reassessment would only occur after giving time for market development and adoption and would take into account other objectives, including the provision of equitable access to payment services and an adequate level of services nationwide.[83] Further information on expected service pricing is found in Part Two, including areas where comment is requested.

IV. Assessment of Expanded Operating Hours for the Fedwire Funds Service and the National Settlement Service to Support Liquidity Management for Faster Payments and For Other Purposes

The second potential action in the 2018 Notice was the development of a liquidity management tool to support RTGS services for faster payments. RTGS-based faster payment services require banks to have sufficient liquidity to perform interbank settlement at any time, on any day.[84] Without sufficient liquidity to conduct settlement, a faster payment cannot be completed in an RTGS-based service where, by design, interbank settlement occurs before final funds can be made available to the receiver. This risk of payments not being completed highlights the need for banks to be able to manage their liquidity on a 24x7x365 basis in accounts that support settlement of faster payments.

At present, the Federal Reserve does not offer a service that would allow banks to move liquidity as needed, in particular on weekends and holidays, to support real-time settlement of

[83] As stated in the Board's policy "The Federal Reserve in the Payments System," "a decision to continue to provide a service that could not reasonably be expected to meet cost-recovery objectives would be made by the Federal Reserve Board only after seeking public comment and only where there were clear public benefits to such a course of action. Similarly, any decision to withdraw from the service would be undertaken in an orderly way, giving due regard to the transition problems associated with the discontinuation of a service." "The Federal Reserve in the Payments System," *supra* note 18.

[84] Liquidity can take various forms, including funds in an account at a settlement institution or extensions of credit that allow payments to be completed when funds in an account are not sufficient to cover outgoing payments.

faster payments.[85] To reduce the risk of insufficient liquidity during those periods, banks can increase the funds in accounts that support settlement of faster payments to provide additional prefunding for future transactions. This additional prefunding, however, could be costly for banks because it prevents those funds from being used for other purposes. Prefunding also requires predicting the number and aggregate value of future customer payments, which has a degree of uncertainty. In consideration of the risk of failed transactions because of insufficient liquidity, the Board proposed developing a tool that would enable movement of funds between accounts at the Reserve Banks on a 24x7x365 basis, either by expanding the hours of current Federal Reserve services or through a new service.

A liquidity management tool could support private-sector RTGS arrangements for faster payments that are based on a joint account at a Reserve Bank.[86] Such a tool, as described in the 2018 Notice, could enable movement of funds between a joint account and banks' master accounts at any time of the day, any day of the year.[87] This tool would allow funds to be transferred, as needed, to support the payment activity of participants in private-sector RTGS services using a joint account.[88]

[85] The Fedwire Funds Service operating hours for each business day begin at 9:00 p.m. eastern time (ET) on the preceding calendar day and end at 6:30 p.m. ET, Monday through Friday, excluding designated holidays. Current operating hours for NSS are 7:30 a.m. ET to 5:30 p.m. ET, Monday through Friday, excluding designated holidays.

[86] In such an arrangement, real-time settlement occurs on an internal ledger maintained by a private-sector operator of an RTGS service for faster payments, supported by funds that are held in an account at a Reserve Bank for the joint benefit of the service's participants. To support settlement through such a service, each participant bank ensures sufficient funding in the joint account to cover its payment obligations on a 24x7x365 basis.

[87] A master account is the record of financial rights and obligations between an account-holding bank and a Reserve Bank. The account is where opening, intraday, and closing balances are determined.

[88] The private sector could develop alternative mechanisms to enable liquidity management for participants in a private-sector RTGS service for faster payments based on a joint account. For example, to address liquidity needs over the weekend, a private-sector operator could allow participants with excess funds on its ledger to transfer those funds within the service to those with a shortage.

In the 2018 Notice, the Board requested feedback on whether the Federal Reserve should provide such a liquidity management tool and, if so, the desirable functionality of such a tool. The Board further requested comment on whether such a tool could be used for purposes other than supporting real-time settlement of faster payments.

A. Public Comments

Approximately 230 commenters expressed views about whether the Federal Reserve should develop a liquidity management tool to support RTGS services.[89] Approximately 225 commenters, from all segments, supported the Federal Reserve developing such a tool. Fewer than five commenters were not supportive of the Federal Reserve developing a liquidity management tool to support RTGS services.[90]

Several large banks and other commenters indicated that the proposed tool could help with managing liquidity in the existing private-sector RTGS service for faster payments. Other commenters more generally discussed the importance of liquidity management in RTGS services for faster payments and noted the challenge of managing the timing of payment inflows and outflows on a 24x7x365 basis. Many commenters emphasized the importance of automated features for a liquidity management tool, such that liquidity transfers could occur outside standard business hours without the need for operational staff at participating banks during those hours. At least one commenter noted that functionality provided through a liquidity management tool should be available to all systems that could benefit from it. This comment was consistent

[89] At least one additional commenter raised issues related to a liquidity management tool but did not express a view about whether the Federal Reserve should offer such a tool.

[90] Commenters expressing this view included those from the following segments: private-sector operators and fintech companies.

with those from other commenters that emphasized the Federal Reserve should more generally enhance its current services to support a variety of payment activities.

Most of the commenters that addressed how the Federal Reserve should provide a liquidity management tool expressed the view that it should do so through expansion of operating hours for the Fedwire Funds Service. Commenters noted the potential for a variety of payment activities to benefit from expanded operating hours for the Fedwire Funds Service. A few commenters stated that the Federal Reserve should expand operating hours for NSS. No commenters suggested that the Federal Reserve should develop a new service to support liquidity management in RTGS services for faster payments.

The commenters that did not support the Federal Reserve developing a liquidity management tool indicated that liquidity management could be accomplished through software developed by the private sector that would alert a bank about balance levels in their account at the Reserve Banks.

B. Board Analysis

The Board believes that expanding the operating hours of the Fedwire Funds Service and NSS, potentially up to 24x7x365, would be the most effective way to provide the liquidity management functionality described in the 2018 Notice and could provide additional benefits to financial markets broadly.

The ability to transfer funds from master accounts to a joint account during nonstandard business hours would allow participants in a private-sector RTGS service to manage liquidity on a "just-in-time" basis. Just-in-time liquidity management would remove the need to increase funding in a joint account ahead of weekends, holidays, and other times when liquidity transfers are not currently possible. Just-in-time liquidity management would also decrease the likelihood that a bank would have insufficient liquidity to settle a payment. As a result, the system would have less risk that an individual or business would experience an incomplete payment because its bank does not have the requisite funds available in a joint account to support settlement. These benefits might broaden the appeal of a private-sector RTGS service using a joint account, thereby potentially expanding the use of RTGS services for settlement of faster payments.

Expanded hours for the Fedwire Funds Service and NSS could also benefit other retail payment services. For retail services that conduct interbank settlement on a deferred basis, including certain faster payment services and traditional payment card services, expanded hours could enable these services to settle net interbank obligations at times not currently possible, including weekends and holidays. Expanded Fedwire Funds Service and NSS hours could also benefit ACH payments by enabling additional settlement windows.[91]

In addition, expanded Fedwire Funds Service hours would increase the overlap between the hours of the Fedwire Funds Service and those of large-value payment systems in other countries, thereby supporting wholesale payment activity in multiple markets. For example, expanded hours could allow U.S. banks that provide clearing services to global correspondents and multinational corporations to meet client needs outside standard business hours. Expanded hours could support a broad range of domestic wholesale payment activity as well, such as margin payments related to trading conducted on 24-hour platforms or payments related to mergers and acquisitions that close on a weekend.

[91] In a separate notice, the Board has requested comment on potential modifications to Federal Reserve payment services to facilitate adoption of a later same-day ACH processing and settlement window. Under the proposal in that notice, the Federal Reserve would extend the daily operating hours of the Fedwire Funds Service and NSS by 30 and 60 minutes, respectively, to accommodate a third same-day ACH settlement window at 6:00 p.m. ET. *See* Board of Governors of the Federal Reserve System, "Potential Modifications to the Federal Reserve Banks' National Settlement Service and Fedwire Funds Service To Support Enhancements to the Same-Day ACH Service and Corresponding Changes to the Federal Reserve Policy on Payment System Risk, Request for Comments," 84 FR 22123, 22129 (May 16, 2019). Available at https://www.federalregister.gov/d/2019-09949.

In light of these potential benefits, the Board has determined that the Federal Reserve should explore the expansion of Fedwire Funds Service and NSS hours. However, because of the systemic importance of the Fedwire Funds Service and the Board's risk management expectations for the service, additional analysis is needed to evaluate fully the relevant operational, risk, and policy considerations for both the Reserve Banks and participants. The Federal Reserve plans to engage with the industry on issues related to expanded Fedwire Funds Service and NSS operating hours, as well as potential approaches for expanding those hours. Implementation approaches could range from limited availability on weekends and holidays to full 24x7x365 availability. Through this engagement, the Federal Reserve intends to solicit additional information about the industry's specific needs and readiness related to these options. The Board will announce any decision regarding the expansion of hours for the Fedwire Funds Service and NSS, including issuing a request for comment if necessary, after further analysis is completed.

PART TWO

V. FedNow Service Description

In what follows, the Board has outlined a general description of the planned FedNow Service and provided additional details on the service's potential features and functionality. The features and functionality, along with related implementation considerations, incorporate feedback from comments received in response to the 2018 Notice.

The Board is seeking comment on all aspects of the FedNow Service. The Federal Reserve also intends to convene industry groups and facilitate other outreach forums to gather input on the service.[92] The Federal Reserve will use the feedback gained through written comments and other channels to finalize the design and features of the FedNow Service. Once these details have been finalized, a final service description will be published in a subsequent *Federal Register* notice with additional information provided through existing Reserve Bank communication channels.

A. Public Comments

In the 2018 Notice, the Board sought input on certain issues related to the design and implementation of a potential RTGS service for faster payments. First, the Board sought comment on the ideal timeline for implementing such a service. Second, the Board requested comment on the adjustments that banks and their customers would need to make under an accounting regime in which the Reserve Banks would record and report end-of-day balances for each calendar day, including weekends and holidays (a seven-day accounting regime).[93] Third, the Board sought input on the operational burden that banks would face if an RTGS service for faster payments were designed to use accounts separate from banks' master accounts.[94] Fourth, the Board sought feedback on the need for auxiliary services, such as fraud prevention services that provide tools to detect fraudulent payments or a directory that allows faster payment services to route end-user payments using the receiver's public identifier, such as a phone number or

[92] The Reserve Banks will communicate information about industry groups and forums through established channels. Industry engagement is expected to be a continual process as part of ongoing service and product development.

[93] At present, end-of-day balances are recorded and reported for each banking day that Federal Reserve services operate. Normal banking days are Mondays through Fridays. Because Federal Reserve services do not currently operate over the weekend (or on holidays), this current practice corresponds to a five-day accounting regime.

[94] As described previously, a master account is the record of financial rights and obligations between account-holding banks and a Reserve Bank. The Reserve Banks typically permit a single master account per eligible institution, and the settlement activity for most Federal Reserve payment services occurs in master accounts.

email address, rather than bank routing and account information.[95] For each question, commenters from nearly every segment provided input.

More than 140 commenters, from all segments, addressed the ideal timeline for implementing a Federal Reserve RTGS service for faster payments. The majority of these commenters encouraged the Federal Reserve to implement such a service as quickly as possible. These commenters noted that the market for faster payments is rapidly evolving and that, if the Federal Reserve were unable to provide a service in the near future, it would face difficulty achieving widespread adoption. A few commenters cautioned that, while acting quickly may be ideal, the timing of a new service should take into consideration the adjustments that banks and service providers would need to make to implement the service.

Approximately 40 commenters addressed operational adjustments that would be required if an RTGS service for faster payments used a seven-day accounting regime.[96] Some of these commenters noted that, although certain banks may have already adopted 24x7x365 accounting for services such as ATM and debit card transactions, some banks and their business customers may need to make substantial back-office adjustments to implement a seven-day accounting regime. These adjustments included system upgrades, operational changes, and staffing outside of standard business hours. Approximately 10 commenters stated that the option to defer receipt

[95] The receiver's bank routing and account information is generally required to deliver payments between end-user bank accounts. This information can be difficult for the sender of a payment to obtain. As a result, some payment services allow the sender to direct a payment using a public identifier of the intended receiver. For such a public identifier to be used in a payment, the sender's bank must be able to link the public identifier to the intended receiver's banking information. A directory allows a bank to obtain this information through a database that connects public identifiers with the receiver's banking information, without requiring the sender to have that information or the receiver to reveal it to the sender.

[96] These commenters included small and midsize banks, large banks, individuals, consumer organizations, service providers, fintech companies, trade organizations, and other interested parties.

of transaction reporting during nonstandard business hours might be useful until banks are able to support 24x7x365 back-office operations.

Approximately 50 commenters expressed views on the incremental operational burden if an RTGS service were to settle faster payments in dedicated Federal Reserve accounts, separate from banks' master accounts.[97] The majority of these commenters indicated that, if necessary, banks would likely be able to manage separate settlement accounts. Some of these commenters further stated that if separate accounts were used, the benefits of such a structure would need to outweigh the burden for banks of managing separate accounts. Commenters also noted that a liquidity management tool would be needed to move funds during nonstandard business hours between master accounts and separate accounts for settlement of faster payments. Most commenters that addressed the use of separate accounts stated that, if separate Federal Reserve accounts were used for settlement of faster payments, balances in those accounts should earn interest and count towards reserve requirements.

More than 100 commenters, from all segments, discussed whether a directory service is needed for an RTGS service for faster payments. Many of these commenters stated that directories are an important driver for adoption of faster payments because individuals and businesses value the ability to make payments based on public identifiers. These commenters often indicated that the Federal Reserve should support development of a directory service for faster payments, citing their views of the Federal Reserve as a trusted service provider with broad reach. Some of these commenters suggested the Federal Reserve could build and operate its own directory service whereas others suggested that it could serve as a centralized link to

[97] These commenters included small and midsize banks, large banks, individuals, service providers, fintech companies, and trade organizations.

existing directories. A few commenters did not support the Federal Reserve developing its own directory service because private-sector directories are already available.

More than 90 commenters addressed the importance of fraud prevention services.[98] Many of these commenters suggested that an RTGS service for faster payments should include fraud prevention services, with some noting that such services could be more efficient and less susceptible to vulnerabilities if they were an integral part of an RTGS service for faster payments. Some commenters noted that fraud prevention services could include a database of known fraudulent accounts or automated fraud detection tools to identify unusual payment activity. Some commenters noted that a potential Federal Reserve RTGS service for faster payments would not require fraud prevention services because the private sector already offers such services. In the context of discussing fraud prevention services, some commenters also highlighted the need for tools that would assist in compliance with regulations to prevent money laundering and terrorist financing.

B. General Description of the FedNow Service

The FedNow Service would process individual payments within seconds, 24 hours a day, 7 days a week, 365 days a year. The service would be designed to support credit transfers, where a sender initiates a payment to an intended receiver for a variety of use cases, such as person-to-person payments, bill payments, and smaller-value business-to-business payments.[99] The service would settle interbank obligations through debit and credit entries to balances in banks' master

---

[98] These commenters included small and midsize banks, individuals, merchants, service providers, and trade organizations.

[99] Some traditional payments, such as card payments and certain ACH payments, are conducted as debit transfers. In a debit transfer, the party that wishes to be paid provides instructions that allow its bank to pull funds from the account of the party that needs to pay for a good or service, subject to the approval of that party and its bank. Because credit transfers require the sender to authorize and initiate each individual payment, services based on such transfers can decrease the risk of fraudulent or otherwise unauthorized payments. This and other considerations have led credit transfers to be the basis of faster payment systems in other countries.

accounts at the Reserve Banks. All settlement entries for transactions through the FedNow Service would be final, meaning that settlement cannot be cancelled or revoked once a transaction is processed by the service. Consistent with the goal of supporting faster payments, use of the service would require participating banks to make the funds associated with individual payments available to their end-user customers immediately after receiving notification of settlement from the service. The service would support values initially limited to $25,000.[100] The service would have the ability to process a large volume of payments rapidly, including volumes that may be unusually large at certain times of the day or days of the year.

The FedNow Service would incorporate clearing functionality with messages containing information required to complete end-to-end payments, such as account information for the sender and receiver, in addition to interbank settlement information. The service would also support the inclusion of additional descriptive information related to a payment, such as remittance or invoice information, and may further allow for nonvalue message types.[101] Payment message format would be based on the ISO 20022 standard.[102]

In its simplest form, a completed payment through the FedNow Service involving two participating banks would have the following steps.[103] To start, a sender would initiate a payment through its bank, by submitting instructions to it using an end-user interface outside the FedNow

[100] The initial $25,000 value limit would be intended to restrict the size of potential fraudulent transactions, while also supporting payments associated with a variety of use cases. Like other aspects of the service, this value limit could change after experience with the service provides additional information about whether a change would be appropriate. Banks would also be able to establish value limits for their customers below the $25,000 limit.

[101] For example, one possible message type is a "request for payment" in which the intended receiver submits a request for the sender to initiate a payment. A request-for-payment message type is addressed in the discussion of specific service features.

[102] Additional information about the ISO 20022 standard is provided in the discussion of specific service features.

[103] Other steps could occur, for example, if either bank were to use an agent, service provider, or correspondent or if a directory service were used.

Service. After the sender's bank authenticates the sender and validates the payment, it would submit a payment message to a Reserve Bank using the FedNow Service. The FedNow Service would authenticate the sender's bank and validate the payment message, for example, by verifying that the message meets the FedNow format specifications. Before the Reserve Bank executes the payment message, the service would place a provisional hold on funds in the master account of the sender's bank and would then send an inquiry message to the receiver's bank seeking confirmation that the receiver's bank, among other things, maintains a valid account for the receiver included in the payment message received by the Reserve Bank. If the receiver's bank sends a positive response to the inquiry, the FedNow Service would execute the payment for the Reserve Banks by sending a payment message forward with an advice of credit to the receiver's bank and nearly simultaneously processing a final debits and final credit to the master accounts of the sender's bank and receiver's bank, respectively.[104] The banks are responsible for debiting and crediting their customers' accounts and providing further notification to their customers that the payment has been completed. The entire process would take place within seconds.

Like current Federal Reserve services, the FedNow Service would be available to banks eligible to hold accounts at the Reserve Banks under applicable federal statutes and Federal Reserve rules, policies, and procedures.[105]Participating banks would be able to designate a

[104] The receiver's bank would need to respond to the message sent to it by the service within a certain amount of time. In the event that the response process is not completed within the expected time, the transaction would not be completed. Instead, the payment would be rejected, with the provisional hold on funds removed from the master account of the sender's bank and the banks being notified of the rejection. A payment could also be rejected, with associated notifications of payment rejection, if any of the necessary steps were not completed. For example, a payment could be rejected because of invalid account information for the receiver, which would cause the receiver's bank to reject the payment.

[105] Section 13(1) of the Federal Reserve Act permits Reserve Banks to receive deposits from member banks or other depository institutions. 12 U.S.C. 342. Section 19(b)(1)(A) of the act includes as depository institutions any

service provider or agent to submit or receive payment instructions on their behalf. Participating banks could also choose to settle payments in the account of a correspondent bank.[106]

The service would establish a "business day" by setting opening (beginning-of-day) and closing (end-of-day) times (in eastern time). This business day would be used to determine end-of-day balances and conduct associated reserve and interest calculations, as well as for transaction reporting and account reconciliation purposes. The existence of these opening and closing times would not affect the service's 24x7x365 continuous processing of payments. End-of-day balances would be calculated for master accounts on each calendar day, including weekends and holidays, as part of a seven-day accounting regime. Banks would be expected to manage their accounts to have a positive end-of-day account balance each day and avoid overnight overdrafts.

The Board recognizes that, in a market structure with multiple operators of RTGS services for faster payments, the ability to achieve ubiquity in faster payments is advanced when customers of a bank participating in one RTGS service are able to reach the customers of a bank participating in another RTGS service. This type of reach can be achieved in multiple ways, such as by banks participating in multiple services, or through interoperability where direct exchange of payments across services is possible. Each of these requires some degree of cooperation among private-sector operators, banks, and service providers. During its engagement with the industry, the Federal Reserve intends to explore both interoperability and other paths to

federally insured bank, mutual savings bank, savings bank, savings association, or credit union. 12 U.S.C. 461(b). The Reserve Banks may maintain accounts for additional institutions under other statutory authority.

[106] A correspondent bank is a bank that has authorized a Reserve Bank to settle debit and credit transaction activity to its master account for a respondent bank. Correspondent/respondent relationships are established under Federal Reserve Operating Circular 1.

achieving nationwide reach in support of ubiquitous faster payments, recognizing that these approaches may change over time.

C. *Discussion of Specific Features and Functionality*

The Board has considered the specific features and functionality of the planned FedNow Service. These features and functionality, as well as whether they would be part of the service initially, offered incrementally after the service is operational, or offered at all, may need to be adjusted based on the Federal Reserve's industry engagement efforts. In addition, industry engagement may identify other features and functionality not described here that may be addressed in the subsequent *Federal Register* notice as part of the final service description or through existing Reserve Bank customer communication channels.

1. *Message Standard*

Payment message formats in the FedNow Service would be based on the ISO 20022 standard and its implementation with respect to faster payments in the United States.[107] The service would support various message types, including payment instructions, confirmations, and request for payment. As part of a payment, the service would also support the exchange of remittance or other information related to a specific payment or invoice. Message specifications for the service, including specific message types and interpretation of ISO formats, would be provided to the industry prior to the initial launch of the service through established Reserve Bank communication channels.

[107] The ISO 20022 standard is a message format standard for payments, securities, trade services, payment cards, and foreign exchange. For more information, see https://www.iso20022.org/. The standard is published by the International Organization for Standardization (ISO), an independent, non-governmental organization comprised of 161 national standards bodies. For more information, see http://www.iso.org. The ISO 20022 standard is increasingly being adopted around the world as part of efforts to modernize payment services, including those that are used for faster payments.

2. *Settlement Account*

Like other Federal Reserve payment and settlement services, the FedNow Service would settle payments in master accounts.[108] Depending on the services used by a participating bank, transactions from multiple Federal Reserve services would settle in a master account at any given time during standard business hours.[109] Banks would need to monitor their master accounts and possibly adjust practices in managing those accounts because of the real-time settlement activity associated with the FedNow Service (see also the *Liquidity and Credit* discussion).

3. *Seven-day Accounting Regime*

After considering Financial Accounting Standards Board (FASB) principles, the Board believes that a seven-day accounting regime is appropriate for the FedNow Service.[110] Funds associated with a payment made using the FedNow Service would be transferred between the sender's bank and the receiver's bank upon final settlement. Therefore, in light of the FASB principles' guidance on when transferred assets should be recognized on each parties' financial records, the Reserve Banks would record and report transactions for accounting purposes as they occur, each day of the week, including weekends and holidays.[111] Similarly, an end-of-day

---

[108] As discussed in the 2018 Notice, the Board contemplated a two-account structure, with a separate account dedicated to settlement of faster payments to possibly reduce the technical complexity of an RTGS service and reduce time-to-market. However, this structure would introduce significant operational complexity for both the Federal Reserve and participating banks. For example, a separate account for settlement of faster payments would require new balance reconciliation procedures and introduce the need for participating banks to make transfers between the two accounts.

[109] These other services are check services, the Fedwire Funds Service, NSS, the Fedwire Securities Service, and FedACH services.

[110] FASB accounting principles are developed under the FASB Statements of Financial Accounting Concepts, which the FASB states are "intended to serve the public interest by setting the objectives, qualitative characteristics, and other concepts that guide...financial reporting." More information on the FASB Statements of Financial Accounting Concepts is available at https://www.fasb.org/cs/ContentServer?c=Page&cid=1176156317989&d=&pagename=FASB%2FPage%2FPreCodSectionPage.

[111] The Board considered a five-day accounting regime for the service, which would be consistent with the Federal Reserve's current approach and that of many banks, but determined that, under the FASB principles, a seven-day

balance would also be calculated for each participating bank at the FedNow Service's designated closing time each day of the week, including weekends and holidays (see also the *Business Day* discussion).

A seven-day accounting regime adopted by the Federal Reserve for the FedNow Service does not dictate or preclude use of specific other accounting regimes by participating banks. Based on their interpretation of accounting principles, participating banks may choose to use other accounting approaches internally; for example, banks may use five-day accounting in which they record and report weekend transactions on their financial records as occurring on Monday.[112] The service would provide queries, confirmations, and reports to support transaction monitoring, reporting, and reconciliation by participating banks under their chosen internal accounting approach. Banks could elect either to receive daily accounting reports at the end of each business day to allow management of reserve balances or to receive reports for weekends and holidays on the next business day.

4. Business Day

In considering the implications of a business day for the FedNow Service in light of business day practices for current Federal Reserve services, the Board has determined that the business day of the FedNow Service should align with the business day of the Fedwire Funds Service.[113] Given the 24x7x365 nature of the FedNow Service, the opening time would be

---

regime is most appropriate for the FedNow Service. Specifically, the FASB principles outline that once control of an asset, such as balances in a Federal Reserve account, is transferred to a new owner, the asset should be removed from the original owner's financial records and recognized on the new owner's financial records.

[112] Over time, participating banks could alternatively choose to adopt a seven-day accounting approach.

[113] Today, the Fedwire Funds Service closes at 6:30 p.m. ET and re-opens for the next business day at 9:00 p.m. ET on the same calendar day. The Board recently requested comment on moving the close of the Fedwire Funds Service to 7:00 p.m. ET to accommodate later settlement for ACH transactions. *See* "Potential Modifications to the Federal Reserve Banks' National Settlement Service and Fedwire Funds Service," *supra* note 91.

designated to occur immediately after the closing time, with the intention that transitions between closing and opening for the next business day would not disrupt continuous processing. Transactions completed after the FedNow Service's closing but before midnight each calendar day would be recorded on Federal Reserve accounting records as transactions occurring on the next business day.

A business day for the FedNow Service that aligns with the Fedwire Funds Service, however, does not dictate that participating banks adopt the same convention, or preclude other conventions, for recording transactions in their customers' accounts. For example, banks could post faster payment transactions occurring after the close of the FedNow business day to customers' accounts in real time based on the calendar day in which they are received.[114]

5. *Liquidity and Credit*

Comments in response to the 2018 Notice indicated concerns about adequate liquidity being available to support faster payments, particularly on weekends and holidays. To support their current payment services, the Reserve Banks provide liquidity in the form of intraday credit, also known as daylight overdrafts, to eligible banks and subject to the Federal Reserve's Policy on Payment System Risk (PSR Policy).[115] Intraday credit supports the smooth functioning

---

Fedwire Funds transactions between 9:00 p.m. ET and midnight ET are recorded as occurring on the next business day and typically support international markets and settlement of other domestic and global payment systems. The Board considered setting a midnight ET closing time for the FedNow Service to align across business and calendar days. However, such an approach would not allow balance calculations performed by the Federal Reserve to be measured on the same business day for the Fedwire Funds service and the FedNow Service, making calculation of balances problematic. Such a misalignment could have consequences for the current activity occurring over the Fedwire Funds Service.

[114] This practice would be akin to banks' common practice of "memo posting" for ATM withdrawals and certain other transaction activity. Under this practice, transactions are provisionally posted to customers' accounts on the date they are made but are reported on a later date for the purposes of monthly account statements.

[115] Intraday credit is generally available to banks that are financially healthy and have regular access to the discount window (the Federal Reserve's program for overnight lending to banks). *See* Board of Governors of the Federal Reserve System, "The Federal Reserve Policy on Payment System Risk," (As amended effective September 15, 2017). Available at https://www.federalreserve.gov/paymentsystems/psr_about.htm.

of the payment system by supplying temporary liquidity to cover shortages that can result when the timing of payment inflows and outflows are not balanced.

Like current services, access to intraday credit for FedNow transactions could support the smooth functioning of payments through the service. The Board is considering the impact of providing intraday credit on a 24x7x365 basis under the same terms and conditions as for current Federal Reserve services. As is the case today, participating banks would be expected to manage their master accounts in compliance with Federal Reserve policies, including avoiding overnight overdrafts.[116] These expectations would apply over weekends and holidays given that the FedNow Service would operate 24x7x365.

Account balance management would become more complex in a 24x7x365 environment where payments settle continuously in master accounts. Given the retail nature of payments through the FedNow Service, transaction values are expected to be relatively small compared with other activity in master accounts, such as Fedwire Funds transfers. Nevertheless, participating banks may need to adjust internal account monitoring practices to manage intraday liquidity. Liquidity management would be particularly important to avoid a negative balance at the service's closing time. Specifically, banks would need to carefully monitor transactions in real time or ensure that sufficient funding is available in their master accounts to cover payments that may arise shortly before the service's closing.

---

[116] To minimize Reserve Bank exposure to overnight overdrafts, policy established by the Board discourages institutions from incurring overnight overdrafts by charging a penalty fee. *See* Board of Governors of the Federal Reserve System, "Policy on Overnight Overdrafts," (Effective July 12, 2012). Available at https://www.federalreserve.gov/paymentsystems/oo_policy.htm.

The Federal Reserve is conducting analysis of when it may be beneficial to extend discount window operations to include weekends or holidays.[117] At least initially, however, discount window loan originations would likely not be available on weekends and holidays. The discount window would continue to be available until the close of the Fedwire Funds Service on Fridays under the same or similar terms as today.

The Board will engage with the industry to consider features and tools to assist institutions with the effective management of intraday and end-of-day account balances.[118] The Board may apply additional controls, initially or over time, in the PSR Policy as necessary to mitigate the credit risk incurred by the Reserve Banks in providing access to liquidity and credit.

6. *Network access*

Participating banks would access the FedNow Service through the FedLine® network, which would be enhanced to support the service's 24x7x365 processing.[119] Participating banks would need to deploy and test enhanced or upgraded FedLine components to enable the FedNow Service. Depending on their electronic connection with the FedLine network, banks also would need to maintain adequate telecommunications services to support the expected end-to-end speed of payments through the FedNow Service.

---

[117] The discount window is a Federal Reserve lending facility that helps to relieve liquidity strains for individual banks and for the banking system as a whole by providing a reliable backup source of funding. Additional information on the discount window is available at https://www.federalreserve.gov/regreform/discount-window.htm.

[118] Today, banks use the Reserve Bank's Account Management Information services for a near real-time view of account balances. At least initially, the Federal Reserve expects that banks would need to monitor account balances outside standard business hours by reconciling payment activity against the last available closing balance. However, the Federal Reserve expects that the Reserve Bank's Account Management Information services would be available during the same hours as the FedNow Service shortly after the service becomes available.

[119] FedLine Solutions is a set of electronic connection products that over 10,000 banks (or their agents) use to access Federal Reserve payment and information services. More information is available at https://frbservices.org/fedline-solutions/index.html.

While not envisioned at this time, the Board may consider in the future whether enabling access to the FedNow Service through alternate messaging networks would enhance resiliency or interoperability for faster payments.

7. *Service Pricing*

Before the FedNow Service is launched, the Board will announce the service's fee structure and fee schedule.[120] Based on prevailing market practices, the Board expects that the fee structure would include a combination of per-item fees, charged to sending and potentially to receiving banks, and fixed participation fees.[121] Separate per-item fees could also be charged for other message types that may be offered in the future.

As discussed in Section III under the *Cost Recovery Criterion*, the Board expects that the FedNow Service will take significant time to mature, as the industry takes steps to adopt the service. The Board expects the service's first instance of long-run cost recovery to occur outside the 10-year cost recovery period typically applied to mature services. The Board anticipates that, until the FedNow Service reaches maturity with relatively stable costs and revenues and a critical mass of bank participation, fees would be based on costs associated with mature volume estimates.[122] The Board believes that this approach to cost recovery for the FedNow Service, as a new service, which would not rely on the standard applied to mature services, is consistent with the language and purpose of the MCA and the Board's pricing principles. The Board is requesting comment on factors that may be relevant to consider in evaluating the long-run cost recovery of new Federal Reserve services compared with mature services.

[120] After announcing the initial fee schedule, consistent with existing practice, the Board would include the FedNow Service with its annual service-pricing process for all priced services.

[121] The ultimate fee structure and schedule would be informed by the Board's assessment of market practices at the time of implementation, which could evolve from today's practices.

[122] This approach is consistent with that used for the Federal Reserve's ACH service before it became a mature service.

8. Request for payment

In the FedNow Service, a request for payment would be a separate nonvalue message type that, when received through an end-user service, would prompt a sender to initiate a payment to the receiver who is requesting funds. The request for payment functionality allows a sender to authorize a credit transfer in real time, based on the receiver's request message. This functionality may increase the use of faster payments by allowing end users to more easily conduct certain types of transactions, such as bill payments. This functionality allows a sender to retain control of the authorization in sending a payment in real time, helps avoid mistakes of sending payments to the wrong party, and reduces the fraud risk relative to that of debit transfers.[123] The Board is seeking input on the incremental value and ideal implementation timing of such functionality to advance broad adoption of faster payments in the United States.

9. Directory service

Comments received in response to the 2018 Notice indicated the ability to originate payments using a receiver's public identifier, such as an email address or cell phone number, would be beneficial to help drive adoption of faster payments. To send a valid payment message in the FedNow Service, however, the sender's bank must have the banking information of the receiver. Therefore, if a sender wanted to originate a payment using a public identifier, the sender's bank would need to be able to find the banking information of the intended receiver using the public identifier. The availability of a directory that connects public identifiers with receivers' banking information would provide the sender's bank with the needed information, without ever revealing that information to the sender.

---

[123] Many payments in the United States, such as electronic bill payments and card payments have traditionally been accomplished as debit transfers, in which the sender provides the receiver with information and authorization to debit the sender's bank account.

Access to a directory for purposes of payments made using the FedNow Service could be accomplished in multiple ways. Individually, banks could establish connections to existing private-sector directories and develop an automated mechanism for populating payment messages with information provided by these external directories. Alternatively, the Reserve Banks could establish a centralized link with private-sector directories on behalf of participating banks, rather than each participating bank needing to do so individually. A further option would be for the Reserve Banks to build their own directory, enabling a message type that would allow banks to query the directory as part of the FedNow Service. The Federal Reserve intends to engage with industry stakeholders to understand more fully the benefits and drawbacks of these potential approaches and to assess possible paths forward to advance broad adoption of faster payments in the United States.

10. *Fraud prevention services*

Comments received in response to the 2018 Notice emphasized the heightened risk of fraud with real-time transactions and noted the importance of fraud-monitoring solutions to aid in mitigating fraud risk. The Board agrees that strong security mechanisms are necessary to support the overall safety of the nation's payment system. Across the payment system, payment security at the end-user level rests between end users and their banks, while at the payment system level, service operators may have additional layers of security.

For the FedNow Service, participating banks would continue to serve as a primary line of defense against fraudulent transactions, as they do today, with solutions to mitigate fraud enabled as part of the end-user services banks offer their customers. At the payment system level, the FedNow Service could offer additional fraud mitigation features, such as payment monitoring to alert participating banks of unusual transactions. In addition, the Federal Reserve remains committed to working with the industry on best practices and standards for mitigating fraud across these levels. The Federal Reserve intends to engage with industry stakeholders to better assess FedNow Service features that could help mitigate fraud risk and advance the safety of faster payments in the United States.

D. Implementation

The Board acknowledges the time-to-market pressure for industry participants related to faster payment services and is committed to launching the FedNow Service as soon as practicably possible. The Federal Reserve will engage quickly with industry participants to gather input for finalizing the initial design and features of the service. Pending engagement with the industry, the Board anticipates the FedNow Service will be available in 2023 or 2024.

VI. Competitive Impact Analysis

The Board conducts a competitive impact analysis when considering an operational or legal change to a new or existing service, such as the planned FedNow Service. The Board has considered whether the FedNow Service as described in Section V would have a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services due to differing legal powers or constraints or due to a dominant market position of the Federal Reserve deriving from such legal differences.[124]

In conducting a competitive impact analysis, the Board first determines whether the proposal has a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services. In instances where such direct and material adverse effects on the ability of the private-sector provider to compete are identified, the Board then considers whether such effects were due to either legal differences

[124] "The Federal Reserve in the Payments System," *supra* note 18.

or a dominant market position deriving from such legal differences. If the Board determines that the material adverse effects were the result of legal differences or the Federal Reserve's dominant market position, the Board then evaluates the potential public benefits of the new service in order to determine whether those benefits could be reasonably achieved with a lesser or no adverse competitive impact. Based on these considerations, the Board then either modifies the proposal to lessen or eliminate the adverse impact on competitors' ability to compete or determines that the payment system objectives may not be reasonably achieved if the proposal is modified. If reasonable modifications would not mitigate the material adverse effect, the Board then determines whether the anticipated benefits of the new service are significant enough to proceed with the service even though it may adversely affect the ability of other service providers to compete with the Federal Reserve in that service.

The Board has conducted an initial competitive impact analysis for the FedNow Service. However, the Board will conduct a final competitive impact analysis after considering the comments received during the public comment period.

A. Relevant Private-Sector Providers of Similar Services

In conducting its initial competitive impact analysis, the Board first identified relevant private-sector providers of similar services. At present, there is one private-sector RTGS service for faster payments in the United States, which has been operational since November 2017.[125] Like the planned FedNow Service, the private-sector RTGS service conducts real-time payment-by-payment final settlement of interbank obligations on a 24x7x365 basis. Unlike the FedNow

[125] The Board recognizes that the FedNow Service may affect additional private-sector entities that may be indirect competitors to or users of the FedNow Service. However, because these entities do not provide RTGS services for faster payments, the Board does not view them as private-sector providers of similar services and, therefore, has not considered them as part of this analysis.

Service, which would settle in central bank money using master accounts, the private-sector RTGS service relies on an internal ledger kept by its operator to conduct settlement, which is supported by funds held in a joint account at a Reserve Bank.[126]

B. Material Adverse Effects on the Ability of Relevant Service Providers to Compete Effectively

After identifying relevant private-sector providers of similar services, the Board then compared those providers' services with the FedNow Service. The purpose of this comparison is to identify differences between private-sector and Federal Reserve services. Such differences could create a direct and material adverse effect on the ability of the private-sector services to compete effectively with the Federal Reserve. Ultimately, it would be difficult to create total parity between the Federal Reserve and private-sector providers in their provision of payment services. Certain differences may provide advantages in the Federal Reserve's provision of priced services, while other differences may provide competitive advantages to private-sector entities.[127]

In this regard, certain specific differences between the FedNow Service and the private-sector RTGS provider are relevant. For example, the eligibility of funds held in master accounts to earn interest and count toward reserve requirements is a particularly notable difference between the two services. However, whether these and other differences between the two

[126] A joint account enables settlement for participants in a private-sector arrangement to be supported by funds held for the joint benefit of the service's participants. Accordingly, the operator of a private-sector arrangement that relies on a joint account can perform real-time, payment-by-payment settlement by adjusting participant positions on its own ledger, which, in the aggregate, will be equal to or less than the amount held in the joint account. Settlement supported by a joint account can occur at any time or on any day at the settlement-arrangement operator's discretion because settlement takes place on the ledger of the settlement-arrangement operator.

[127] For example, although private-sector providers generally do not need to publish their fees, the Federal Reserve publishes fees for their priced services in a manner that is transparent to competitors and customers alike.

services will, on net, have a direct and material adverse effect on the ability of the private-sector RTGS service to compete effectively with the Federal Reserve is unclear.

First, the FedNow Service would allow participants to use their master accounts at the Reserve Banks, whereas the private-sector RTGS provider uses a separate non-interest-bearing joint account that each participant must prefund. Use of master accounts may provide an advantage to the FedNow Service because funds remain in participants' Federal Reserve accounts, earning interest and counting towards reserve requirements, and can be used for other purposes. Unlike funds held in a master account, funds held in the private-sector service's joint account do not earn interest or count towards reserve requirements and are not available for other purposes that may arise, such as satisfying payment or liquidity needs outside the private-sector service.[128]

Second, if the Board confirms that the FedNow Service would provide access to intraday credit under the same terms and conditions as for current Federal Reserve services, such intraday credit would lower the risk that payments will be rejected because of lack of funds. In such a scenario, the Federal Reserve would expect banks to manage their master accounts at all times in compliance with Federal Reserve policies. Further, because the Board does not expect that the discount window would be available initially on weekends and holidays, participants in the FedNow Service would need to manage their master accounts more actively during those times to avoid overnight overdrafts.

[128] In adopting guidelines for evaluating joint account requests, the Board explained that the treatment of joint account balances depends on the nature of the private-sector arrangement, including the rights and obligations of the parties involved. Therefore, determining whether balances held in a joint account can be used to meet reserve requirements or are eligible for interest is assessed for each request individually. *See* Board of Governors of the Federal Reserve System, "Final Guidelines for Evaluating Joint Account Requests," 82 FR 41951, 41956 (Sept. 5, 2017). Available at https://www.federalregister.gov/d/2017-18705.

In the private-sector service, participants are able to use intraday credit available to them under the Federal Reserve's PSR Policy to fund the joint account. Access to intraday credit in funding the joint account mitigates the risk of private-sector RTGS faster payment transactions being rejected. However, access would be limited to the current operating hours of the Fedwire Funds Service, resulting in continued risk of rejected payments because of lack of prefunding outside those hours. Participants in the private-sector service, however, can manage this risk by establishing credit arrangements outside of Federal Reserve services, making the materiality of this possible difference unclear.

The Board identified additional differences between the two services that may provide advantages or disadvantages to either service. The FedNow Service and the private-sector service require participants to manage their account positions in different ways, presenting different challenges for some institutions. The FedNow Service's use of master accounts requires consideration of the defined closing and opening of other Federal Reserve payment services also settling in the same account. Further, use of master accounts for a service operating 24x7x365, such as the FedNow Service, adds a layer of complexity to banks' management of their positions to meet reserve requirements and avoid overnight overdrafts and associated penalties. At the same time, use of a joint account requires participants to prefund that account, removing liquidity from their master accounts, and to manage their contributions to the joint account to ensure sufficient liquidity to avoid rejected payments.

The Board is requesting comment on whether the differences identified above would have a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve and whether additional differences are also relevant. The

Board will conduct a final assessment of these differences and others that may be identified in light of comments received.

C. Legal Differences between the FedNow Service and the Private-Sector Service

The Board has considered whether the differences between the FedNow Service and the private-sector service that have potential direct and material adverse effects are due to legal differences or due to a dominant market position deriving from such legal differences. The Board invites comment on the following initial analysis.

Several of the differences identified above as potentially advantageous to the FedNow Service would be available to a private-sector service if it were to use an operating model other than one based on a joint account at a Reserve Bank. For example, the service could use a commercial bank to hold the prefunding that backs the service's internal ledger. The funds in an account at a commercial bank could potentially earn interest. A commercial bank may also allow overdrafts and extensions of credit, thereby reducing the risk of rejected payments. Depending on the arrangement, balances held at a commercial bank to settle faster payments may count towards reserve requirements.

Choice of a different operating model, however, would have potentially negative implications for other aspects of a private-sector RTGS service for faster payments. Most significantly, if a commercial bank were used, balances would be subject to risk of loss if the commercial bank holding the account were to fail. The use of a joint account at a Reserve Bank to support settlement mitigates this risk by reproducing, as closely as possible, the risk-free nature of settlement in central bank money.

The Board believes that the inherently risk-free nature of deposits at a central bank relative to deposits at a commercial bank is a unique legal difference between the Federal

Reserve and other possible institutions, such as a commercial bank, that may result in a competitive advantage for the FedNow Service. This advantage may have a direct and material effect in light of the private-sector operator's use of a joint account.

D. Achieving Potential Benefits with a Lesser, or No, Adverse Competitive Impact

As described in Section III, the Board believes the FedNow Service would offer clear public benefits. Specifically, the service would promote the Federal Reserve's objective of an accessible, safe, and efficient payment system by helping ensure nationwide access to an RTGS infrastructure for faster payments, promoting the safety of the payment system and reducing risks associated with faster payments, and having positive effects on competition and innovation in the payment industry.

If the differences between the FedNow Service and the private-sector service discussed above are determined to have a material adverse effect on the ability of the private-sector provider to compete effectively with the Federal Reserve as part of the Board's final competitive impact analysis, certain actions may help to lessen those effects while still advancing the Federal Reserve's objectives. Specifically, if the Federal Reserve were to offer expanded Fedwire Funds Service or NSS hours, those services could enable access to liquidity during nonstandard business hours, when such access is currently not available. With expanded Fedwire Funds Service or NSS hours, direct participants in the private-sector RTGS service may be able to reduce the amount of prefunding, in particular, on weekends and holidays. This reduction in prefunding could then reduce the amount of liquidity committed to the joint account and allow more funds to remain in participants' master accounts, where those funds could accrue interest, count towards reserve requirements, and be used for purposes other than faster payments. Further, an expansion of Fedwire Funds Service or NSS hours could eventually allow participants in the private-sector RTGS service to have access to intraday credit during times that Fedwire Funds Service and NSS are currently closed.

The expanded functionality provided by these actions, if implemented, may help reduce, if not fully eliminate, the potentially adverse effects described earlier. The Board is requesting comment on modifications to the FedNow Service or other actions that would further reduce or eliminate potentially adverse effects without significantly compromising the anticipated public benefit associated with the service. The Board will conduct and publish its final competitive impact analysis of the FedNow Service as part of the subsequent *Federal Register* notice presenting the final FedNow Service description.

By order of the Board of Governors of the Federal Reserve System August 2, 2019.

Ann Misback (signed)

Ann Misback,
Secretary of the Board.

SUPERINTENDENT OF FINANCIAL SERVICES LINDA A. LACEWELL LEADS MULTISTATE INVESTIGATION OF THE PAYROLL ADVANCE INDUSTRY

New York Leads Regulators from Ten States and Puerto Rico in Investigating Companies that Engage in Payroll Advances

States to Investigate Allegations of Illegal Online Lending, and Unlawful Interest Rates Disguised as Tips, Monthly Memberships and Other Unexpected Fees to Protect Cash-Strapped Consumers

NEW YORK - Financial Services Superintendent Linda A. Lacewell today announced that the Department of Financial Services (DFS) is leading a multistate investigation into the payroll advance industry and allegations of unlawful online lending. Members of the industry purport to provide consumers access to wages already earned prior to payroll. However, some of these firms appear to collect usurious or otherwise unlawful interest rates in the guise of "tips," monthly membership and/or exorbitant additional fees, and may force improper overdraft charges on vulnerable low-income consumers. The investigation focuses on whether companies are in violation of state banking laws, including usury limits, licensing laws and other applicable laws regulating payday lending and consumer protection laws.

"High-cost payroll loans are scrutinized closely in New York, and this investigation will help determine whether these payroll advance practices are usurious and harming consumers. Protecting consumers is our top priority and New York is leading the charge to expand the investigation of illegal online lending by including regulators from ten additional states and Puerto Rico," **said Superintendent Lacewell.** "We will use all the tools at our disposal, including partnering with peer regulators to safeguard consumers from predatory lending and scams that ensnare families in endless cycles of debt."

DFS is sending out letter requests for information to members of the payroll advance industry.

The following regulators join DFS in investigating the payroll advance industry:

1. Connecticut Department of Banking;
2. Illinois Department of Financial Professional Regulation;
3. The Office of the Commissioner for Financial Regulation in the State of Maryland;
4. New Jersey Department of Banking and Insurance;
5. North Carolina Office of the Commissioner of Banks;
6. North Dakota Department of Financial Institutions;
7. Oklahoma Department of Consumer Credit;
8. Puerto Rico Comisionado de Instituciones Financieras;
9. South Carolina Department of Consumer Affairs;
10. South Dakota Department of Labor and Regulation's Division of Banking; and
11. Texas Office of Consumer Credit Commissioner.

Consumers who believe that they have been the victim of a payroll advance company can file a complaint with the DFS at www.dfs.ny.gov/complaint. You may also contact the Consumer Hotline at (800) 342-3736, Monday to Friday, 8:30 a.m. to 4:30 p.m. DFS has also posted information on its website for consumers about combating illegal online payday loans.

###

Contact NYDFS Press Office

Contact us by phone:
(212) 709 - 1691

Contact us by email:
public-affairs@dfs.ny.gov

Who We Supervise

Institutions That We Supervise

The Department of Financial Services supervises many different types of institutions. Supervision by DFS may entail chartering, licensing, registration requirements, examination, and more.

Learn More

Connect With Us

Facebook Instagram Twitter

TERMS AND PRIVACY

Terms of Service

(Last Updated August 19, 2019)

These terms of service ("Terms of Service") constitute a legal agreement between you and Activehours, Inc., ("Activehours") a Delaware corporation, and govern use of the Site and the Services and your use of the Site and the Services. As used in these Terms of Service, the words "you" and "your" refer to you, the user of Activehours's website, device, or applications, as the party agreeing to these Terms of Service. The words "we", "us", "our" and any other variation thereof refer to Activehours. Any reference to "Activehours" in this document includes our directors, officers, employees, contractors, owners, agents, licensors, or licensees. As used in these Terms of Service, the term "Site" includes all websites and all devices or applications that we operate that link to these Terms of Service, pages within each such website, device, or application, any equivalent, mirror, replacement, substitute or backup website, device, or application, and pages that are associated with each such website, device, or application. The use of the word "includin these Terms of Service to refer to specific examples will be constru mean "including, without limitation" or "including but not limited to" and will not be construed to mean that the examples given are an exclusive list of the topics covered.

1. Overview

Pay Outs. Activehours offers various tools and functions through the Sites (the "Services"), that can enable you to assess the value of your accrued pay and to access such earned wages prior to payday by obtaining a payout from Activehours (each, a "Pay Out").

Balance Shield. Activehours also allows you to access earned wages prior to payday in order to help you minimize overdrafts by automatically sending you a payout between $.01 and $100 every time we see that your bank account balance has fallen below $100 ("Balance Shield").

Health Aid. Activehours also allows you to submit your medical bills (including, medical, dental and vision) to Activehours's medical billing negotiators to negotiate lower payment options with your medical providers ("Health Aid," formerly known as "MediPal"). Once you upload a medical bill, Activehours will first determine if the bill is eligible for the Medical Bill Review Service, and then if Activehours determines your bill is eligible for the service, Activehours will send you an update within 48 business hours with either a final report of any available options to lower your medical bill payments that it was able to learn, or requesting further action from you in order to learn what options are available.

Earnin Cash Back Rewards. Activehours also allows you to receive cashback in the form of credit issued to you through your debit card or bank account within 10 days of when you make a Qualified Purchase at participating merchants as further described below ("Earnin Cash Back Rewards"). Rewards will be available to payout 3-5 days after making a Qualified Purchase and each payout will take an additional 3-5 days to be reflected in your associated bank account. A "Qualified Purchase" is a purchase from a participating merchant using your registered card in accordance with the terms of the Offer and these Terms. An "Offer" is the cashback percentage or amount offered by the merchant, which may include, but not limited to, a minimum transaction amount, expiration date, any other additional terms or limitations associated with the offer. There is a $250 cashback limit per transaction.

No Fees or Charges. You are not required to pay any fees or charges to use the Services. There are no fees to obtain a Pay Out, receive a payout for Balance Shield, use Health Aid, or use Earnin Cash Back Rewards. You may make voluntary additional payments in appreciation of the services rendered, but you are not required to pay any charge or fee to be eligible to receive or in return for receiving the Services. These voluntary additional payments help fund Activehours.

When you enroll in Balance Shield, you may select a voluntary additional amount to pay in appreciation of the services rendered each time Balance Shield is automatically activated. If your payout under Balance Shield is less than $100, your voluntary additional payment amount will be prorated based on the amount of money that Balance Shield cashes out. You can turn Balance Shield on or off, and/or edit your pre-selected voluntary payment amount at any time. We will also send you an annual reminder informing you that Balance Shield is still turned on and of the preselected voluntary payment amount you chose.

No Obligation to Repay. We will have no legal or contractual claim or remedy against you based on your failure to repay, however, if we are unable to access funds from your bank account to complete a payment that you authorized Activehours to take, you will be prevented from using the Services until you pay any outstanding authorized payment to Activehours. Activehours will not engage in any debt collection activities if the payout is not repaid on the scheduled date, place the payout as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount of the payout.

2. Acceptance of Terms

PLEASE READ THESE TERMS OF SERVICE CAREFULLY. BY ACCESSING OR USING THE SITE OR THE SERVICES, OR ENROLLING IN EARNIN CASH BACK REWARDS YOU AGREE TO BE BOUND BY THE TERMS OF SERVICE. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS OF SERVICE, YOU MAY NOT ENROLL IN EARNIN CASH BACK REWARDS, ACCESS OR USE THE SITE OR THE SERVICES. You may not enroll in Earnin Cash Back Rewards or use the Site or Services, or accept these Terms of Service, if (a) you are not of legal age to form a binding contract with Activehours; (b) you are prohibited by law from receiving or using the Services; or (c) you are not a U.S. resident.

Activehours may modify this Terms of Service from time to time. Any and all changes to these Terms of Service will be posted on the Activehours.com site. The Terms of Service will always indicate the date it was last revised. In addition, we will send you an in-app notification or email informing you of any material changes in the Terms of Service prior to posting those changes. When you use the Service after those changes are posted, you are deemed to have accepted the new Terms of Service and agree to be bound by any changes to the Terms of Service.

3. Privacy and your Personal Information

For information about Activehours's data protection practices, please read Activehours's Privacy Policy, which is hereby incorporated into this Terms of Service. This policy explains how Activehours treats your personal information when you use the Service. The policy may be updated from time to time at our discretion. Changes will be effective upon posting to the site.

You may opt-out of Earnin Cash Back Rewards at any time by following the instructions below.

To opt out of our program and unlink your cards, you must follow the steps below:

1. Go to Cash Back Rewards
2. Click on "unenroll"
3. Confirm you want to unenroll card
4. You must repeat this process for every card you wish to delete

4. Registration Information

You agree and understand that you are responsible for maintaining the confidentiality of the combination of your Login ID and password, which together allow you to access the Services, and access Earnin Cash Back

Rewards . That Login ID and password, together with any account information, mobile number or other contact information you provide form your "Registration Information."

If you believe that your Registration Information or a device that you use to access any Site has been lost or stolen, that someone is using your account without your permission, or that an unauthorized transaction has occurred, you must notify us IMMEDIATELY at **support@earnin.com.**

5. Accuracy of and Changes to your Information

You agree to provide accurate profile information, including, as applicable, your name, physical address, email address and Account Information ("Profile Information"). You further agree to promptly update all your Profile Information whenever the information provided to us is no longer accurate. You can update your information by clicking on the settings link after you login. If you need help in changing your information, please email us at support@earnin.com. We are not responsible for any payment processing errors or fees or other Services-related issues arising from your failure to keep your Profile Information current.

6. Disclosure and Consent to Electronic Communications

You understand and agree that you are entering into these Terms of Service electronically and that certain categories of information ("Communications") may be provided by Activehours to you by electronic means (i.e., via email, through the Service by displaying links to notices generally on the Site, or to your mobile device), unless and until you withdraw your consent as described below. The categories of Communications that may be provided by electronic means include:

- these Terms of Service and any amendments, modifications, or supplements;

- records of any payment and other transactions you handle through the Sites or Services, including payment histories and transaction confirmations;
- disclosures or notices provided in connection with the Services, including any required by federal or state law (including initial disclosures, periodic statements, periodic and annual error resolution notices, initial and annual privacy notices, opt-out notices, and change-in-terms notices);
- any customer service communications, including communications with respect to claims of error or unauthorized use of the Sites or Services; and
- any other communication related to the Sites or Services.

Your access to this page through your device verifies that your device meets these requirements.

Although we reserve the right to provide Communications in paper format at any time, you agree that we are under no obligation to do so. All Communications in either electronic or paper format will be considered to be "in writing." You should print a paper copy of these Terms of Service and any Communication that is important to you and retain the copy for your records. If you do not wish to receive these Terms of Service or the Communications electronically, you may not use the Sites or Services.

If you have opened an account with us and you wish to withdraw your consent to have Communications provided electronically, you must close your account by contacting support@earnin.com and stop using the Sites and Services. There are no fees to close your account with us. Any withdrawal of your consent to receive electronic Communications will be effective only after we have a reasonable period of time to process your withdrawal.

We reserve the right, in our sole discretion, to discontinue the provision of your electronic Communications, or to terminate or change the terms and conditions on which we provide electronic Communications. We will provide you with notice of any such termination or change as required by law.

7. Service

Pay Outs. Activehours offers various tools and functions through the Sites, that can enable you to assess the value of your accrued pay and to access such earned wages prior to payday by obtaining a payout from Activehours (each, a "Pay Out").

We may limit the total number Pay Outs that you may receive at any given time or over a period of time. We may decline to extend a Pay Out to you if we reasonably believe such refusal is necessary or advisable for legal or security reasons or to protect the Services. If you generally fail to maintain a balance in your bank account that is sufficient to cover your repayment of a Pay Out, we may decline to allow you to obtain a Pay Out for as long as we determine to be necessary or appropriate.

Balance Shield. Activehours also allows you to access earned wages prior to payday in order to help you minimize overdrafts by automatically sending you a payout between $.01 and $100 every time we see that your bank account balance has fallen below $100 ("Balance Shield").

We may limit the amount we send you for Balance Shield at any given time or over a period of time. We may decline to offer Balance Shield to you at any time if we reasonably believe such refusal is necessary or advisable for legal or security reasons or to protect the Services. If you've already reached your Daily Max or Pay Period Max we may decline to send you a payout under Balance Shield. We may also decline to send you a payout under Balance Shield if you don't have earnings added to your account, or if we were unable to connect to your bank account, or if your account is on hold.

Health Aid. Activehours offers Health Aid (formerly known as "MediPal") to allow you to submit your medical bills (including, medical, dental and vision) to Activehours's medical billing negotiators to negotiate lower payment options with your medical providers. Not all medical bills are eligible for Medical Bill Review. Once you upload a medical bill, Activehours will first determine if the bill is eligible for the Medical Bill Review Service, and then if Activehours determines your bill is eligible for the service, Activehours will send you an update within 48 business hours with either a final report of any available options to lower your medical bill payments that it was able to learn, or requesting further action from you in order to learn what options are available. Activehours provides its Medical Bill Review Service for informational purposes only. Activehours does not enter into any binding agreement with third-parties on your behalf or make any payments to any third-parties on your behalf in connection with its Medical Bill Review service.

By submitting documents, including documents containing medical and insurance information, for Medical Bill Review, you agree that you are disclosing the documents to Activehours and expressly authorize Activehours to review the contents of each document. By using Medical Bill Review, you further authorize Activehours to speak to your medical provider, or their representatives, on your behalf about the contents of the documents you submitted for Medical Bill Review. By using Medical Bill Review, you also agree to waive any rights you may have to prevent Activehours from disclosing the content of the documents to your medical provider, or their representatives, on your behalf for the purpose of learning about available payment options to lower your medical bill payments.

Earnin Cash Back Rewards. Activehours offers Earnin Cash Back Rewards to allow you to receive cashback in the form of statement credits issued to you through your debit card or bank account within 10 days of when you make a Qualified Purchase at participating merchants. Rewards will be available to payout 3-5 days after making a Qualified Purchase and each payout will take an additional 3-5 days to be reflected in your associated bank account. A "Qualified Purchase" is a purchase from a participating merchant using your registered card in accordance with the terms of the Offer and these Terms. An "Offer" is the cashback percentage or amount offered by the merchant, which may include, but not limited to, a minimum transaction amount, expiration date, any other additional terms or limitations associated with the offer. There is a $250 cashback limit per transaction.

Not all Visa, MasterCard, and American Express cards are eligible for registration. Visa, MasterCard, and American Express Corporate cards. Visa, MasterCard, and American Express Purchasing cards, non-reloadable prepaid cards, government-administered prepaid cards (including EBT cards), healthcare (including Health Savings Account (HSA) or Flexible Spending Account (FSA) or insurance prepaid cards, Visa Buxx, and Visa-, MasterCard-, and American Express-branded cards whose transactions are not processed through the Visa U.S.A payment system, MasterCard payment system, and/or American Express payment system are not eligible to participate.

Not all transactions with your registered Visa, MasterCard and American Express card are tracked by Visa, MasterCard and American Express. You acknowledge that Visa, MasterCard, and American Express may be unable to monitor every transaction made with your enrolled Visa, MasterCard, or American Express card, including PIN-based purchases, purchases you initiate through identification technology that substitutes for a PIN, payments made through other payment methods (such as a digital wallet or a third party payment app, where you may choose your Visa, MasterCard, or American Express card as a funding source but you do not present your card directly to the merchant), payments of existing balances, balance transfers, or transactions that are not processed or submitted through the Visa U.S.A., MasterCard, and American Express payment systems, and that these transactions are not eligible.

If you register a debit card, your transaction must be processed as a 'credit' (i.e., signature) transaction to make sure the transaction can be monitored. Do not use a Personal Identification Number (PIN) when paying for your purchases with your enrolled card if you want the transaction to be eligible for rewards or offer completion.

Please note that we use Empyr, Inc. as our service provider to help us operate our program. Your payment card may only be enrolled in one program operated by Empyr, Inc. If you have already enrolled a payment card with a separate program operated by Empyr, Inc., you will be unable to register that card in both Earnin Cash Back Rewards and the other Empyr, Inc.-operated program. You may enroll another payment card in Earnin Cash Back Rewards or deactivate your card in the other Empyr, Inc.-operated program.

8. Credits

Earnin Cash Back Rewards statement credits will not appear or be reflected on your transaction receipt from the Merchant at the time of purchase, and will instead be reflected as part of the aggregate amount received from Earnin. Subject to eligibility verification and settlement of the Qualifying Transaction, statement credits will typically appear as part of your Earnin balance within approximately 10 days of the qualifying transaction, but may be subject to delays.

Earnin Cash Back Rewards Statement credits cannot be processed if your card number expires or changes while the statement credit is pending and not settled, or your card account is not open or in good standing. You may not receive a statement credit if it is not posted by your card issuer. Activehours, the applicable card network, and your issuer have no responsibility or liability for the failure of a statement credit to be posted, or for any finance or other charge, or impact on any rewards, feature, or term of your account resulting from the statement credit.

In no event will the applicable card network be considered as maintaining any type of financial obligation or deposit or other asset account, or holding funds or other value for you for distribution to you. Any pending statement credits and any associated dollar values represent offer fulfillment amounts in process owed by the applicable merchant, and not your funds or balances maintained or held by the payment card network or Activehours.

Earnin may choose to share a portion of its Empyr publisher fee with Earnin Cash Back Rewards customers, but is not required to share any portion and may cease sharing its portion at any time, with or without notice.

9. Your Use of the Services

Your right to access and use the Sites and use the Services is personal to you and is not transferable by you to any other person or entity, and you may only access and use the Sites and Services for lawful purposes.

When you request a Pay Out or turn on Balance Shield, you warrant that the earned wages being paid out are just and due to you and that you have not received payment for such wages or any part of the wages from anyone else.

We will recoup payment for Pay Outs or a payout for Balance Shield directly from your bank account upon deposit of your next paycheck. By requesting a Pay Out or turning on Balance Shield, you authorize us to initiate debit and credit entries to your bank account, or if you link a debit card to your account, you authorize us to charge your debit card, for all payments due to us. You agree to maintain a balance that is sufficient to fund all payments you initiate. Activehours reserves the right to charge your bank account at any time on or after the day the paycheck associated with the earned wages you have requested are expected to deposit into your account; however, Activehours will attempt to avoid charging your bank account if we believe your bank account does not contain sufficient funds to cover repayment of a Pay Out or payout for Balance Shield in the pay period. Our failure to charge your bank account for repayment of a Pay Out or payout for Balance Shield within a set amount of time does not constitute a waiver of our right to charge your account for such funds.

You represent and warrant that you have the right to authorize us to charge your account for payments due to us under these Terms. You will indemnify and hold Activehours harmless from any claims by any other owner of the account.

Activehours' authorization to initiate debit and credit entries to your bank account will remain in full force and effect until you revoke your authorization. If you wish to revoke your authorization, you may do so by contacting support@earnin.com at least three business days before the day the transaction is scheduled and stop using the Sites and the Services. Please note that your revocation of authorization when transactions are pending could result in delays to your receipt of funds and additional charges owed by you to Activehours. You are responsible for any costs or damages related to the timing of authorization revocation.

If we are unable to access funds from your bank account to complete a payment that is owed to Activehours, we will have no legal or contractual claim or remedy against you based on your failure to repay, however, you will be prevented from using the Services until you repay any outstanding balance owed to Activehours. Activehours will not engage in any debt collection activities if the payout is not repaid on the scheduled date, place the payout as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount of the payout. You further agree that:

- you will reimburse Activehours for any fees imposed on us as a result of the failed transaction; and
- you will reimburse Activehours for any fees we incur in attempting to debit the amount of the failed transaction from you.

Activehours is not responsible for any overdraft fees, over-the-limit fees, or insufficient fund charges (including finance charges, late fees, or similar charges) that result from your failure to maintain a balance or available credit in the bank account that is sufficient to fund all payments you initiate.

Accurate records enable us to provide the Sites and Services to you. You must provide true, accurate, current, and complete information about your accounts maintained at Third Party Sites ("Account Information"). and you may not misrepresent any Account Information. In order for the Services to function effectively, you must also keep your Account Information up to date and accurate. If you do not do this, the accuracy and effectiveness of the Services provided to you will be affected. You represent that you are a legal owner of, and that you are authorized to provide us with, all Account Information and other information necessary to facilitate your use of the Services.

In order to allow you to use certain Services, we may be required to verify your identity. You authorize us to make any inquiries we consider necessary to validate your identity. These inquiries may include asking you for further information, requiring you to provide a taxpayer identification number, requiring you to take steps to confirm ownership of your email address or financial instruments, ordering a credit report, or verifying information you provide against third party databases or through other sources. If you do not provide this information or we cannot verify your identity, we can decline to allow you to use the Services.

Your access and use of the Sites or Services may be interrupted from time to time for any of several reasons, including the malfunction of equipment, periodic updating, maintenance or repair of the Service, or other actions that Activehours, in its sole discretion, may elect to take. In no event will Activehours be liable to any party for any loss, cost, or damage that results from any period of downtime of the Sites or Services.

10. Modification to Site or Services

Activehours reserves the right at any time and from time to time to modify or discontinue, temporarily or permanently, the Sites or Services with or without notice, including Pay Outs, Balance Shield, Medical Bill

Review and Earnin Cash Back Rewards. We reserve the right to change the Services and Terms of Service, including applicable fees, in our sole discretion and from time to time. In such event, if you are a member to the Service, we will provide notice to you. If you do not agree to the changes after receiving a notice of the change to the Services, you may stop using the Services. Your use of the Services after you are notified of any change(s) will constitute your agreement to such change(s). You agree that Activehours will not be liable to you or to any third party for any modification, suspensions, or discontinuance of the Sites or Services.

11. Rights You Grant to Us

By submitting information, data, passwords, usernames, PINs, other log-in information, materials and other content to Activehours through the Service, you are licensing that content to Activehours solely for the purpose of providing the Service. Activehours may use and store the content for the purpose of providing the Service to you. By submitting this content to Activehours, you represent that you are entitled to submit it to Activehours for use for this purpose, without any obligation by Activehours to pay any fees or other limitations.

By using the Service, you expressly authorize Activehours to access your Account Information maintained by identified third parties, including but not limited to your bank, on your behalf as your agent. Activehours will submit information including usernames and passwords that you provide to log you into the site. You hereby authorize and permit Activehours to use and store information submitted by you to the Service (such as account passwords and usernames) to accomplish the foregoing and to configure the Service so that it is compatible with the third party sites for which you submit your information. For purposes of these Terms of Service and solely to provide the Account Information to you as part of the Service, you grant Activehours a limited power of attorney, and appoint Activehours as your attorney-in-fact and agent, to access third party sites, retrieve and use your information with the full power and authority to do and perform each thing necessary in connection with such activities, as you could do in person. YOU ACKNOWLEDGE AND AGREE THAT WHEN Activehours IS ACCESSING AND RETRIEVING ACCOUNT INFORMATION FROM THIRD PARTY SITES, Activehours IS ACTING AS YOUR AGENT, AND NOT AS THE AGENT OF OR ON BEHALF OF THE THIRD PARTY. You understand and agree that the Service is not sponsored or endorsed by any third parties accessible through the Service.

12. No Unlawful or Prohibited Use

As a condition of your use of the Sites and Services, you represent and warrant to Activehours that you will not use the Sites or Services for any purpose that is unlawful or prohibited by these Terms of Service.

You agree that you will not:

- request a Pay Out or use Balance Shield for any earned wages that you do not have the complete right, title and interest in or for which you have already received payment;
- use the Sites or Services in any manner that could damage, disable, overburden, or impair the Sites or Services;
- obtain or attempt to obtain any materials or information through any means not intentionally made available or provided for through the Sites or Services;
- access the Sites by any means other than through the interface that is provided by Activehours for use in accessing the Sites;
- use or attempt to use any engine, software, tool, agent, or other device or mechanism (including without limitation browsers, spiders, robots, avatars or intelligent agents) to navigate or search the Site or Services; or
- attempt to decipher, decompile, disassemble, or reverse-engineer any of the software comprising or in any way making up a part of the Site or the Service.

If Activehours, in its sole discretion, believes that you may have engaged in any activities restricted by these Terms of Service or by law, we may take various actions to protect Activehours, other users, and other third parties from fees, fines, penalties, and any other liability. The actions we may take include the following:

- we may close, suspend, or limit your access to your account or ability to use the Sites or Services;
- we may update inaccurate information you provided us;
- we may decline to allow you to use the Sites or Services in the future;
- we may take legal action against you; however, with respect to any Pay Outs or payout for Balance Shield, Activehours will not engage in collection efforts to collect payments due to us, place the amount paid out as a debt with, or sell it to, any third party, or report your repayment history to a credit bureau or other consumer reporting agency; and
- we may hold you liable to Activehours for the amount of Activehours's damages caused by your violation of these Terms of Service.

Activehours, in its sole discretion, reserves the right to terminate these Terms of Service, access to its Sites, or access to the Services for any reason and at any time with or without notice to you.

13. Activehours's Intellectual Property Rights

All content included or available in connection with the Sites, including any and all materials, information, text, data, contents, names, trade names, trademarks, trade dress, service marks, layout, logos, designs, images, graphics, illustrations, artwork, icons, photographs, displays, sound, music, video, animation, organization, assembly, arrangement, interfaces, databases, technology, and all intellectual property of any kind whatsoever (collectively, the "Content") and the selection and arrangement thereof is owned exclusively by Activehours or the licensors or suppliers of Activehours and is protected by U.S. and international copyright and other intellectual property laws. All rights are hereby reserved. Without limiting the foregoing, no Content on the Sites may be copied, reproduced, duplicated, published, or distributed in any form or by any means whatsoever without the express prior written permission of Activehours or the appropriate licensor or supplier.

Any feedback, questions, comments, suggestions, ideas, or the like that you send to Activehours will be treated as being non-confidential and nonproprietary, and Activehours will be free to use such information for any purpose whatsoever including developing, manufacturing, and marketing products and services incorporating the information.

14. Disclaimer of Presentation and Warranties

THE SITES, SERVICES, INCLUDING Pay Outs, Balance Shield, Medical Bill Review, and Earnin Cash Back Rewards, INFORMATION, DATA, FEATURES, AND ALL CONTENT IS OFFERED AND MADE AVAILABLE ON AN "AS IS" AND "AS AVAILABLE" BASIS. TO THE FULLEST EXTENT PERMISSIBLE PURSUANT TO APPLICABLE LAW, Activehours AND ITS AFFILIATES, LICENSORS AND SUPPLIERS (INCLUDING PAYMENT CARD NETWORKS AND PAYMENT PROCESSORS) EXPRESSLY DISCLAIM ANY WARRANTIES, EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, AND NON-INFRINGEMENT. Activehours AND ITS AFFILIATES, LICENSORS AND SUPPLIERS (INCLUDING PAYMENT CARD NETWORKS AND PAYMENT PROCESSORS) MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE CONTENT OR OPERATION OF THE SITES OR SERVICES, INCLUDING Pay Outs, Balance Shield, Medical Bill Review, and Earnin Cash Back Rewards. YOU EXPRESSLY AGREE THAT YOUR USE OF THE SITES AND

SERVICES, INCLUDING Pay Outs, Balance Shield, Medical Bill Review, and Earnin Cash Back Rewards, IS AT YOUR SOLE RISK.

Activehours AND ITS AFFILIATES, LICENSORS AND SUPPLIERS (INCLUDING PAYMENT CARD NETWORKS AND PAYMENT PROCESSORS) MAKE NO REPRESENTATIONS, WARRANTIES OR GUARANTEES, EXPRESS OR IMPLIED, REGARDING THE ACCURACY, RELIABILITY, COMPLETENESS, OR CONTINUED AVAILABILITY OF THE CONTENT ON THE SITES OR THE SERVICES, AND EXPRESSLY DISCLAIMS ANY WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. Activehours AND ITS AFFILIATES, LICENSORS AND SUPPLIERS (INCLUDING PAYMENT CARD NETWORKS AND PAYMENT PROCESSORS) MAKE NO REPRESENTATION, WARRANTY, OR GUARANTEE THAT THE CONTENT THAT MAY BE AVAILABLE THROUGH THE SITES OR SERVICES IS FREE OF BUGS, DEFECTS, OR ERRORS, OR INFECTION FROM ANY VIRUSES OR OTHER CODE OR COMPUTER PROGRAMMING ROUTINES THAT CONTAIN CONTAMINATING OR DESTRUCTIVE PROPERTIES OR THAT ARE INTENDED TO DAMAGE, SURREPTITIOUSLY INTERCEPT, OR EXPROPRIATE ANY SYSTEM, DATA, OR PERSONAL INFORMATION.

THE SERVICE IS NOT INTENDED TO PROVIDE LEGAL, TAX, OR FINANCIAL ADVICE. Activehours IS NOT A FINANCIAL PLANNER, BROKER, OR TAX ADVISOR. To the extent you use a Service for banking or other financial services, the Service is intended only to assist you in your financial organization and decision-making and is broad in scope. Before making any final decisions or implementing any financial strategy, you should consider obtaining additional information and advice from your accountant or other financial advisers who are fully aware of your individual circumstances.

Activehours does not assume any responsibility for the timeliness, accuracy, deletion, non-delivery, or failure to store Account Information. Any information made available through the Services will only reflect the information that we most recently accessed, and as such, may not reflect activity that occurred after we last accessed the applicable Third Party Site or any pending transactions.

You understand and agree that any alerts provided to you through the Services may be delayed or prevented by a variety of factors. Activehours makes commercially reasonable efforts to provide alerts in a timely manner with accurate information, but we cannot guarantee the delivery, timeliness, or accuracy of the content of any alert. Activehours will not be liable for any delays, failure to deliver, or misdirected delivery of any alert; for any errors in the content of an alert; or for any actions taken or not taken by you or any third party in reliance on an alert.

15. Limitation of Liability

UNDER NO CIRCUMSTANCES WILL Activehours OR ITS AFFILIATES, CONTRACTORS, EMPLOYEES, AGENTS, OR THIRD PARTY PARTNERS OR SUPPLIERS (INCLUDING PAYMENT CARD NETWORKS OR PAYMENT PROCESSORS) BE RESPONSIBLE OR LIABLE TO YOU OR TO ANY THIRD PARTY, WHETHER IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, LIQUIDATED, OR PUNITIVE DAMAGES YOU MAY INCUR IN CONNECTION WITH THE SITES, THE SERVICES, INCLUDING Pay Outs, Balance Shield, Medical Bill Review, and Earnin Cash Back Rewards, YOUR USE THEREOF, OR ANY OF THE USER SUBMISSIONS, INFORMATION, DATA, OR OTHER MATERIAL TRANSMITTED THROUGH OR RESIDING ON THE SITES, OR ANY ERRORS, DEFECTS, INTERRUPTIONS, DELETIONS, OR LOSSES RESULTING THEREFROM, INCLUDING LOSS OF PROFIT, REVENUE, OR BUSINESS, ARISING IN WHOLE OR IN PART

FROM YOUR ACCESS TO OR USE OF THE SERVICE, EVEN IF Activehours HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. UNLESS OTHERWISE EXPRESSLY SET FORTH IN THESE TERMS OF SERVICE, Activehours'S LIABILITY TO YOU FOR ANY CAUSE WHATSOEVER AND REGARDLESS OF THE FORM OF THE ACTION, WILL AT ALL TIMES BE LIMITED TO US $500.00 (FIVE HUNDRED UNITED STATES DOLLARS).

SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. IN SUCH STATES LIABILITY IS LIMITED TO THE EXTENT PERMITTED BY LAW. ACCORDINGLY, SOME OF THE ABOVE LIMITATIONS OF THIS SECTIONS AND THE PREVIOUS SECTION MAY NOT APPLY TO YOU.

16. Indemnification of Activehours

You will defend, indemnify and hold harmless Activehours and its officers, directors, shareholders, and employees, from and against all claims and expenses, including but not limited to attorney's fees, in whole or in part arising out of or attributable to any breach of these Terms of Service by you.

17. Governing Law & Forum for Disputes

These Terms of Service, and your relationship with Activehours under these Terms of Service, will be governed by the laws of the State of California without regard to its conflict or choice of laws provisions. Any dispute with Activehours, or its officers, directors, employees, agents or affiliates, arising under or in relation to these Terms of Service will be resolved exclusively through the small-claims court of the Superior Court of California within the county of Santa Clara, California, except with respect to imminent harm requiring temporary or preliminary injunctive relief in which case Activehours may seek such relief in any court with jurisdiction over the parties. You understand that, in return for agreement to this provision, Activehours is able to offer the Service at the terms designated, and that your assent to this provision is an indispensable consideration to these Terms of Service.

You also acknowledge and understand that, with respect to any dispute with Activehours, its officers, directors, employees, agents or affiliates, arising out of or relating to your use of the Service or these Terms of Service:

- YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY; and
- YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT INVOLVING ANY SUCH DISPUTE.

18. Miscellaneous

If any portion of these Terms of Service is deemed unlawful, void or unenforceable by any arbitrator or court of competent jurisdiction, these Terms of Service as a whole will not be deemed unlawful, void or unenforceable, but only that portion of these Terms of Service that is unlawful, void or unenforceable will be stricken from these Terms of Service.

You agree that if Activehours does not exercise or enforce any legal right or remedy which is contained in these Terms of Service (or which Activehours has the benefit of under any applicable law), this will not be taken to be a formal waiver of Activehours's rights and that those rights or remedies will still be available to Activehours.

All covenants, agreements, representations and warranties made in these Terms of Service will survive your acceptance of these Terms of Service and the termination of these Terms of Service.

These Terms of Service represents the entire understanding and agreement between you and Activehours regarding the subject matter of the same, and supersedes all other previous agreements.

Is Your Website Compliant with the Americans With Disabilities Act?

February 22, 2018

By: Brett J. Ashton and Libby Yin Goodknight

While financial institutions are typically aware of their responsibilities under the Americans with Disability Act (the "ADA" or the "Act") as they relate to the maintenance of their physical office spaces and overall general corporate policies, application of these same principles to an institution's website is a new concept that many were unaware of until recently. As we reported in our **November 2016 post**, financial institutions have been receiving demand letters from plaintiff's counsel alleging violations of the ADA based on the institution's websites failing to comply with the Web Content Accessibility Guidelines 2.0 ("WCAG 2.0"). [1] WCAG 2.0 is a set of guidelines adopted by a non-governmental entity called the Accessibility Guidelines Working Group designed to promote technical best practices for the World Wide Web. While the demand letters haven't stopped, there have been several recent developments on the issue of ADA website compliance worth noting if you become the target of a similar demand from plaintiff's counsel.

A recap of Title III of the ADA

The Act broadly protects the rights of individuals with disabilities as to employment, access to state and local government services, places of public accommodation, transportation, and other critical activities. Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of places of public accommodation (private entities whose operations affect commerce and that fall into one of the identified covered categories) and requires newly constructed or altered places of public accommodation, as well as commercial facilities, to comply with the ADA Standards for Accessible Design. The Act provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." [2] To that end, any Title III plaintiff must show:

1. He or she is disabled within the meaning of the ADA.
2. The defendant is a private entity that owns, leases, or operates a place of public accommodation.
3. The plaintiff was denied access to that public accommodation by the defendant because of his or her disability, *i.e.*,
   the defendant failed to make "reasonable modifications" of policies, practices or procedures or to provide auxiliary
   aids if necessary.

While case law is well established as to what constitutes a disability under the Act, the question of what constitutes a "public accommodation" is the subject of differing interpretations by the courts that have been presented with this issue.

Recent regulatory developments

The U.S. Department of Justice (the "DOJ" or the "Department") is responsible for promulgating regulations under the ADA, other than certain provisions dealing specifically with transportation.[3] Our **November 2016 post** discussed the uncertainty created by the DOJ's on again, off again approach to rulemaking on ADA website compliance that had existed since the DOJ issued its 2010 Advanced Notice of Proposed Rulemaking on Web Accessibility entitled "Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations". *See* 75 FR 43460 (July 26, 2010). This uncertainty, at least with respect to the DOJ's rulemaking, was eliminated with the December 26, 2017 formal withdrawal of all four pending rules on Title II and Title III Website compliance. *See* 82 FR 60932 (December 26, 2017). Notably, the withdrawal of these proposed rules occurred under the Trump Administration, which has been vocal in its desire to move towards less, rather than more, regulation, especially where businesses are concerned. This development stands in contrast to the DOJ's seemingly more aggressive stance concerning ADA website compliance under the Obama Administration. Previously, the DOJ had intervened in several civil litigation matters filed on behalf of plaintiffs asserting ADA website violations,[4] and had forced several companies to enter into consent decrees requiring the payment of monetary settlements.[5] It remains to be seen how this issue plays out on the regulatory front.

Recent Case Law Developments

In the meantime, the case law on ADA website compliance continues to develop in the courts. The district court in *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017), ruled that the grocery store's website was subject to the ADA. In affirming a business's obligation to make its website ADA compliant, the district court held: *"Although Winn–Dixie argues that Gil has not been denied access to Winn–Dixie's physical store locations as a result of the inaccessibility of the website, the ADA does not merely require physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided 'full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation[.]' 42 U.S.C. § 12182(a)."* The district court's decision in *Gil* is currently up on appeal to the Eleventh Circuit Court of Appeals, and oral arguments are scheduled for May 2018.

In *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354 (D.N.H. 2017), the district court considered whether the online grocery delivery website constituted a place of public accommodation under the ADA. In denying Blue Apron's motion to dismiss, the district court rejected the argument that a website must have a nexus to a physical brick and mortar location to constitute a place of public accommodation. The district court concluded that "a website alone may amount to a public accommodation."

KRIEG | DEVAULT

These recent decisions, coupled with the case law discussed in our November 2016 post, are indicative of a growing consensus among the courts that websites are indeed places of public accommodation that must adhere to the accessibility requirements of the ADA. Thus, the financial institutions industry continues to be exposed to scrutiny on this issue, irrespective of the uncertainty on the regulatory front.

Recent Settlements

In an effort to be proactive in staying ahead of the uncertainty and protecting its members on this issue, the Independent Community Bankers Association (the "ICBA") entered into a settlement agreement with Access Now in November 2017. Under the settlement agreement, the ICBA agreed to adopt a Statement of Voluntary Access Principles in exchange for the consumer group's agreement not to litigate against the ICBA's members. The ICBA's agreement with Access Now does not, however, prevent any other plaintiff from filing similar litigation against ICBA members, or any other financial institution.

Other Developments

The U.S. Architectural and Transportation Barriers Compliance Board (the "Board"), recently adopted a rule requiring federal agencies to follow the WCAG 2.0 guidelines.[6] The Board is structured to function as a coordinating body among Federal agencies and to directly represent the public, particularly people with disabilities. Half of its members are representatives from most of the Federal departments. The other half is comprised of members of the public appointed by the President, a majority of whom must have a disability. While the Board's adoption of the WCAG 2.0 guidelines does not apply to financial institutions, their adoption provides further support for plaintiff claims that this standard is required for all websites.

Krieg DeVault is closely monitoring developments in this area of law, and is able to provide assistance in responding to demands from plaintiff's counsel in the event your financial institution is targeted.

For further information, please contact **Brett J. Ashton** or **Libby Yin Goodknight.**

[1] [illegible]

[2] 42 U.S.C. § 12182(a)

[3] 42 U.S.C. § 12134, 42 U.S.C. §12186(b)

[4] See *National Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012), *National Federation of the Blind v. Scribd Inc.*, 97 F Supp 3d 565 (D. Vt. 2015), *Gil v. Winn-Dixie Stores, Inc.*, 257 F Supp 3d 1340 (S.D. Fla. June 12, 2017)

[5] *See March 6, 2014, DOJ Consent Decree with HRB Digital LLC and HRB Tax Group Inc., subsidiaries of H&R Block Inc., to remedy alleged violations of the Americans with Disabilities Act (ADA); Nov. 17, 2014, DOJ Settlement Agreement with Ahold U.S.A. Inc. and Peapod LLC, the owners and operators of www.peapod.com(link is external), to remedy alleged violations of the Americans with Disabilities Act (ADA); April 2, 2015 DOJ Settlement Agreement with edX Inc. (edX), to remedy alleged violations of the Americans with Disabilities Act (ADA).*

KRIEG | DEVAULT

[illegible]

913 F.3d 898
United States Court of Appeals, Ninth Circuit.

Guillermo **ROBLES**, an Individual, Plaintiff-Appellant,
v.
DOMINO'S PIZZA, LLC, a Limited Liability Corporation, Defendant-Appellee.

No. 17-55504
|
Argued and Submitted October 12, 2018 Pasadena, California
|
Filed January 15, 2019

Synopsis
Background: Blind customer brought action against pizzeria operator, alleging that operator's website and mobile application for ordering **pizza** was not fully accessible to him in violation of Americans with Disabilities Act (ADA) and California's Unruh Civil Rights Act (UCRA). The United States District Court for the Central District of California, No. 2:16-cv-06599-SJO-FFM, S. James Otero, J., 2017 WL 1330216, granted operator's motion to dismiss. Customer appealed.

Holdings: The Court of Appeals, Owens, Circuit Judge, held that:

[1] ADA applied to operator's website and mobile application;

[2] operator received fair notice that its website and mobile application were required to comply with ADA;

[3] allowing customer's action to proceed beyond pleading stage despite operator's lack of notice regarding the private industry standards that could possibly be imposed as equitable remedy would not violate operator's due process rights;

[4] due process did not require Department of Justice (DOJ) to issue specific guidelines for ADA compliance; and

[5] district court's invocation of primary jurisdiction doctrine to defer to DOJ's rulemaking process was inappropriate.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (23)

[1] **Federal Courts**
Statutes, regulations, and ordinances, questions concerning in general
The Court of Appeals reviews de novo a district court's interpretation and construction of a federal statute.

Cases that cite this headnote

[2] **Federal Courts**
Statutes, regulations, and ordinances, questions concerning in general
The constitutionality of a statute or regulation is a question of law, which is reviewed de novo.

Cases that cite this headnote

[3] **Federal Courts**
Jurisdiction
The Court of Appeals reviews de novo a district court's invocation of the primary jurisdiction doctrine.

Cases that cite this headnote

[4] **Civil Rights**
Public Accommodations
The ADA applies to the services of a place of public accommodation, not services in a place of public accommodation; to limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute. Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

4 Cases that cite this headnote

[5] **Civil Rights**

Discrimination by reason of handicap, disability, or illness

Title III of ADA, prohibiting discrimination in places of public accommodation, applied to pizzeria operator's website and mobile application; website and mobile application were two of the primary means of ordering operator's products to be picked up at or delivered from pizzerias, which were places of public accommodation. Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

3 Cases that cite this headnote

[6] **Federal Courts**

Mode and sufficiency of presentation

An issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.

Cases that cite this headnote

[7] **Constitutional Law**

Certainty and definiteness; vagueness

An impermissibly vague statute violates due process because it does not give fair notice of conduct that is forbidden or required. U.S. Const. Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**

Certainty and definiteness; vagueness

A statute is vague in violation of due process not when it prohibits conduct according to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. U.S. Const. Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**

Particular Subjects and Regulations

Because the ADA is a statute that regulates commercial conduct, it is reviewed, for purposes of a vagueness argument under the Due Process Clause, under a less stringent standard of specificity than, for example, criminal laws or restrictions on speech. U.S. Const. Amend. 14; Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

Cases that cite this headnote

[10] **Constitutional Law**

Trade or Business

A statute regulating commercial conduct would be vague in violation of due process only if it is so indefinite in its terms that it fails to articulate comprehensible standards to which a person's conduct must conform. U.S. Const. Amend. 14.

Cases that cite this headnote

[11] **Civil Rights**

Discrimination by reason of handicap, disability, or illness

Constitutional Law

Food and beverages; restaurants

Pizzeria operator received fair notice, as required by Due Process Clause, that its website and mobile application for ordering **pizzas** were required to comply with Title III of ADA, which prohibited discrimination in places of public accommodation; ADA clearly stated that covered entities must provide full and equal enjoyment of their services to people with disabilities, and Department of Justice (DOJ), which was charged with issuing regulations concerning implementation of ADA, had clarified that ADA's provisions required "effective communication" and repeatedly affirmed application of ADA to websites of public accommodations. U.S. Const. Amend. 14; Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a); 28 C.F.R. § 36.303(c)(1).

1 Cases that cite this headnote

[12] **Civil Rights**

Discrimination by reason of handicap, disability, or illness

Constitutional Law

Food and beverages; restaurants

In blind customer's action alleging that pizzeria operator's website and mobile application failed to comply with ADA, whether operator would be required to comply with private industry standards for website accessibility developed by technology and accessibility experts was question of remedy not liability, and thus allowing customer's action to proceed beyond pleading stage despite operator's lack of notice regarding the private industry standards would not violate operator's due process rights; customer only sought to impose liability on operator for failing to comply with ADA, which, pursuant to regulation promulgated prior to creation of website and mobile application, unambiguously applied to websites of covered entities, and any due process concerns regarding the remedy would be premature until customer could establish liability. U.S. Const. Amend. 14; Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

Cases that cite this headnote

[13] **Civil Rights**

Administrative agencies and proceedings

Constitutional Law

Food and beverages; restaurants

Due process did not require Department of Justice (DOJ) to issue specific guidelines for what operators of public accommodations must do to make its websites and mobile applications compliant with ADA before pizzeria operator could be held liable for its alleged failure to make its website and mobile application accessible to blind customers. U.S. Const. Amend. 14; Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

Cases that cite this headnote

[14] **Constitutional Law**

Certainty and definiteness; vagueness

As a general matter, in the context of a due process vagueness argument, the lack of specific regulations cannot eliminate a statutory obligation. U.S. Const. Amend. 14.

Cases that cite this headnote

[15] **Action**

Actions and administrative proceedings

Administrative Law and Procedure

Nature and purpose

The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency.

1 Cases that cite this headnote

[16] **Administrative Law and Procedure**

Nature and purpose

The primary jurisdiction doctrine is a prudential doctrine that does not implicate the subject matter jurisdiction of the federal courts.

1 Cases that cite this headnote

[17] **Administrative Law and Procedure**

Nature and purpose

The primary jurisdiction doctrine permits courts to determine that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.

Cases that cite this headnote

[18] **Administrative Law and Procedure**

Primary Jurisdiction

While no fixed formula exists for applying the doctrine of primary jurisdiction, courts consider: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.

Cases that cite this headnote

[19] **Administrative Law and Procedure**
Nature and purpose
The purpose of the primary jurisdiction doctrine is not to secure expert advice from an agency every time a court is presented with an issue conceivably within the agency's ambit.

Cases that cite this headnote

[20] **Administrative Law and Procedure**
Primary Jurisdiction
Efficiency is the deciding factor in whether a court should invoke the primary jurisdiction doctrine and yield to an administrative agency.

1 Cases that cite this headnote

[21] **Administrative Law and Procedure**
Exceptions
Even when agency expertise would be helpful, a court should not invoke the primary jurisdiction doctrine when the agency is aware of but has expressed no interest in the subject matter of the litigation.

1 Cases that cite this headnote

[22] **Administrative Law and Procedure**
Exceptions
Yielding to an administrative agency pursuant to the primary jurisdiction doctrine is not required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make.

1 Cases that cite this headnote

[23] **Civil Rights**
Administrative agencies and proceedings
In blind customer's action alleging that pizzeria operator's website and mobile application failed to comply with ADA, district court's invocation of primary jurisdiction doctrine to defer to Department of Justice's (DOJ) rulemaking process was inappropriate; DOJ issued but subsequently withdrew regulation regarding methods for websites and mobile applications to comply with ADA, customer had not ability to participate in DOJ's administrative hearing process, waiting for DOJ to complete its rulemaking process would delay resolution of customer's claims, and district court was capable of interpreting ADA's requirements of "full and equal enjoyment" and "auxiliary aids and services." Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

1 Cases that cite this headnote

Attorneys and Law Firms

***901** Joseph R. Manning (argued) and Michael J. Manning, Manning Law APC, Newport Beach, California, for Plaintiff-Appellant.

Gregory Francis Hurley (argued) and Bradley J. Leimkuhler, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, California, for Defendant-Appellee.

Jessica Paulie Weber (argued) and Eve L. Hill, Brown Goldstein & Levy LLP, Baltimore, Maryland, for Amici Curiae National Federation of the Blind, American Council of the Blind, American Foundation for the Blind, Association of Late Deafened Adults, California Council of the Blind, California Foundation for Independent Living Centers, Disability Rights Advocates, Disability Rights California, Disability Rights Education & Defense Fund, National Association of the Deaf, National Disability Rights Network, National Federation of the Blind of California, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and World Institute on Disability.

Stephanie N. Moot and Carol C. Lumpkin, K&L Gates LLP, Miami, Florida; Martin S. Kaufman, Executive VP and General Counsel, Atlantic Legal Foundation, Harrison, New York; for Amicus Curiae The Atlantic Legal Foundation.

Stephanie Martz, National Retail Federation, Washington, D.C., for Amicus Curiae National Retail Federation.

Kathleen McGuigan and Deborah White, Retail Litigation Center, Inc., Arlington, Virginia, for Amicus Curiae Retail Litigation Center, Inc.

Felicia Watson and Jeffrey B. Augello, National Association of Home Builders of the United States, Washington, D.C., for Amicus Curiae National Association of Home Builders of the United States.

Janet Galeria and Warren Postman, U.S. Chamber Litigation Center, Washington, D.C., for Amicus Curiae Chamber of Commerce of the United States of America.

Angelo I. Amador, Restaurant Law Center, Washington, D.C., for Amicus Curiae Restaurant Law Center.

Elizabeth Milito, Karen R. Harned, National Federation of Independent Business Small Business Legal Center, Washington, D.C., for Amicus Curiae National Federation of Independent Business Small Business Legal Center.

Christine Mott, International Council of Shopping Centers, New York, New York, for Amicus Curiae International Council of Shopping Centers.

Justin Vermuth, American Resort Development Association, Washington, D.C., for Amicus Curiae American Resort Development Association.

Mary Caroline Miller, Kevin W. Shaughnessy, and Joyce Ackerbaum Cox, Baker & Hostetler LLP, Orlando, Florida; John B. Lewis, Baker & Hostetler LLP, Cleveland, Ohio; for Amici Curiae Restaurant Law Center, American Bankers Association, American Hotel & Lodging Association, American Resort Development Association, Asian American Hotel Owners Association, Chamber of Commerce of the United States of America, International Council of Shopping Centers, International Franchise Association, National Association of Convenience Stores, National Association of Home Builders of the United States, National Association of Realtors, National Association of Theater Owners, National Federation of Independent Business Small Business Legal Center, National Multifamily Housing Council, National Retail Federation, Retail Litigation Center.

Appeal from the United States District Court for the Central District of California, S. James Otero, District Judge, Presiding, D.C. No. 2:16-cv-06599-SJO-FFM

Before: Paul J. Watford and John B. Owens, Circuit Judges, and Jennifer G. Zipps, [*] District Judge.

OPINION

OWENS, Circuit Judge:

***902** Plaintiff Guillermo **Robles**, a blind man, appeals from the district court's dismissal of his complaint alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12101, and California's Unruh Civil Rights Act (UCRA), California Civil Code § 51. **Robles** alleged that Defendant **Domino's Pizza, LLC, (Domino's)** failed to design, construct, maintain, and operate its website and mobile application (app) to be fully accessible to him. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robles accesses the internet using screen-reading software, which vocalizes visual information on websites. **Domino's** operates a website and app that allows customers to order **pizzas** and other products for at-home delivery or in-store pickup, and receive exclusive discounts.

On at least two occasions, **Robles** unsuccessfully attempted to order online a customized **pizza** from a nearby **Domino's**. **Robles** contends that he could not order the **pizza** because **Domino's** failed to design its website and app so his software could read them.

In September 2016, **Robles** filed this suit seeking damages and injunctive relief based on **Domino's** failure to "design, construct, maintain, and operate its [website and app] to be fully accessible to and independently usable by Mr. **Robles** and other blind or visually-impaired people," in violation of the ADA and UCRA. **Robles** sought a "permanent injunction requiring Defendant to ... comply with [Web Content Accessibility Guidelines (WCAG) 2.0] for its website and Mobile App." [1] **Domino's** ***903** moved for summary judgment on the grounds that (1) the ADA did not cover **Domino's** online offerings; and (2) applying the ADA to the website or app violated **Domino's** due process rights. **Domino's** alternatively invoked the primary jurisdiction doctrine, which permits a court to dismiss a complaint pending the resolution of an issue before an administrative agency with special competence. *See* *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (defining primary jurisdiction doctrine).

The district court first held that Title III of the ADA applied to **Domino's** website and app. The court highlighted the ADA's "auxiliary aids and services" section, 42 U.S.C. § 12182(b)(2)(A)(iii), which requires that covered entities provide auxiliary aids and services to ensure that individuals with disabilities are not excluded from accessing the services of a "place of public accommodation"—in this case, from using the website or app to order goods from **Domino's** physical restaurants.

The district court then addressed **Domino's** argument that applying the ADA to its website and app violated its due process rights because the Department of Justice (DOJ) had failed to provide helpful guidance, despite announcing its intention to do so in 2010.[2] *See* Nondiscrimination on the Basis of Disability, 75 Fed. Reg. 43460-01 (July 26, 2010) (issuing Advance Notice of Proposed Rulemaking (ANPRM) to "explor[e] what regulatory guidance [DOJ] can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible").[3]

The district court, relying heavily on *United States v. AMC Entertainment, Inc.*, 549 F.3d 760 (9th Cir. 2008), concluded that imposing the WCAG 2.0 standards on **Domino's** "without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic ... fl[ew] in the face of due process."[4] The district court held that DOJ "regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III." In the district court's view, therefore, only the long-awaited regulations from DOJ could cure the due process concerns, so it had no choice but to invoke ***904** the primary jurisdiction doctrine. The district court granted **Domino's** motion to dismiss without prejudice, and this appeal followed.

II. STANDARD OF REVIEW

[1] **[2]** **[3]** We review de novo the district court's interpretation and construction of a federal statute—here, the court's application of the ADA to websites and apps. *See ASARCO, **LLC** v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015). As the constitutionality of a statute or regulation is a question of law, we also review de novo the district court's holding that applying the ADA to websites and apps would violate due process. *See* *Az. Libertarian Party v. Reagan*, 798 F.3d 723, 728 (9th Cir. 2015); *Preminger v. Peake*, 552 F.3d 757, 765 n.7 (9th Cir. 2008). Finally, we review de novo the court's invocation of the primary jurisdiction doctrine. *See* *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015).

III. DISCUSSION

This appeal presents three questions. First, whether the ADA applies to **Domino's** website and app. Second, if so, whether that holding raises due process concerns. Third, whether a federal court should invoke the primary jurisdiction doctrine because DOJ has failed to provide meaningful guidance on how to make websites and apps comply with the ADA.

A. The ADA's Application to Domino's Website and App

The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' " *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) (quoting 42 U.S.C. § 12101(b)(1)). Title III of the ADA advances that goal by providing that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). We agree with the district court that the ADA applies to **Domino's** website and app.

The ADA expressly provides that a place of public accommodation, like **Domino's**, engages in unlawful discrimination if it fails to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[5] *Id.* § 12182(b)(2)(A)(iii). DOJ regulations require that a public accommodation "furnish appropriate auxiliary aids and services where necessary to ensure *effective communication* with individuals with disabilities." 28 C.F.R. § 36.303(c)(1) (emphasis added); *see* *Bragdon*, 524 U.S. at 646, 118 S.Ct. 2196 (holding that DOJ's administrative guidance on ADA compliance is entitled to deference). And DOJ defines "auxiliary aids and services" to include "accessible electronic and information technology" or "other effective methods of making visually delivered materials available ***905** to individuals who are blind or have low vision." 28 C.F.R. § 36.303(b)(2).

[4] Therefore, the ADA mandates that places of public accommodation, like **Domino's**, provide auxiliary aids and services to make visual materials available to individuals who are blind. *See id.* § 36.303. This requirement applies to **Domino's** website and app, even though customers predominantly access them away from the physical restaurant: "The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute." *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 953 (N.D. Cal. 2006) (emphasis in original) (internal citation omitted).

The alleged inaccessibility of **Domino's** website and app impedes access to the goods and services of its physical **pizza** franchises—which are places of public accommodation. *See* 42 U.S.C. § 12181(7)(B) (listing a restaurant as a covered "public accommodation"). Customers use the website and app to locate a nearby **Domino's** restaurant and order **pizzas** for at-home delivery or in-store pickup. This nexus between **Domino's** website and app and physical restaurants—which **Domino's** does not contest—is critical to our analysis. [6]

In *Weyer v. Twentieth Century Fox Film Corp.*, our court examined whether an insurance company that administered an allegedly discriminatory employer-provided insurance policy was a covered "place of public accommodation." 198 F.3d 1104, 1113–14 (9th Cir. 2000). We concluded that it was not. Because the ADA only covers "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services," there had to be "some connection between the good or service complained of and an actual physical place." *Id.* at 1114. While the insurance company had a physical office, the insurance policy at issue did not concern accessibility, or "such matters as ramps and elevators so that disabled people can get to the office." *Id.* And although it was administered by the insurance company, the employer-provided policy was not a good offered by the insurance company's physical office. *Id.* at 1115.

[5] Unlike the insurance policy in *Weyer*, **Domino's** website and app facilitate access to the goods and services of a place of public accommodation—**Domino's** physical restaurants. They are two of the primary (and heavily advertised) means of ordering **Domino's** products to be picked up at or delivered from **Domino's** restaurants. We agree with the district court in this case—and the many other district courts that have confronted this issue in similar contexts [7] —that the ADA applies to **Domino's** website and app, which connect customers ***906** to the goods and services of **Domino's** physical restaurants.

B. Due Process

[6] The second question we address is whether applying the ADA to **Domino's** website and app raises due process concerns. Despite concluding that the ADA covered **Domino's** website and app, the district court held that imposing liability on **Domino's** here would violate its Fourteenth Amendment right to due process. [8]

[7] **[8]** **[9]** **[10]** As a preliminary matter, we hold that **Domino's** has received fair notice that its website and app must comply with the ADA. An impermissibly vague statute violates due process because it does not "give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). However, "[a] statute is vague not when it prohibits conduct according 'to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' " *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)). Moreover, "[b]ecause the ADA is a statute that regulates commercial conduct, it is reviewed under a less stringent standard of specificity" than, for example, criminal laws or restrictions on speech. *Id.* (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). [9] Therefore, the ADA would be vague "only if it is so indefinite in its terms that it fails to articulate comprehensible standards to which a person's conduct must conform." *Id.*

[11] The ADA articulates comprehensible standards to which **Domino's** conduct must conform. Since its enactment in 1990, the ADA has clearly stated that covered entities must provide "full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations" to people with disabilities, 42 U.S.C. § 12182(a), and must "ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," *id.* § 12182(b)(2)(A)(iii). DOJ has clarified that these provisions require "effective communication." 28 C.F.R. § 36.303(c)(1). Moreover, since it announced its position in 1996, DOJ has "repeatedly affirmed the application of [T]itle III to Web sites of public accommodations." ***907** 75 Fed. Reg. 43460-01, 43464 (July 26, 2010). Thus, at least since 1996, **Domino's** has been on notice that its online offerings must effectively communicate with its disabled customers and facilitate "full and equal enjoyment" of **Domino's** goods and services. *See* 42 U.S.C. § 12182(a); *see also Gorecki*, 2017 WL 2957736, at *5 ("Title III's general prohibition of discrimination on the basis of disability, and its requirements to provide appropriate auxiliary aids and services, where necessary to ensure effective communication, place an affirmative obligation on places that meet the definition of a public accommodation to ensure disabled individuals have as full and equal enjoyment of their websites as non-disabled individuals.").

However, the heart of **Domino's** due process argument is not that **Domino's** lacked fair notice that its website and app must comply with the ADA. Instead, **Domino's** argues that imposing liability would violate due process because (1) **Robles** seeks to impose liability on **Domino's** for failing to comply with WCAG 2.0, which are private, unenforceable guidelines; and (2) DOJ has not issued regulations specifying technical standards for compliance, so **Domino's** does not have "fair notice of what *specifically* the ADA requires companies to do in order to make their websites accessible."

1. Robles Does Not Seek to Impose Liability Based on WCAG 2.0

[12] First, we address **Domino's** argument that **Robles** seeks to impose liability based on **Domino's** failure to comply with WCAG 2.0. Relying heavily on our decision in *AMC*, **Domino's** argues that this would violate due process because **Domino's** has not received fair notice of its obligation to comply with the WCAG 2.0 guidelines. Yet, as explained below, **Domino's** overstates both the holding of *AMC* and the significance of WCAG 2.0 in this case.

AMC concerned movie-theater accessibility for wheelchair-bound patrons. *See* 549 F.3d at 762. Our court reversed an injunction ordering that AMC's stadium-style theaters (many built before 1998) undergo a massive reconfiguration to comply with DOJ's interpretation of an ambiguous accessibility regulation (finalized in 1998). *Id.* at 768–70. Our court held that requiring AMC to reconfigure theaters built before DOJ announced its interpretation of the ambiguous regulation would violate due process. *Id.*

This case does not present the fair notice concerns of *AMC*, and the district court erred in equating the relevance of WCAG 2.0 with the regulation at issue in *AMC*. Here, **Robles** does not seek to impose liability based on **Domino's** failure to comply with WCAG 2.0. Rather, **Robles** merely argues—and we agree—that the district court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA. At this stage, **Robles** only seeks to impose liability on **Domino's** for failing to comply with § 12182 of the ADA, not for the failure to comply with a regulation or guideline of which **Domino's** has not received fair notice. *See Reed*, 2017 WL 4457508, at *5 ("[A]t this point in the litigation ... Plaintiff does not seek to require [Defendant] to adopt any particular set of guidelines. Plaintiff simply alleges that her difficulty accessing [Defendant's] website and mobile app violate the ADA.").

Also unlike in *AMC*—where the overbroad injunction would have required AMC to retrofit theaters built before it received fair notice of DOJ's position—**Domino's** does not allege that its website or app were created prior to (or never updated since) 1996, when DOJ announced ***908** its position that the ADA applies to websites of covered entities. Further, the regulation at issue in *AMC* was ambiguous. *See* 549 F.3d at 764–67 (summarizing circuit split on how to interpret this regulation, which all courts agreed was ambiguous). It was unfair to expect AMC to have guessed which interpretation to follow when circuits were in disagreement and DOJ had not announced its position. *Id.* at 768. By contrast, the statutory provisions of § 12182 at issue here—requiring "auxiliary aids and services" and "full and equal enjoyment"—are flexible, but not ambiguous, and have been interpreted many times by federal courts.[10] Finally, in *AMC*, our court limited its due process holding to the district court's remedy without disturbing liability. *Id.* at 768–70. Here, the district court dismissed the case at the pleading stage before **Robles** could conduct discovery and establish liability. Even if due process concerns akin to those in *AMC* were present here, further consideration of them "would be premature because due process constrains the *remedies* that may be imposed," *Fortyune v. City of Lomita*, 766 F.3d 1098, 1106 n.13 (9th Cir. 2014) (citing *AMC*, 549 F.3d at 768–70) (emphasis added), and not the initial question of ADA compliance. *See Reed* 2017 WL 4457508, at *4 ("[W]hether or not [defendant's] digital offerings must comply with [WCAG], or any other set of noncompulsory guidelines, is a question of *remedy*, not liability.") (emphasis in original).

2. The Lack of Specific Regulations Does Not Eliminate Domino's Statutory Duty

[13] Second, we address **Domino's** argument that imposing liability here would violate due process because **Domino's** lacked "fair notice of what *specifically* the ADA requires companies to do in order to make their websites accessible." In other words, **Domino's** argues it "needs consistent standards when it designs its website." While we understand why **Domino's** *wants* DOJ to issue specific guidelines for website and app accessibility, the Constitution only requires that **Domino's** receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations. And, as one district court noted, the lack of specific instructions from DOJ might be purposeful:

> The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process.

Reed, 2017 WL 4457508, at *5. A desire to maintain this flexibility might explain why DOJ withdrew its ANPRM related to website ***909** accessibility and "continue[s] to assess *whether specific technical standards are necessary and appropriate* to assist covered entities with complying with the ADA." 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (emphasis added).

[14] And in any case, our precedent is clear that, "as a general matter, the lack of specific regulations cannot eliminate a statutory obligation." *City of Lomita*, 766 F.3d at 1102; *see also Gorecki*, 2017 WL 2957736, at *4 ("The lack of specific regulations [regarding website accessibility] does not eliminate [defendant's] obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA.").

For example, in *City of Lomita*, the defendant-city argued that although existing Title II regulations broadly prohibited it from discriminating in its services, requiring the city to provide accessible on-street parking would violate its due process rights absent specific regulatory guidance. 766 F.3d at 1102. Our court rejected that argument, and held that the ADA's regulations did not "suggest[ ] that when technical specifications do not exist for a particular type of facility, public entities have no accessibility obligations." *Id.* at 1103 (citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1076–78 (9th Cir. 2002) (holding that Title II requires public entities to maintain accessible public sidewalks, notwithstanding absence of implementing regulations addressing sidewalks)).

Similarly, in *Kirola v. City & County of San Francisco*, we explained that even if there were no technical accessibility requirements for buildings and facilities under Title II of the ADA, "[p]ublic entities would not suddenly find themselves free to ignore access concerns when altering or building new rights-of-way, parks, and playgrounds." 860 F.3d 1164, 1180 (9th Cir. 2017). Instead, our court applied Title II's "readily accessible" and "usable" standards to determine whether the city violated the ADA. *Id.* Although DOJ guidance might have been helpful, "[g]iving content to general standards is foundational to the judicial function." *Id.* (citing *Marbury* *v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803)).

Moreover, the possibility that an agency might issue technical standards in the future does not create a due process problem. In *Reich v. Montana Sulphur & Chemical Company*, our court held that although the Secretary of Labor would likely promulgate specific standards for safe and healthy working conditions, these standards would only "amplify and augment" the existing statutory obligation to provide a safe workspace and would not "displace" it. 32 F.3d 440, 445 (9th Cir. 1994); *cf. Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132–33 (9th Cir. 2003) (following DOJ's interpretation of existing regulation, even though Access Board was addressing the specific topic at issue through rulemaking). The same logic applies here.

In sum, we conclude that the district court erred in holding that imposing liability in this case would violate **Domino's** due process rights. **Domino's** has received fair notice that its website and app must provide effective communication and facilitate "full and equal enjoyment" of **Domino's** goods and services to its customers who are disabled. Our Constitution does not require that Congress or DOJ spell out exactly how **Domino's** should fulfill this obligation.

C. Primary Jurisdiction Doctrine

[15] [16] [17] Finally, we address the primary jurisdiction doctrine, which "allows courts to stay proceedings or to dismiss a complaint without prejudice pending the ***910** resolution of an issue within the special competence of an administrative agency." *Clark*, 523 F.3d at 1114. It is a prudential doctrine that does not "implicate[ ] the subject matter jurisdiction of the federal courts." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 759 (9th Cir. 2015) (quoting *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002)). Rather, it permits courts to determine "that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id.* at 760 (quoting *Clark*, 523 F.3d at 1114).

[18] While "no fixed formula exists for applying the doctrine of primary jurisdiction," we consider: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Davel Commc'n, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086–87 (9th Cir. 2006); *see also Astiana*, 783 F.3d at 760 (same).

[19] [20] [21] [22] Here, the district court erred in invoking primary jurisdiction. The purpose of the doctrine is not to "secure expert advice" from an agency "every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002); *see also Astiana*, 783 F.3d at 760 ("Not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction."). Rather, " 'efficiency' is the 'deciding factor' in whether to invoke primary jurisdiction." *Astiana*, 783 F.3d at 760 (citation omitted). Our precedent is clear:

> [E]ven when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency *is aware of but has expressed no interest* in the subject matter of the litigation. Similarly, primary jurisdiction is not required *when a referral to the agency would significantly postpone a ruling* that a court is otherwise competent to make.

Id. at 761 (emphases added). Both circumstances are present here.

[23] First, DOJ is aware of the issue—it issued the ANPRM in 2010, 75 Fed. Reg. 43460-01 (July 26, 2010), and withdrew it in 2017, 82 Fed. Reg. 60932-01 (Dec. 26, 2017). Second, DOJ's withdrawal means that the potential for undue delay is not just likely, but inevitable. **Robles** has no ability to participate in an administrative hearing process with remedies. *See Arizona ex rel. Goddard v. Harkins Admin. Servs., Inc.*, 2011 WL 13202686, at *3 (D. Az. Feb. 8, 2011) ("[T]he DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute. The absence of such an administrative process argues against referral to an agency under the primary jurisdiction doctrine.").

Therefore, according to the district court, **Robles** cannot vindicate his statutory rights unless DOJ reopens and completes its rulemaking process. This would "needlessly delay the resolution of" **Robles'** claims and undercut efficiency, "the 'deciding factor' in whether to invoke primary jurisdiction." *Astiana*, 783 F.3d at 760 (citation omitted); *see also* *Reid*, 780 F.3d at 966–67 (declining to invoke primary jurisdiction in part because "it has been over a decade since the FDA indicated that it would issue a new [rule]").

The delay is "needless" because the application of the ADA to the facts of this ***911** case are well within the court's competence. Properly framed, the issues for the district court to resolve on remand are whether **Domino's** website and app provide the blind with auxiliary aids and services for effective communication and full and equal enjoyment of its products and services. Courts are perfectly capable of interpreting the meaning of "equal" and "effective" and have done so in a variety of contexts. *See supra* note 10 (providing examples of circuit courts interpreting ADA's requirements of "full and equal enjoyment" and "auxiliary aids and services" in non-website contexts); *see also* *Georgia v. Ashcroft*, 539 U.S. 461, 462, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003) (interpreting "effective exercise of the electoral franchise"), superseded by statute, 52 U.S.C. §§ 10304(b)(d), as recognized in *Ala. Legislative Black Caucus v. Alabama*, — U.S. ——, 135 S.Ct. 1257, 1273, 191 L.Ed.2d 314 (2015); *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (interpreting right to "effective assistance of counsel"). In addition, if the court requires specialized or technical knowledge to understand **Robles'** assertions, the parties can submit expert testimony. *See, e.g.*, *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 501–02 (4th Cir. 2016) (relying on credited expert testimony on security risks associated with "online ballot marking tool," which the court held was a "reasonable modification" to make absentee voting accessible to blind voters); *cf.* *Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046–47 (9th Cir. 2013) (holding that expert testimony is not required to understand plaintiff's straightforward ADA claim about physical barriers). Whether **Domino's** website and app are effective means of communication is a fact-based inquiry within a court's competency.

Thus, we reverse the district court's reliance on the primary jurisdiction doctrine. Rather than promote efficiency—the deciding factor in whether to invoke primary jurisdiction—the district court's ruling unduly delays the resolution of an issue that a court can decide. *See* *Astiana*, 783 F.3d at 760–62.

IV. CONCLUSION

We express no opinion about whether **Domino's** website or app comply with the ADA. We leave it to the district court, after discovery, to decide in the first instance whether **Domino's** website and app provide the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates. [11]

REVERSED AND REMANDED.

All Citations

913 F.3d 898, 58 NDLR P 103, 19 Cal. Daily Op. Serv. 641, 2019 Daily Journal D.A.R. 416

Footnotes

* The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

1 WCAG 2.0 guidelines are private industry standards for website accessibility developed by technology and accessibility experts. WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. 36 C.F.R. pt. 1194, app. A (2017). In addition, the Department of Transportation requires airline websites to adopt these accessibility standards. *See* 14 C.F.R. § 382.43 (2013). Notably, the Department of Justice has required ADA-covered entities to comply with WCAG 2.0 level AA (which incorporates level A) in many consent decrees and settlement agreements in which the United States has been a party.

2 DOJ is charged with issuing regulations concerning the implementation of the ADA. *See* 42 U.S.C. § 12186(b) ("[T]he Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter...");

Bragdon v. Abbott, 524 U.S. 624, 646, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (noting that DOJ is "the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court") (internal citations omitted).

3 We recognize that DOJ withdrew its ANPRM on December 26, 2017, so the district court did not have the benefit of considering this withdrawal when it issued its decision on March 20, 2017. *See* Nondiscrimination on the Basis of Disability, 82 Fed. Reg. 60932-01 (Dec. 26, 2017).

4 Only after **Robles** filed this suit, **Domino's** website and app began displaying a telephone number that customers using screen-reading software could dial to receive assistance. The district court noted that **Robles** had "failed to articulate why [**Domino's**] provision of a telephone hotline for the visually impaired ... does not fall within the range of permissible options afforded under the ADA." However, the district court did not reach whether a genuine issue of material fact existed as to the telephone hotline's compliance with the ADA, including whether the hotline guaranteed full and equal enjoyment and "protect[ed] the privacy and independence of the individual with a disability." 28 C.F.R. § 36.303(c)(1)(ii) (2017). We believe that the mere presence of the phone number, without discovery on its effectiveness, is insufficient to grant summary judgment in favor of **Domino's**.

5 The ADA exempts covered entities from the requirement to provide auxiliary aids and services where compliance would "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii); *see also* 28 C.F.R. § 36.303(a). At this stage, **Domino's** does not argue that making its website or app accessible to blind people would fundamentally alter the nature of its offerings or be an undue burden.

6 We need not decide whether the ADA covers the websites or apps of a physical place of public accommodation where their inaccessibility does not impede access to the goods and services of a physical location.

7 *See, e.g.*, ***Robles** v. Yum! Brands, Inc.*, 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018); *Rios v. N.Y. & Co., Inc.*, 2017 WL 5564530, at *3 (C.D. Cal. Nov. 16, 2017); *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017); *Gorecki v. Hobby Lobby Stores, Inc.*, 2017 WL 2957736, at *3–4 (C.D. Cal. June 15, 2017); *Target*, 452 F.Supp.2d at 953; *Gomez v. Gen. Nutrition Corp.*, 323 F.Supp.3d 1368, 1375–76 (S.D. Fla. 2018); *Castillo v. Jo-Ann Stores, **LLC***, 286 F.Supp.3d 870, 881 (N.D. Ohio 2018); *Gil v. Winn-Dixie Stores, Inc.*, 257 F.Supp.3d 1340, 1348–49 (S.D. Fla. 2017), *appeal docketed*, No. 17-13467 (11th Cir. Aug. 1, 2017).

8 The district court also held (in error) that **Robles** conceded **Domino's** due process argument by not squarely addressing it at the motion to dismiss stage. The relevant issue here is whether **Domino's** website and app comply with the ADA. **Domino's** due process argument is a defense to that issue. **Domino's** cites no authority holding that a plaintiff's failure to respond to a *defense* waives the plaintiff's *cause of action* (here, the ADA). Regardless, "an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) (internal quotation marks omitted). Here, the parties raised the matter sufficiently for the district court to dedicate four pages to this issue, and **Robles** did not waive his ability to respond to **Domino's** due process argument.

9 In *Village of Hoffman Estates*, the Supreme Court explained: "The degree of vagueness that the Constitution tolerates —as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." 455 U.S. at 498, 102 S.Ct. 1186 (internal footnotes omitted).

10 *See, e.g.*, *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (holding that, to provide "full and equal enjoyment," public accommodations must "consider[ ] how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience"); *Fortyune v. American Multi-Cinema*, 364 F.3d 1075, 1085 (9th Cir. 2004) (interpreting "full and equal enjoyment" to require theater to provide wheelchair seating and adjacent seat for plaintiff's wife); *see also, e.g.*, *McGann v. Cinemark*, 873 F.3d 218, 223 (3d Cir. 2017) (holding that theater's failure to provide deaf patron with sign language interpreter—an auxiliary aid or service—excluded him from services); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (holding that university must provide reasonable auxiliary aids and services to partially deaf medical student to afford him opportunity equal to his nondisabled peers).

11 We also reverse the dismissal of **Robles**' UCRA claims and remand for proceedings consistent with this opinion.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Reversed and Remanded by Robles v. Domino's Pizza, LLC, 9th Cir.(Cal.), January 15, 2019

2017 WL 1330216
United States District Court, C.D. California.

ROBLES
v.
DOMINOS PIZZA LLC

Case No.: CV 16–06599 SJO (SPx)
|
Signed 03/20/2017

Attorneys and Law Firms

Joseph Richard Manning, Jr., Mark A. Hiller, Caitlin J. Scott, Manning Law APC, Newport Beach, CA, for Robles.

Alison Nicole Kleaver, Bradley J. Leimkuhler, Gregory F. Hurley, Michael J. Chilleen, Sheppard Mullin Richter and Hampton LLP, Los Angeles, CA, for Dominos Pizza LLC.

PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S ALTERNATIVE MOTION TO DISMISS OR STAY

THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Defendant Domino's Pizza, LLC's ("Defendant") Motion for Summary Judgment or, in the Alternative, Dismissal or Stay ("Motion"), filed February 22, 2017. Plaintiff Guillermo Robles ("Plaintiff") opposed the Motion ("Opposition") on March 6, 2017, and Defendant replied ("Reply") on March13, 2017. The Court found this matter suitable for disposition without oral argument and vacated the hearing scheduled for January 27, 2017. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** Defendant's Motion to Dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case, which commenced on September 1, 2016, centers on allegations that Defendant has failed "to design, construct, maintain, and operate its website [and mobile application] to be fully accessible to and independently usable by Plaintiff and other blind or visually-impaired people" using "screen-readers." (*See* Compl. ¶¶ 2–3, ECF No. 1.) In particular, Plaintiff contends Defendant's website, Dominos.com, does not permit a user to complete purchases using a particular screen-reading software program, Job Access With Speech ("JAWS"). (Compl. ¶¶ 18, 27–29.) Plaintiff also contends Defendant's mobile application ("Mobile App") does not permit him to access the menus and applications on his iPhone using the iPhone's "VoiceOver" software program. (Compl. ¶¶ 30–33.) Plaintiff alleges neither Dominos.com nor the Mobile App are in compliance with version 2.0 of W3C's Web Content Accessibility Guidelines ("WCAG 2.0"), and further alleges that "simple compliance with the WCAG 2.0 Guidelines would provide Plaintiff and other visually-impaired consumers with equal access" to these access portals. (Compl. ¶ 36.) Plaintiff asserts the following four causes of action against Defendant: (1) violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181 *et seq.* (Dominos.com); (2) violation of the ADA, 42 U.S.C. § 12181 *et seq.* (Mobile App); (3) violation of the Unruh Civil Rights Act ("UCRA"), California Civil Code § 51 *et seq.* (Dominos.com); and (4) violation of the UCRA, California Civil Code § 51 *et seq.* (Mobile App). (*See generally* Compl.) Plaintiff seeks, among other things, preliminary and permanent injunctive relief, an award of statutory minimum damages of $4,000 per violation, and attorneys' fees and expenses. (*See* Compl. at 18–19.)

Defendant filed its Answer on September 29, 2016, and the Court held a scheduling conference on November 28, 2016, setting a discovery cutoff deadline of May 29, 2017, a motion cutoff deadline of June 26, 2017, and a trial date of August 29, 2017. (*See* Answer, ECF No. 15; Minutes of Scheduling Conference, ECF No. 26.) The following facts are undisputed.

Since February 20, 2017 at the latest, both Defendant's website, www.dominos.com, and its mobile website have included accessibility banners that direct users who access the website using a screen reader with the following statement: "If you are using a screen reader and are having problems using this website, please call 800–254–4031 for assistance." (*See* Pl.'s Statement of Genuine Disputes of Materials Facts ("Pl.'s Response") ¶¶ 1–2, ECF No. 35.) This phone number, 800–252–4031, is staffed by a live representative who can provide blind or visually impaired individuals with assistance using Defendant's websites, although callers may experience delays and be placed on hold. (Pl.'s Response ¶¶ 3–4.) Customers may also directly call their local Domino's Pizza restaurant to order food, purchase goods, or ask questions. (Pl.'s Response ¶ 5.)

II. DISCUSSION

***2** Defendant, not pleased with having to defend against what it characterizes on the first page of its Motion as both a "form lawsuit" and a "nuisance lawsuit[ ]," moves for summary judgment as to each of Plaintiff's four causes of action, submitting that dismissal is warranted for a bevy of reasons. (*See* Mot. 1, ECF No. 32.) First, Defendant asks the Court to find that neither Dominos.com nor the Mobile App are "places of public accommodation" within the meaning of the ADA. (Mot. 3–7.) Second, it contends that the instant lawsuit violates fundamental principles of due process because the ADA, its implementing regulations, and the DOJ's accessibility guidelines not only are silent with respect to the standards that apply to private and public websites, but also fail to indicate whether compliance with the WCAG or the Apple Standards is tantamount to compliance with the statute. (Mot. 7–16.) Third, Defendant argues Plaintiff cannot establish violations of any applicable accessibility standards. (Mot. 16–19.) Fourth, it submits that Plaintiff's UCRA claims should be denied because Plaintiff cannot prove that Defendant intentionally discriminated against him. (Mot. 19–20.) Fifth, Defendant contends Plaintiff's UCRA claims fail because Defendant lacks fair notice of the barriers Plaintiff claims exist. (Mot. 20–23.) Finally, Defendant argues that, in the alternative, Plaintiff's claims should be stayed because the Department of Justice ("DOJ") has not promulgated any accessibility regulations governing the website or mobile applications of private businesses. (Mot. 23–25.)

Plaintiff responds by challenging procedural, evidentiary, and substantive aspects of Defendant's Motion. First, Plaintiff argues the Court should deny the Motion because of the following two procedural shortcomings: (1) Defendant's failure to meet and confer regarding the instant motion; and (2) Defendant's filing of an oversized memorandum of points and authorities. (Opp'n 1–2, ECF No. 33.) Second, Plaintiff contends that because Defendant's evidence only establishes the websites at issue bore the "accessibility banner" in February of this year, this "banner" cannot support Defendant's claim of "effective communication" in 2016 and does not necessarily render this case moot. (Opp'n 4–7.) Third, Plaintiff argues that even if the "banner" had been present on Defendant's websites in 2016, there would still be triable issues as to whether Defendant's websites violate the ADA given regulations concerning effective communication titled "auxiliary aids and services." (Opp'n 7–10.)

A. Legal Standard

Federal Rule of Civil Procedure 56(a) mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

Once the moving party meets its initial burden, the "party asserting that a fact cannot be or is genuinely disputed must support the assertion." Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *accord* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."). Further, "[o]nly disputes over facts that might affect the outcome of the suit ... will properly preclude the entry of summary judgment [and f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See* *id.* at 249. A court is required to draw all inferences in a light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

B. Analysis

1. Whether and to What Extent the ADA Regulates Web Accessability

***3** The central question Defendant asks the Court to answer is whether and to what extent the ADA, a statute enacted before the widespread adoption of the Internet, regulates the manner in which companies can permissibly engage in e-commerce. Before attempting to answer this difficult question, the Court must provide some background.

The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' " *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999) (citing 42 U.S.C. § 12101(b)(1)). Title III of the ADA, which Plaintiff claims covers this case, provides that, as a general rule, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). "The statute applies to the services **of** a place of public accommodation, not services **in** a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute." *Nat'l Fed'n of the Blind v. Target Corp.* ("*Target*"), 452 F. Supp. 2d 1148, 953 (N.D. Cal. 2006) (emphasis in original) (citations omitted). [1]

Moreover, Title III of the ADA, in a section entitled "specific prohibitions," defines discrimination to include:

> a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the **absence of auxiliary aids and services, unless** the entity can demonstrate that taking such steps would **fundamentally alter the nature** of the goods, service, facility, privilege, advantage, or accommodation being offered or would **result in an undue burden**.

42 U.S.C. § 12182(a)(2)(A)(iii) (emphasis added). "This section explicitly exempts public accommodations from the obligation to provide auxiliary aids or services if doing so would fundamentally change the nature of the good or service, or result in an undue burden." *Target*, 452 F. Supp. 2d at 955 (citation omitted). "In regulations implementing this section, the Department of Justice has explained that the ADA obligates public accommodations to communicate effectively with customers who have disabilities concerning hearing, vision, or speech." *Id.* (citing 28 C.F.R. § 36.303(c)). Moreover, regulations provide "examples" of "auxiliary aids and services," including "screen reader software" and "other effective methods of making visually delivered materials available to individuals who are blind or have low vision[.]" 28 C.F.R. § 36.303(b)(2).

*4 Notwithstanding the above, Defendant contends the Court must either dismiss or stay this action because the DOJ has not promulgated concrete guidance regarding the accessibility standards an e-commerce webpage must meet, much less required that companies operating such webpages comply with the specific standards Plaintiff references in his Complaint. In support of this position, Defendant places great weight on the fact that the United States Department of Justice ("DOJ") has not yet issued a formal adjudication or rule on the subject. In order to address the merits of Defendant's contention, the Court must review the DOJ's position on the issue of web accessibility.

As a threshold matter, the DOJ has consistently stated its view that the ADA's accessibility requirements apply to websites belonging to private companies. *See, e.g.*, *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Cong., 2d Sess. 65–010 (2000) ("It is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); 75 Fed. Reg. 43460–01 (July 6, 2010) ("The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations."). Contrary to Plaintiff's suggestion, however, this realization does not end the inquiry, for the Court must analyze whether the DOJ has issued guidance regarding the type of access at issue in this case. (*Cf.* Mot. 19–20.)

On July 26, 2010, the DOJ issued a Notice of Proposed Rulemaking ("NOPR"), stating it was "considering revising the regulations implementing title III of the [ADA] in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the [web], accessible to individuals with disabilities." *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations* ("*NOPR*"), 75 Fed. Reg. 43460–01, 2010 WL 2888003 (July 26, 2010). In the section of this NOPR titled "Need for Department Action," the DOJ explains that "[t]he Internet has been governed by a **variety of voluntary standards** or structures developed through nonprofit organizations using multinational collaborative efforts," including the W3C's "develop[ment] [of] a variety of technical standards and guidelines ranging from **issues related to mobile devices** and privacy to internationalization of technology," as well as the "**creat[ion] of the [WCAG]**." *Id.* at *43463 (emphasis added). A few paragraphs down, the DOJ notes that

> For years, businesses and individuals with disabilities alike have urged the Department to provide guidance on the accessibility of Web sites of entities covered by the ADA. While some actions have been brought regarding access to Web sites under the ADA that have resulted in courts finding liability or in the parties agreeing to a settlement to make the subject Web sites accessible, **a clear requirement that provides** the disability community **consistent access** to Web sites and covered entities **clear guidance on what is required under the ADA does not exist**.

Id. at *43464 (emphasis added). The NOPR concludes with the DOJ stating its "interest[ ] in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under titles II and III of the ADA" and soliciting feedback and public comment. *Id.* at *43467.

*5 Although the NOPR issued in July 2010, the DOJ has yet to issue a final rule regarding web access. In light of this undisputed fact, Defendant argues that Plaintiff's request to impose liability under the ADA for Defendant's alleged failure to abide by certain accessibility standards would violate Defendant's constitutional right to due process. In so arguing, Defendant relies on *United States v. AMC Entertainment, Inc.*, a Ninth Circuit Court of Appeals decision in which the court considered whether the ADA obligated theater owners to retroactively incorporate a comparable viewing angle requirement in movie theaters. 549 F.3d 760 (9th Cir. 2008). The district court had held that AMC's existing facilities violated a particular standard, § 4.33.3, awarded summary judgment in favor of the government, and issued a comprehensive remedial order. *Id.* at 762. The Ninth Circuit reversed, holding that "[b]ecause the injunction requires modifications to multiplexes that were designed or built before the government gave fair notice of its interpretation of § 4.33.3, the injunction violates due process[.]" *Id.* In reaching this conclusion, the Ninth Circuit surveyed the history of litigation involving § 4.33.3, which primarily turned on different possible interpretations of the phrase "lines of sight comparable." *Id.* at 764–67. After noting that its sister circuits had reached different conclusions regarding the meaning of this phrase, the court emphasized that "[a]ll circuits considering § 4.33.3 found common ground on the proposition that the regulation was vague or ambiguous." *Id.* at 767 (citation omitted). After examining these decisions, the Ninth Circuit stated "it is clear that the text of § 4.33.3 did not even provide our colleagues, armed with exceptional legal training in parsing statutory language, a 'reasonable opportunity to know what is prohibited'—let alone those of 'ordinary intelligence.' " *Id.* at 768 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Moreover, the court "share[d] the First Circuit's frustration that the government could have solved this problem [of vagueness], without time–and cost-consuming litigation, by merely clarifying § 4.33.3 through amendment or some other form of public pronouncement[.]" *Id.* at 769 (citation omitted). "The government has had ample opportunity throughout the stadium-seating era to update the regulation to respond to the overhaul of the nation's movie-theaters." *Id.* Notwithstanding being provided with "ample opportunity" to update or clarify this provision, the government had not done so:

> As late as 1999, the Access Board indicated that it was still "**considering whether to include specific requirements** in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters." ... **No new rule was forthcoming.** Again, in April of 2002, the Access Board published a **new proposed draft regulation** that included a viewing angle requirement.... This proposal was **never formally accepted**. When Regal Cinemas sought certiorari from the Supreme Court to resolve the circuit split between the Ninth and Fifth Circuits, the Solicitor General of the United States represented to the Supreme Court that review was not necessary because the **DOJ planned to issue new regulations** to resolve the split: "There is no need for this Court to exercise its certiorari jurisdiction to address an issue of regulatory interpretation that is presently being addressed directly by the relevant regulatory bodies themselves." .... Despite this representation to the Court, made now **over four years ago**, § 4.33.3 has not been replaced with something more specific. **We decline to require AMC to have determined the precise meaning of the regulation when the government did not do so.**

Id. (emphasis added) (internal citations omitted). A similarly lengthy timeline of DOJ inaction exists in this case, leaving "in-house counsel [and] others to read correctly legislative tea-leaves ..." *Id.* at 770.

The phrase "due process" does not appear once in Plaintiff's Opposition, and Plaintiff's sole citation to *AMC* is couched in a footnote for an inapposite point of law. (*See* Opp'n 20 n. 9.) Whether inadvertent or purposeful, this omission is telling, and the Court is independently authorized to grant summary judgment on this conceded issue. *See Garrett v. City of Los Angeles*, No. CV 12–1670 FMO (SSx), 2014 WL 11397949, at *11 (C.D. Cal. Mar. 3, 2014) (granting summary judgment in favor of defendant on a particular claim where plaintiff failed to address defendant's arguments regarding this claim); *Silva v. U.S. Bancorp*, No. 5:10–cv–01854–JHN–PJWx, 2011 WL 7096576, at *3 ("In addition, the Court finds that Plaintiff concedes his recordkeeping claim should be dismissed by failing to address Defendants' arguments in his Opposition.").

In any event, the Court finds Defendant's due process challenge to be meritorious, largely because it finds *AMC* to be squarely on point. In *AMC*, the Ninth Circuit was troubled by the inclusion of ambiguous language in a particular guideline and by the DOJ's quest to have its late-announced interpretation of this language—offered for the first time in an amicus brief—apply to movie theaters that had already invested substantial sums in building their theaters under a particular set of operating assumptions. Here, too, Plaintiff seeks to impose on all regulated persons and entities a requirement that they "compl[y] with the WCAG 2.0 Guidelines" without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic. (*Cf.* Compl. ¶ 36.) This request flies in the face of due process.

***6** Notwithstanding his failure to address Defendant's four-page argument regarding *AMC* and due process, Plaintiff appears to argue that because the DOJ has issued several "Statements of Interest" and has entered into consent decrees and settlements obligating entities to abide by particular WCAG 2.0 success criteria, this lawsuit cannot be dismissed. (*See* Opp'n 19–20.) This argument does not hold water.

As a threshold matter, the Ninth Circuit "has declined to give deference to Access Board guidelines that have not yet been adopted by the DOJ." *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010). "Moreover, [the Ninth Circuit] ha[s] refused to defer to a proposed regulation published by the DOJ itself." *Id.* (citing *Cal. Rural Legal Assistance v. Legal Servs. Corp.*, 917 F.2d 1171, 1173 (9th Cir. 1990)). Furthermore, "[t]he DOJ's interpretation in a notice of proposed rulemaking is similarly unpersuasive." *Id.* Given the Ninth Circuit's decision not to give deference to these categories of concrete, public statements made in the ADA context, the Court concludes that little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation with regulated entities.

Even if the Court were to give deference to the cited Statements of Interest, consent decree, or settlement, it would nevertheless conclude that imposing the requirements urged by Plaintiff would violate Defendant's right to due process. First, the Statements of Interest cited by Plaintiff were filed in connection with cases that are materially distinct from the case at bar, and even suggest that Domino's provision of a telephone number for disabled customers satisfies its obligations under the ADA. In the first of these Statements of Interest, attached as Exhibit A to Plaintiff's Request for Judicial Notice ("RJN"), the DOJ asked a court in the Southern District of Florida not to be persuaded by defendant Lucky Brand's arguments (1) that because the ADA contains no specific requirement mandating that point-of-sale ("POS") devices have tactile key pads, it has no obligation to ensure that customers who are blind can make purchases using it's debit payment option; or (2) that because disabled individuals can purchase items using cash, credit, or by processing their debit card as a credit card, there was no discrimination under the ADA. (*See* RJN, Ex. A at 1–2, ECF No. 7.) [2] The DOJ was primarily concerned that Lucky Brand's use of a touch-screen POS device, for which Plaintiff alleged there was a readily available substitute, required blind customers either to divulge their personal identification number ("PIN") to a third party, violating the ADA's mandate that companies "protect the privacy and independence of" individuals with disabilities, *see* 28 C.F.R. Section 36.303(c)(1)(ii), or to use a different form a payment. (*See generally* RJN, Ex. A.) The DOJ began by rejecting Lucky Brand's argument that POS devices did not fall within the scope of the ADA, analogizing its consistently expressed view that "websites [are] covered by title III despite the fact that there are no specific technical requirements for websites currently in the regulation or ADA Standards." (RJN, Ex. A at 7.) The DOJ then noted, however, that until the process of establishing specific technical requirements for a particular technology is complete, "public accommodations have a **degree of flexibility in complying** with title III's more general requirements of nondiscrimination and effective communication—but they still must comply." (RJN, Ex. A at 8–9 [emphasis added].) Plaintiff has failed to articulate why either Defendant's provision of a telephone hotline for the visually impaired or it's compliance with a technical standard other than WCAG 2.0 does not fall within the range of permissible options afforded under the ADA.

***7** The Statements of Interest attached as Exhibits B and C to the RJN offer similarly little help to Plaintiff. In these two cases, the plaintiffs sought to require Harvard University and Massachusetts Institute of Technology ("MIT") to provided closed captions on their free online programming and the universities moved to stay or dismiss these cases. (*See generally* RJN, Exs. B, C.) No "due process" challenge was raised in connection with these motions, perhaps because the plaintiffs requested a particular auxiliary aid that the universities simply had not been providing. Indeed, in her Report and Recommendation, the assigned Magistrate Judge noted the "DOJ has identified the 'auxiliary aid requirement [a]s a flexible one,' insofar as the 'public accommodation can choose among various alternatives as long as the result is effective communication.' " R. & R. Regarding Defs.' Mot. to Stay or Dismiss, *Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15–cv–30023-MGM, at *24 (D. Mass. February 9, 2016), ECF No. 50 (quoting *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35544, 35566 (July 26, 1991)). She went on to note that "[t]he flexibility to choose an appropriate auxiliary aid does not extend so far as to allow a public accommodation to choose to provide **no** auxiliary aid when one is required for effective communication if a reasonable one exists." *Id.* (emphasis added). Here, by contrast, Plaintiff asks the Court to require Defendant to comply with a particular—but not fully identified—web accessibility standard issued by a non-government entity that is subject to modification. The Court thus finds the Harvard and MIT cases to be inapposite.

The consent decree and settlement proffered by Plaintiff offer him less assistance. Plaintiff has submitted evidence indicating the DOJ has, at least twice, required entities subject to Title III to adopt measures to ensure that their websites and mobile applications conform to, at a minimum, certain WCAG 2.0 success criteria. For example, Plaintiff points to a settlement agreement between the DOJ and Peapod LLC, America's leading Internet grocer, under which Peapod was obligated, among other things, to "ensure that www.peapod.com and its mobile applications conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level AA Success Criteria (WCAG 2.0 AA), except for certain third party content[.]" *See* Press Release, *Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities*, THE UNITED STATES DEPARTMENT OF JUSTICE (Nov. 17, 2014), *available at* https://www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website. Plaintiff also points to a consent decree reached in *National Federation of the Blind, et al. v. HRB Digital LLC, et al.*, under which the defendants would, *inter alia*, ensure that their website, www.hrblock.com, and their Online Tax Preparation Product "conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level A and AA Success Criteria[.]" Consent Decree, No. 1:13–cv–10799–GAO, at *5 (D. Mass. Mar. 24, 2014), ECF No. 60.

These two examples highlight, rather than dispel, the vagueness concern that forms the basis of Defendant's Motion, and demonstrate why a lack of formal guidance in this complex regulatory arena places those subject to Title III in the precarious position of having to speculate which accessibility criteria their websites and mobile applications must meet. In the Peadpod case, the DOJ required the defendants to fashion their website and mobile applications to conform with WCAG 2.0 Level AA Success Criteria. In *HRB*, by contrast, the DOJ obligated the defendants to instead comply with WCAG 2.0 Level AA **or Level A** Success Criteria. In its own NOPR, the DOJ noted that "the WCAG 2.0 contains 12 guidelines addressing Web accessability" and requires that a "Web page must satisfy the criteria for all 12 guidelines under one of three conformance levels: A, AA, or AAA," which "indicate a measure of accessability and feasability." 75 Fed. Reg. at *43465. Moreover, immediately below this discussion, the DOJ sought feedback regarding the following difficult-to-answer questions:

> Question 1. Should the Department **adopt the WCAG 2.0's "Level AA Success Criteria"** as its standard for Web site accessability for entities covered by titles II and III of the ADA? Is there any reason why the Department should consider adopting another success criteria level of the WCAG 2.0? Please explain your answer.
>
> ***8** Question 2. Should the [DOJ] adopt the **section 508 standards instead of the WCAG** guidelines as its standard for Web site accessability under titles II and III of the ADA? Is there a **difference in compliance burdens and costs** between the two standards? Please explain your answer.
>
> Question 3. How should the [DOJ] address the **ongoing changes to WCAG** and section 508 standards" and "[s]hould covered entities be given the option to comply with the latest requirements?
>
> Question 4. Given the **ever-changing nature of many Web sites**, should the Department adopt **performance standards instead** of any set of **specific technical standards** for Web site accessibility? ....

Id. (emphasis added). Almost seven years have transpired since the DOJ first posed these questions to the interested public, but the public has yet to receive a satisfactory answer.[3] Indeed, the Court, after conducting a diligent search, has been unable to locate a single case in which a court has suggested, much less held, that persons and entities subject to Title III that have chosen to offer online access to their goods or services must do so in a manner that satisfies a particular WCAG conformance level.

The Court therefore **GRANTS** Defendant's Motion and **DISMISSES** each of Plaintiff's causes of action **without prejudice** pursuant to the primary jurisdiction doctrine, which "allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (affirming dismissal of a case referring the issue of "slamming," a question of federal telecommunications policy, to the Federal Communications Commission for consideration in the first instance). Congress has vested the Attorney General with promulgating regulations clarifying how places of public accommodation must meet their statutory obligations of providing access to the public under the comprehensive ADA. Congress has further provided that the DOJ's mandate with respect to Title III of the ADA is "to issue implementing regulations, *see* 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b)." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). Such regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III. Moreover, the Court finds the issue of web accessibility obligations to require both expertise and uniformity in administration, as demonstrated by the DOJ's multi-year campaign to issue a final rule on this subject. *See* *Clark*, 523 F.3d at 1115. The Court concludes by calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary.

III. RULING

***9** For the foregoing reasons, the Court **GRANTS** Defendant Domino's Pizza, LLC's Alternative Motion to Dismiss or Stay. This matter shall close.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 1330216, 55 NDLR P 9

Footnotes

1 In light of this authority, the Court rejects Defendant's argument that the Court should dismiss this action because "the ADA was simply not drafted with the specific regulation of virtual spaces in mind," which relies on a bevy of Eleventh Circuit authority. (*Cf.* Mot. 4–7.) The Court also finds this case distinguishable from those that have determined that Title III does not apply to internet-based retailers or service providers, as Defendant operates a chain of brick-and-mortar pizza stores. *Cf.* *Young v. Facebook, Inc.*, 790 F. SUpp. 2d 1110, 1114–16 (N.D. Cal. 2011) (explaining that a website is not a physical structure and plaintiff had not alleged a sufficient nexus to a physical place of public accommodation). Indeed, Defendant does not challenge the existence of a "nexus" between its websites and its pizza franchises. (Mot. 5.)

2 The Court takes judicial notice of this publicly filed litigation document pursuant to Rule 201(b) of the Federal Rules of Evidence.

3 Even more problematic to Plaintiff's case is the apparent absence of any discussion by the DOJ regarding whether a mobile website or mobile application must conform with "Apple's iOS accessibility guidelines." (*Cf.* Compl. ¶ 31.)

End of Document

2019 WL 4921438
Only the Westlaw citation is currently available.
Supreme Court of the United States.

DOMINO'S PIZZA, LLC
v.
Guillermo ROBLES,

No. 18-1539

|
October 7, 2019

Opinion

***1** The petition for writ of certiorari is denied.

All Citations

--- S.Ct. ----, 2019 WL 4921438 (Mem)

End of Document

2017 WL 6623932 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

Guillermo ROBLES, Appellant-Plaintiff,
v.
DOMINO'S PIZZA LLC, Appellee-Defendant.

No. 17-55504.
December 27, 2017.

Appeal from a Final Judgment of the United States District Court for the Central District of California
Lower Court Case No. 2:16-cv-06599

Brief of the Restaurant Law Center; American Bankers Association; American Hotel & Lodging Association; American Resort Development Association; Asian American Hotel Owners Association; Chamber of Commerce of the United States of America; International Council of Shopping Centers; International Franchise Association; National Association of Convenience Stores; National Association of Home Builders of the United States; National Association of Realtors®; National Association of Theatre Owners; National Federation of Independent Business Small Business Legal Center; National Multifamily Housing Council; National Retail Federation; and Retail Litigation Center, Inc. as Amici Curiae in Support of Appellee-Defendant Domino's Pizza LLC

Joyce Ackerbaum Cox, Esq., Kevin W. Shaughnessy, Esq., Mary Caroline Miller, Esq., Baker & Hostetler LLP, SunTrust Center, Suite 2300, 200 South Orange Avenue, Orlando, Florida 32801, (407) 649-4000, for amici curiae.

John B. Lewis, Esq., Baker & Hostetler LLP, Key Tower, Suite 2000, 127 Public Square, Cleveland, Ohio 44114, (216) 621-0200, for amici curiae.

Angelo I. Amador, Esq., The Restaurant Law Center, 2055 L Street, NW, Washington, D.C. 20036, (202) 331-5913, for amicus curiae Restaurant Law Center.

Justin Vermuth, Esq., American Resort Development Association, 1201 15th Street, NW, Washington, D.C. 20005, (202) 371-6700, for amicus curiae American Resort Development Association.

Warren Postman, Esq., Janet Galeria, Esq., U.S. Chamber Litigation Center, 1615 H Street, NW, Washington, D.C. 20062, (202) 463-5337, for amicus curiae Chamber of Commerce of the United States of America.

Christine Mott, Esq., International Council of Shopping Centers, 1221 Avenue of the Americas, 41st Floor, New York, New York 10020, (646) 728-3664, for amicus curiae International Council of Shopping Centers.

Jeffrey B. Augello, Esq., Felicia Watson, Esq., National Association of Home Builders of the United States, 1201 15th Street, NW, Washington, D.C. 20005, (202) 266-8490, for amicus curiae National Association of Home Builders of the United States.

Karen R. Harned, Esq., Elizabeth Milito, Esq., National Federation of Independent Business Small Business Legal Center, 1201 F Street, NW, Washington, D.C. 20004, (202) 406-4443, for amicus curiae National Federation of Independent Business Small Business Legal Center.

Stephanie Martz, Esq., National Retail Federation, 1101 New York Avenue, NW, Washington, D.C. 20005, (202) 626-8106, for amicus curiae National Retail Federation.

Deborah White, Esq., Kathleen McGuigan, Esq., Retail Litigation Center, Inc., 1700 N. Moore Street, Suite 2250, Arlington, Virginia 22209, (703) 600-2067, for amicus curiae Retail Litigation Center, Inc.

i *TABLE OF CONTENTS

iii *TABLE OF AUTHORITIES

Cases

Federal Statutes

Regulations

Other Authorities

1** ***STATEMENT OF THE ISSUES

1. Whether Internet websites are places of public accommodation under Title III of the Americans With Disabilities Act.

2. Whether requiring businesses to comply with nonexistent regulations and non-binding private sector guidelines violates basic principles of administrative law and due process.

3. Whether the Web Content Accessibility Guidelines have the force of law or deserve any judicial deference.

4. Whether application of the primary jurisdiction doctrine is appropriate and/or necessary to resolve the current quagmire of website accessibility litigation.

INTEREST OF AMICI CURIAE

The **Restaurant Law Center** (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The industry is comprised of over one million restaurants and foodservice outlets employing 15 million people.

The **American Bankers Association** (the "ABA") is the principal national trade association of the financial services industry in the United States. The ABA is the voice for the nation's $13 trillion banking industry and its millions of employees.

The **American Hotel and Lodging Association** ("AHLA") is the sole national association representing all segments of the United States lodging industry, ***2** including iconic global brands, hotel owners, REITs, franchisees, management companies, independent properties, bed and breakfasts, and hotel associations.

The **American Resort Development Association** ("ARDA") is the non-profit trade association representing the interests of the time-share and vacation ownership industries. ARDA represents more than 700 time-share development and related service corporations.

The **Asian American Hotel Owners Association** ("AAHOA") is the largest association of hotel owners in the world. Representing more than 16,500 members nationwide, AAHOA members own 22,000 properties - nearly one out of two hotels in the United States.

The **Chamber of Commerce of the United States of America** (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of over three million companies and professional organizations of every size, in every industry, and from every region of the country.

The **International Council of Shopping Centers** ("ICSC") is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, and brokers.

***3** The **International Franchise Association** ("IFA") is the largest trade association in the world dedicated to the entire franchise industry. Its membership spans more than 300 different industries and includes more than 733,000 franchise establishments.

The **National Association of Convenience Stores** ("NACS") is an international trade association that represents both the convenience and fuel retailing industries, with more than 2,200 retail and 1,800 supplier company members.

The **National Association of Home Builders of the United States** ("NAHB") represents over 140,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, apartments, condominium, commercial, and industrial properties, as well as land developers and remodelers.

The **National Association of REALTORS®** ("NAR") represents residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in all aspects of the real estate industry. NAR's constituents include approximately 1100 local and 52 state associations of REALTORS®.

The **National Association of Theatre Owners** ("NATO") is the national trade association of the motion picture theater industry. Its membership, which includes the world's largest theater chains as well as numerous independent theaters, operates over 33,000 motion picture screens located in all 50 states.

***4** The **National Federation of Independent Business Small Business Legal Center** (the "NFIB") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues affecting small businesses.

The **National Multifamily Housing Council** ("NMHC") is the leadership of the trillion-dollar apartment industry. NMHC unites the prominent owners, managers, and developers who help create thriving communities by providing apartment homes for 35 million Americans.

The **National Retail Federation** ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries.

The **Retail Litigation Center, Inc.** (the "RLC") is a public policy organization whose members include many of the country's largest and most innovative retailers. The RLC's members employ millions of people, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales.

Many of *Amici's* members operate websites in conjunction with their businesses. The members utilize these websites in a variety of ways and for a host of different reasons. Some websites simply provide information about a business' ***5** location and hours of operation and, in doing so, only reiterate information available elsewhere (i.e., by calling the business or visiting in person). Other websites function more as advertisements, mirroring ads printed in newspapers or catalogues or shown on television. Still other websites are more interactive in nature, allowing visitors to purchase products or services online, submit questions to customer service departments, or communicate with fellow visitors on discussion forums. Some of these websites are static, whereas others change constantly. Moreover, many of these websites include content created and controlled by (or links to content created and controlled by) third parties like Google, YouTube, and Facebook. In sum, the websites operated by *Amici's* members are diverse in both form and functionality.

Amici's members endeavor to maintain their websites in keeping with all laws and regulations governing website form and functionality. Under the current legal landscape, however, there is great uncertainty regarding whether or under what circumstances Title III of the Americans With Disabilities Act ("Title III" or the "ADA") regulates commercial websites. Adding to this uncertainty is the fact that the Department of Justice (the "DOJ") has promulgated *no* guidance establishing the contours of website accessibility or otherwise indicating what measures businesses must take to ensure that their websites meet any supposed accessibility requirements that may exist under Title III.

***6** In *Guillermo Robles v. Domino's Pizza, LLC,* No. 2:16-cv-06599, 2017 WL 1330216, at *1 (C.D. Cal. Mar. 20, 2017), the United States District Court for the Central District of California recognized the impossible situation businesses now face in determining their obligations under Title III and consequently dismissed a website accessibility case under the primary jurisdiction doctrine. In doing so, the lower court provided businesses with a sense of much-needed security that, at least in the Central District of California, they will not be required to conform to nonexistent website accessibility standards.

The disabled community, including those with visual impairments, are valued customers and stakeholders of *Amici*. Together, *Amici* strongly support the goals of Title III. However, if this Court overturns the lower court's decision at issue on this appeal, *Amici's* members will be forced to do the impossible and attempt to "comply" with nonexistent, undefined, and potentially ever-changing "standards" for website accessibility. This uncertainty only spawns unproductive litigation that, at best, results in ad hoc solutions. *Amici* have a strong interest in preventing such result.

As many of *Amici's* members are in the process of improving the accessibility of their websites while simultaneously facing an onslaught of lawsuits attacking such accessibility, *Amici* possess unique insight regarding the realities of website accessibility litigation and website modification efforts. With this interest ***7** and insight, *Amici* submit this Brief to aid the Court in its consideration of the important questions at issue in this appeal.

STATEMENT OF AUTHORITY TO FILE

Amici have prepared this Brief in Support of the Appellee-Defendant, Domino's Pizza LLC ("Domino's"). This Brief accompanies *Amici's* Motion for Leave to Participate as *Amici Curiae,* in which *Amici* seek this Court's permission to file the present Brief.

This Brief was not authored, in whole or in part, by counsel for either Party, nor did any Party, counsel for any Party, or any person other than *Amici*, their counsel, or their members contribute money intended to fund this Brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent years, the business community has faced a deluge of lawsuits, including the Complaint filed by Appellant-Plaintiff, Guillermo Robles ("Robles"), attacking the accessibility of companies' websites. Despite the sheer volume of these lawsuits, the various individual complaints filed are nearly identical in substance. Each complaint alleges that defendant-businesses' websites are "inaccessible" to blind and visually impaired individuals. Consequently, these complaints allege that businesses have denied disabled individuals "full and equal ***8** access" to the goods and services of a "place of public accommodation" in violation of Title III.

Historically, and consistent with the statutory language of the ADA, claims under Title III have been limited to those directly related to *physical* places of public accommodation. Despite this limitation, various courts across the country have begun expanding Title III's application to non-physical "spaces" like websites. In doing so, these courts have established a variety of inconsistent standards imposing often shifting and unpredictable obligations on businesses. As a result, it is becoming increasingly difficult for businesses to determine, with any sort of meaningful finality, whether their websites fall within Title III's purview.

Adding to this uncertainty is the fact that these courts have failed to point to any discernable or clearly-defined regulations or other guidelines governing website accessibility. In truth, no binding standards exist. As a result, it is impossible for businesses to know how to ensure their websites meet whatever obligations - if any - are required by Title III. Businesses can try, as many have, to modify their websites in good faith to increase access for the disabled, but the lack of definitive regulations and agency guidance means that there is no clear path to or safe haven for compliance. This uncertainty not only violates basic principles of administrative law, but also contravenes fundamental notions of due process, as no definitive ***9** guidance makes clear whether Title III applies to websites or, if so, instructs businesses how to institute and operate ADA-compliant websites.

The lower court's decision in *Robles*, in which the Central District of California dismissed a website accessibility lawsuit pursuant to the primary jurisdiction doctrine, explicitly recognizes the uncertainties businesses face in attempting to determine their legal obligations under Title III. In refusing to allow Robles' case to move forward in the absence of specific and enforceable accessibility guidelines, the court provided Domino's (and other businesses) with a much-needed sense of security amidst an otherwise uncertain legal landscape. Moreover, by "calling upon Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, Title III, and the judiciary," the Central District of California has put the Title III law-making power back in the hands of those responsible for defining the contours of Title III. *Id.* at *9. In doing so, the lower court took an important step toward resolving the relentless onslaught of current website accessibility litigation. Until Congress or the DOJ takes action to clarify businesses' specific Title III obligations, businesses and disabled individuals will continue disagreeing about what (if any) guidelines govern website accessibility - and will continue to waste judicial resources in the process. As the *Robles* decision makes clear, the best way to stop this unproductive cycle is to seek guidance from the legislative and/or ***10** executive branch. Accordingly, *Amici* respectfully urge this Court to affirm the decision below.

ARGUMENT

I. By Extending Title III To Websites, Courts Ignore The Statutory Language Of Title III And Create A Patchwork Of Inconsistent Exposure To Liability For Nationwide Businesses.

A. Under The Statutory Language Of Title III, Websites Are Not "Places Of Public Accommodation."

Title III provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place* of public accommodation." 42 U.S.C. § 12182(a) (emphasis added).

The most natural definition of the term "place" refers to "a physical environment." *See* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/place (last visited November 30, 2017) (defining "place" as "a physical environment;" "a particular region, center of population, or location to visit;" or "a building, part of a building, or area occupied"). In keeping with this definition, Title III defines the term "public accommodation" by listing twelve distinct categories of physical, brick-and-mortar establishments open to the public at a specific physical location. 42 U.S.C. § 12181(7). In keeping with this definition, the ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities clarifies that a "place of public accommodation" is ***11** limited to the twelve categories listed in the statute, while also equating the word "place" with physical "facilities":

> Can a facility be considered a place of public accommodation if it does not fall under one of these 12 categories? No, the 12 categories are an exhaustive list. However, within each category the examples given are just illustrations. For example, the category "sales or rental establishments" would include many facilities other than those specifically listed, such as video stores, carpet showrooms, and athletic equipment stores.

ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities, ADA.GOV, https://www.ada.gov/taman3.html (last visited December 19, 2017).

Title III's statutory language reflects Congress's intent to limit the statute's reach to physical establishments. Had Congress intended Title III to apply to all businesses offering goods and services to the public, it would not have limited the defined list of public accommodations to only those offered at a "place." Following this basic logic, both the Third and Sixth Circuits have refused to extend Title III to non-physical locations or spaces. *See* *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-14 (3d Cir. 1998) ("[W]e do not find...the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning."); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-13 (6th Cir. 1997) ("As is evident by § 12187(7), a public accommodation is a physical place..."); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (explaining that places of public accommodation are limited to physical "facilities").

***12** The DOJ's regulations implementing Title III also reinforce that places of public accommodation are limited to physical places. The regulations define the term "place of public accommodation" as "a facility," which is further defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104. This language confirms that places of public accommodation are only those spaces accessible at a specific physical location. [1] A website, by contrast, is simply a collection of data that one "accesses" by requesting a web server to transmit the data to his or her computer from another host source. Under any natural definition, collections of data are not "places of public accommodation."

*13 B. Courts Use A Variety Of Inconsistent Legal Analyses To Expand Title III's Coverage To Include Websites, Creating Uncertain Obligations For Businesses.

As described above, Title III and its implementing regulations do not apply to websites. *See* *Earll v. eBay, Inc.*, No. 5:11-cv-00262, 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011) (holding that websites are not places of public accommodation under Title III). While Congress may "amend the ADA to define a website as a place of public accommodation," it has not yet done so (despite having amended the ADA since its passage in 1990). *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801, 2017 WL 1957182, at *4, n.3 (S.D. Fla. Feb. 2, 2017). By contrast, courts, having no legislative power, "cannot create law where none exists." *Id.*; *see also J.H. by & through Holman v. Just for Kids, Inc.*, 248 F. Supp. 3d 1210 (D. Utah 2017) ("[T]he law's remedial purpose cannot overcome its plain meaning as written."); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) ("[C]ourts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights..."); *Rome v. MTA/New York City Transit*, No. 97-cv-2945 (JG), 1997 WL 1048908, at *1 (E.D.N.Y. Nov. 18, 1997) ("[W]hile such reasoning [including non-physical spaces as places of public accommodation] may have a certain logic to it, it is contrary to the statute."). Despite the limited scope of the ADA, some courts - using vastly different approaches - have begun expanding Title III's reach to include websites.

*14 1. The "Spirit Of The Law" Approach

In considering whether Title III applies to non-physical spaces like websites, some courts - including those in the First and Seventh Circuits - construe the language of Title III broadly "to effectuate its [remedial] purpose of providing a ... national mandate for the elimination of discrimination against individuals with disabilities." *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 573 (D. Vt. 2015) (internal citation and quotations omitted). According to these courts, the "core meaning of

Title III's anti-discrimination provision is that the owner or operator of a store, hotel, restaurant, dentist's office, theater, website, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and using the facility in the same way that nondisabled persons do." *Doe v. Mutual Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

Courts using this "spirit of the law" approach do not limit consideration to whether businesses offer goods or services to the public *at a physical place*, but instead ask whether businesses offer goods or services to the public via *any* platform. Under this approach, several courts have held that purely online businesses - those with no connection to any physical storefront, theater, or any other type of "public accommodation" listed in Section 12181(7) - are nonetheless places of public accommodation covered under Title III. *See* ***15** *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) ("[E]xcluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA...'") (quoting *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994)).

2. The "Nexus" Approach

Other courts - including the Ninth and Eleventh Circuits - apply a narrower approach, holding that Title III imposes obligations on non-physical spaces or processes only when a sufficient "nexus" exists between the non-physical space or process in question and some other concrete, physical space. *See* *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1280-81, 1285 (11th Cir. 2002) (looking to nexus between remote technological eligibility process and access to concrete space); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (requiring "some connection between the good or service complained of and an actual physical place").

Under this approach, a website cannot form the basis of a Title III claim when it does not impede a disabled individual from accessing the goods or services at a related physical establishment. *See* *Gomez*, 2017 WL 1957182, at *2 ("Because Plaintiff has not alleged that Defendant's website impeded his personal use of [Defendant's] retail locations, his ADA claim must be dismissed."); ***16** *Jancik v. Redbox Automated Retail, LLC*, No. 8:13-cv-01387, 2014 WL 1920751, at *8-9 (C.D. Cal. May 14, 2014) (holding website was not place of public accommodation because there was insufficient nexus between website and physical space); *Young v. Facebook*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) ("Although Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which [the plaintiff] sought access are offered to the public."); *Ouellette v. Viacom*, No. 9:10-cv-00133, 2011 WL 1882780, at *4-5 (D. Mont. Mar. 31, 2011) (holding online theater websites were not physical places and were not sufficiently connected to any physical structure), *report and recommendation adopted*, No. 9:10-cv-00133, 2011 WL 1883190 (D. Mont. May 17, 2011); *Access Now*, 227 F. Supp. 2d at 1319-20 (refusing to apply Title III to website because it was not physical location nor means of accessing concrete space), *appeal dismissed,* 385 F.3d 1324 (11th Cir. 2004).

A business' website *can* run afoul of Title III under the "nexus" approach, however, when it impedes a disabled individual's "full and equal enjoyment" of the goods and services offered at that business' *physical* establishment(s). *See* *National Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954-955 (N.D. Cal. 2006) (holding plaintiffs had alleged sufficient facts to state Title III claim when plaintiffs "alleged the inaccessibility of Target.com denie[d] the blind the ability to enjoy the services *of Target stores*") (emphasis added).

17 3. Uncertain Lessons From *Netflix

As a result of the differing approaches taken by courts analyzing website accessibility claims under Title III, entities with a broad geographic presence now face inconsistent exposure based upon a plaintiff's domicile or a courthouse address. *Compare* *National Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196 (D. Mass. 2012) (following "spirit of the law" approach in holding Netflix's video streaming website *is* place of public accommodation, even though its web-based services are unrelated to any physical space); *with* *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (following "nexus" approach in holding Netflix's online streaming service *is not* place of public accommodation because Netflix's services are *only* available online). These *Netflix* decisions - under which the same website is a place of public accommodation in one judicial district but not another - demonstrate the uncertainty businesses now face in determining their obligations, if any, under Title III.

II. To The Extent That Websites Are Places Of Public Accommodation Under Title III, Requiring Businesses To Comply With Nonexistent "Guidelines" Addressing Website Accessibility Violates Basic Principles Of Administrative Law And Due Process.

A. The Department Of Justice Has Not Yet Implemented Guidelines Addressing Website Accessibility For Private Businesses.

To make a disability discrimination claim under Title III, a plaintiff must allege that the defendant engaged in one of the specifically prohibited actions described in the DOJ's implementing regulations. *See PGA Tour. Inc. v.* ***18** *Martin*, 532 U.S. 661, 681-82 (2001) (explaining that whether defendant has engaged in unlawful discrimination under Title III depends on whether it committed an act specifically prohibited by regulation). While the statute itself lists the broad categories of discrimination that are unlawful under Title III, it does not proscribe or mandate specific conduct. Instead, Title III requires the DOJ to issue implementing regulations that establish accessibility standards and put covered entities on notice of their specific obligations under the law. 42 U.S.C. § 12186(b); *see also* 28 C.F.R. § 36.101 (describing purpose of DOJ's regulations). Under this framework, absent a violation of a specific guideline established in the regulations, there can be no violation of Title III's general prohibitions. *See United States v. Nat'l Amusements, Inc.*, 180 F. Supp. 2d 251, 258-260 (D. Mass. 2001) ("The Attorney General argues that because the Cinemas' theaters are in violation of these general regulatory provisions, he should be able to state a claim... absent a violation of a specific regulation... The Court disagrees.").

The existing regulations contain *no* provisions governing the accessibility of websites or online content. Indeed, the DOJ admits that it has been "unable to issue specific regulatory language on Website accessibility." 28 C.F.R. § 36, Appendix A. In July of 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking ("ANPR"), in which it explains that it was "*considering* revising the regulations implementing title III of the ADA in order *to establish requirements* for making the ***19** goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web ('Web') accessible to individuals with disabilities." *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, 75 Fed. Reg. 43460, 43460 (proposed July 26, 2010) (emphasis added). The ANPR does not set forth any proposed regulations or guidelines. Rather, it simply indicates the DOJ's desire to eradicate "remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III" and "make clear to entities covered by the ADA their obligations to make their Web sites accessible." 75 Fed. Reg. 43460, 43464. To this end, the ANPR explicitly explains that the DOJ has yet to adopt regulations regarding website accessibility and even questions whether the agency should adopt regulations in the first place. *Id.* at 43465.

Despite issuing the ANPR and collecting comments from the public nearly seven years ago, the DOJ has yet to take the next step in enacting an official regulation addressing website accessibility - issuing a Notice of Proposed Rulemaking ("NPRM"). After several delays, the DOJ indicated, under the Obama Administration, that it did not expect to publish a NPRM addressing this issue until 2018 at the earliest. More recently, the Trump Administration put the ANPR on its list of "inactive" regulations. *2017 Inactive Regulations*, REGINFO.GOV, ***20** https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update. pdf (last visited December 19, 2017). Thus, while the inactive status of the ANPR may reflect the DOJ's intention to promulgate binding regulations *in the future*, it in no way imposes *present* obligations on places of public accommodation.

Given that no regulations currently impose clearly-defined obligations regarding website accessibility, businesses are simply not on notice of what, if anything, Title III may require of them. Requiring businesses to comply with some undefined accessibility requirements violates fundamental principles of fairness and due process. *See* *U.S. v. AMC Entm't, Inc.*, 549 F.3d 760 (9th Cir. 2008); *see also* *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."); *Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (explaining that "those regulated by an administrative agency are entitled to know the rules by which the game will be played") (internal quotations omitted), *abrogated on other grounds by* *Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199 (2015).

***21 B. The Web Content Accessibility Guidelines Do Not Have The Force Of Law.**

In an attempt to side-step the absence of applicable regulations addressing website accessibility, plaintiffs like Robles argue that the Web Content Accessibility Guidelines (the "WCAG"), a spectrum of private-sector accessibility recommendations, somehow help businesses understand their supposed obligation to provide websites accessible to visually impaired individuals. As an initial matter, the WCAG are a set of non-mandatory accessibility guidelines developed by the Web Accessibility Initiative (the "WAI"), a subgroup of the World Wide Web Consortium. The WAI is a private-sector "international community where Member organizations, a full-time staff, and the public work together to develop Web standards." *About W3C*, WWW.W3.ORG, https://www.w3.org/Consortium/ (last visited December 19, 2017). The WAI described the initial version of the WCAG as a "reference document for accessibility principles," and the WCAG 2.0 makes clear that its guidelines are merely "recommendations." *Web Content Accessibility Guidelines 1.0*, WWW.W3.ORG, https://www.w3.org/TR/WAI-WEBCONTENT/ (last visited December 19, 2017); *Web Content Accessibility Guidelines 2.0*, WWW.W3.ORG, https://www.w3.org/TR/WCAG20/ (last visited December 19, 2017). Consistent with these disclaimers, the WCAG are merely meant to assist people in understanding the technical tools that may be used to make websites more accessible. They do not create binding requirements.

***22** In an appendix published along with the DOJ's 2010 revisions to its implementing regulations, the agency noted that it had not "issue[d] specific regulatory language on Website accessibility" but mentioned that "[a]dditional guidance is available in the [WCAG]...which are *developed and maintained by* the [WAI]." 28 C.F.R. § 36, Appendix A (emphasis added). Importantly, the fact that the DOJ has referenced the WCAG does not somehow transmute such non-binding guidance into mandatory rules under Title III. Similarly, such "references" are not entitled to any deference. Because the Appendix is more akin to an informal policy statement or guidance document and is in no way an authoritative determination, it does not warrant *Chevron* deference. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all which lack the force of law - do not warrant *Chevron*-style deference.") (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). *Auer* deference is also inappropriate, as any position that the WCAG are mandatory is plainly at odds with the actual language of the regulations themselves, which do not proscribe any website content, templates, or functionality. *See* *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 395 (9th Cir. 2011) (refusing to defer to agency position under *Auer* because such position was "plainly erroneous and inconsistent with the regulation's unambiguous and obvious ***23** meaning") (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)), *aff'd*, 567 U.S. 142, 132 S. Ct. 2156 (2012). Finally, the DOJ's passing references are not even entitled to *Skidmore* deference, as the agency has been inconsistent regarding its "position" on website accessibility and has explicitly admitted that there is "uncertainty regarding the applicability of the ADA to Web sites." *See* 75

Fed. Reg. 43460, 43464; 28 C.F.R. § 36, Appendix A (explaining that places of public accommodation may meet website accessibility obligations "by providing an accessible alternative for individuals to enjoy its goods and services, such as a staffed telephone information line"); *see also* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control.") (emphasis added).

C. Non-Binding Private Sector Accessibility "Recommendations" Do Not Set Clearly Defined Accessibility Standards.

Even if the WCAG were somehow binding, which they are not, it is unclear what steps a business must take to ensure compliance with these "recommendations." The WCAG 2.0 is divided into three different conformance levels - A, AA, and AAA. The criteria for complying with each of the three varying levels of "success criteria" differ greatly and indicate a different level of accessibility and design feasibility (with AAA being the most accessible but least feasible). Even ***24** within the three levels, however, there are various terms or criteria that are vague or subject to different interpretations.

The DOJ has itself acknowledged the difference between the various conformance levels but has not clearly indicated which - if any - level of compliance may be required under Title III. *See* 75 Fed. Reg. 43460, 43465 (seeking feedback regarding whether DOJ should adopt WCAG 2.0's Level AA success criteria or should consider adopting another success criteria level). To this end, no court has indicated which level of success criteria is sufficient under Title III. *See* *Robles*, 2017 WL 1330216, at *8 ("Indeed, the Court, after conducting a diligent search, has been unable to locate a single case in which a court has suggested, much less held, that persons and entities subject to Title III that have chosen to offer online access to their goods and services must do so in a manner that satisfies a particular WCAG conformance level.").

Under this framework, it is impossible for businesses to know if and when they have ensured sufficient accessibility. If a business takes measures to comply with the WCAG Level A success criteria, a plaintiff may claim that Level AA compliance is required. Once that business complies with Level AA, another plaintiff may insist upon Level AAA. There is no limit to the compliance challenges businesses will face. Even if a business achieves compliance with the WCAG Level AAA success criteria, another private interest group could promulgate another, more ***25** exacting standard of accessibility. [2] These infinite permutations, creating unending uncertainty about what *might* pass muster in one, or even many (but not all) courts, underscore the importance of creating website accessibility guidelines through proper notice-and-comment rulemaking and *not* through litigation. *See* *Access Now*, 227 F. Supp. 2d at 1318 ("To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."). To maintain operationally feasible and legally compliant websites, businesses need - and are entitled to - a uniform set of accessibility guidelines that both put them on notice of their obligations under the law and also clearly define when compliance has been achieved. The WCAG do neither.

***26 III. Given The Lack Of Established Guidance In This Field, Dismissal Of Website Accessibility Litigation Under The Primary Jurisdiction Doctrine Is Both Appropriate And Necessary.**

There is no consensus, among the parties regulated and protected by the ADA *or* this nation's federal courts, as to whether or under what circumstances Title III applies to websites. Even among those in favor of extending Title III's application, there is similar disagreement regarding what actions businesses must take to make their websites "accessible" to visually impaired individuals. Such disagreement and confusion make website accessibility cases ripe for dismissal under the primary jurisdiction doctrine, which "allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). Application of this doctrine is appropriate when there is "(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Id.* at 1115 (internal citation and quotations omitted). The current morass of website accessibility cases, the inconsistent manner in which courts across the country deal with such cases, and "the DOJ's multi-year campaign to issue a final rule on this subject" all demonstrate ***27** the need for an agency with particular knowledge and expertise to establish clearly-defined and easily-enforceable accessibility guidelines.

To the extent one concludes that Title III permits the application of accessibility requirements to websites, the application of the primary jurisdiction doctrine is not only appropriate in this case, it is *necessary*. As the past several years of contentious and unpredictable website accessibility litigation have demonstrated, until Congress or the DOJ clarifies businesses' web-related obligations under Title III, both the business community and the disabled community will continue to seek clarification as to their rights and obligations under the ADA. The only avenue for true resolution of the current uncertainty is the promulgation of *binding* workable standards. By calling on Congress and the DOJ to enact such standards (or to clarify that websites are in fact *not* places of public accommodation covered by Title III), the *Robles* court has taken a necessary step in resolving the relentless and unproductive wave of website accessibility litigation that is sweeping our nation's court system.

CONCLUSION

In urging this Court to uphold the Central District of California's decision in *Robles*, *Amici* do not seek to undermine the ADA and its important purpose. Instead, *Amici* aim to highlight the need for clearly-defined website accessibility standards. Until such standards exist, complaints that attack the supposed inaccessibility of ***28** commercial websites should not be allowed to move forward. For this and the foregoing reasons, *Amici* respectfully request that this Court affirm the Central District of California's decision and find in favor of Domino's on this appeal.

Joyce Ackerbaum Cox, Esq.

Kevin W. Shaughnessy, Esq.

Mary Caroline Miller, Esq.

BAKER & HOSTETLER LLP

SunTrust Center, Suite 2300

200 South Orange Avenue

Orlando, Florida 32801

(407) 649-4000

Counsel of Record for Amicus Curiae

John B. Lewis, Esq.

BAKER & HOSTETLER LLP

Key Tower, Suite 2000

127 Public Square

Cleveland, Ohio 44114

(216) 621-0200

Counsel of Record for Amici Curiae

Angelo I. Amador, Esq.

THE RESTAURANT LAW CENTER

2055 L Street, NW

Washington, D.C. 20036

(202) 331-5913

Counsel for Amicus Curiae Restaurant Law Center

***29** Justin Vermuth, Esq.

AMERICAN RESORT DEVELOPMENT ASSOCIATION

1201 15th Street, NW

Washington, D.C. 20005

(202) 371-6700

Counsel for Amicus Curiae American Resort Development Association

Warren Postman, Esq.

Janet Galeria, Esq.

U.S. CHAMBER LITIGATION CENTER

1615 H Street, NW

Washington, D.C. 20062

(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Christine Mott, Esq.

INTERNATIONAL COUNCIL OF SHOPPING CENTERS

1221 Avenue of the Americas

41st Floor

New York, New York 10020

(646) 728-3664

Counsel for Amicus Curiae International Council of Shopping Centers

***30** Jeffrey B. Augello, Esq.

Felicia Watson, Esq.

NATIONAL ASSOCIATION OF HOME

BUILDERS OF THE UNITED STATES

1201 15th Street, NW

Washington, D.C. 20005

(202) 266-8490

Counsel for Amicus Curiae National Association of Home Builders of the United States

Karen R. Harned, Esq.

Elizabeth Milito, Esq.

NATIONAL FEDERATION OF

INDEPENDENT BUSINESS SMALL

BUSINESS LEGAL CENTER

1201 F Street, NW

Washington, D.C. 20004

(202) 406-4443

Counsel for Amicus Curiae National Federation of Independent Business Small Business Legal Center

Stephanie Martz, Esq.

NATIONAL RETAIL FEDERATION

1101 New York Avenue, NW

Washington, D.C. 20005

(202) 626-8106

Counsel for Amicus Curiae National Retail Federation

Deborah White, Esq.

Kathleen McGuigan, Esq.

RETAIL LITIGATION CENTER, INC.

1700 N. Moore Street, Suite 2250

Arlington, Virginia 22209

(703) 600-2067

Counsel for Amicus Curiae Retail Litigation Center, Inc.

Footnotes

1 Despite the clear meaning of its own definition, the DOJ has noted - in statements not subject to notice-and-comment rulemaking - that "[a]lthough the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations." 28 C.F.R. § 36, Appendix A. These informal statements are not entitled to the force and effect of law. *See infra* Section II.B. Regardless, the DOJ has been inconsistent in its own "position" and has admitted that there is "uncertainty regarding the applicability of the ADA to Web sites." *See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, 75 Fed. Reg. 43460, 43464 (proposed July 26, 2010); *see also* 28 C.F.R. § 36, Appendix A (explaining businesses may meet website accessibility obligations "by providing an accessible alternative for individuals to enjoy its goods and services, such as a staffed telephone information line").

2 The WAI's Accessibility Guidelines Working Group recently released a "working draft" of the WCAG 2.1 and is already at work developing the WCAG 3.0. *See Web Content Accessibility Guidelines (WCAG) 2.1: W3C Working Draft 07 December 2017*, WWW.W3.ORG, https://www.w3.org/TR/WCAG21/ (last visited December 19, 2017). Moreover, other "alternative" sources of website accessibility guidelines already exist. For example, pursuant to Section 508 of the Rehabilitation Act of 1973, the "Electronic and Information Technology Accessibility Standards" impose binding website accessibility regulations on federal agencies. U.S. Department of Justice, Civil Rights Division, *Accessibility of State and Local Government Websites to People with Disabilities* (2003), https://www.ada.gov/websites2_prnt.pdf. Apple, another private organization, has also promulgated its own accessibility standards. There is considerable variance amongst these already-existing "standards" of accessibility.

End of Document

2017 WL 4869092 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

Guillermo ROBLES, Plaintiff-Appellant,

v.

DOMINOS PIZZA, LLC, Defendant-Appellee.

No. 17-55504.
October 19, 2017.

On Appeal from the United States District Court for the Central District of California District Court Case No.: 2:16-cv-06599-SJO-FFM

Opening Breif for Plaintiff-Appellant

Manning Law, APC, Joseph R. Manning, Jr., Esq. (State Bar No. 223381), Michael J. Manning, Esq. (State Bar No. 286879), 4667 MacArthur Blvd., Suite 150, Newport Beach, CA 92660, Office: (949) 200-8755, ADAPracticeGroup @manninglawoffice.com, for plaintiff-appellant.

***i TABLE OF CONTENTS**

*iv *TABLE OF AUTHORITIES*

Cases

Statutes

Other Authorities

*1 I. JURISDICTIONAL STATEMENT

A. BASIS FOR THE DISTRICT COURT'S JURISDICTION

The United States District Court for the Central District of California had jurisdiction over this case because this case arises out of violation of federal law under Title III of the Americans with Disabilities Act ("ADA" or "Title III"), 42 U.S.C. § 1281, et seq.

B. BASIS FOR THE APPELLATE COURT'S JURISDICTION

The United States Court of Appeals for the Ninth Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

C. FILING DATE OF THE APPEAL

The District Court issued the judgment that is the subject of this appeal on March 20, 2017 (E.R. 001-012). Appellant filed a timely Notice of Appeal on April 12, 2017 (E.R. 427-446)

D. ASSERTION THAT APPEAL IS FROM A FINAL ORDER OR JUDGMENT THAT DISPOSES OF ALL PARTIES' CLAIMS

This appeal is from a final order on motion for summary judgment or in the alternative, dismissal or stay, dismissing the action without prejudice pursuant to the primary jurisdiction doctrine, and appealable pursuant to the "final judgment rule," see 28 U.S.C. § 1291.

*2 II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it treated the allegations of the Complaint as an effort to "impose on all regulated persons and entities a requirement that they "compl[y] with the WCAG 2.0 Guidelines", despite the clearly pled allegations of the Complaint and the Prayer for Relief asking only for equal accessibility?
2. Did the District Court err when it dismissed each of Appellant's causes of action pursuant to the primary jurisdiction doctrine stating that "regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III", despite the DOJ's existing directive to ensure disabled individuals have as full and equal enjoyment of the Dominos website and mobile application as non-disabled individuals?

3. Was the District Court's statement (in dicta) that Domino's due process challenge to the Complaint was "meritorious" erroneous and premature given that this is a question of remedy, not liability and no specific remedy beyond equal accessibility is sought in Appellant's Prayer for Relief?

***3** 4. Did the District Court err when it gave "little or no deference" to the DOJ's interpretation of its own regulations regarding website accessibility despite this Court's holding that a Statement of Interest by the DOJ in an ADA case is due deference and respect?

5. Was the District Court's statement (in dicta) that Plaintiff failed to articulate why Dominos' provision of a telephone hotline for the visually impaired does not satisfy the ADA erroneous?

III. STATEMENT REGARDING ADDENDUM

All applicable statutes and agency rulings are contained within the Addendum at the end of the Opening Brief. See Fed. R. App. P. 28-2.7.

IV. STATEMENT OF THE CASE

This appeal concerns an order of the District Court for the Central District of California dismissing Appellant Guillermo Robles' ("Mr. Robles") complaint for damages and injunctive relief against Dominos Pizza LLC ("Dominos") for failure to design, construct, maintain, and operate its website www.dominos.com (the "Website") and mobile application (the "Mobile App") to be fully accessible to and independently usable by Mr. Robles and other blind or visually-impaired people, in violation of the ADA and California's Unruh Civil Rights Act ("UCRA"). The District Court dismissed Mr. Robles causes of action without prejudice pursuant to the primary jurisdiction doctrine because it found that ***4** "regulations and technical assistance [from the Department of Justice] are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III [and] the issue of web accessibility obligations [] require both expertise and uniformity in administration, as demonstrated by the Department of Justice's ("DOJ") multi-year campaign to issue a final rule on this subject" E.R. 011-012.

The complaint was filed on September 1, 2016 (E.R. 408-426). On September 29, 2016, Dominos filed an Answer (E.R. 447-461). On February 22, 2017, Dominos filed its Dominos' Motion for Summary Judgment, or in the Alternative, Dismissal or Stay (E.R. 013-043). The motion was directed at the allegations of the Complaint that alleged the inaccessibility of the Dominos Website and "Mobile Website". Significantly, the Complaint did not contain any allegations concerning, any "Mobile Website" offered by Dominos. Rather, the Complaint alleged separate violations of the ADA and Unruh Civil Rights Act as to the Dominos Website (Causes of Action 1 and 3) and the Domino's Mobile App (Causes of Action 2 and 4). The bases for the motion were that Dominos' Website should not be subject to the ADA, that Mr. Robles' case violates due process because there is no published regulatory standard that is violated, Defendant did not have "fair notice" of the barriers, and the court should dismiss the case pursuant to the primary jurisdiction doctrine. Mr. Robles filed an Opposition on ***5** March 6, 2017 (E.R. 147-173). Dominos filed a Reply on March 15, 2017 (E.R. 347-382). The District Court found Dominos' Motion for Summary Judgment, or in the Alternative, Dismissal or Stay suitable for disposition without oral argument and granted Defendant's alternative motion to dismiss and dismissed each of Mr. Robles' causes of action (including Causes of Action 2 and 4 which related to the Domino's Mobile App and which were not even mentioned in the Motion) without prejudice pursuant to the primary jurisdiction doctrine on March 20, 2017. (E.R. 001-012, ECF #42).

V. STATEMENT OF FACTS

Dominos operates several restaurants in Los Angeles and its Website connects its customers to Dominos' restaurants. (E.R. 411, ¶13, *see also* E.R. 154:17-18:) The features on the Website include a restaurant locator and permit users to order food for pick-up and delivery. (E.R. 415, ¶24) The Website is heavily-integrated in the operation of Defendant's restaurant locations. (E.R. 421, ¶49, *see also* E.R. 154:22-23) Mr. Robles is permanently blind and uses a screen reader to access the internet and read website content. (E.R. 410-411, ¶10) Screen reading software vocalizes visual information on a computer screen, and is the only method for a blind person to independently access the internet. (E.R. 412, ¶ 17) Unless websites are designed to be read by screen reading software, blind persons ***6** cannot fully access websites and its information, products and services. (E.R. 412, ¶17)

There are well-established industry adopted guidelines for making websites accessible to visually-impaired people who require screen-reading software programs. (E.R. 413, ¶21) These guidelines have existed for several years and are successfully followed by large business entities who want to ensure their websites are accessible to all persons. The Web Accessibility Initiative ("WAI"), an initiative of the World Wide Web Consortium, developed guidelines on website accessibility. (E.R. 413, ¶21) Through Section 508 of the Rehabilitation Act, the federal government also promulgated website accessibility standards establishing WCAG 2.0 AA, promulgated by the WAI, as the standard for federal government websites. These guidelines, easily found on the Internet, recommend several basic components for making websites accessible, including, but not limited to: adding invisible alt-text to graphics; ensuring all functions can be performed using a keyboard and not just a mouse; ensuring that image maps are accessible and adding headings so blind and visually-impaired people can navigate websites and mobile applications just as sighted people do. (E.R. 413-415, ¶23) Without these basic components, websites and mobile applications are inaccessible to a blind person using screen-reading software. (E.R. 413-415, ¶23) The use of the WCAG 2.0 AA ***7** standard is one way, but not the only way, to measure the accessibility of a website.

In July 2015, Mr. Robles attempted to access the Website to customize and order a pizza from a Domino's physical location closest to him in Los Angeles County using screen-reader software. (E.R. 155:9-11) Due to several access barriers on the Website, including barriers that prevented Mr. Robles from independently building a pizza and adding it to his online shopping cart, Mr. Robles was unable to independently navigate the Website and order a pizza for pick-up or delivery. (E.R. 155:12-13) Mr. Robles offered evidence, including expert testimony, that the Website for the pizza chain was inaccessible in numerous respects including the most obvious and important measure of a pizza restaurant website, ***he could not order a pizza***. (E.R. 417, ¶29, *see also* E.R. 174-197)

The record and the undisputed evidence shows that the determination of whether the Dominos Website was accessible to Mr. Robles, a blind man using a screen reader to access website content, is the type of straightforward claim that Dominos failed to provide disabled individuals full and equal enjoyment of goods and services offered by its physical stores by not maintaining a fully accessible website. There nothing unique about this case, as federal courts have resolved effective communication claims under the ADA in a wide variety of contexts - ***8** including cases involving allegations of unequal access to goods, benefits and services provided through websites. Therefore, Dominos Motion for Summary Judgment, or in the Alternative, Dismissal or Stay should have been denied.

VI. SUMMARY OF ARGUMENT

A. STANDARD OF REVIEW

A challenge to a district court's decision to invoke the primary jurisdiction doctrine is reviewed *de novo*. See *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1162 n.ll (9th Cir. 2007); *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1155 (9th Cir. 2000); *Reid v. Johnson & Johnson*, ___ F.3d ___, Case No. 12-56726 (9th Cir. March 13, 2015). The Ninth Circuit reviews "We *novo* the district court's grant of summary judgment." *Smith v. Clark Cnty. Sch. Dist*, 727 F.3d 950, 954 (9th Cir. 2013).

B. THE DISTRICT COURT ERRED WHEN IT TREATED THE ALLEGATIONS OF THE COMPLAINT AS AN EFFORT TO "IMPOSE ON ALL REGULATED PERSONS AND ENTITIES A REQUIREMENT THAT THEY "COMPL[Y] WITH THE WCAG 2.0 GUIDELINES", DESPITE THE CLEARLY PLED ALLEGATIONS OF THE COMPLAINT PRAYING ONLY FOR EQUAL ACCESSIBILITY

The Complaint seeks compliance with the ADA's equal access and effective communication requirements (E.R. 409-410, Introduction, ¶¶ 1-5). It explains in detail Mr. Robles' efforts to access the Website (E.R. 410-411, Parties, ¶¶ 10-12). It refers to "well-established guidelines for making websites accessible" to the blind and visually impaired and also describes in general terms common barriers to ***9** access found on websites and apps that do not comply with the law. (E.R. 413-415, ¶¶ 21-23).

The Complaint alleges it is Dominos' policy to deny access to the blind and visually impaired by not removing barriers to access on the Website. (E.R. 415-417, ¶¶ 26-29). Mr. Robles alleges that because Dominos could make the Website accessible Dominos discriminates by continuing to operate with its inaccessible Website. (E.R. 418-419, ¶¶ 36-38). Mr. Robles then asks the District Court, because the Dominos Website has never been accessible, to order Dominos to comply with the ADA by providing accessible content and effective communication. (E.R. 419, ¶ 43). Mr. Robles request is made, not because he alleges that Domino's failure to abide by the WCAG 2.0 guidelines by itself violates the law, but because doing so is one means of making the website equally accessible. This is made clear when read together with the sections of the Complaint setting forth the Causes of Action and in the Prayer for Relief where Mr. Robles seeks only "full and equal access" to the Website and Mobile App and does not mention WCAG. (E.R. 425-426, Prayer, ¶¶ 1-10).

The District Court treats the Complaint as requiring compliance with WCAG 2.0 because, ostensibly, Mr. Robles asserts it is the law (he does not) as opposed to requiring equal access and suggesting WCAG 2.0 as a means of accomplishing equal access (he does), led the District Court far afield into a discussion of whether imposing WCAG 2.0 "on all regulated persons and entities" ***10** would offend due process principles. The District Court's departure here culminated to the dismissal of the Complaint when in fact this is a straightforward claim that Dominos failed to provide disabled individuals full and equal enjoyment of goods and services offered by its physical stores by not maintaining a fully accessible website. If this reading of the Complaint is not already clear, this interpretation can certainly be reached by making the type of plausible inference that should be drawn in favor of the non-moving party in the context of a motion to dismiss (or motion for summary judgment).

C. THE DISTRICT COURT ERRED WHEN IT DISMISSED EACH OF MR. ROBLES CAUSES OF ACTION PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE STATING THAT "REGULATIONS AND TECHNICAL ASSISTANCE ARE NECESSARY FOR THE COURT TO DETERMINE WHAT OBLIGATIONS A REGULATED INDIVIDUAL OR INSTITUTION MUST ABIDE BY IN ORDER TO COMPLY WITH TITLE III", DESPITE THE DOJ'S EXISTING DIRECTIVE TO ENSURE DISABLED INDIVIDUALS HAVE AS FULL AND EQUAL ENJOYMENT OF THE DOMINOS WEBSITE AND MOBILE APPLICATION AS NON-DISABLED INDIVIDUALS

The issue presented by the Domino's motion to dismiss on primary jurisdiction grounds is one of liability, which did not require the District Court to master complicated web standards, but rather asked the Court to make exactly the same sort of accessibility determinations that courts regularly make when evaluating the accessibility of physical locations. See *Order Denying Motion for* ***11** *Summary Judgment, Sean Gorecki v. Dave & Buster's, Inc.*, Case No. 2:17-cv -01138-PSG-AGR (C.D.C.A. Oct. 10, 2017) (Gutierrez) at *7, (*"D&B Order"*) [Request for Judicial Notice ("RJN") 1]. [1] For this reason, and because a finding of liability regarding the Website's compliance with the ADA does not require sophisticated technical expertise beyond the ability of the Court, the primary jurisdiction doctrine is inapposite in this case. See *Fortyune v. City of Lomita*, 766 F. 3d 1098, 1106 n. 13 (9th Cir. 2014) (explaining that "further consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed").

D. THE DISTRICT COURT ERRED WHEN IT DETERMINED (IN DICTA) THAT DOMINO'S DUE PROCESS CHALLENGE TO THE COMPLAINT WAS "MERITORIOUS," GIVEN THAT THIS IS A QUESTION OF REMEDY, NOT LIABILITY, AND NO SPECIFIC REMEDY BEYOND EQUAL ACCESSIBILITY IS SOUGHT IN MR. ROBLES' PRAYER FOR RELIEF

Although the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District Court made references to violations of due process in its Order. (E.R. 001-012) However, in the Complaint and the Prayer for relief Mr. Robles seeks only that the Website and Mobile App must be made accessible, (E.R. 425, Prayer, ¶4) (praying ***12** for judgment including a "permanent injunction requiring Defendant to take the steps necessary to make Dominos.com readily accessible to and usable by blind and visually-impaired individuals"). Given that Dominos was on notice as early as 1996 that the Website was subject to the ADA and because Robles seeks only that the Website and Mobile App be made accessible, due process principles are not implicated. See e.g. *D&B Order* at *4 [RJN 1]; *Principal Deputy Assistant Attorney General for Civil Rights Samuel R. Bagenstos Testimony Before House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties*, April 22, 2010 [RJN 2]. Further, Robles references WCAG 2.0 as "well-established guidelines for making websites accessible (E.R. 413, Compl., ¶ 21) and as one means of making a website accessible (E.R. 419-420, Compl., ¶ 43), but does not seek to implement it, or mention it, in his prayer for relief. (E.R. 425-426, Prayer, ¶¶ 1-10). As such, any opinion that Dominos' due process challenge is "meritorious" is premature and to find to the contrary the District Court "puts the cart before the horse". *D&B Order* at *4, quoting *CVS Order* [RJN 1].

E. THE DISTRICT COURT ERRED WHEN IT GAVE "LITTLE OR NO DEFERENCE" TO THE DOJ'S INTERPRETATION OF ITS OWN REGULATIONS REGARDING WEBSITE ACCESSIBILITY DESPITE THIS COURT'S HOLDING THAT A STATEMENT OF INTEREST BY THE DOJ IN AN ADA CASE IS ENTITLED TO DUE DEFERENCE AND RESPECT

Because the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District ***13** Court's references to violations of due process in its Order are dictum. Further, because the District Court's due process concerns were motivated by its misinterpretation of the allegations of the complaint - that Mr. Robles sought to impose WCAG guidelines on all "regulated persons and entities" - when he did not, the questions raised by Domino's due process concerns need not be addressed by this Court.

But should the Court reach them, the position of the DOJ on these issues should be afforded due deference and respect according to the binding authority of this court. In Dominos the District Court stated, "the Court concludes that little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation with regulated entities." (E.R, 008, Order of 3/20/17 at *8; ECF #42.) That is wrong. The published Ninth Circuit decision, *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012), makes this clear because in that decision, the Ninth Circuit relied on the DOJ's Statement of Interest in an ADA case (involving Title II) as entitled to deference and "respect" and compared the Statement of Interest "to an amicus brief because of its interest in ensuring a proper interpretation and application of the [ADA] mandate." 697 F.3d at 735. It added, "DOJ's interpretation is not only reasonable; it also better effectuates the purpose of the ADA 'to provide clear, strong, consistent, enforceable standards addressing ***14** discrimination against individuals with disabilities."' Id. (citing 42 U.S.C. § 12101(b)(2)).

F. GIVEN THAT THE DISTRICT COURT APPLIED THE PRIMARY JURISDICTION DOCTRINE, THE DISTRICT COURT'S REFERENCES TO THE TELEPHONE SERVICE AFFIRMATIVE DEFENSE ARE DICTUM, AND DOMINOS' LACKS ADMISSIBLE EVIDENCE TO PROVE EVEN MINIMALLY EFFECTIVE COMMUNICATION.

The auxiliary aid provision of the ADA, 42 U.S.C. § 12182(a)(2)(A)(iii), which requires that a public accommodation provide an auxiliary aid to ensure disabled individuals are not excluded, denied services, segregated, or otherwise treated differently, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden, "allows a public accommodation to provide the information in any format, so long as it results in effective communication."

The only evidence Dominos submitted in support of its motion (a single page declaration) is conclusory and does not provide any information to determine whether the telephone is even minimally effective to guarantee the "full and equal enjoyment" that an accessible website would deliver. (E.R. 067-069). Without such findings showing that Defendant met *its burden* (Dominos offered no evidence for the court to even consider with respect to this burden), Defendant cannot prevail in invoking its affirmative defense under ***15** 42 U.S.C. § 12182(a)(2)(A)(iii). Of critical importance here, and dispositive of the issue for Dominos, the Declaration of Mandi Galluch also fails to allege that the Domino's "accessibility banner" presented on the Website is accessible to screen reader users. This alone constitutes a triable issue of material fact and precludes summary judgment for Dominos.

VII. ARGUMENT

A. THE DISTRICT COURT ERRED WHEN IT TREATED THE ALLEGATIONS OF THE COMPLAINT AS AN EFFORT TO "IMPOSE ON LL REGULATED PERSONS AND ENTITIES A REQUIREMENT THAT THEY "COMPL[Y] WITH THE WCAG 2.0 GUIDELINES", DESPITE THE CLEARLY PLED ALLEGATIONS OF THE COMPLAINT PRAYING ONLY FOR EQUAL ACCESSIBILITY

In its March 20, 2017, Order, the District Court proclaimed that Mr. Robles request for injunctive relief "flies in the face of due process" because Mr. Robles "seeks to impose on all regulated persons and entities a requirement that they 'compl[y] with the WCAG 2.0 Guidelines' without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic" (E.R. 008). The District Court incorrectly transformed Mr. Robles' request from (1) a recommendation that Dominos uses WCAG guidelines and compliance to fix its inaccessible website, into (2) an inflexible demand to impose WCAG guidelines as the legal standard that implicates due process. But as plainly set forth in the Prayer and Causes of Action of the Complaint, Mr. Robles seeks "full and equal access" to the Website and Mobile App with no mention of WCAG. (E.R. 425 ***16** -426, Prayer, ¶¶ 1-10). The District Court therefore erred, misclassified the Complaint and the remedy Mr. Robles sought, and failed to assess evidence read in the "light most favorable to the nonmovant." *See Mankaruse v. Raytheon Co.*, 2016 WL 7324154, at *2 (C.D. Cal. Dec. 8, 2016) (Selna, J.). "The moving party has the initial burden of establishing the absence of a material fact for trial." Id. (citing *Anderson v. Liberty Lobby, Inc., All* U.S. 242, 256 (1986)).

1. *The District Court's Analysis Misclassified The Complaint And Flows From A False Premise*

The Complaint seeks compliance with the ADA's equal access and effective communication requirements (E.R. 409-410, Introduction, ¶¶ 1-5). It explains in detail Mr. Robles' efforts to access the Website (E.R. 410-411, Parties, ¶¶ 10-12) and refers to "well-established guidelines for making websites accessible" to the blind and visually impaired and also describes in general terms common barriers to access found on websites and apps that do not comply with the law. (E.R. 413, ¶¶ 21-23). The Complaint alleges it is Dominos' policy to deny access to the blind and visually impaired by not removing barriers to access on the Website. (E.R. 415-416, ¶¶ 26-29). Mr. Robles alleges that because Dominos could make the Website accessible, Dominos discriminates by continuing to operate its Website. (E.R. 418-419, ¶¶ 36-38). Mr. Robles then asks the District Court, because the Dominos Website has never been accessible, to order Dominos to comply with the ADA. (E.R. 419-420, ¶ 43). Mr. Robles request is made, not because he alleges ***17** that Domino's failure to abide by the WCAG 2.0 guidelines by violates the law, but because doing so is one means of making the website equally accessible. This is made clearer when read together with the sections of the Complaint setting forth the Causes of Action and in the Prayer for Relief where Mr. Robles seeks only "full and equal access" to the Website and Mobile App and does not mention WCAG. (E.R. 425-426, Prayer, ¶¶ MO).

The District Court's treats the Complaint as requiring compliance with WCAG 2.0 because, ostensibly, Mr. Robles asserts it is the law (he does not) as opposed to requiring equal access and suggesting WCAG 2.0 as a means of accomplishing equal access (he does), which led the District Court far afield into a discussion of whether imposing WCAG 2.0 "on all regulated persons and entities" would offend due process principles and culminating in the dismissal of the Complaint. In fact, this is a straightforward claim that Dominos failed to provide disabled individuals full and equal enjoyment of goods and services offered by its physical stores by not maintaining a fully accessible website. Moreover, the District Court's approach contravenes this Court's guidance to "construe the language of the ADA broadly to advance its remedial purpose." *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014).

2. *If the District Court Had Drawn Inferences In Favor Of Mr. Robles. As Required At This Stage, It Would Have Reached An Opposite Conclusion*

***18** If this reading of the Complaint is not clear, it can certainly be reached by making the type of plausible inference that should be drawn in favor of the non-moving party in the context of a motion to dismiss. "All reasonable inferences from the facts alleged are drawn in plaintiff's favor in determining whether the complaint states a valid claim." *Barker v. Riverside County Office of Education*, 584 F.3d 821, 824 (9th Cir. 2009) ("we must draw inferences in the light most favorable to the plaintiff') (. "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiffs complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). "Plaintiffs complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiffs explanation is implausible." *Id.*

B. THE DISTRICT COURT ERRED WHEN IT DISMISSED EACH OF MR. ROBLES' CAUSES OF ACTION PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE

The issue presented by Dominos' motion to dismiss on primary jurisdiction grounds is one of liability - not relief. To decide liability, the District Court did not have to master complicated web standards, but rather needed to make exactly the same sort of accessibility determinations that courts regularly make when evaluating the accessibility of physical locations. See *D&B Order* at *7 [RJN 1]. For this reason, and because a finding of liability regarding the Website's ***19** compliance with the ADA does not require sophisticated technical expertise beyond the ability of the Court, the primary jurisdiction doctrine is inapposite in this case. [2]

1. *AMC Entertainment Does Not Require Dismissal*

As the foundation for its due process and primary jurisdiction discussion, the District Court cites *United States v. AMC Entertainment, Inc.*, 549 F. 3d 768 (9th Cir. 2008) and states that it "finds AMC to be squarely on point" (E.R. 008). The District Court is mistaken. At issue in *AMC* was ambiguity between the meaning of "lines of sight," which resulted in conflicting positions between district courts in different circuits. The DOJ eventually took a position in the form of an amicus brief in *Lara v. Cinemark USA, Inc.* after district courts had taken respective positions. *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, at *2 (W.D. Tex.Aug. 21, 1998), rev'd, 207 F.3d 783 (5th Cir. 2000). The DOJ then brought a lawsuit against AMC arguing AMC was required to **retrofit theaters, including those built *before the DOJ's amicus brief*** in *Lara*, which the Ninth Circuit reversed on due process grounds. *AMC Entertainment, Inc.*, 549 F. 3d. at 770. The *AMC* court found that as little as the filing of an amicus brief in separate litigation by the DOJ ***20** could provide adequate prospective notice of prohibited conduct. Id. at 770. In so doing, the court observed that, "[d]ue process requires that the government provide citizens and other actors with sufficient notice as to what behavior complies with the law." *AMC*, 549 F. 3d at 768. The *AMC* court's decision turned on the notice provided to AMC in the *Lara* amicus brief and the violation of due process found by the Ninth Circuit related only to pre-Lara amicus brief retrofit requirements. The distinction between *AMC* and Dominos here is that AMC did not have notice to satisfy due process for theaters built *before* the amicus brief, while Dominos had notice of the ADA's basic mandate that commercial websites must be accessible to the disabled, since as early as 1996 (See Part IV.C.l infra).

The Court's due process concerns in *AMC* were motivated in part by the theater chain receiving "pre-and post-construction approval for their stadium-seating theaters from multiple states, whose own programs had been certified by the DOJ as 'meeting or exceeding' the federal requirements promulgated by the Access Board." *AMC*, 549 F.3d at 769 n.3. Here, however, there is no evidence that Dominos has had its website certified as accessible by any government entity. Nor was there any evidence that Dominos.com was created before 1996, when DOJ made clear that the ADA applied to websites, or that Dominos' website has not been altered since then.

***21** Nor did the 9th Circuit disturb the district court's finding of liability in *AMC*. Id. at 767 n.2. Instead, the due process holding concerned only the court's remedial relief. In explaining its due process concerns, this 9th Circuit focused heavily on the evidence of how costly it would be for the defendant to retrofit its theaters. Id. at 767-68. In contrast, the District Court dismissed this case at the pleadings stage, where liability is to be established. If there were any due process concerns in this case akin to those in *AMC* which there are not, they would not surface until the Mr. Robles prevailed on the merits and the District Court was considering the scope of injunctive relief. *AMC* provides no support for dismissal at the pleadings stage on due process grounds (or relatedly pursuant to primary jurisdiction because of due process concerns). See *Fortyime v. City of Lomita*, 766 F. 3d 1098, 1106 n.13 (9th Cir. 2014) (explaining that "further consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed").

2. *The District Court Inappropriately Invoked The Primary Jurisdiction Doctrine*

Primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). It "allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." ***22** N. *Cnty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1162 (9th Cir. 2010). It may be employed when a case "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Syntek Semiconductor Co. v. Microchip Tech.*, Inc., 307 F.3d 775, 789 (9th Cir. 2002). It "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision making responsibility should be performed by the relevant agency rather than the courts." *Id.*

Primary jurisdiction, however, does not "require that all claims within an agency's purview ... be decided by the agency." *Brown v. MCI WorldCom Network Sen's.*, 277 F.3d 1166, 1172 (9th Cir. 2002). It is not used to "secure expert advice" from agencies "every time a court is presented with an issue conceivably within the agency's ambit." Id. Courts must determine "whether any set of facts could be proved which would avoid application of the doctrine." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1088 (9th Cir. 2006); *See also* *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1252 (9th Cir. 2009). There is no case law suggesting that a court should abdicate its responsibility to apply and enforce existing law because of anticipated regulations that would set forth specific technical standards. To be sure, a stay based on the possibility that the DOJ may at some unknown, future time adopt new regulations would deprive disabled individuals of relief from discriminatory conditions addressed by existing law.

***23** Courts look to four factors to decide whether to apply primary jurisdiction: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." Id. at 1086-87. If the primary jurisdiction doctrine applies, the case is "referred" to the DOJ. *Syntek*, 307 F.3d at 782 n.3. There is no formal transfer mechanism, rather "the parties are responsible for initiating the appropriate proceedings before the agency." *Id.* "In practice, it means that a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies." *Id.*

Turning to the four factors courts traditionally consider in primary jurisdiction cases, the Court is guided by a combination of factors one and two, as well as factor four. Invoking primary jurisdiction would not send the parties to the DOJ to "initiat[e] the appropriate proceedings before the agency," and the parties cannot "pursue their administrative remedies." *Syntek*, 307 F.3d at 782 n.3. The parties have no administrative remedies to pursue. Rather, the parties would be forced to wait for an administrative rulemaking process to conclude. The parties are not direct participants in the DOJ rulemaking process. They have no ability to impact that process beyond the general public right to comment.

***24** While the DOJ is responsible for issuing ADA regulations, Courts routinely decide the extent to which accommodations are required under the ADA and when such accommodations constitute an undue burden. Further, Congress has not provided a mechanism for the DOJ to resolve disputes regarding undue burden. The DOJ cannot resolve the parties' dispute before this Court. Although the DOJ is responsible for issuing regulations for the ADA, this alone does not invoke primary jurisdiction. *Brown*, 277 F.3d at 1172 (primary jurisdiction does not "require that all claims within an agency's purview ... be decided by the agency."). The Court need not "secure expert advice" from DOJ "every time a court is presented with an issue conceivably within the agency's ambit." *Id.* [3]

***25** Referral to the DOJ will not resolve the question presented in this case: to what extent, if at all, the ADA and Unruh Act require Dominos to provide effective communication to blind and visually-disabled persons with respect to its Website and Mobile App and what constitutes effective communication. If and when the DOJ issues a final rule, the Court must still determine at what point, if at all, remediating the website imposes an undue burden on Dominos. This stands in contrast to *Syntek*. In *Syntek*, the plaintiff asserted the defendant's copyright registration was invalid. *Syntek*, 307 F.3d at 781. The *Syntek* court found it "important to note" the plaintiff sought a declaratory judgment that the defendant's copyright registration was invalid, not that the copyright itself was invalid. *Id.* at 781. As such, the "resolution of the question at hand require[d] an analysis of whether the agency acted in conformance with its own regulations when it granted the registration." *Id.* "[A] declaration of registration invalidity ... is indistinguishable from the remedy of copyright registration cancellation." *Id.* at 781. The Copyright Office has statutory authority to cancel a registration and therefore provided "an administrative remedy for the relief which [the plaintiff sought]." *Id.* Thus, in *Syntek*, the parties were direct participants in an administrative procedure capable of resolving the parties' dispute. The Ninth Circuit applied primary jurisdiction to refer the matter to the Copyright Office. *Id.*

***26** Unlike the Copyright Office in *Syntek*, the DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute. The absence of such an administrative process argues against referral to an agency under the primary jurisdiction doctrine. *Compare* *Rosado v. Wyman*, 397 U.S. 397, 406 (1970) (refusing to apply primary jurisdiction doctrine where a Department of Health Education and Welfare "has no procedures whereby recipients may trigger and participate in the department's review of state welfare programs."), and *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) Again, the parties cannot initiate and directly participate in an administrative process that will resolve their dispute.

As set forth in the Complaint and Mr. Robles' evidence supports, there are barriers on the Website that prevent Plaintiff from full and equal access to the services and privileges offered by Defendant's website that are violations of title III ADA and the Unruh Civil Rights Act (E.R. 410-411, ¶¶ 10-12). It is further undisputed that the ADA applies to commercial websites (75 *Fed. Reg. 43460-01* (July 6, 2010)) and the Ninth Circuit has adopted this position. *See* *Target*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) ("Commercial websites that are not accessible for blind and visually-impaired individuals using screen-readers and keyboards only, violate [the] basic mandate of the ADA."); *Shields*, 279 F.R.D. 529 (C.D. Cal. 2011) ("The lack of a widely accepted standard for website accessibility does not preclude ***27** injunctive relief that would improve access to Defendants' websites by the visually impaired.")

3. *Referral To The DOJ Does Not Promote Efficiency And Would Prejudice Individuals With Disabilities*

The District Court did not apply or make any findings as to whether the primary jurisdiction factors to determine whether a stay or referral of the issue to the DOJ is appropriate, or even possible. Efficiency, the "deciding factor in determining whether the primary jurisdiction doctrine should apply," *Reid v. Johnson & Johnson*, 780 F.3d 952, 967 (9th Cir. 2015), weighs heavily against dismissal on primary jurisdiction grounds. Accordingly, the District Court incorrectly applied the primary jurisdiction doctrine.

In sum, the District Court erred by dismissing this case pursuant to primary jurisdiction because: (1) As noted *supra*, this issue is not a complicated question of first impression; (2) Courts routinely decide these kinds of cases involving accommodations and undue burden; (3) Referral to the DOJ is not needed to obtain agency experience or to ensure uniformity in administration. As discussed *infra*, through many consent decrees and settlement agreements, DOJ has already made clear its position that a covered entity can ensure that its website provides equal access to individuals with disabilities by adhering to WCAG 2.0 level AA; (4) There is no administrative proceeding to which the Court can refer the parties, the parties will not directly participate in DOJ's rulemaking, and DOJ is incapable of resolving ***28** the parties' dispute. Individuals with disabilities can only seek a remedial order from the courts. See *Arizona ex rel. Goddard*, 2011 WL 13202686, at *3 (reasoning that because "DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute," dismissal under the primary jurisdiction doctrine would be inappropriate); [4] and (5) As of July 20, 2017, DOJ is prohibited from issuing a final rule and has published the fact of its abandonment of efforts to do so. [5]

C. THE DISTRICT COURT ERRED WHEN IT DETERMINED (IN DICTA) THAT DOMINO'S DUE PROCESS CHALLENGE TO THE COMPLAINT WAS "MERITORIOUS," GIVEN THAT THIS IS A QUESTION OF REMEDY, NOT LIABILITY, AND NO SPECIFIC REMEDY BEYOND ACCESSIBILITY IS SOUGHT IN MR. ROBLES' PRAYER FOR RELIEF

***29** Although the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District Court made references to violations of due process in its Order. (E.R. 001-012) However, in the Complaint and the Prayer for relief Mr. Robles seeks only that the Website and Mobile App must be made accessible, (E.R. 425-426, Prayer, ¶¶ 4-5) (praying for judgment including a "permanent injunction requiring Defendant to take the steps necessary to make Dominos.com readily accessible to and usable by blind and visually-impaired individuals"). Given that Dominos was on notice as early as 1996 that the Website was subject to the ADA and because Robles seeks only that the Website and Mobile App be made accessible, due process principles are not implicated. See e.g. *D&B Order* at *4 [RJN 1].

Further, Mr. Robles references "well-established guidelines for making websites accessible" (E.R. 413, Compl., ¶ 21), but does not seek to implement any particular standard, or mention one, in his prayer for relief. (E.R. 425-426, Prayer, ¶¶ 1-10).

As such, any opinion that Dominos' due process challenge is "meritorious" is premature and to find to the contrary the District Court "puts the cart before the horse". *D&B Order* at *4, citing *CVS Order* [RJN 1]. Dominos' due process argument relates only to the remedies that may be imposed ***later*** in the case, should Mr. Robles prevail. ***30** *Fortyune v. City of Lomita*, 766 F. 3d 1098 (9th Cir. 2014) (denying appeal of district court's refusal to grant motion to dismiss on due process grounds) at FN. 13 ("Any further consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed. *See* AMC, 549 F. 3d at 768 -70.

1. *The General Mandate Of The ADA And Website Accessibility Since 1996*

When faced with a lack of specific scoping regulations, as is the condition here, courts have commonly held that the general accessibility mandate of the ADA applies to websites. The general rule of Title III states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Thus, in circumstances closely akin to those of Mr. Robles here - where the DOJ has not yet promulgated a final rule governing the technical aspects of accessibility - courts have sustained the cause of action under the general accessibility mandate of the ADA set forth above. [6]

***31** In *Gorecki v. Hobby Lobby Stores, Inc., No. 2;17-cv-01131-JFW-SK, 2017 WL 2957736, at *4-*6 (C.D. Cal. June 15, 2017) (Walter, J.) ("Hobby Lobby Order")* the Court discusses that due process notice Title III applies to websites existed as early as 1996:

The department's position "that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services" was also discussed at length in 2000 at a congressional hearing regarding the ADA's applicability to private websites. *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm.* On the Constitution of the H. Comm, on the Judiciary, 106th Cong. 8 (2000)

A number of witnesses from the public and private sectors, including computer programmers, professors, lawyers, and executive officers appeared at the hearing. The witnesses universally acknowledged that the DOJ had taken the position in 1996 that the ADA applies to websites and that it was "beyond dispute" that the ADA applies to places that meet the definition a of public accommodation and their online publications. [Id at 114]. One speaker noted, "[a]lthough we know that the ADA does apply to a wide variety of private websites, no one has a very clear idea of what compliance may entail. It will be natural for litigants and courts, however, to look to what accessibility standards have been published with official support in deciding whether private sites are in compliance." Id.

Hobby Lobby Order at *5; Id. at FN.3.

The *Hobby Lobby* court therefore concluded that "the lack of regulations does not eliminate [the] obligation to comply with the ADA or excuse [the] failure to comply with the mandates of the ADA." *Hobby Lobby Order* at *4. ***32** (emphasis added). Additionally, To the extent the 2010 ANPRM seeks to clarify existing obligations under the ADA to maintain accessible websites, those clarifications are best read as interpretations of existing and currently effective rules and not as legislative rules. [7]

2. *Shields v. Walt Disney Parks and Resorts US Supports Mr. Robles' Position*

In published decision, *Shields v. Walt Disney Parks and Resorts US, Inc.*, 279 F.R.D. 529(C.D. Cal. 2011), the plaintiffs prevailed on a contested motion for class certification involving a website class comprised of visually impaired individuals. Significantly, the district court in Shields rejected as "unpersuasive" Disney's argument that "there is no accepted accessibility standard" and the argument that the DOJ has yet to determine what standards to apply to websites. Significantly, the district court stated, **"The lack of a widely accepted standard for website *33 accessibility does not preclude injunctive relief that would improve access to Defendants' websites by the visually impaired."** Id. at 559 (emphasis added.) That case was resolved via a class action settlement in which Disney agreed to follow WCAG 2.0 AA to resolve the matter.

3. *Reed v. CVS Order Supports Mr. Robles' Position*

On October 3, 2017, in case similar to here, the United States District Court Central District of California denied a motion to dismiss, holding (1) that Title III of the ADA applies to a website and mobile application where there is a "nexus" between its online offerings and its physical space (2) defendant had sufficient notice to meet the requirements of due process "because the DOJ has made it abundantly clear that websites fall under Title Ill's requirements" [8] and (3) the primary jurisdiction doctrine is inappropriate because a "determination of liability does not require the Court to master complicated web standards, but rather asks the Court to make exactly the same sort of accessibility determinations that it regularly makes when evaluating the accessibility of physical locations." See *CVS Order* [RJN 3],

***34 4. *Gorecki v. Dave & Buster's* Order Supports Mr. Robles' Position**

On October 10, 2017, in another web access case similar to the case here, the United States District Court Central District of California denied a motion for summary judgment, holding (1) defendant "had sufficient notice to meet the requirements of due process" and "[a]lthough the eventual remedy in this case might raise the specter of due process concerns, liability does not amended complaint to satisfy the requirements of due process," (2) "[b]ecause a finding of liability regarding the Website's compliance with the ADA does not require sophisticated technical expertise beyond the ability of the Court, the primary jurisdiction doctrine is inapposite in this case," (3) a triable issue as to ADA compliance exists because "[b]ased on the scant evidence presented in the papers the Court cannot conclude that D&B's website guarantees 'full and equal enjoyment'" and (4) plaintiff "needs neither to plead nor to prove intentional discrimination" to state a viable Unruh Act claim. See *D&B Order* (denying motion for summary judgment, or to dismiss, or in the alternative to stay virtually identical to the motion granted by the District Court in Dominos and authored by the same defense counsel.) [RJN 1].

5. *Andrews v. Blick* Order Supports Mr. Robles' Position

***35** On August 1, 2017, Eastern District Court Judge Weinstein issued a lengthy 3 8-page order that, among other points, rejected the primary jurisdiction argument on the basis that it is the court's job to interpret and apply statutes and regulations and the risk of inconsistent rulings is outweighed by plaintiffs right to prompt adjudication of his claim. *Andrews v. Blick Art Materials, LLC*, F. Supp. 3d, No. 17-CV-767, 2017 WL 3278898, at *17-18 (E.D.N.Y. Aug. 1, 2017). [RJN 6] The Blick court rejected the defendants' due process arguments, stating that no standard set by statute or regulation is needed for the ADA's requirements of "reasonable modifications," "auxiliary aids and services," and "full and equal enjoyment" to apply to website accessibility. Id at *17; 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii). "Blick does not point to any word or term that is unconstitutionally vague. A statute's use of the word "reasonable" and similar terms Is not constitutionally problematic." Id. The *Blick* court rejected defendants' invocation of the District Court ruling in *Dominos* stating:

"The defendant's principal complaint appears to be that it wants there to be black-and-white rules for ADA compliance, and here, there may be shades of gray. But the anti-discrimination provisions the defendant is accused of violating are not simple checklists of clear-cut rules - they are standards that are meant to be applied contextually and flexibly. The "gray" the defendant complains of is a feature of the Act." Id.

The *Blick* court also discussed the long history of the Justice Department's website accessibility rulemaking efforts before concluding that "t[]he court will not ***36** delay in adjudicating [plaintiffs] claim on the off-chance the DOJ promptly issues regulations it has contemplated issuing for seven years but has yet to make significant progress on." Id.

6. The *Gil v. Winn-Dixie Stores. Inc.* Verdict Supports Mr. Robles' Position

In *Gil v. Winn-Dixie Stores, Inc., No. CV 16-23020-CIV, 2017 WL 2547242, at *9 (S.D. Fla. June 12, 2017)*, the court held, after completing a full bench trial, that a defendant Winn-Dixie violated Title III of the ADA by having an inaccessible website. In Winn-Dixie's briefing throughout the case (it filed and lost a MJOP) and in pre-trial filings, Winn-Dixie specifically argued that "without federal regulations in place, there is no clear guidance to a business entity as to what is required for website accessibility." (Joint Pretrial Stip. of 3/17/17 at 3; ECF #34.) [RJN 7] Winn-Dixie argued that it "is not required to design its website specifically to integrate with screen reader software under current federal law." Id. Winn-Dixie argued that "under current ADA statutes and regulations, websites are not places of public accommodation." Id. Also, Winn-Dixie's Proposed Findings of Fact and Conclusions of Law asserted, "The DOJ has not issued any accessibility guidelines for internet websites." (Def.'s Prop. FF/CL at 7; ECF #39.) [RJN 8] Winn-Dixie also asserted in that filing, "[Plaintiff's] requested modification of Winn-Dixie's website is not reasonable or readily achievable because no legal standards exist for website accessibility ...." Id. In addition, ***37** Winn-Dixie's Answer alleged as the seventh affirmative defense failure to state a claim because "current federal law does not require Winn-Dixie to implement the policies and procedures demanded by Plaintiff." (Answer at 8; ECF #7.) [RJN 9] Further, Winn-Dixie's unsuccessful MJOP argued that the DOJ "has not promulgated any rules or regulations to govern website accessibility." (MJOP at 3; ECF #15.) [RJN 10] Winn-Dixie's Reply In Support of MJOP expressly argued that the DOJ had not issued any final or even proposed regulations in response to the DOJ's 2010 issuance of an Advance Notice of Proposed Rulemaking ("ANPRM"). (Reply ISO MJOP at 6-7; ECF #19.) [RJN 11] The foregoing amply demonstrates that the yet another court was presented with the argument that the DOJ has not promulgated any specific website standards, but was not persuaded.

D. THE DISTRICT COURT ERRED WHEN IT GAVE "LITTLE OR NO DEFERENCE" TO THE DOJ'S INTERPRETATION OF ITS OWN REGULATIONS REGARDING WEBSITE ACCESSIBILITY DESPITE THIS COURT'S HOLDING THAT A STATEMENT OF INTEREST BY THE DOJ IN AN ADA CASE IS ENTITLED TO DUE DEFERENCE AND RESPECT

Because the District Court granted Domino's motion to dismiss the action "without prejudice" based upon the primary jurisdiction doctrine, the District Court's references to violations of due process in its Order are dictum. Further, because the District Court's due process concerns were motivated by its misinterpretation of the allegations of the complaint - that Mr. Robles sought to impose WCAG guidelines on all "regulated persons and entities" - when he did ***38** not, the questions raised by Domino's due process concerns need not be addressed by this Court. But should the Court reach them, the position of the DOJ on these issues should be afforded deference and respect according to the binding authority of this Court.

1. *Ninth Circuit Cases Support Mr. Robles' Position*

In Dominos, the District Court stated, "the Court concludes that little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation with regulated entities." (E.R. 008, Order of 3/20/17 at 8; ECF #42.) That is wrong. An agency's interpretation of its own regulations is entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The published Ninth Circuit decision, M.7. v. Dreyfus, 697 F.3d 706, 735 (9th Cir. 2012), makes this clear. In that decision, the Ninth Circuit relied on the DOJ's Statement of Interest in an ADA case (involving Title II) as entitled to deference and "respect" and compared the Statement of Interest "to an amicus brief because of its interest in ensuring a proper interpretation and application of the [ADA] mandate." 697 F.3d at 735. It added, "DOJ's interpretation is not only reasonable; it also better effectuates the purpose of the ADA 'to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."' Id. (citing ***39** 42 U.S.C. § 12101 (b)(2)). [9] Given the deference and respect required of the positions take by the DOJ in litigation with regulated entities and the fact that the DOJ has consistently required that commercial website owners and operators ensure that their websites conform to at least WCAG 2.0 Level AA Success Criteria, under appropriate circumstances, such as seeking to make a website accessible, it would not present an issue of due process for the District Court to require Dominos website to meet at least WCAG 2.0 Level AA Success Criteria. *See, e.g., National Fed. of the Blind, et al. v. HRB Digital LLC, et al.*, No. 1:13-cv-10799-GAO, Consent Decree [ECF #60 at pg. 5] (D. Mass. Mar. 24, 2014) ("By January 1, 2015, H&R Block shall ensure that www.hrblock.com ... conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level A and AA Success Criteria ("WCAG 2.0 AA").") [RJN 4]. [10]

Judge Walter in *Hobby Lobby Stores, Inc.*, Case No. 2:17-cv-01131-JFW-SK (June 15, 2017) (ECF #47) at p.4 fn 2 [RJN 12], in a similar web access case also stated, "Congress delegated authority to promulgate regulations to implement Title ***40** III to the DOJ. 42 U.S.C. § 12186(b). The DOJ also has authority to issue technical assistance for compliance with the ADA and to seek enforcement of its regulations in federal court. See 42 U.S.C. §§ 12186(b), 12188(b), 12206. ***Accordingly, the DOJ's interpretations of the ADA are entitled to substantial deference***(citing *Auer v. Robbins*, 519 U.S. 452, 463 (1997); *Chevron U.S.A., Inc. v. Natural Res. Def Council, Inc.*, 467 U.S. 837, 844 (1984).) (emphasis added)

2. ***The DOJ's Many Statements of Interest And Consent Decrees Consistently Enforced and Endorsed Commercial Websites To Conform To At Least WCAG 2.0 Level AA Success Criteria***

The DOJ has consistently stated that the general accessibility mandate of the ADA applies to websites, irrespective of whether rulemaking is still underway:

On July 26, 2010, the Department issued an Advanced Notice of Proposed Rulemaking ("ANPRM") on Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations. The Department explained in the ANPRM that although the Department has been clear that the ADA applies to websites of public accommodations, inconsistent court decisions, differing standards for determining web accessibility, and repeated calls for Department action warranted further guidance.

While the regulatory process may not have proceeded as quickly as Defendant expects, it is still very much ongoing.... The fact that []the regulatory process is not yet complete does not support any inference whatsoever that web-based services are not already covered by the ADAf or should not be covered by the ADA.

(Statement of Interest of the United States, *National Association of the Deaf v. Netflix, Inc.*), at 11-12 (emphasis added). *See also New v. Lucky Brand Dungarees* ***41** *Stores, Inc.*, Statement of Interest of the United States, Case No. 14-CV-20574, at 7 (S.D. Fla.) (filed Apr. 10, 2014)("[T]he Department has long considered websites to be covered by title III despite the fact that there are no specific technical requirements for websites currently in the regulations or ADA standards[.]"); Consent Decree, *Natl Fed. of the Blind, et ah, United States of America v. HRB Digital LLC and HRB Tax Group, Inc.*, No. 1:13-cv-10799-GAO, ¶ 3 (D. Mass)

(entered Mar. 25, 2014). *See also* Statement of Interest of the United States, *Juan Carlos Gil v. Winn-Dixie Stores, Inc.*, Civil Action No. 16-23020 (S.D. Fla.) (ECF #23) at 5 ("[T]he goods and services of a public accommodation provided via website are covered by the ADA.") [RJN 13]

When the DOJ first intervened as a plaintiff in a lawsuit against H&R Block, the DOJ sought injunctive relief to make the website, mobile app, and online tax prep tool accessible to all persons with disabilities. H&R Block settled with a very detailed consent decree in which it agreed to make its website, mobile app, and online tax preparation tool accessible to individuals with disabilities, using WCAG version 2.0 Level AA. Consent Decree, HRB Digital LLC, No. 1:13-cv-10799-GAO (D. Mass. Mar. 25, 2014) (ECF #60) [RJN 4] (*available* at https://www.ada.gov/hrb-cd.htm)

In Dominos, the District Court's characterization of the H&R Block Consent Decree (E.R. 010, Order of 3/20/17 at 10; ECF #42.) is flawed and does not support ***42** its conclusions. The District Court initially acknowledges that such consent decree requires conformance to "Level A and AA Success Criteria." That part is accurate. In the next paragraph, however, it claims that that same consent decree "obligated the defendants to instead comply with WCAG 2.0 Level AA **or** Level A Success Criteria." Id. (emphasis added) That is mistaken insofar as it is construing the consent decree to mean that defendant H&R Block in that consent decree can choose between Level A or Level AA for a particular guideline. This is implausible given the reality of how the WCAG 2.0 is actually written. If one reads the WCAG 2.0, each guideline is either Level A, Level AA, or Level AAA. Each level above the last encompasses all of the Success Criteria of the prior level:

Level A: For Level A conformance (the minimum level of conformance), the Web page satisfies all the Level A Success Criteria, or a conforming alternate version is provided.

Level AA: For Level AA conformance, the Web page satisfies all the Level A and Level AA Success Criteria, or a Level AA conforming alternate version is provided.

Level AAA: For Level AAA conformance, the Web page satisfies all the Level A, Level AA and Level AAA Success Criteria, or a Level AAA conforming alternate version is provided."

"The first requirement deals with the levels of conformance. It basically says that all information on a page conforms or has a conforming alternate version that is available from the page. The requirement also explains that no conformance is possible without at least satisfying all of the Level A Success Criteria." *See* Web Guidelines 2.0 at 19-20. (RJN 14)

***43** Insofar as the H&R Block Consent Decree required both Level A and Level AA, the redundancy to include both levels is to clarify that H&R Block is not to use a conforming "alternate version," but the Level AA Success Criteria that encompasses both Levels A and AA. The Dominos Order makes it seem as if H&R Block had a choice, when, in reality, there was no choice. The District Court's analysis therefore creates ambiguity where none exists.

An important effect of the H&R Block Consent Decree, and all others to promote civil rights, are their continuing enforceability. This begs the question: Did the DOJ act beyond its agency authority or "ultra vires" by entering into the H&R Block consent decree and requiring conformance to WCAG 2.0 AA? Specifically, if H&R Block violates the consent decree, then it could be hauled back to court, and would be required to enforce WCAG 2.0 AA. Taken to its logical conclusion, this necessarily means that the DOJ's H&R Block Consent Decree is an unlawful exercise of the DOJ's authority.

The DOJ has since secured commitments from public accommodations or state and local governments to make their websites and/or mobile apps accessible with an actual or threatened enforcement lawsuit, all of which adopted the WCAG 2.0 AA standard in the form of settlement agreements or consent decrees. [11]

***44** Thus, under the DOJ's explicit guidance, which is entitled to substantial deference and respect, it is clear that:

• Current regulations incorporate specific obligations for effective communication with disabled persons such as the visually impaired;

• The DOJ has consistently relied upon WCAG 2.0 Level AA Success Criteria as an appropriate measure to ensure that commercial websites are accessible to the visually impaired; and

• Until the process of establishing specific technical requirements is complete for certain topics, public accommodations must still comply with title Ill's more general requirements of nondiscrimination and effective communication.

If the DOJ has the legal authority to currently enforce the ADA against owners and operators of commercial websites to ensure that such websites are ***45** accessible to visually-impaired persons as measured against the WCAG 2.0 Level AA Success Criteria, then there is no cogent reason why visually-impaired persons cannot enforce the ADA to address and remedy their own personal harm arising from barriers on commercial websites as measured against the WCAG 2.0 Level AA Success Criteria. [12]

*46 E. GIVEN THAT THE DISTRICT COURT APPLIED THE PRIMARY JURISDICTION DOCTRINE, THE DISTRICT COURT'S REFERENCES TO THE TELEPHONE SERVICE AFFIRMATIVE DEFENSE ARE DICTUM, AND DOMINOS LACKS ADMISSIBLE EVIDENCE TO PROVE EVEN MINIMALLY EFFECTIVE COMMUNICATION.

Although the District Court dismissed the action "without prejudice," the District Court's order addressed Defendant's affirmative defense via the existence of a purported telephone hotline for the visually impaired to call if they encountered problems with Defendant's website. (E.R. 009, Order of 3/20/17 at 9; ECF #42.)

The auxiliary aid provision of the ADA, 42 U.S.C. § 12182(a)(2)(A)(iii), which requires that a public accommodation provide an auxiliary aid to ensure disabled individuals are not excluded, denied services, segregated, or otherwise treated differently, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden, "allows a public accommodation to provide the information in any format, so long as it results in effective communication." *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 952, 956 (N.D. Cal. 2006). The ADA's auxiliary aid provision is an affirmative defense, which exempts public accommodations from ***47** the obligation to provide auxiliary aids or services if doing so would fundamentally change the nature of the good or service, or result in an undue burden. In *Target*, the defendant, Target Corp., raised the telephone service issue via a motion to dismiss, which was denied. The district court in *Target* held:

> "The flexibility to provide reasonable accommodation is an affirmative defense and not an appropriate basis upon which to dismiss the action. After plaintiffs state a claim - by alleging that the website is not accessible to the blind - the burden then shifts to defendants to assert, as an affirmative defense, that they already provide the information on Target.com in another reasonable format (such as over the phone) .... Defendant's challenge is premature and the court declines to dismiss the action on this basis."

Target, 452 F. Supp. 2d at 956.

In addition, a plaintiff's entitlement is to receive auxiliary aids and services that provide "effective communication" under 28 CFR § 36.303(c)(1). That regulation expressly states that the auxiliary aids and services must be provided "in such a way as to protect the privacy and independence of the individual with a disability." 28 CFR § 36.303(c)(l)(ii).

As an initial matter, the District Court's Order failed to address whether or not Defendant had satisfied its burden of showing that requiring Defendant's website to be accessible would "fundamentally" alter the website service offered by Defendant. Similarly, the District Court's Order failed to address whether Defendant had satisfied its burden of showing that providing an accessible website would result in an "undue burden" for Defendant. Without such findings showing ***48** that Defendant met ***its burden*** (Dominos offered no evidence for the court to even consider with respect to this burden), Defendant cannot prevail in invoking its affirmative defense under 42 U.S.C. § 12182(a)(2)(A)(iii).

Furthermore, surely both the "privacy" and the "independence" of the individual with a disability shall be compromised via the telephone service accommodation that Defendant relies upon. The District Court's Order made no findings as to either the "privacy" or the "independence" factors. Thus, the District Court's conclusion that "Plaintiff has failed to articulate why ... Defendant's provision of a telephone hotline for the visually impaired" "does not fall within the range of permissible options afforded under the ADA," (E.R. 009, Order of 3/20/17 at 9; ECF #42.), fails to recognize the obvious deficiency in such alternative service in ensuring the independence of visually-impaired persons. In other words, while non-visually disabled persons are freely able to navigate through Defendant's website privately and independently, Defendant has relegated visually-impaired persons to be subjected to an alternative telephone service that forces such persons to be dependent on Defendant's representative for assistance.

The only evidence Dominos submitted in support of its motion (a single page declaration) is conclusory and does not provide any information to determine whether the telephone is even minimally effective to guarantee the "full and equal enjoyment" that an accessible website would deliver (E.R. 067-069). Nor did ***49** Dominos offer any evidence to overcome its initial burden to show that remedying the Website would be undue burden that requires an alternative. The following excerpts of the Declaration of Mandi Galluch are instructive:
"2. Defendant's website contains an accessibility banner that directs users who access the website with a screen reader with the statement 'If you are using a screen reader and are having problems using this website, please call 800-252-4031 for assistance.' Defendant provides customer support with a live customer service representative through that number twenty-four hours a day,

seven days a week. If a blind or visually impaired individual calls that number, Defendant's representative can provide assistance with Defendant's website."

E.R. 068:12-18

> "6. Customers may also directly call their local Domino's Pizza restaurant to order food, purchase goods, and/or ask questions."

E.R. 069:1-2

Regardless, the fact that individuals with disabilities could somehow overcome barriers to access is not the relevant inquiry. *See* *Baughman v. Walt Disneyworld Company*, 685 F.3d 1131, 1134 (9th Cir. 2012)("Read as Disney suggests, the ADA would require very few accommodations indeed. After all, a paraplegic can enter a courthouse by dragging himself up the front steps ... [a]nd no facility would be required to provide wheelchair-accessible doors or bathrooms, because disabled individuals could be carried in litters or on the backs of their friends...The ADA guarantees the disabled more than mere access to public facilities; it guarantees 'full and equal enjoyment.' 42 U.S.C. § 12182(a).") ***50** (internal citation omitted). Dominos' provision of some manner to avoid the barriers to access on its website is not the relevant inquiry. The relevant question is whether those barriers can be removed in a manner that provides members of the disabled community with full access, equivalent to that enjoyed by persons without disabilities.

When faced with the same hastily added telephone number as part of Dave & Buster's motion for summary judgment (authored by the same counsel as Domino's motion here), District Judge Gutierrez refused to accept it as "effective communication" in the absence of a more fully developed record:

"Gorecki, however, has raised a genuine dispute as to whether the mere existence of the phone line and a receptionist to answer it satisfies the ADA. For example, he notes that D&B 'does not allege this sentence is accessible to screen reader users.' Opp. 22:27-28. Given that the relevant DOJ notice requires an 'accessible alternative,' the Court agrees that the record as it stands is insufficient to address compliance, and so the Court disagrees with D&B that the mere appearance of the phone number on the Website renders Gorecki's claim moot."

See *D&B Order* at 7 [RJN 1].

Of critical importance here, and dispositive of the issue for Dominos, the Declaration of Mandi Galluch also fails to allege that the Domino's "accessibility banner" presented on the Website is accessible to screen reader users. This alone constitutes a triable issue of material fact and precludes summary judgment for Dominos.

***51** In any event, a telephone line is an inadequate substitute for the website as a means of effective communication, particularly given the readily achievable alternative of accessible digital content. Regressing to the telephone line is tantamount to telling Mr. Robles to call and ask for sighted assistance, something that this court has condemned as perpetuating the damaging and undermining stereotype of the helpless disabled person, *Byron Chapman v. Pier 1 Imports* and *Baughman v. Walt Disneyworld* cases:

"'DOJ commentaries - and the ADA itself - refer to an obligation that defendant bears,' the court observed, and the ADA was intended 'to eliminate the stereotype of the helpless disabled person completely reliant on the assistance of able-bodied persons to come to their rescue.' Therefore, the court ruled, accessible facilities 'must be maintained in a condition that allows a disabled person to actually use them.'"

Chapman v. Pier 1 Imports, No. 2:04-cv-01339 (9th Cir. 2015) at *8.

Dominos cannot escape liability by covertly slipping a statement and phone number into its website several months *after* Mr. Robles initiated his action about Dominos' inaccessible website and days before filing its motion (E.R. 157).

VIII. CONCLUSION

In sum, the District Court erred in granting Dominos' motion to dismiss and by dismissing all causes of action pursuant to the primary jurisdiction doctrine. Therefore, Mr. Robles respectfully requests that this Court reverse the District Court's ruling and hold that: (1) The invocation of the primary jurisdiction doctrine is not appropriate because Robles asks the Court only to require Dominos to make ***52** Dominos.com and the Dominos Mobile App readily accessible to and usable by blind and visually impaired individuals and that the Website and Mobile App comply with the ADA - issues requiring no specialized expertise and which arise *only* after liability is adjudicated; 2) That the District Court must respect and defer to statements made by the DOJ through documents filed in the course of litigation with regulated entities and otherwise; and 3) Causes of action 2 and 4 directed at the Domino's Mobile App must be allowed to proceed as they were not addressed anywhere in the Motion and as a consequence they were never properly at issue.

Dated: October 19, 2017
Respectfully Submitted

MANNING LAW, APC

BY: */s/ JOSEPH R. MANNING. JR.*

JOSEPH R. MANNING, JR., ESQ.

ATTORNEYS FOR APPELLANT

*53 STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, undersigned counsel declares that there are no known related cases pending in this Court

Footnotes

1 "Instead, the issue at present is strictly one of liability, and a 'determination of liability does not necessarily require the Court to master complicated web standards, but rather asks the Court to make exactly the same sort of accessibility determinations that it regularly makes when evaluating the accessibility of physical locations."' *D&B Order*, citing *Order Re Motion to Dismiss, Kayla Reed v. CVS Pharmacy, Inc.*, Case No. 2:17-cv-03877-MWF-SK (C.D.C.A. Oct. 3, 2017) (Fitzgerald) ("CPS *Order*") [RJN 2].

2 *See also Gorecki v. Hobby Lobby Stores, Inc.*, No. 2:17-cv-01131-JFW-SK, 2017 WL 2957736, at *6-*7 (C.D. Cal. June 15, 2017) (Walter, J.) (Ruling on similar motion distinguishes the AMC decision as both "factually and procedurally distinguishable.")

3 Despite citing and relying upon the magistrate judge's Report and Recommendation in *Nat 7 Ass 'n of the Deaf v. Harvard Univ., Case 3:15 - cv-30023-MGM, 2016 WL 6540446, at *1-*3 (D. Mass. Nov. 3, 2016) (Mastroianni, J.)* [ECF #50], in *Dominos* the District Court's Order did not address the fact that such magistrate judge elsewhere stated the following in her detailed Report and Recommendation: "[T]here is no inherent reason for concluding that DOJ has any specialized technical expertise regarding internet accessibility. Moreover, the ANPRM counsels the opposite conclusion. In it, DOJ seeks input from "experts in the field of computer

science, programming, networking, assistive technology, and other related fields" to assist it in formulating regulations addressing website accessibility. 75 Fed. Reg. at 43,464. If DOJ had specialized technical expertise, it would not need to solicit it from the outside. Thus, the magistrate judge's analysis in the foregoing decision, which the district court adopted in *Harvard Univ.* stands in stark contrast to the *Dominos* Court's Order. The magistrate judge's reasoning and rationale for not applying the primary jurisdiction doctrine is more persuasive than the *Dominos* Court's analysis, the latter of which completely omitted the foregoing analysis of Magistrate Judge Robertson.

4 See, e.g., *Andrews v. Blick Art Materials, LLC*, - F. Supp. 3d - , 2017 WL 3278898, at *15-* 17 (E.D.N.Y. Aug. 1, 2017) (Weinstein, J.) (Rejecting the same the primary jurisdiction argument, "The court will not delay in adjudicating [plaintiff's] claim on the off-chance the DOJ promptly issues regulations it has contemplated issuing for seven years but has yet to make significant progress on." 2017 WL 3278898, at *17.)

5 On July 20, 2017, the United States issued the Trump Administration's Unified Agenda of Regulatory and Deregulatory Actions, for the first time the Agenda separated regulatory actions into three categories: active, long-term, or inactive. Projected deadlines are published only for active and long-term matters. The Agenda places the DOJ's rulemakings under Title III of the ADA for websites on the 2017 Inactive Actions list indicating no intent to issue regulations now or in the "long-term". This is consistent with the prior Executive Order on Reducing Regulation and Controlling Regulatory Costs. (See 2017 Inactive Actions list at page 8; RIN# 1190-AA61; RIN# 1190-AA65.) [RJN 5] (https: //www. reginfo. go v/public/do/eAgendaMain,); *See* Executive Order on Reducing Regulation and Controlling Regulatory Costs, dated January 30, 2017, (https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling)

6 Notably, the District Court ignored the Ninth Circuit's well-established holding that "**the lack of specific regulations cannot eliminate a statutory obligation**." *Fortyune v. City of Lomita*, 766 F. 3d 1098, 1102 (9th Cir. 2014), *cert, denied*, 135 S. Ct. 2888 (2015) (rejecting a defendant's due process argument that the defendant lacked notice that the ADA's general mandate to eliminate discrimination against disabled persons applied even absent technical specifications) (emphasis added); *id.* at 1100-06 (holding that the plaintiff stated claims under the ADA and CDPA based on the City's alleged failure to provide accessible on-street diagonal stall parking irrespective of whether the DOJ has adopted technical specifications for on-street parking).

7 *See also* *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1032-33 (9th Cir. 2008) (holding that the DOJ's change in its interpretation of a certain ADAAG section *did not require notice and comment for formal rule-making* because the DOJ's announcement of its change was an "interpretive rule," which is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers"). "[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule,' whereas legislative rules 'create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.'" *Id.* An interpretive rule clarifies the agency's view of ambiguous terms. "A rule does not become a legislative rule because it effects some unanticipated change; otherwise, only superfluous rules could qualify as interpretive rules." *Id.* The DOJ's various public pronouncements about website accessibility via its Statements of Interest, amicus briefs, and other public statements constitute "interpretive rules".

8 "The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process." *CVS Order* at *9.

9 The District Court ignored the published Ninth Circuit decision in *Fortyune v. City of Lomita*, 766 F.3d 1098, 1102 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2888 (2015), whereby the Ninth Circuit held that "an agency's interpretation of its own regulations as advanced in an amicus brief is also entitled to deference." *Id.* at 1104. The only exception would be if such interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* (citation omitted). The District Court made no such finding.

10 Courts also give DOJ's interpretation of its ADA implementing regulations "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

11 Settlement Agreement Between the *United States of America and edX Inc.*, DJ No. 202-36-255 (Apr. 2, 2015), https://www.ada.gov/edx sa.htm; Settlement Agreement Between the *United States of America and Ahold U.S.A., Inc. and Peapod, LLC*, DJ No. 202-63-169 (Nov. 17, 2014), https://www.ada.gov/peapod_sa.htm; Settlement Agreement Between the *United States of America and Carnival Corp.*, DJ No. 202-17M-206 (July 23, 2015), https://www.ada.gov/camival/camival_sa.html; Settlement Agreement Between the *United States of America and the National Museum of Crime and Punishment* (Jan. 13, 2015), https://www.ada.gov/crime punishment

museum/crime punishment_sa.htm; Settlement Agreement Between the *National Federation of the Blind & Law School Admission Council Inc.* (Apr. 25, 2011), https://www.ada.gov/LSAC.htm; Settlement Agreement Between the *United States of America and Florida State Univ.*, DJ No. 205-17-13 (May 29, 2014), https://www.ada.gov/floridastate-tl-sa.htm: Joint Motion for Entry of Consent Decree by Intervenor Plaintiff United States of America, *Dudley v. Miami Univ.*, No. 1:14-cv-00038-SJD (S.D. Ohio Oct. 17, 2016) (ECF# 63), https://www.ada.gov/miami university_cd.html.

12 *See e.g. Gorecki v. Hobby Lobby Stores, Inc.* 2017 WL 2957736 (Order Denying Motion to Dismiss on due process and primary jurisdiction grounds)(June 15, 2017); *Gil v. Winn-Dixie Stores, Inc., which is Gil v. Winn-Dixie Stores, Inc., - F. Supp. -, No. 16-23020-Civ-Scola, 2017 WL 2547242, at *7-*9 (S.D. Fla. June 13, 2017)* (ECF #63) (Judgment for blind plaintiff in website accessibility case after two day bench trial ordering injunctive relief including compliance with WCAG 2.0 Criteria); *Andrews v. Blick Art Materials, LLC*, No. 17-CV-767, 2017 WL 3278898, at *17-18 (E.D.N.Y. Aug. 1, 2017) (rejecting due process challenge in Title III website case because the ADA's flexibility does not render it unconstitutionally ambiguous) *Nat'l Fed. of the Blind v. Target Corp.*, 45 F. Supp. 2d 952 (N.D. Cal. 2006) (denying, in part, motion to dismiss Title III website accessibility claims brought against large retailer); *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 2017 WL 1437199 (W.D. Pa. Apr. 21, 2017) (denying separate motions to dismiss Title III website accessibility claims against a bank and a sports and gaming operator); *Natl. Assn, of the Deaf v. Harvard U.*, 2016 WL 3561622, at *13 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, 2016 WL 6540446 (D. Mass. Nov. 3, 2016) (recommendation that university's motion to dismiss Title III claims that its online content is inaccessible to deaf and hard of hearing individuals be denied); *Nat'l Ass'n of the Deaf v. Massachusetts Inst, of Tech., Case 3:15-cv-30024-MGM, 2016 WL 3561631 (D. Mass. Feb. 9, 2016) (Robertson, Mag. J.) (recommending the denial of a motion to dismiss or stay predicated on the primary jurisdiction doctrine), adopted in Natl Ass'n of the Deaf v. Massachusetts Inst, of Tech., Case 3:15-cv-30024-MGM, 2016 WL 6652471, at *1 (D. Mass. Nov. 4, 2016) (Mastroianni, J.)*; *Natl. Fedn. of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015) (denying a digital library operator's motion to dismiss); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (denying an Internet-based movie rental company's motion for judgment on the pleadings); *Sipe v. Huntington National Bank*, 15-CV 1083 (W.D.Pa. Nov. 18, 2015) (denying motion to dismiss Title III website accessibility claims against a bank).

End of Document

KRIEG | DEVAULT®

Is Your Website Compliant with the Americans With Disabilities Act?

February 21, 2018

By: Brett J. Ashton and Libby Yin Goodknight

While financial institutions are typically aware of their responsibilities under the Americans with Disability Act (the "ADA" or the "Act") as they relate to the maintenance of their physical office spaces and overall general corporate policies, application of these same principles to an institution's website is a new concept that many were unaware of until recently. As we reported in our November 4, 2016 post, financial institutions have been receiving demand letters from plaintiff's counsel alleging violations of the ADA based on the institution's websites failing to comply with the Web Content Accessibility Guidelines 2.0 ("WCAG 2.0"). [1] WCAG 2.0 is a set of guidelines adopted by a non-governmental entity called the Accessibility Guidelines Working Group designed to promote technical best practices for the World Wide Web. While the demand letters haven't stopped, there have been several recent developments on the issue of ADA website compliance worth noting if you become the target of a similar demand from plaintiff's counsel.

A recap of Title III of the ADA

The Act broadly protects the rights of individuals with disabilities as to employment, access to state and local government services, places of public accommodation, transportation, and other critical activities. Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of places of public accommodation (private entities whose operations affect commerce and that fall into one of the identified covered categories) and requires newly constructed or altered places of public accommodation, as well as commercial facilities, to comply with the ADA Standards for Accessible Design. The Act provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." [2] To that end, any Title III plaintiff must show:

1. He or she is disabled within the meaning of the ADA.
2. The defendant is a private entity that owns, leases, or operates a place of public accommodation.
3. The plaintiff was denied access to that public accommodation by the defendant because of his or her disability, *i.e.*,
   the defendant failed to make "reasonable modifications" of policies, practices or procedures or to provide auxiliary
   aids if necessary.

While case law is well established as to what constitutes a disability under the Act, the question of what constitutes a "public accommodation" is the subject of differing interpretations by the courts that have been presented with this issue.

Recent regulatory developments

The U.S. Department of Justice (the "DOJ" or the "Department") is responsible for promulgating regulations under the ADA, other than certain provisions dealing specifically with transportation.[3] Our November 4, 2016 post discussed the uncertainty created by the DOJ's on again, off again approach to rulemaking on ADA website compliance that had existed since the DOJ issued its 2010 Advanced Notice of Proposed Rulemaking on Web Accessibility entitled "Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations". *See* 75 FR 43460 (July 26, 2010). This uncertainty, at least with respect to the DOJ's rulemaking, was eliminated with the December 26, 2017 formal withdrawal of all four pending rules on Title II and Title III Website compliance. *See* 82 FR 60932 (December 26, 2017).

Perhaps most concerning throughout this period of rulemaking uncertainty, the DOJ intervened in several civil litigation matters on behalf of plaintiff's asserting ADA website violations, [4] and forced several companies into consent decrees requiring monetary settlements.[5] Notably, all of these actions were taken during the Obama administration. The DOJ is yet to enter into a consent decree, or intervene in any civil ADA website litigation, under the Trump Administration.

Recent Case Law Developments

In the only reported ADA Website case to be decided by a jury, the court in *Gil v. Winn-Dixie Stores, Inc.*, 257 F.Supp.3d 1340 (S.D. Fla. June 12, 2017) ruled that the grocery store website was subject to the ADA, holding, *"Although Winn–Dixie argues that Gil has not been denied access to Winn–Dixie's physical store locations as a result of the inaccessibility of the website, the ADA does not merely require physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation...." 42 U.S.C. § 12182(a)."* An appeal in this case is pending before the 11th Circuit Court of Appeals, with oral arguments scheduled for the week of May 14, 2018.

In *Access Now, Inc. v. Blue Apron, LLC.*, No. 17-cv-116-JL, WL 5186354 (D.N.H. 2017), the U.S. District Court of New Hampshire recently considered whether the online grocery delivery website constituted a "public place" under the ADA. In denying the defendants motion to dismiss, the Court rejected Blue Apron's argument that a website did not constitute a public accommodation absent a nexus with a physical brick and mortar location, holding, " *a website alone may amount to a public accommodation under precedent in this circuit." "Though true that websites are not specifically mentioned in the twelve enumerated categories of "public accommodations" the plaintiff must only show that the web site falls within the general category listed under the ADA."*

KRIEG | DEVAULT®

Recent Settlements
In an effort to protect its members on this issue, the Independent Community Bankers Association (the "ICBA") entered into a settlement agreement with Access Now in November, 2017 whereby the ICBA agreed to adopt a Statement of Voluntary Access Principles in exchange for the consumer group's agreement not to litigate against its members. This does not however, prevent any other plaintiff from filing similar litigation against ICBA members, or any other financial institution.

Other Developments
The U.S. Architectural and Transportation Barriers Compliance Board (the "Board"), recently adopted a rule requiring federal agencies to follow the WCAG 2.0 guidelines.[6] The Board is structured to function as a coordinating body among Federal agencies and to directly represent the public, particularly people with disabilities. Half of its members are representatives from most of the Federal departments. The other half is comprised of members of the public appointed by the President, a majority of whom must have a disability. While the Board's adoption of the WCAG 2.0 guidelines does not apply to financial institutions, their adoption provides further support for plaintiff claims that this standard is required for all websites.

Krieg DeVault is closely monitoring developments in this area of law, and is able to provide assistance in responding to demands from plaintiff's counsel in the event your financial institution is targeted.

For further information, please contact **Brett J. Ashton** or **Libby Yin Goodknight.**

[1] [illegible]

[2] 42 U.S.C. § 12182(a).

[3] 42 U.S.C. § 12134; 42 U.S.C. §12186(b)

[4] See *National Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012); *National Federation of the Blind v. Scribd Inc.*, 97 F.Supp.3d 565 (D. Vt. 2015); *Gil v. Winn-Dixie Stores, Inc.*, 257 F.Supp.3d 1340 (S.D. Fla. June 12, 2017)

[5] See *March 6, 2014, DOJ Consent Decree with HRB Digital LLC and HRB Tax Group Inc., subsidiaries of H&R Block Inc., to remedy alleged violations of the Americans with Disabilities Act (ADA); Nov. 17, 2014, DOJ Settlement Agreement with Ahold U.S.A. Inc. and Peapod LLC, the owners and operators of www.peapod.com(link is external), to remedy alleged violations of the Americans with Disabilities Act (ADA); April 2, 2015 DOJ Settlement Agreement with edX Inc. (edX), to remedy alleged violations of the Americans with Disabilities Act (ADA).*

[6] [illegible]

AFSA 2018 Law Committee

Personal Loan Subcommittee Report

January 29, 2018.

Convenience Fees

- Relevant Law
  - Dodd-Frank UDAAP (12 U.S.C. §§ 5531, 5536);
  - Fair Debt Collection Practices Act (15 U.S.C. § 1692);
  - FTC Staff Commentary on the FDCPA (53 FR 50097-02); and
  - Existing State Laws/Regulations/Opinions.
- CFPB Compliance Bulletin 2017-01: Phone Pay Fees
- Recent Litigation Trends

Compliance Bulletin 2017-01: Phone Pay Fees

- The Bulletin (http://bit.ly/2DadLER) provides a list of practices the CFPB believes may constitute a UDAAP violation, including:
  - Failing to disclose the prices of all available phone pay fees when different phone pay options carry materially different fees;
  - Misrepresenting the available payments options or that a fee is required to pay by phone; and
  - Failing to disclose that a phone pay fee would be added to a consumer's payment and creating the misimpression that there was no service fee.

- While the Bureau falls short of labeling these practices per se UDAAP violations, they note,

  > *"Whether conduct similar to the conduct described in this Bulletin violates these laws may depend on additional facts and analysis. The Bureau will closely review conduct related to phone pay fees for potential violations of Federal consumer financial laws."*

- In light of the recent leadership change at the Bureau, how, or even if, the CFPB intends to apply these standards remains unclear.

FDCPA Claims

15 U.S.C.A. § 1692f (Pub.L. 90-321, Title VIII, § 808)

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

> (1) The collection of any amount (including any interest, fee, charge, ***or expense incidental*** to the the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

Federal Trade Commission Statements of General Policy or Interpretation, Staff Commentary On the Fair Debt Collection Practices Act, 53 FR 50097-02.

- Section 808 prohibits a debt collector from using “unfair or unconscionable means” in his debt collection activity. It provides eight examples of unfair practices.

- A debt collector's act in collecting a debt may be “unfair” if it causes injury to the consumer that is (1) substantial, (2) not outweighed by countervailing benefits to consumers or competition, and (3) not reasonably avoidable by the consumer.

- Section 808(1) prohibits collecting any amount unless the amount is expressly authorized by the agreement creating the debt or is permitted by law.

- Legality of charges. A debt collector may attempt to collect a fee or charge in addition to the debt if either (A) the charge is expressly provided for in the contract creating the debt and the charge is not prohibited by state law, or (B) the contract is silent but the charge is otherwise expressly permitted by state law.
- Conversely, a debt collector may not collect an additional amount if either (A) state law expressly prohibits collection of the amount or (B) the contract does not provide for collection of the amount and state law is silent.
- For purposes of this section, “amount” includes not only the debt, but also any incidental charges, such as collection charges, interest, service charges, late fees, and bad check handling charges.

Litigation Trends

McWhorter v. Ocwen Loan Servicing, LLC, No.: 2:15-cv-01831-MHH, 2017 WL 4304625 (D. Ala. 2017).

- Plaintiff's filed a class action suit against both Ocwen and Western Union Business Solutions, alleging violations of 15 U.S.C.A. § 1692f(1) for being charged a "SpeedPay" fee to make loan payments online and over the phone.

- Ocwen filed a motion to dismiss asserting that it was not a debt collector under the Act, and that the convenience fee wasn't an Unfair Practice under the Act because it was reasonably avoidable by the consumer, and permitted by the Electronic Fund Transactions Act.

- The U.S. District Court for the Court granted Western Union’s motion, it denied the Ocwen motion because they could not prove the convenience fee did not inure to their benefit. The court rejected Ocwen’s claim the EFTA qualified as a law.
- In the absence of an Alabama stature permitting convenience fees or language in the contract between the parties permitting such a fee, the court held that Ocwen had violated 1692(f).

***Thomas v. John A. Youderian Jr.,* LLC, 232 F.Supp.3d 656 (D. N.J. 2017).**

- Debtor filed class action alleging that debt collection letter he received from an attorney advising him that if he took the option of paying reported debt by credit card, a $3 convenience fee would be added, violated the FDCPA.

- **Debtor never used the pay by credit card option, or paid the $3 fee.**

- The plaintiff contended the Convenience Fee was neither authorized by contract nor permitted by law, and therefore the letter contained false, deceptive, and misleading language, violating 15 U.S.C. §§ 1692e, 1692f, and 1692g.

- Plaintiff uses the convenience to fee to assert a long list of FDCPA violations, including claiming the defendant:
  - made false, deceptive or misleading representations or means in connection with the collection of a debt, in violation of 15 U.S.C. § 1692e;
  - made false representations of the character, amount, or legal status of a debt, in violation of 15 U.S.C. § 1692e(2)(A);
  - made false representations that services rendered or compensation may be lawfully received, in violation of 15 U.S.C. § 1692e(2)(B);
  - threatened to take any action that cannot legally be taken or that is not intended to be taken, in violation of 15 U.S.C. § 1692e(5);

- used false representations or deceptive means to collect or attempt to collection a debt, in violation of 15 U.S.C. § 1692e(10)
- used unfair or unconscionable means to collect or attempt to collect a debt, in violation of 15 U.S.C. § 1692f;
- attempted to collect any amount (including any interest, fee, charge, or expense incidental to the principal obligation) not expressly authorized by the agreement creating the debt or permitted by law, in violation of 15 U.S.C. § 1692f(1); and
- failed to properly disclose the amount of the debt, in violation of 15 U.S.C. § 1692g(a)(1).

- The court rejected Youderian's claim that the Convenience Fee is valid because it was both permitted under a New Jersey law applicable to municipalities, and authorized under an agreement Thomas entered into with his medical creditor that provided for "collection fees". In doing so, it noted the FTC Staff Commentary and precedent from the 2nd and 3rd circuits:

  "Courts have often applied Section 1692f(1) in the context of convenience fees, also known as service charges. It is settled that such a fee does not violate the FDCPA (1) where it is expressly permitted under state law; or (2) if state law does not expressly authorize or prohibit the charge, where the customer expressly agreed to the fee in the contract creating the debt. Tuttle v. Equifax Check, 190 F.3d 9, 15 (2d Cir. 1999); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 407–408 (3d Cir. 2000) (adopting the interpretation set forth in Tuttle and FTC Staff Commentary)."

- *The court also rejected Yonderian's Spokeo defense after an extensive analysis of FDCPA claims under the recent Supreme Court decision.*

Flores v. Collection Consultants of California, No. SA CV 14–0771–DOC, 2015 WL 4254032(C.D. Cal. 2015)

- Flores filed a class action Complaint based on alleged violations of the FDCPA, and the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code § 1788 because Defendant offered him the ability to pay his debt by using a credit card, in exchange for a $5 convenience fee.

- Defendant argues that the $5 credit card transaction fee was not prohibited by law, and, in any event, was only charged in connection with a credit card transaction if Plaintiff chose to pay via credit card.
- Defendant also claims that the $5 fee does not even actually cover the cost of processing a credit card transaction, which is in fact higher than $5.
- Defendant also contended that the $5 amount is immaterial, specifically in light of the fifty percent discount on the debt that Defendant was offering.

- In assessing the Defendants claims, the Court noted, *“As Defendant has not identified any legal basis permitting the charge, liability turns on whether the “fee ... [is] incidental to the principal obligation.”*

- The Court concluded that the charge was not “incidental” to the principal obligation, noting:

  “It is undisputed that this charge would be imposed only if the debtor elected to pay via credit card. While this payment method was offered in the letter, the letter also provided for payment without additional charge if the debtor elected to pay by check. Nothing in the letter steered the consumer to payment by credit card, and the letter provided clear notice that the fee was imposed only upon those who sought to pay via credit card. A consumer must choose to affirmatively and separately opt-in to this alternative method.”

Takeaways

- Identify loans that may be subject to the FDCPA;
- Identify state laws applicable to convenience fees;
- Review current use of all expedited payment mechanisms and the fees associated with them – if fees charged are beyond merely a pass through re-evaluate in light of recent litigation trends and state laws; and
- Consider amending agreements to account for the ability to charge a convenience fee.

Accessibility Under The ADA

- Title III of the ADA prohibits discrimination against individuals “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.” 42 U.S.C.A. § 12182(a)
- Under the ADA, a prevailing plaintiff is not entitled to damages, but they may recover reasonable attorneys' fees. 42 U.S.C. §§ 12188(a), 12205, 2000a–3(b).
- Injunctive relief is available under the ADA if the discrimination includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities ... where such removal is readily achievable.” 42 U.S.C. §§ 12188(a)(2), 12182(b)(2)(A)(iv).

What Is Website Accessibility?

- Making websites accessible to individuals with disabilities:
  - Vision-impaired or hearing-impaired individuals
  - Making websites compatible with assistive devices that allow individuals with disabilities to access webpage content
- A World Wide Web Consortium has recommended what is known as the Web Content Accessibility Guidelines (WCAG 2.0 AA), a set of highly technical standards for web content accessibility.

Absence of DOJ Guidance On Website Accessibility Under The ADA

- The Web Content Accessibility Guidelines are not law; however, they were recently endorsed by the U.S. Architectural and Transportation Barriers Compliance Board (responsible for Federal Agency compliance): https://www.gpo.gov/fdsys/pkg/FR-2017-01-18/pdf/2017-00395.pdf

- July of 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking ("ANPR"), in which it explained that it was "*considering* revising the regulations implementing title III of the ADA in order *to establish requirements* for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web ('Web') accessible to individuals with disabilities." *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, 75 Fed. Reg. 43460 (proposed July 26, 2010)

- Subsequent Notice of Proposed Rulemaking (NPRM) titled Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities (RIN 1190-AA65) – Issued July 9, 2014, but withdrawn April 28, 2016.
- DOJ simultaneously issues a Supplemental Advance Notice of Proposed Rulemaking titled, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities – Title III Rulemaking delayed.
- DOJ places these rules on their "Inactive" list in July of 2017, and then on December 26, 2017 –officially withdraws their rulemaking:

https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced

Case Law On Website Accessibility

National Federation of the Blind v. Target Corporation, 452 F. Supp. 2d 946 (N.D. Cal. 2006)

- The Court noted that the ADA "applies to the services ***of*** a place of public accommodation, not services ***in*** a place of public accommodation."
- The Court held that the plaintiff could premise a Title III claim on the accessibility of Target's website, even if the violation occurred "away from a 'place' of public accommodation."

Case Law On Website Accessibility (cont.)

- *National Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012), and *National Federation of the Blind v. Scribd Inc.*, 97 F.Supp.3d 565 (D. Vt. 2015)
  - In both of those cases, the courts ultimately concluded Title III of the ADA did include websites within the scope of a public accommodation
  - Notably, the DOJ filed a Statement of Interest brief in *Netflix* supportive of the position that websites are within the scope of Title III protection

Case Law On Website Accessibility (cont.)

Gil v. Winn-Dixie Stores, Inc., 257 F.Supp.3d 1340 (S.D. Fla. June 12, 2017)

- Visually impaired grocery store patron brought action against owner of grocery store chain, seeking declaratory and injunctive relief for owner's alleged violation of Americans with Disabilities Act (ADA) in maintaining website that was inaccessible to visually impaired consumers.

- Court noted, *"Where a website is heavily integrated with physical store locations and operates as a gateway to the physical store locations, courts have found that the website is a service of a public accommodation and is covered by the ADA."* citing Nat'l Fed'n of the Blind v. Target Corp., 452 F.Supp.2d 946, 953–55 (N.D. Cal. 2006)

Case Law On Website Accessibility (cont.)

- In ruling that the Defendant violated ADA by maintaining website that was inaccessible to visually impaired consumers, the Court held *"[we] need not decide whether Winn–Dixie's website is a public accommodation in and of itself, because the factual findings demonstrate that the website is heavily integrated with Winn–Dixie's physical store locations and operates as a gateway to the physical store locations. Although Winn–Dixie argues that Gil has not been denied access to Winn–Dixie's physical store locations as a result of the inaccessibility of the website, the ADA does not merely require physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation...."* 42 U.S.C. § 12182(a).

- Financial Institutions, predominantly Community Banks, have been receiving Demand Letters from a group called Access Now that is represented by a plaintiff's firm from Pittsburgh (Carlson Lynch Sweet Kilpela)
- The Independent Community Bankers Association (the "ICBA") entered into a settlement agreement with Access now in November, 2017 whereby the ICBA agreed to adopt a Statement of Voluntary Access Principles in exchange for the consumer group's agreement not to litigate against its members.

AMERICANS WITH DISABILITIES ACT UPDATE

ICBA
INDEPENDENT COMMUNITY BANKERS of AMERICA®

SETTLEMENT AGREEMENT REACHED WITH ACCESS NOW RELEASING ICBA MEMBERS AND COMMUNITY BANKS FROM ADA LIABILITY

The Independent Community Bankers of America (ICBA) and Access Now, Inc. ("Access Now") have reached a mutually-agreeable settlement whereby: a) as a reaffirmation of its ongoing commitment to encouraging accessibility for visually-impaired persons, ICBA is adopting and distributing to its current members a Restatement of Voluntary Access Principles referenced below that are acceptable to Access Now; and b)Access Now, on behalf of itself and its members, released ICBA's members and banks eligible for membership with assets of $50 billion or less from all claims related to the provision of Electronic Banking Services such as any electronic information technology, including website, mobile apps, accessibility, online banking, mobile banking, ATM services, and telephone banking.

Access Now and its members, through its counsel Carlson Lynch Sweet Kilpela and KamberLaw LLC, had sent letters to banks that are members of ICBA offering to settle purported claims against such banks for alleged violations of the Americans with Disabilities Act (ADA).

ICBA STATEMENT OF VOLUNTARY ACCESS PRINCIPLES

As a reaffirmation of its existing commitment to access, ICBA adopts this Statement of Voluntary Access Principles:

1) ICBA encourages its members to make commercially reasonable efforts to convey public web commerce transaction functionality in a manner that is accessible to their visually impaired and low vision customers, potential customers and companions to such customers or potential customers. While the United States Department of Justice has not adopted a website accessibility standard, one acceptable set of voluntary principles for accessibility is the World Wide Web Consortium's Version 2.0 of the Web Content Accessibility Guidelines ("WCAG 2.0"). Nothing herein is intended to suggest that members should adopt an accessibility standard greater than that which may ultimately be adopted by the United States Department of Justice, or that equal access may not lawfully be provided in an alternative fashion.

2) Training. ICBA encourages its members to conduct periodic training for their employees responsible for electronic banking service accessibility to promote progress toward accomplishing the goal described in Paragraph 1.

3) Electronic Banking Service Accessibility Guidelines. ICBA encourages its members to develop Electronic Banking Service accessibility guidelines designed to promote increased independent use of the member's Electronic Banking Services by their customers and potential customers with disabilities, as well as their companions. The details of the accessibility policies adopted, if any, will be in the sole discretion of each individual member.

4) Target Implementation Date. In the event formal guidelines are not issued by the Department of Justice in 2018, ICBA encourages its members to implement these Principles on or before December 31, 2020.

5) Website Access Information Incorporated into Existing Customer Service. ICBA encourages its members to post notification and contact information in connection with their provision of Electronic Banking Services for their customers and potential customers who claim to encounter access barriers. Members are encouraged to provide a reasonably prompt response to customer/potential customer inquiries or complaints related to any alleged access barriers.

6) Third Party Vendors. ICBA encourages its members to utilize their existing vendor management due diligence process and communicate the goal that customer and potential customer facing digital content provided by that vendor conform to these Principles.

CARLSON LYNCH SWEET KILPELA CARPENTER

CARLSON LYNCH

HOME

ABOUT

ATTORNEY PROFILES

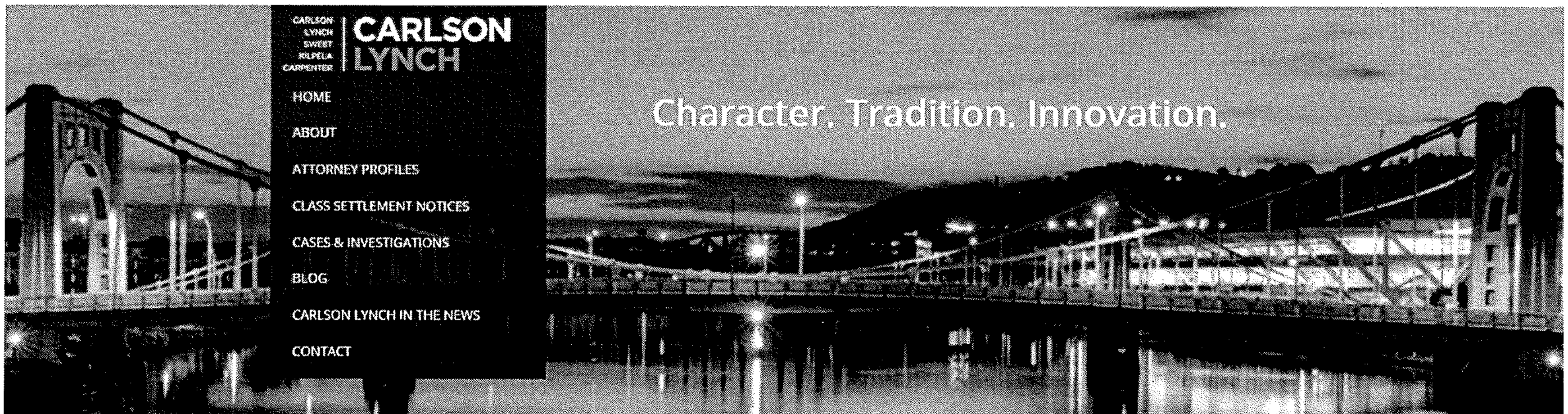
CLASS SETTLEMENT NOTICES

CASES & INVESTIGATIONS

BLOG

CARLSON LYNCH IN THE NEWS

CONTACT



Advocates for Consumer and Workplace Fairness.

We fight for the little guy. Our practice is exclusively dedicated to representing employees and consumers, both individually and in class action lawsuits. If you have been illegally denied the wages you deserve, victimized by workplace harassment or discrimination, or taken advantage of by unfair business practices, please contact us for a free initial case evaluation, at no cost or obligation to you.

Have Your Rights as an Employee Been Violated?

Our Latest Blog

Carlson Lynch Wins $24 Million Dollar Award on behalf of Certified Class of Mortgage Borrowers

On March 24, 2017, a three judge panel awarded $24 million dollars to a certified class of mortgage borrowers represented by Carlson Lynch.

Continue Reading...

News Feed

Advocates for the disabled find fault in many realty websites

The real estate brokerage industry faces a sudden wave of potentially costly and embarrassing legal challenges to companies' websites, alleging violations of the Americans With Disabilities Act, or ADA.

Continue Reading...

Questions?

741 Fed.Appx. 752
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Dennis **HAYNES**, individually, Plaintiff-Appellant
v.
DUNKIN' DONUTS LLC, a foreign limited liability company, DD IP Holder **LLC**, Cashstar, Inc., Defendants-Appellees.

No. 18-10373
|
Non-Argument Calendar
|
(July 31, 2018)

Synopsis

Background: Blind consumer brought action against operators of website for national restaurant chain, alleging that operators violated Title III of the Americans with Disabilities Act (ADA) by failing to maintain a website compatible with screen reading software. The United States District Court for the Southern District of Florida, No. 0:17-cv-61072-WPD, William P. Dimitrouleas, J., granted operators' motion to dismiss. Consumer appealed.

[Holding:] The Court of Appeals held that consumer's allegations were sufficient to state public accommodation claim under the ADA.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (1)

[1] **Civil Rights**
Discrimination by reason of handicap, disability, or illness

Allegations by blind consumer, who alleged that website for national restaurant chain was incompatible with screen reader software, were sufficient to state public accommodation claim under Title III of the ADA; consumer plausibly alleged that neither he, nor any blind person, could use features of website, and that website, which allowed customers to locate physical restaurant locations and purchase gift cards online, was a service that facilitated the use of chain's restaurants, which were places of public accommodation. Americans with Disabilities Act of 1990 §§ 301, 302, 42 U.S.C.A. §§ 12181(7)(B), 12182(a); 42 U.S.C.A. § 12182(b)(2)(A)(iii).

7 Cases that cite this headnote

Attorneys and Law Firms

Thomas B. Bacon, Thomas B. Bacon, PA, Mount Dora, FL, Aaron Scott Finesilver, Finesilver Law, PA, Miami, FL, for Plaintiff-Appellant

Charles S. Marion, Blank Rome, LLP, Philadelphia, PA, for Defendants-Appellees

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:17-cv-61072-WPD

Before ED CARNES, Chief Judge, WILSON, and FAY, Circuit Judges.

Opinion

PER CURIAM:

Dennis **Haynes** is blind. To use the internet, he relies on screen reading software, specifically a program called "JAWS." According to the allegations in his third amended complaint, one day **Haynes** attempted to go to the website for **Dunkin' Donuts**, www.dunkindonuts.com, but the website was not compatible with his, or any, screen reading software.

***753** **Haynes** sued **Dunkin' Donuts, LLC**, claiming that it violated Title III of the Americans with Disabilities Act, 42 U.S.C. § 12188 et seq., by not maintaining a website compatible with screen reading software. [1] He sought declaratory and injunctive relief under 42 U.S.C. § 12188 and attorney's fees under 42 U.S.C § 12205.

On **Dunkin' Donuts**' motion, the district court dismissed **Haynes**' complaint. It determined that **Haynes** did not state a plausible claim for relief under Title III of the ADA. It reasoned that **Haynes** failed to allege a nexus between the barriers to access that he faced on the website and his inability to access goods and services at **Dunkin' Donuts**' physical store. This is **Haynes**' appeal.

"We review de novo the dismissal of a complaint for failure to state a claim, construing all [factual] allegations in the complaint as true and in the light most favorable to the plaintiff." Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1281–82 (11th Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter ... to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quotation marks omitted). "Determining whether a complaint states a plausible claim for relief [is] ... a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679, 129 S.Ct. at 1950.

Haynes contends that the district court erred in dismissing his third amended complaint. He argues that **Dunkin' Donuts**' "website is a service, facility, privilege, advantage, benefit and accommodation of" **Dunkin' Donuts**' place of public accommodation (that is, its shops), which means that the ADA requires the website to be accessible to blind people like himself. **Dunkin' Donuts** does not dispute that the shops are places of public accommodation, see 42 U.S.C. § 12181(7)(B) (listing "a restaurant" as an example of a "place of public accommodation"), but argues that its website is neither a place of public accommodation nor a good, service, facility, privilege, or advantage of its shops, and as a result, it claims that **Haynes** has failed to state a claim because the website is not covered by the ADA. [2]

The ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who ... operates a place of public accommodation." 42 U.S.C. § 12182(a). One example of discrimination prohibited by the ADA is when a place of ***754** public accommodation "fail[s] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services...." Id. § 12182(b)(2)(A)(iii).

The prohibition on discrimination is not limited to tangible barriers that disabled persons face but can extend to intangible barriers as well. Rendon, 294 F.3d at 1283 ("A reading of the plain and unambiguous statutory language at issue reveals that the definition of discrimination provided in Title III [of the ADA] covers both tangible barriers ... and intangible barriers ... that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.") (footnotes omitted). In Rendon, the plaintiffs alleged that a telephone selection process screened out disabled contestants from competing on the show Who Wants to be a Millionaire. Id. Even though the telephone selection process was an intangible barrier, and was not at the studio's place of public accommodation, we held that the plaintiffs stated a claim for relief under the ADA because the inaccessibility of the telephone selection process prevented the plaintiffs from accessing a privilege (the opportunity to be a contestant on the show) that was afforded by the television studio. Id. at 1283, 1286.

Haynes alleges that the inaccessibility of **Dunkin' Donuts**' website has similarly denied blind people the ability to enjoy the goods, services, privileges, and advantages of **Dunkin' Donuts**' shops. Among other things, he alleges that **Dunkin' Donuts**' website allows customers to locate physical **Dunkin' Donuts** store locations and purchase gift cards online. **Haynes** also alleges that **Dunkin' Donuts**' website "provides access to" and "information about ... the goods, services, facilities, privileges, advantages or accommodations of" **Dunkin' Donuts**' shops. Because the website isn't compatible with screen reader software, **Haynes** alleges that neither he, nor any blind person, can use those features.

Taking all of those allegations in the complaint as true and viewing them in the light most favorable to **Haynes**, as we must at this stage, see id. at 1281–82, he has shown a plausible claim for relief under the ADA. It appears that the website is a service that facilitates the use of **Dunkin' Donuts**' shops, which are places of public accommodation. And the ADA is clear that whatever goods and services

Dunkin' Donuts offers as a part of its place of public accommodation, it cannot discriminate against people on the basis of a disability, even if those goods and services are intangible. See 42 U.S.C. § 12182(a); see also Rendon 294 F.3d at 1283. As much as the telephone selection process in Rendon prevented the plaintiffs in that case from accessing a privilege of that defendant's physical place of public accommodation, the alleged inaccessibility of **Dunkin' Donuts**' website denies **Haynes** access to the services of the shops that are available on **Dunkin' Donuts**' website, which includes the information about store locations and the ability to buy gift cards online. The failure to make those services accessible to the blind can be said to exclude, deny, or otherwise treat blind people "differently than other individuals because of the absence of auxiliary aids and services...." 42 U.S.C. § 12182(b)(2)(A)(iii); see also 28 C.F.R. § 36.303(b)(2) (giving "screen reader software" as an example of an auxiliary aid or service for "individuals who are blind or have low vision"). And as a result, **Haynes** has alleged a plausible claim for relief under the ADA.

REVERSED AND REMANDED.

All Citations

741 Fed.Appx. 752, 57 NDLR P 138

Footnotes

1 Along with **Dunkin' Donuts**, **Haynes** sued DD IP Holder **LLC** and Cashstar, Inc. Those three companies operated www.dunkindonuts.com and its associated websites. We'll refer to them collectively as **Dunkin' Donuts**.

2 **Dunkin' Donuts** does argue that even if the website is a service, privilege, advantage, or accommodation, it is not a service, privilege, advantage, or accommodation of its physical place of public accommodation because, according to **Dunkin' Donuts**, it is merely the franchisor of **Dunkin' Donuts** shops. But the complaint doesn't allege anything about **Dunkin' Donuts** being a franchisor; it alleges that **Dunkin' Donuts** owns and operates shops all around the country and near **Haynes**. At this stage it would be inappropriate to consider **Dunkin' Donuts**' factual assertions that it is merely a franchisor. The district court did not convert the motion to dismiss into a motion for summary judgment, which would have allowed it to consider materials outside the complaint. See Day v. Taylor, 400 F.3d 1272, 1275–76 (11th Cir. 2005) ("The district court generally must convert a motion to dismiss into a motion for summary judgment if it considers materials outside the complaint.").

End of Document

Dated: September 18, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–20570 Filed 9–30–19; 8:45 am]

BILLING CODE 3410–02–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AE84

Payday Alternative Loans

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule (referred to as the PALs II rule) to allow federal credit unions (FCUs) to offer additional payday alternative loans (PALs) to their members. The final rule does not replace the NCUA's current PALs rule (referred to as the PALs I rule). Rather, the PALs II rule grants FCUs additional flexibility to offer their members meaningful alternatives to traditional payday loans while maintaining many of the key structural safeguards of the PALs I rule.

DATES: The final rule is effective on December 2, 2019.

FOR FURTHER INFORMATION CONTACT: Matthew Biliouris, Director, Office of Consumer Financial Protection; Joseph Goldberg, Director, Division of Consumer Compliance Policy and Outreach, Office of Consumer Financial Protection; or Marvin Shaw, Staff Attorney, Division of Regulations and Legislation, Office of General Counsel; 1775 Duke Street, Alexandria, VA 22314–6113 or telephone: (703) 518–1140 (Messrs. Biliouris and Goldberg), or (703) 518–6540 (Mr. Shaw).

SUPPLEMENTARY INFORMATION:

I. Background

Federal credit unions (FCUs) provide individuals of modest means access to affordable credit for productive and provident purposes.[1] This core credit union mission puts FCUs in natural competition with short-term, small-dollar lenders that offer payday, vehicle title, and other high-cost installment loans to borrowers of modest means.[2]

A "payday loan" generally refers to a short-term, small-dollar loan repayable in one or more installments with repayment secured by a pre- or post-dated check or a preauthorized electronic fund transfer (EFT) from the borrower's checking account.[3] A payday loan usually matures in 14 days, around the borrower's next payday, at which time the borrower is often required to repay the loan in a single balloon payment. The borrower typically does not pay interest on a payday loan. Rather, payday lenders charge high "application" fees relative to the amount borrowed, which typically range between $15 and $35 per 100 borrowed.[4] This pricing structure produces a triple-digit annual percentage rate (APR).[5]

Despite marketing payday loans as a temporary lifeline to borrowers, most payday lenders refinance or "rollover" the borrower's initial payday loan charging additional fees without a significant economic benefit to the borrower. In fact, the Center for Responsible Lending estimates that 76 percent of payday loans are rollovers.[6] Borrowers most often rollover a payday loan because the borrower does not have the ability to repay the initial loan upon maturity or will have limited funds to meet other obligations.[7] This pattern of repeated borrowings creates a "cycle of debt" that can increase the borrower's risk of becoming unbanked, filing for bankruptcy, or experiencing severe financial hardship.[8]

2010 Payday Alternative Loan Rulemaking (PALs I Rule)

In 2010, the Board amended the NCUA's general lending rule, § 701.21, to provide a regulatory framework for FCUs to make viable alternatives to payday loans, the PALs I rule.[9] The PALs I rule, § 701.21(c)(7)(iii), permits an FCU to offer to its members a PAL loan, a form of closed-end consumer credit, at a higher APR than other credit union loans as long as the PAL has certain structural features, developed by the Board, to protect borrowers from predatory payday lending practices that can trap borrowers in repeated borrowing cycles.

For example, the PALs I rule eliminates the potential for "loan churning," the practice of inducing a borrower to repay an existing loan with another loan without significant economic benefit to the borrower, by prohibiting an FCU from rolling one PALs I loan into another PALs I loan.[10] As the Board previously explained, "these provisions of the [PALs I rule] will work to curtail a member's repetitive use and reliance on this type of product, which often compounds the member's already unstable financial condition . . . The Board recognizes that continuously 'rolling-over' a loan can subject a borrower to additional fees and repayment amounts that are substantially more than the initial amount borrowed." [11] However, to avoid the possibility of a default in cases where the borrower cannot repay the initial PAL loan, an FCU may extend the maturity of an existing PALs I loan to the maximum term limit permissible under the regulation as long as the borrower does not pay any additional fees or receive additional credit. An FCU may also refinance a traditional payday loan into a PALs I loan.[12]

The PALs I rule also eliminates the underlying borrower payment shock from a single balloon payment, which often forces a borrower to rollover a payday loan, by requiring that each PAL loan fully amortize over the life of the loan.[13] As the Board previously stated in the preamble to the final PALs I rule, "balloon payments often create additional difficulty for borrowers trying to repay their loans, and requiring FCUs to fully amortize the loans will allow borrowers to make manageable payments over the term of the loan, rather than trying to make one large payment." [14] Accordingly, an FCU must structure a PALs I loan so that a member repays principal and interest in

[1] *See* Credit Union Membership Access Act, Public Law 105–219, section 2, 112 Stat. 913 (Aug. 7, 1998) (*codified as* 12 U.S.C. 1751 note).

[2] Roy F. Bergengren, *Coöperative Credit,* 191 The Annals of the American Academy of Political and Social Science 144–148 (1937).

[3] Robert W. Snarr, Jr., Fed. Reserve Bank of Phila., *No Cash 'til Payday: The Payday Lending Industry,* Compliance Corner (1st Quarter 2002) *available at www.philadelphiafed.org/bank-resources/publications/compliance-corner/2002/first-quarter/q1cc1_02.cfm.*

[4] *See* National Consumer Law Center, *Consumer Credit Regulation* 403–6 (1st ed. 2012).

[5] The "annual percentage rate" is a "measure of the cost of credit, expressed as a yearly rate." 12 CFR 1026.14(a).

[6] Uriah King & Leslie Parrish, Center for Responsible Lending, *Phantom Demand: Short-Term Due Date Generates 76% of Total Volume* 15 (July 2009) *available at www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-short-term-due-date-genderates-need-for-repeat-payday-loans-accounting-for-76-of-total-volume.html.*

[7] *Id.*

[8] *Id.*

[9] Short-Term, Small Amount Loans, 75 FR 58285 (Sept. 24, 2010).

[10] 12 CFR 701.21(c)(7)(iii)(A)(*4*).

[11] Short-Term, Small Amount Loans, 75 FR 24497, 24499 (May 5, 2010).

[12] Short-Term, Small Amount Loans, 75 FR 58285, 58286 (Sept. 24, 2010).

[13] 12 CFR 701.21(c)(7)(iii)(A)(*5*).

[14] Short-Term, Small Amount Loans, 75 FR 58285, 58287 (Sept. 24, 2010).

approximately equal installments on a periodic basis until loan maturity.[15] While the Board does not prescribe a specific payment schedule—*e.g.*, bi-weekly or monthly—the Board expects an FCU to structure the repayment of each PALs I loan to ensure that the member has a reasonable ability to repay the loan without the need for another PALs I loan or traditional payday loan. Accordingly, an FCU may not require that a borrower repay a PAL loan using a single balloon payment.

Moreover, the PALs I rule removes the economic incentive for an FCU to encourage a borrower to take out multiple PALs I loans by limiting the permissible fees that an FCU may charge that borrower to a reasonable application fee.[16] The non-credit union payday lending business model depends on repeated borrowings from a single borrower of small dollar amounts with high fees and associated charges. A traditional payday lender has every incentive to make multiple payday loans to that borrower to maximize the profitability of that relationship at the expense of the borrower. By limiting the scope of permissible fees, the PALs I rule realigns economic incentives to encourage an FCU to provide a PALs I loan as a pathway towards mainstream financial products and services rather than as a separate profit center for the credit union.

The Board recognizes that the PALs I rule contains recommended best practices that, when exercised in conjunction with a PALs I loan, help put credit union members on the pathway to mainstream financial products and services. This includes reporting to credit reporting agencies and providing financial education. As of December 2018, almost eighty-five percent of FCUs reported sharing PALs I loan information with credit reporting agencies and nearly forty-five percent reported providing financial education services to PALs I loan borrowers. The Board commends FCUs for undertaking these additional steps to assist their members.

2012 Payday Alternative Loan Advanced Notice of Proposed Rulemaking (PALs I ANPR)

As part of the 2010 rule making process, the Board indicated that it would review PALs I loan data collected on FCU call reports after one year to reevaluate the requirements of the PALs I rule.[17] As of September 2011, 372 FCUs offered PALs I loans with an aggregate balance of $13.6 million or 36,768 outstanding loans. Six months later, as of March 31, 2012, approximately 386 FCUs reported offering PALs I loans with an aggregate balance of $13.5 million on 38,749 outstanding loans. While the Board acknowledged at that time that some FCUs might make an independent business decision not to offer PALs I loans, it nevertheless sought to increase the number of FCUs making PALs I loans in a meaningful way and to ensure that all FCUs that chose to offer PALs I loans were able to recover the costs associated with making these types of loans.

For that reason, the Board issued an advanced notice of proposed rulemaking (PALs I ANPR) seeking comments on specific aspects of the PALs I rule at its September 2012 meeting.[18] These questions included, but were not limited to, asking whether the Board should allow an FCU to charge a higher application fee, whether the Board should increase the permissible PALs I loan interest rate, and whether the Board should expand the maximum permissible loan amount. The Board also asked commenters to provide information on any small dollar, short-term loans offered outside of the PALs I rule.

The Board received comments from trade organizations, state credit union leagues, consumer advocacy groups, lending networks, private citizens, and FCUs suggesting changes to at least one aspect of the PALs I rule. However, these commenters offered no consensus regarding which aspects of the PALs I rule the Board should modify. Consequently, the Board chose not to undertake any changes to the PALs I rule at that time.

2018 Payday Alternative Loan II Notice of Proposed Rulemaking (PALs II NPRM)

In May 2018, the Board approved a notice of proposed rulemaking to amend the NCUA's general lending rule to allow FCUs to make an additional viable alternative to predatory payday loans (PALs II NPRM).[19] As of December 2017, 518 FCUs reported offering PALs I loans with 190,723 outstanding loans and an aggregate balance of $132.4 million.[20] These figures represent a significant increase in loan volume from 2012 when the Board issued the PALs I ANPR. However, the number of FCUs offering these products has only grown modestly.

The purpose of the PALs II NPRM was to provide FCUs with additional flexibility to offer PALs loans to their members. The PALs II NPRM did not propose to replace the PALs I rule. Rather, it allowed an FCU to offer a more flexible PALs loan while retaining key structural features of the PALs I rule designed to protect consumers from predatory payday lending practices, including restrictions on permissible fees, rollovers, and amortization. The Board intended the PALs I rule and proposed PALs II rule to create distinct products (referred to in this document, respectively, as PALs I and PALs II loans) that must satisfy similar regulatory requirements tailored to the unique aspects of each product.

Features Incorporated From the PALs I Rule

The PALs II NPRM proposed to incorporate many of the structural features of the PALs I rule designed to protect borrowers from predatory payday lending practices. Those features included a limitation on rollovers, a requirement that each PALs II loan must fully amortize over the life of the loan, and a limitation on the permissible fees that an FCU may charge a borrower related to a PALs II loan. An FCU would also have had to structure each loan as closed-end consumer credit. As discussed in more detail below, the PALs II NPRM modified other features of the PALs I rule for PALs II loans. The purpose of these modifications was to encourage additional FCUs to offer PALs II loans as an alternative to predatory payday loans and to meet the needs of certain payday loan borrowers that may not be met by PALs I loans.

Loan Amount

The PALs II NPRM proposed to allow an FCU to make a PALs II loan for a loan amount up to $2,000 without any minimum loan amount. The PALs I rule currently limits PALs I loan amounts to a minimum of $200 and a maximum of $1,000.[21] The PALs II NPRM noted that allowing a higher loan amount would give an FCU the opportunity to meet increased demand for higher loan amounts from payday loan borrowers and provide some borrowers with an opportunity to consolidate multiple payday loans into one PALs II loan. The Board was particularly interested in allowing a sufficient loan amount to encourage borrowers to consolidate

[15] *Id.*

[16] 12 CFR 701.21(c)(7)(iii)(A)(*3*).

[17] 75 FR 58285, 58288 (Sept. 24, 2010).

[18] Payday-Alternative Loans, 77 FR 59346 (Sept. 27, 2012).

[19] Payday Alternative Loans, 83 FR 25583 (June 4, 2018).

[20] As of December 2018, 606 FCUs reported offering PALs I loans with 211,589 outstanding loans and an aggregate balance of $145.2 million.

[21] *See* 12 CFR 701.21(c)(7)(iii)(A)(*1*).

payday loans into PALs II loans to create a pathway to mainstream financial products and services offered by credit unions.

Loan Term

Consistent with the proposal to increase the permissible loan amount to $2,000, the PALs II NPRM proposed increasing the maximum loan term for a PALs II loan to 12 months. The PALs I rule currently limits PALs I loan maturities to a maximum term of 6 months.[22] The increased loan term would allow a borrower sufficient time to repay their loans, thereby avoiding the types of borrower payment shock common in the payday lending industry that force borrowers to repeatedly rollover payday loans. The PALs II NPRM noted that an FCU would be free to choose an appropriate loan term, provided the loan fully amortized, and encouraged FCUs to select loan terms that were in the best financial interests of PALs II borrowers.

Membership Requirement

The PALs II NPRM also proposed to allow an FCU to offer a PALs II loan to any member regardless of the length of membership. The PALs I rule currently requires a borrower to be a member of the credit union for at least one month before receiving a PALs I loan.[23] The PALs II NPRM eliminated the membership time requirement to allow an FCU to make a PALs II loan to any member borrower that needed access to funds immediately and would otherwise turn to a payday lender to meet that need. Nevertheless, the PALs II NPRM still encouraged FCUs to consider a minimum membership requirement as a matter of prudent underwriting.

Number of Loans

Finally, the PALs II NPRM proposed to remove the restriction on the number of PALs II loans that an FCU may make to a single borrower in a rolling 6-month period. The PALs I rule currently prohibits an FCU from making more than three PALs loans in a rolling 6-month period to a single borrower.[24] An FCU also may not make more than one PALs I loan to a borrower at a time. The Board suggested removing the rolling 6-month requirement for PALs II loans to provide FCU's with maximum flexibility to meet borrower demand. However, the PALs II NPRM proposed to retain the requirement from the PALs I rule that an FCU can only make one loan at a time to any one borrower. Accordingly, the PALs II NPRM did not allow an FCU to provide more than one PALs product, whether a PALs I or PALs II loan, to a single borrower at a given time.

Request for Additional Comments

In addition to the proposed PALs II framework, the PALs II NPRM asked general questions about PAL loans, including whether the Board should prohibit an FCU from charging overdraft fees for any PAL loan payments drawn against a member's account. The PALs II NPRM also asked questions, in the nature of an ANPR, about whether the Board should create an additional kind of PAL loan, referred to as PALs III, which would be even more flexible than what the Board proposed in the PALs II NPRM. Before proposing a PALs III loan, the PALs II NPRM sought to gauge industry demand for such a product, as well as solicit comment on what features and loan structures should be included in a PALs III loan.

II. Summary of Comments on the PALs II NPRM

The Board received 54 comments on the PALs II NPRM from 5 credit union trade organizations, 17 state credit union leagues, 5 consumer advocacy groups, 2 state and local governments, 2 charitable organizations, 2 academics, 2 attorneys, 3 credit union service organizations, 14 credit unions, and 2 individuals. A majority of the commenters supported the Board's proposed PALs II framework but sought additional changes to provide FCUs with more regulatory flexibility. These commenters focused on ways to increase the profitability of PALs loans such as by allowing FCUs to make larger loans with longer maturities, or charge higher fees and interest rates.

Some commenters strongly opposed the proposed PALs II framework. These commenters argued that the proposed framework could blur the distinction between PALs and predatory payday loans, which could lead to greater consumer harm. One commenter in particular argued that the Board has not fully explained why the proposed PALs II framework will encourage more FCUs to offer PALs loans to their members. Instead, these commenters urged the Board to focus on methods to curtail predatory lending by credit unions outside of the PALs I rule and to address potential abuses regarding overdraft fees.

Most commenters offered at least some suggestions on the creation of a PALs III loan. An overwhelming majority of these comments related to increasing the allowable interest rate for PALs III loans and giving FCUs greater flexibility to charge a higher application fee. The commenters that were opposed to the proposed PALs II framework similarly were opposed to the creation of a PALs III loan for the reasons noted above.

III. Summary of Final Rule

With the exception of reconsidering the proposed removal of the limit on the number of PAL loans in a rolling 6-month period, the Board is adopting the PALs II framework largely as proposed in the PALs II NPRM. The requirements for PALs II loans will be set out in a new paragraph of the NCUA's general lending rule, § 701.21(c)(7)(iv). The final rule allows an FCU to offer a PALs II loan to a member for any amount up to a maximum loan amount of $2,000. The PALs II loan must carry a loan term of at least 1 month with a maximum loan maturity of 12 months. The FCU may make such a loan immediately upon the borrower establishing membership in the credit union. However, an FCU may only offer one type of PALs loan to a member at any given time. All other requirements of the PALs I rule will continue to apply to PALs II loans including the prohibition against rollovers, the limitation on the number of PALs loans that an FCU can make to a single borrower in a given period, and the requirement that each PALs II loan fully amortize over the life of the loan.

Additionally, the final rule prohibits an FCU from charging any overdraft or non-sufficient funds (NSF) fees in connection with any PALs II loan payment drawn against a borrower's account. This includes overdraft fees or NSF fees that an FCU could assess against the borrower for paying items presented for payment after the PALs II loan payment creates a negative balance in the borrower's account. As discussed below, while the Board believes that reasonable and proportional fees assessed in connection with an overdraft loan are appropriate in most cases to compensate an FCU for providing an important source of temporary liquidity to borrowers, the Board has serious fairness concerns regarding this practice in connection with PAL loans given the unique characteristics of payday loan borrowers and the Board's stated goal of putting individuals on a path to mainstream financial products and services.

Lastly, the final rule does not take any immediate action with regard to PALs III loans. The Board has taken the comments regarding a PALs III loan under advisement and will determine whether future action is necessary.

[22] *See* 12 CFR 701.21(c)(7)(iii)(A)(*2*).

[23] *See* 12 CFR 701.21(c)(7)(iii)(A)(*6*).

[24] *See* 12 CFR 701.21(c)(7)(iii)(A)(*3*).

IV. Statement of Legal Authority

The Board is issuing this final rule pursuant to its plenary regulatory authority to administer the Federal Credit Union Act (FCU Act) [25] and its specific authority to adopt rules and regulations that it deems necessary or appropriate to ensure the safety and soundness of the credit union system and the National Credit Union Share Insurance Fund (NCUSIF).[26] Given the historic mission of credit unions to serve individuals of modest means, the importance of providing these individuals with a realistic pathway towards mainstream financial products and services, and the high fixed costs associated with offering viable alternatives to payday loans, this final rule is an appropriate exercise of the Board's regulatory authority.

V. Section-by-Section Analysis

Because the PALs II NPRM proposed to apply many of the requirements of the PALs I rule to PALs II loans, the Board received numerous comments regarding the PALs I rule. The Board addresses those comments below in a section-by-section analysis of the PALs I rule, § 701.21(c)(7)(iii). With the exception of one clarification regarding the aggregate concentration limit set out in § 701.21(c)(7)(iii)(A)(*8*), the Board is not adopting any changes to the PALs I rule. However, in response to questions raised by several commenters, the Board does provide additional guidance below regarding application fees and underwriting criteria. Specific comments related to the PALs II NPRM are discussed in the section-by-section analysis of § 701.21(c)(7)(iv), which contains the new PALs II rule.

Section 701.21(c)(7)(iii)—Payday Alternative Loans (PALs I)

Section 701.21(c)(7)(iii)(A)—Minimum Requirements for PALs I

Section 701.21(c)(7)(iii)(A) permits an FCU to charge an interest rate that is 1000 basis points above the usury ceiling established by the Board under the NCUA's general lending rule. The current usury ceiling is 18 percent inclusive of all finance charges.[27] For PALs I loans, this means that the maximum interest rate that an FCU may charge for a PAL is currently 28 percent inclusive of all finance charges.

Many commenters requested that the Board increase the maximum interest rate that an FCU may charge for a PALs loan to 36 percent. These commenters noted that a 36 percent maximum interest rate would mirror the rate used by the Consumer Financial Protection Bureau (CFPB or Bureau) to determine whether certain high-cost loans are "covered loans" within the meaning of the Bureau's Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (payday lending rule) [28] and maximum interest rate allowed for active duty service members under the Military Lending Act,[29] providing a measure of regulatory uniformity for FCUs offering PALs loans. These commenters also argued that increasing the maximum interest rate to 36 percent would allow FCUs to compete more effectively with insured depository institutions and payday lenders for market share in this market.

In contrast, two commenters argued that a 28 percent interest rate is sufficient for FCUs. These commenters stated that on higher dollar loans with longer maturities, the current maximum interest rate of 28 percent is enough to allow an FCU to make PALs loans profitably. Another commenter noted that many credit unions are able to make PALs loans profitably at 18 percent, which it believed is evidence that the higher maximum interest rate is unnecessary.

Since the Board originally adopted the PALs I rule, it has observed substantial ongoing changes in the payday lending marketplace. Given all of these developments, the Board does not believe it is appropriate to adjust the maximum interest rate for PALs loans, whether a PALs I loan or PALs II loan, without further study. Furthermore, the Board notes that both the Bureau's payday lending rule and the Military Lending Act use an all-inclusive interest rate limit that may or may not include some of the fees, such as an application fee, that are permissible for PALs loans. Accordingly, the Board will continue to consider the commenters' suggestions and may revisit the maximum interest rate allowed for PALs loans if appropriate.

Section 701.21(c)(7)(iii)(A)(3)

Section 701.21(c)(7)(iii)(A)(*3*) limits the number of PALs I loans that an FCU can make to three in a rolling 6-month period to any one borrower. An FCU also may not make more than one PALs I loan at a time to a borrower. To account for the adoption of the PALs II rule, the final rule amends this section to clarify that an FCU may not offer more than one PALs loan, whether a PALs I or PALs II loan, to a borrower at a time.

Some commenters argued that the limitation on the number of PALs loans that a borrower may receive at a given time would force borrowers to take out a payday loan if the borrower needs additional funds. However, the Board believes that this limitation places a meaningful restraint on the ability of a borrower to take out multiple PALs loans at an FCU, which could jeopardize the borrower's ability to repay each of these loans. While a pattern of repeated or multiple borrowings may be common in the payday lending industry, the Board believes that allowing FCUs to engage in such a practice would defeat one of the purposes of PALs loans, which is to provide borrowers with a pathway towards mainstream financial products and services offered by credit unions.

Section 701.21(c)(7)(iii)(A)(7)

Section 701.21(c)(7)(iii)(A)(*7*) permits an FCU to charge a reasonable application fee, not to exceed $20, to all members applying for a PALs I loan. The Board interprets the term "application fee," as used in the PALs I rule, consistently with that of the CFPB's Regulation Z. Accordingly, in order to qualify as an "application fee" under the PALs I rule, an FCU must use the charge to recover actual costs associated with processing an individual application for credit such as credit reports, credit investigations, and appraisals.[30] An application fee that exceeds the actual cost of processing a borrower's application is a finance charge under Regulation Z that must be included in the APR and measured against the usury ceiling in the NCUA's rules.[31]

In response to the PALs II NPRM, several commenters argued that the current application fee limit of $20 is too low to allow an FCU to recover the actual costs of processing applications. The majority of these commenters recommended that the Board set the application fee limit between $40 and $50 to create an incentive for more FCUs to offer PALs loans to their members. Because of the limited underwriting involved with a PALs loan, the Board does not believe that an

[25] 12 U.S.C. 1766(a).

[26] 12 U.S.C. 1789(a)(11).

[27] Historically, the Board has interpreted the term "finance charge" in the NCUA's general lending rule consistently with that term in the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and the Consumer Financial Protection Bureau's implementing regulation, Regulation Z, 12 CFR part 1026. *See e.g.* Payday Lending, Letter to Federal Credit Unions 09–FCU–05 (July 2009) ("NCUA's long standing policy has been to look to the definition of 'finance charge' in Regulation Z").

[28] 12 CFR 1041.3(b)(3)(i).

[29] 10 U.S.C. 987; 32 CFR part 232.

[30] 12 CFR 1026.4(c)(1).

[31] *See* 12 CFR part 1026, Supp. I, comment 4(c)(1)–1.

application fee limit between $40 and $50 is appropriate. While one commenter provided a revenue model to help illustrate the potential cost of making a PALs loan, a majority of the commenters have not provided sufficient data to support their conclusion that the $20 application fee limit is too low to allow any FCU to recover the actual costs of processing applications. Furthermore, the Board believes that an increased application fee limit creates unnecessary potential for abuse by an FCU that may use a higher application fee as concealed interest to compensate the credit union for the risk of loss associated with making a PALs loan.

Other commenters asked the Board to clarify whether an application fee may reflect staff and technology costs, investing in loan processing automation, third-party service provider costs, and advertising. As noted above, the Board interprets the term "application fee" in the PALs I rule consistently with Regulation Z. An application fee must reflect the actual and direct costs associated with processing an individual application. While certain third-party service provider costs may be included in the application fee, especially if the FCU offers a PALs loan through a third-party vendor and passes any costs associated with using that vendor onto the member borrower, the Board does not believe that other costs, such as investing in loan processing automation or advertising costs, are actual and direct costs associated with processing a borrower's application. Rather, these costs are general business expenses incurred as part of credit union operations and do not relate to costs specifically incurred processing a borrower's PALs loan application.

One commenter stated that the Board should only permit one application fee per year. This commenter argued that the limited underwriting of a PALs loan does not justify allowing an FCU to charge an application fee for each PALs loan. Another commenter similarly requested that the Board adopt some limit on the number of application fees that an FCU may charge for PALs loans in a given year. The Board appreciates the commenters concerns about the burden excessive fees place on borrowers. This is particularly relevant in this area. However, the Board must balance the need to provide a safe product for borrowers with the need to create sufficient incentives to encourage FCUs to make PALs loans. The Board believes that its current approach of allowing FCUs to charge a reasonable application fee, consistent with Regulation Z, which does not exceed $20, provides the appropriate balance between these two objectives.

Several commenters also suggested that the Board permit an FCU to charge a monthly service fee for PALs loans. As noted above, the Board interprets the term "finance charge," as used in the FCU Act, consistently with Regulation Z. A monthly service fee is a finance charge under Regulation Z.[32] Consequently, the monthly service fee would be included in the APR and measured against the usury ceiling in the NCUA's rules. Therefore, while the PALs I rule does not prohibit an FCU from charging a monthly service fee, the Board believes that such a fee will be of little practical value to an FCU because any monthly service fee income likely would reduce the amount of interest income an FCU could receive from the borrower or would push the APR over the applicable usury ceiling.

Section 701.21(c)(7)(iii)(A)(8)

Section 701.21(c)(7)(iii)(A)(*8*) requires an FCU to include a limit on the aggregate dollar amount of PALs I loans in its written lending policies. Under no circumstances may the total amount of PALs I loans be greater than 20 percent of the FCU's net worth. This provision also requires an FCU to adopt appropriate underwriting guidelines to minimize the risks related to PALs I loans. A set of best practices for PALs I loan underwriting is included as guidance in § 701.21(c)(7)(iii)(B)(*2*).

The final rule amends § 701.21(c)(7)(iii)(A)(*8*) to clarify that the 20 percent aggregate limit applies to both PALs I and PALs II loans. The Board adopted this limit in the PALs I rule as a precaution to avoid unnecessary concentration risk for FCUs engaged in this type of activity. While the Board indicated that it might consider raising the limit later based on the success of FCU PAL programs, the Board has insufficient data to justify increasing the aggregate limit for either PALs I or PALs II loans at this time. Rather, based on the increased risk to FCUs related to high-cost, small-dollar lending, the Board believes that the 20 percent aggregate limit for both PALs I and PALs II loans is appropriate. The final rule includes a corresponding provision in § 701.21(c)(7)(iv)(*8*) to avoid any confusion regarding the applicability of the aggregate limit to PALs I and PALs II loans.

Many commenters asked the Board to exempt low-income credit unions (LICUs) and credit unions designated as community development financial institutions (CDFIs) from the 20 percent aggregate limit for PALs loans. These commenters argued that making PALs loans is part of the mission of LICUs and CDFIs and, therefore, the Board should not hinder these credit unions from making PALs loans to their members. Another commenter requested that the Board eliminate the aggregate limit for PALs loans entirely for any FCU that offers PALs loans to their members. The Board did not raise this issue in the PALs II NPRM. Accordingly, the Board does not believe it would be appropriate under the Administrative Procedure Act to consider these requests at this time. However, the Board will consider the commenters' suggestions and may revisit the aggregate limit for PALs loans in the future if appropriate.

Other commenters to the PALs II NPRM asked for clarification regarding the underwriting criteria that an FCU must use in connection with a PALs loan. Specifically, commenters requested guidance on whether an FCU should consider a borrower's debt burden in addition to monthly income or deposit activity when making a PALs loan. The Board has not historically required specific underwriting standards for PALs loans. Rather, the Board has allowed an FCU to develop its own lending policies based on its risk tolerance.[33] At a minimum, however, the Board has recommended that an FCU develop underwriting standards that "account for a member's need for quickly available funds, while adhering to principles of responsible lending." [34] This includes examining a borrower's "proof of employment or income, including at least two recent paycheck stubs" to determine a borrower's repayment ability as well as "developing standards for maturity lengths and loan amounts so a borrower can manage repayment of the loan." [35]

The Board continues to believe that an FCU is in the best position to develop its own underwriting standards based on its risk tolerance as long as those standards are consistent with responsible lending principles. While the Board has historically only provided guidance on minimum standards for determining a borrower's recurring income as the key criteria for eligibility for a PALs loan, that does not mean that an FCU may ignore a borrower's debt burden when determining whether to grant a PALs loan. Rather, the FCU must consider the borrower's entire financial position, including debt burden, and make an informed judgment consistent

[32] *See* 12 CFR 1026.4(b)(2).

[33] *See* Short-Term, Small Amount Loans, 75 FR 58285, 58288 (Sept. 24, 2010).

[34] 12 CFR 701.21(c)(7)(iii)(B)(*2*).

[35] *Id.*

with responsible lending principles regarding whether to extend a PALs loan to a borrower. Accordingly, the FCU should conduct some inquiry into whether the borrower can manage to repay the PALs loan without the need for additional PALs loans or traditional payday loans. When considering the application of a member with prior a history at the credit union, a review of credit and debit activity in their account may be sufficient to make this determination.

Section 701.21(c)(7)(iv)—Payday Alternative Loans (PALs II)

The final rule creates a new provision, § 701.21(c)(7)(iv), that sets forth the requirements for PALs II loans. In the PALs II NPRM, a majority of commenters asked that the Board combine the PALs I rule and proposed PALs II rule together in a single PALs regulation. Most of the commenters argued strongly that one PALs loan regulation would reduce confusion and provide FCUs with greater flexibility to structure their PAL programs in ways that best serve their members.

A small number of commenters raised serious concerns regarding the applicability of the CFPB's payday lending rule [36] should the Board adopt any changes to the PALs I rule. The CFPB's payday lending rule establishes consumer protections for certain high-cost credit products, including payday loans, and deems some credit practices related to those products to be unfair or abusive in violation of the Consumer Financial Practices Act.[37] However, the CFPB's payday lending rule provides a "safe harbor" for any loan that is made by an FCU in compliance with the PALs I rule with an explicit cross-reference to § 701.21(c)(7)(iii).[38] These commenters argued that any changes to the PALs I rule may eliminate the safe harbor for FCUs in the CFPB's rule. To allow FCUs to continue to avail themselves of the safe harbor, the commenters requested that the Board adopt the PALs II rule as a separate provision within the NCUA's general lending rule.[39]

[36] 12 CFR part 1041.

[37] *See* 12 CFR 1041.1(b) (purpose).

[38] 12 CFR 1041.3(e)(4).

[39] In addition, as noted in the NPRM, the CFPB's current payday lending rule conditionally exempts "alternative loans," which covers loans that meet certain PALs I requirements. The Board notes that the CFPB's rule does not include the minimum membership period or limitation on the number of loans in a six-month period among the criteria for the exemption. The Board's decision to limit the number of loans that may be made in a six-month period does not affect this exemption because the CFPB's rule does not include the number of loans as a criterion for the exemption.

The CFPB has proposed amendments to certain aspects of its payday lending rule.[40] Because the regulatory landscape with respect to payday lending remains somewhat uncertain until the Bureau completes the rulemaking process, the Board believes that adopting the PALs II rule as a separate provision within the NCUA's general lending rule is appropriate at this time to preserve the availability of the safe harbor for FCUs that offer PALs loans that conform to the requirements of the PALs I rule.

Membership Requirement

Current § 701.21(c)(7)(iii)(A)(*6*) requires a borrower to be a member of an FCU for at least one month before the FCU can make a PALs I loan to that borrower.[41] However, an FCU may establish a longer period as a matter of business judgment. The PALs II NPRM proposed to remove this minimum membership time requirement for PALs II loans. The purpose of this change was to allow an FCU to make a PAL II loan to any member borrower that needs access to funds immediately and would otherwise turn to a payday lender to meet that need.

Many of the commenters that addressed this issue favored removing the minimum membership time requirement with respect to PALs II loans. These commenters argued that this change would provide an FCU with the flexibility necessary to serve member borrowers that need immediate access to temporary liquidity who might otherwise turn to a payday lender. In contrast, a few commenters argued against this change, noting that that a minimum membership requirement is a prudent lending practice that helps an FCU establish a meaningful relationship with a potential borrower before offering a PALs II loan to that borrower.

The Board agrees that establishing a meaningful relationship with a potential borrower is a prudent lending practice and protects an FCU from certain risks. Accordingly, the Board encourages FCUs to consider establishing a minimum membership requirement as a matter of sound business judgment. However, the Board believes that granting PALs II loans to member borrowers, who need immediate access to funds, is a better alternative than having those borrowers take out predatory payday loans and wait for 30 days before rolling that predatory payday loan over into a PALs II loan, or worse, never applying for a PALs II loan. Therefore, the Board is adopting

[40] Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 FR 4252 (Feb. 14, 2019).

[41] 12 CFR 701.21(c)(7)(iii)(A)(*6*).

this aspect of the PALs II NPRM as proposed. The Board notes, however, that this final rule does not prohibit a credit union from setting a minimum membership term, but it is not required to do so.

Section 701.21(c)(7)(iv)(A)(1)

The PALs I rule limits the principal amount of a PALs I loan to not less than \$200 or more than \$1,000.[42] In contrast, the PALs II NPRM proposed to allow an FCU to offer a PALs II loan with a loan amount up to \$2,000 without any minimum loan amount. The Board believes that a higher maximum and no minimum loan amount will allow an FCU to meet the demands of more segments of the payday loan market. Furthermore, the PALs II NPRM provided that a higher maximum loan amount will allow some borrowers to cover a larger financial emergency or to consolidate multiple payday loans into a PALs II loan, thereby providing a pathway to mainstream financial products and services offered by credit unions.

Maximum Loan Amount

Many commenters argued against the \$2,000 maximum loan amount as too low. These commenters argued that \$2,000 is insufficient to cover most large financial emergencies that prompt a borrower to resort to a payday loan or to allow a borrower to consolidate all of the borrower's payday loans. Some of these commenters, however, also argued that a larger maximum loan amount would be more profitable and allow an FCU to make sufficient interest to cover the cost of this type of lending.

In contrast, some commenters argued that allowing an FCU to charge a 28 percent APR for a \$2,000 PALs II loan is a slippery slope to allowing an FCU to operate outside of the usury ceiling. These commenters noted that larger, longer-term loans provide increased revenue to the credit union and, therefore, the Board should not adopt a special exception from the general usury ceiling for these types of products.

While the Board recognizes that \$2,000 may be insufficient to cover a larger financial emergency or to allow a borrower to consolidate a considerable number of payday loans, it nevertheless believes that allowing an FCU to offer a \$3,000 or \$4,000 loan at 28 percent interest is too high a limit and would violate the spirit of the FCU Act. In adopting the PALs I rule, the Board reluctantly established a separate usury ceiling for PALs I loans after a careful determination than an FCU could not

[42] 12 CFR 701.21(c)(7)(iii)(A)(*1*).

provide a reasonable alternative to a payday loan under the general usury ceiling. By allowing an FCU to charge a higher interest rate, the Board sought to create a regulatory structure that allowed an FCU to offer a responsible payday loan alternative to members in a prudent manner.

The Board believes that $2,000 is a reasonable limit for the vast majority of PALs II loan borrowers. Accordingly, the Board is also adopting this aspect of the PALs II NPRM as proposed.

Minimum Loan Amount

Several commenters expressed support for removing the minimum loan amount as a means of allowing an FCU to tailor its PALs II program to the unique needs of its members. In contrast, other commenters argued that removing the minimum loan amount would result in a triple digit APR comparable to a traditional payday loan for any PALs II loan under $100 where the credit union also charges an application fee.

The Board believes that an FCU should have the flexibility to meet borrower demand to avoid the need for those borrowers to resort to a traditional payday loan. While the total cost of credit may be high for these loans, the PALs II rule provides significant structural safeguards not present in most traditional payday loans.

Furthermore, the Board does not believe it is prudent for an FCU to require a member to borrow more than necessary to meet the borrower's demand for funds. Establishing a minimum PALs II loan amount would require a borrower to carry a larger balance and incur additional interest charges to avoid an apparently high APR when a smaller PALs II loan would satisfy that borrower's need for funds without the additional interest charges. On balance, the Board believes that the borrower's real need to avoid additional charges outweighs the need to avoid the appearance of a higher APR for smaller PALs II loans. Accordingly, the Board is adopting this aspect of the PALs II NPRM as proposed.

Nevertheless, the Board is mindful that allowing an FCU to charge an application fee up to $20 in connection with a PALs II loan less than $100 is problematic. Depending on the facts and circumstances, the Board believes that charging a $20 application fee for a low amount financed may take unfair advantage of the inability of the borrower to protect his or her interests, especially where minimal underwriting is expected to be performed. The Board reminds commenters that the application fee is to recoup the actual costs associated with processing an application. And more importantly, the $20 maximum amount allowed under this rule is the ceiling, not the floor. Any application fee charged by an FCU should be commensurate with the level of underwriting necessary to process a PALs II loan. Accordingly, the NCUA Board will instruct examiners to thoughtfully scrutinize the application fee charged for a PALs II loan less than $200.

Section 701.21(c)(7)(iv)(A)(2)

The PALs I rule currently limits loan maturities to a minimum of one month and a maximum of 6 months.[43] The PALs II NPRM proposed to allow an FCU to make a PALs II loan with a minimum maturity of one month and a maximum maturity of 12 months. The PALs II NPRM provided that the longer loan term will allow an FCU making a larger PALs II loan to establish a repayment schedule that is affordable for the borrower while still fully amortizing the loan.

All of the commenters that addressed this issue favored a maximum loan term of at least one year. A few commenters believed that a maximum loan term of one year is too short, allowing borrowers insufficient time to pay off larger PALs II loans. These commenters favored a more flexible maximum loan term to allow an FCU to establish a repayment schedule that is appropriate for the unique needs of each individual borrower. Other commenters advocated for the removal of any maximum maturity limit to allow an FCU the greatest amount of flexibility to establish an affordable repayment schedule. A few commenters also suggested that the Board increase the minimum loan term to 90 days to make PALs II loans safer for borrowers.

Each group of commenters made a reasonable argument why the Board should adopt a flexible maximum loan term. After considering these varied viewpoints, the Board has determined to finalize this aspect of the PALs II NPRM as proposed. Should the Board engage in any future rulemaking regarding PALs loans, it will further consider the commenters' suggestions along with any applicable data gathered on PALs II loans.

Section 701.21(c)(7)(iv)(A)(3)

The PALs I rule currently prohibits an FCU from making more than three PALs I loans in a rolling 6-month period to a single borrower.[44] The PALs II NPRM proposed to remove that restriction for PALs II loans. However, an FCU would not be allowed not make more than one of any type of PALs loan, whether a PALs I or PALs II loan, to a single borrower at a time.

Many of the commenters that addressed this issue favored removing the limit on the number of PALs II loans that an FCU may make to a borrower over 6 months as long as the Board retained the restriction of making no more than one PALs loan to a single borrower at a time. These commenters argued that this would provide FCUs with added flexibility to meet the needs of their members, particularly those members that currently use payday loans as a source of temporary liquidity. Other commenters also favored removing the limit, but opposed retaining the limit of one loan per borrower at a time.

Some commenters opposed removal of the limit on the number of PALs II loans an FCU can make to a borrower in a 6-month period. These commenters argued that such a change would allow an FCU to churn loans each month, charging an application fee for each PALs loan, with little economic benefit to the borrower similar to a predatory payday loan. According to these commenters, this would create a strong incentive for FCUs to adopt a business model that maximizes application fee revenue at the expense of the borrower contrary to the purposes of PALs loans.

The Board has reconsidered this aspect of the proposed rule and agrees that removing the limit on the number of PALs II loans an FCU may make to a single borrower at a time may encourage some FCUs to adopt a business model that maximizes fee revenue at the expense of the borrower. The Board fashioned the structural safeguards in the PALs I rule to eliminate the business practices common in the predatory payday lending industry that trap borrowers in cycles of repeated borrowings. Accordingly, the Board is not adopting this aspect of the PALs II NPRM in the final rule.

Section 701.21(c)(7)(iv)(A)(8)

The final rule adds a new § 701.21(c)(7)(iii)(A)(*8*) prohibiting an FCU from charging an overdraft or NSF fee in connection with a PALs II loan payment drawn against a borrower's account.[45] In the PALs II NPRM, the Board asked whether the NCUA should prohibit overdraft or NSF fees charged

[43] 12 CFR 701.21(c)(7)(iii)(A)(*2*).

[44] 12 CFR 701.21(c)(7)(iii)(A)(*3*).

[45] This includes extended overdraft fees or NSF fees that the FCU would assess against the borrower for paying items presented for payment after the PAL payment creates a negative balance in the borrower's account.

in connection with any PALs loan payments. Half of the commenters that responded to this question answered in the affirmative, arguing that an FCU could use overdraft fees in a predatory manner to extract additional revenue from a PALs loan borrower. These commenters also felt that allowing overdraft fees related to a PALs loan is contrary to providing borrowers with a meaningful pathway towards mainstream financial products and services because additional fees can have a devastating impact on the borrower's financial health and leave the borrower trapped in a "cycle of debt."

The remainder of the commenters that responded to this question opposed prohibiting an FCU from charging overdraft fees related to PALs loans. These commenters argued that the decision to extend an overdraft loan and charge overdraft fees should be business decisions for each individual FCU and that the Board should not treat overdraft or NSF fees charged in connection with a PALs loan payment any differently from other circumstance when a borrower overdraws an account to make a loan payment. Finally, some cautioned that prohibiting overdraft or NSF fees could pose a safety and soundness risk to an FCU if a borrower routinely overdraws an account because of a PALs loan.

The Board agrees that the decision to extend an overdraft loan to a borrower is a business decision for each FCU to make in accordance with its own risk tolerance. Generally, the Board also believes that an FCU charging a reasonable and proportional overdraft fee in connection with an overdraft loan is appropriate in most cases to compensate the credit union for providing an important source of temporary liquidity to borrowers. However, the Board has serious fairness [46] concerns regarding the potential harm to borrowers caused by allowing an FCU to charge overdraft or NSF fees in connection with a PALs II loan payment given the increased principal amount allowed for PALs II loans.

Charging overdraft fees related to a PALs II loan payment is likely to cause substantial borrower harm.[47] The Board envisions PALs II loan borrowers typically will be in a vulnerable financial position and unable to take on additional expenses. Charging an overdraft fee in this situation will likely weaken the borrower's financial position further and can have cascading consequences including an inability to repay the PALs II loan. Moreover, charging an overdraft fee in addition to requiring repayment of the overdrawn balance makes the borrower even less likely to meet other expenses or obligations.

This type of harm is also not reasonably avoidable by the borrower.[48] A borrower cannot reasonably avoid injury that results from an unpredictable event.[49] The decision whether to extend an overdraft loan and charge an overdraft fee, rests entirely with the FCU and not with the borrower. Accordingly, the borrower does not have an ability to anticipate which items that could overdraw the account that the FCU will honor and take appropriate action to minimize the potential for overdraft fees. Even if the borrower, in the abstract, should have the ability to anticipate such an event, behavioral economics research shows that borrowers are prone to hyperbolic discounting of the risk of potential negative events, making such an ability to anticipate the overdraft more theoretical than actual.[50]

Moreover, a borrower cannot reasonably avoid injury that results from an involuntary event.[51] The Federal Trade Commission (FTC) has compiled an extensive factual record showing that "the precipitating cause of default is usually a circumstance or event beyond the debtor's immediate control." [52] Accordingly, "among those defaults that do occur, the majority are not reasonably avoidable by consumers. Instead, default is a response to events that are largely beyond the consumer's control." [53] Although some precaution "can reduce the risk of default . . . no reasonable level of precautions can eliminate the risk. Moreover, some consumers are unable to take various precautionary steps." [54] While an overdraft loan prevents a borrower from defaulting, many of the same circumstances that would cause a borrower to default would also cause a borrower to overdraw an account. Furthermore, in the case of PALs II loan borrowers, the member borrower may have limited ability to take precautionary steps to limit the harm caused by overdrafts given the borrower's financial position.

Allowing an FCU to charge overdraft fees related to a PALs II loan payment offers an insubstantial benefit to borrowers or competition in the payday lending marketplace when measured against the potential for substantial borrower harm.[55] The Board recognizes that allowing overdraft or NSF fees will make an FCU more likely to extend an overdraft loan to provide temporary liquidity for a PALs II loan borrower. However, the tradeoff for that liquidity is the potential for additional overdraft fees that could cause the borrower to experience other negative consequences such as the loss of a vehicle or eviction while trying to pay off overdraft fees. Moreover, while the Board acknowledges that this provision could result in borrowers receiving less overdraft loans or FCUs receiving less fee income, the Board believes that overdraft loans related to PALs II loans leave the borrower less financially stable and that FCUs already receive sufficient income through application fees and higher APRs charged on PALs II loan balances. Accordingly, the Board believes, on balance, that potential borrower harm outweighs potential tangible benefits.

Finally, the Board believes that allowing overdraft fees related to a PALs

[46] A business practice is unfair if it is likely to cause substantial consumer harm that is not reasonably avoidable by the consumer and not otherwise outweighed by any countervailing benefits to consumers or competition. *See* 15 U.S.C. 45(n).

[47] A harm may be "substantial" if "a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers . . . [i]n most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks." *See* Sen. Rep. No. 130, 103d Cong. 2d Sess. 12 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1787–1788.

[48] "A harm is 'reasonably avoidable' if consumers 'have reason to anticipate the impending harm and the means to avoid it,' or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *Davis* v. *HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168–69 (9th Cir. 2012) (*citing Orkin Exterminating Co.* v. *FTC*, 849 F.2d 1354, 1365–66 (11th Cir. 1988)). Thus, "[i]n determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." *FTC* v. *Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010).

[49] Trade Regulation Rule; Credit Practices, 49 FR 7740, 7747 (Mar 1. 1984).

[50] *See e.g.*, Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & Bus. 617, 659–660 (2009).

[51] Trade Regulation Rule; Credit Practices, 49 FR 7740, 7747–8 (Mar 1. 1984).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] In assessing whether a business practice is "not outweighed by countervailing benefits to consumers or to competition," one is not required to "quantify the detrimental and beneficial effects of the practice in every case . . . [i]n many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible." Rather, one must "carefully evaluable the benefits and costs . . .considering reasonably available evidence." *See* Sen. Rep. No. 130, 103d Cong. 2d Sess. 12 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1787–1788. If the net effect of a particular business practice is injurious to consumers, then the practice is unfair. *See Am. Fin. Svcs Ass'n* v. *FTC*, 767 F.2d 957 (D.C. Cir. 1985).

II loan payment is contrary to one of the goals of PALs loans,[56] which is to provide borrowers with meaningful pathways towards mainstream financial products and services offered by credit unions. Accordingly, the Board is adopting a provision in the final rule to prohibit an FCU from charging an overdraft or NSF fee in connection with a PALs II loan payment drawn against a borrower's account. It may consider imposing similar requirement on all PALs loans in a future rulemaking should the Board determine that such a restriction is necessary for all PALs loans.

The Board recognizes that certain automated internal processes may cause an FCU to violate this prohibition on charging an overdraft or NSF fee in connection with a PALs II loan payment inadvertently. The Board notes that any FCU that charges an overdraft or NSF fee in connection with a PALs II loan payment should immediately refund the charge to the borrower. If the FCU refunds the charge to the borrower, the Board will not consider the FCU to have violated this aspect of the PALs II rule.

VI. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities (primarily those under $100 million in assets).[57] This rule will provide a limited number of FCUs making PALs with additional flexibility to make such loans. Accordingly, the Board believes that the rule will not have a significant economic impact on a substantial number of small credit unions. Therefore, a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) provides generally for congressional review of agency rules. The NCUA triggers a SBREFA reporting requirement when the agency issues a final rule as defined by section 551 of the Administrative Procedure Act. As required by SBREFA, the NCUA submitted this final rule to the Office of Management and Budget (OMB) for it to determine if the final rule is a "major rule" for purposes of SBREFA. The OMB determined that the rule is not major. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), the NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. For purposes of the PRA, an information collection may take the form of a reporting, recordkeeping, or a third-party disclosure requirement, referred to as a paperwork burden. The information collection requirements of § 701.21 of NCUA's regulations are assigned OMB control number 3133–0092 and this rule would not impose any new paperwork burden.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[58]

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests.[59] The NCUA, an independent regulatory agency, as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The final rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has therefore determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

List of Subjects in 12 CFR Part 701

Credit unions, Federal credit unions.

By the National Credit Union Administration Board on September 19, 2019.

Gerard S. Poliquin,

Secretary of the Board.

For the reasons stated above, the National Credit Union Administration amends 12 CFR part 701 as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

■ 1. The authority for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.*; 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. Amend § 701.21 by revising paragraph (c)(7)(iii) and adding paragraph (c)(7)(iv) to read as follows:

§ 701.21 Loans to members and lines of credit to members.

* * * * *

(c) * * *

(7) * * *

(iii) *Payday alternative loans (PALs I)*—(A) *Minimum requirements for PALs I.* Notwithstanding any other provision of this section, a federal credit union may charge an interest rate that is 1000 basis points above the maximum interest rate established by the Board under paragraph (c)(7)(ii) of this section provided the federal credit union is offering closed-end credit, as defined in § 1026.2(a)(10) of this title, in accordance with the following conditions:

(*1*) The principal of the payday alternative loan is not less than $200 or more than $1,000;

(*2*) The payday alternative loan has a minimum maturity of one month and a maximum maturity of six months;

(*3*) The federal credit union does not make more than three payday alternative loans provided under either this paragraph (c)(7)(iii) or paragraph (c)(7)(iv) of this section in any rolling six-month period to any one borrower and does not make more than one payday alternative loan provided under either this paragraph (c)(7)(iii) or paragraph (c)(7)(iv) of this section at a time to any borrower;

(*4*) The federal credit union does not rollover any payday alternative loan provided under this paragraph (c)(7)(iii) or paragraph (c)(7)(iv) of this section, provided that the prohibition against rollovers does not apply to an extension of a payday alternative loan term within

[56] When determining whether a business practice is fair, one may consider established public policy as evidence to be considered with all over evidence. However, public policy may not serve as the primary basis for determining the fairness of a business practice. *See* 15 U.S.C. 45(n). At least some older cases have found excessive bank fees to be unconscionable. *See Perdue* v. *Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985).

[57] 5 U.S.C. 603(a).

[58] Public Law 105–277, section 654, 112 Stat. 2681, 2681–581 (1998).

[59] 64 FR 43255 (Aug. 4, 1999).

the maximum loan term set forth in paragraph (c)(7)(iii)(A)(*3*) of this section that does not include any additional fees assessed or extend additional credit to the borrower;

(*5*) The federal credit union fully amortizes the payday alternative loan;

(*6*) The federal credit union requires the borrower to be a member of the credit union for at least one month before receiving a payday alternative loan provided under this paragraph (c)(7)(iii);

(*7*) The federal credit union charges a reasonable application fee to all members applying for a new payday alternative loan offered under this paragraph (c)(7)(iii) that reflects the actual costs associated with processing the application, but that in no case exceeds $20; and

(*8*) The federal credit union includes, in its written lending policies, a limit on the aggregate dollar amount of payday alternative loans made under this paragraph (c)(7)(iii) and paragraph (c)(7)(iv) of this section that does not exceed an aggregate of 20% of net worth and implements appropriate underwriting guidelines to minimize risk, such as, requiring a borrower to verify employment by providing at least two recent pay stubs.

(B) *PALs I guidance and best practices.* In developing a successful payday alternative loan program, a federal credit union should consider how the program would benefit a member's financial well-being while considering the higher degree of risk associated with this type of lending. The guidance and best practices are intended to help federal credit unions minimize risk and develop a successful program, but are not an exhaustive checklist and do not guarantee a successful program with a low degree of risk.

(*1*) *Program features.* Several features that may increase the success of a payday alternative loan program and enhance member benefit include adding a savings component, financial education, reporting of members' payment of payday alternative loans to credit bureaus, or electronic loan transactions as part of a payday alternative loan program. In addition, although a federal credit union cannot require members to authorize a payroll deduction, a federal credit union should encourage or incentivize members to utilize payroll deduction.

(*2*) *Underwriting.* Federal credit unions should develop minimum underwriting standards that account for a member's need for quickly available funds, while adhering to principles of responsible lending. Underwriting standards should address required documentation for proof of employment or income, including at least two recent paycheck stubs. Federal credit unions should be able to use a borrower's proof of recurring income as the key criterion in developing standards for maturity lengths and loan amounts so a borrower can manage repayment of the loan. For members with established accounts, federal credit unions should only need to review a member's account records and proof of recurring income or employment.

(*3*) *Risk avoidance.* Federal credit unions should consider risk avoidance strategies, including requiring members to participate in direct deposit and conducting a thorough evaluation of the federal credit union's resources and ability to engage in a payday alternative loan program.

(iv) *Payday alternative loans (PALs II)*—(A) *Minimum requirements for PALs II.* Notwithstanding any other provision of this section, a federal credit union may charge an interest rate that is 1000 basis points above the maximum interest rate established by the Board under paragraph (c)(7)(ii) of this section provided the federal credit union is offering closed-end credit, as defined in § 1026.2(a)(10) of this title, in accordance with the following conditions:

(*1*) The principal of the payday alternative loan is not more than $2,000;

(*2*) The payday alternative loan has a minimum maturity of one month and a maximum maturity of 12 months;

(*3*) The federal credit union does not make more than three payday alternative loans provided either under paragraph (c)(7)(iii) of this section or this paragraph (c)(7)(iv) in any rolling six-month period to any one borrower and does not make more than one payday alternative loan provided under either paragraph (c)(7)(iii) of this section or this paragraph (c)(7)(iv) at a time to any borrower;

(*4*) The federal credit union does not rollover any payday alternative loan provided under paragraph (c)(7)(iii) of this section or this paragraph (c)(7)(iv), provided that the prohibition against rollovers does not apply to an extension of a payday alternative loan term within the maximum loan term set forth in paragraph (c)(7)(iv)(A)(*3*) of this section that does not include any additional fees assessed or extend additional credit to the borrower;

(*5*) The federal credit union fully amortizes the payday alternative loan;

(*6*) The federal credit union charges a reasonable application fee to all members applying for a new payday alternative loan offered under this paragraph (c)(7)(iv) that reflects the actual costs associated with processing the application, but that in no case exceeds $20;

(*7*) The federal credit union does not assess a fee or charge, including a non-sufficient funds fee, on the borrower's account pursuant to the federal credit union's overdraft service, as defined in § 1005.17(a) of this title, in connection with any payday alternative loan provided under this paragraph (c)(7)(iv); and

(*8*) The federal credit union includes, in its written lending policies, a limit on the aggregate dollar amount of payday alternative loans made under paragraph (c)(7)(iii) of this section and this paragraph (c)(7)(iv) that does not exceed an aggregate of 20% of net worth and implements appropriate underwriting guidelines to minimize risk, such as, requiring a borrower to verify employment by providing at least two recent pay stubs.

(B) *PALs II guidance and best practices.* In developing a successful payday alternative loan program, a federal credit union should consider how the program would benefit a member's financial well-being while considering the higher degree of risk associated with this type of lending. The guidance and best practices are intended to help federal credit unions minimize risk and develop a successful program, but are not an exhaustive checklist and do not guarantee a successful program with a low degree of risk.

(*1*) *Program features.* Several features that may increase the success of a payday alternative loan program and enhance member benefit include adding a savings component, financial education, reporting of members' payment of payday alternative loans to credit bureaus, or electronic loan transactions as part of a payday alternative loan program. In addition, although a federal credit union cannot require members to authorize a payroll deduction, a federal credit union should encourage or incentivize members to utilize payroll deduction.

(*2*) *Underwriting.* Federal credit unions should develop minimum underwriting standards that account for a member's need for quickly available funds, while adhering to principles of responsible lending. Underwriting standards should address required documentation for proof of employment or income, including at least two recent paycheck stubs. Federal credit unions should be able to use a borrower's proof of recurring income as the key criterion in developing standards for maturity lengths and loan amounts so a borrower can manage repayment of the loan. For members with established accounts, federal credit unions should only need to review a member's account records and proof of recurring income or employment.

(3) *Risk avoidance.* Federal credit unions should consider risk avoidance strategies, including requiring members to participate in direct deposit and conducting a thorough evaluation of the federal credit union's resources and ability to engage in a payday alternative loan program.

* * * * *

[FR Doc. 2019–20821 Filed 9–30–19; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0318; Product Identifier 2019–NM–015–AD; Amendment 39–19745; AD 2019–19–09]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A330–200 Freighter, A330–200, and A330–300 series airplanes. This AD was prompted by an analysis conducted on Airbus SAS Model A330–200 Freighter, A330–200, and A330–300 series airplanes that identified structural areas that are susceptible to widespread fatigue damage (WFD). This AD requires reinforcement modifications of various structural parts of the fuselage, and applicable related investigative and corrective actions if necessary, as specified in a European Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 5, 2019.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 5, 2019.

ADDRESSES: For the material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0318.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0318; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229.

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2018–0276R1, dated January 11, 2019; corrected January 15, 2019 ("EASA AD 2018–0276R1") (referred to after this as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition for all Airbus SAS Model A330–200 Freighter, A330–200, and A330–300 series airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus SAS Model A330–200 Freighter, A330–200, and A330–300 series airplanes. The NPRM published in the **Federal Register** on May 16, 2019 (84 FR 22075). The NPRM was prompted by an analysis conducted on Airbus SAS Model A330–200 Freighter, A330–200, and A330–300 series airplanes that identified structural areas that are susceptible to WFD. The NPRM proposed to require reinforcement modifications of various structural parts of the fuselage, and applicable related investigative and corrective actions if necessary.

The FAA is issuing this AD to address structural areas that are susceptible to WFD, which, if not corrected, could lead to crack initiation and undetected propagation, reducing the structural integrity of the airplane, possibly resulting in rapid depressurization and consequent injury to occupants. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the NPRM and the FAA's response to each comment. Commenters Christopher Cracraft, Samuel Hazo, and American Airlines (AAL) stated that they support the NPRM.

Request To Use Later-Approved Service Information

AAL requested that the FAA provide a statement in the final rule confirming its approval of later-approved service information since the FAA rarely allows such practice without an alternative method of compliance (AMOC).

This AD does not exclude the "Ref. Publications" section of EASA AD 2018–0276R1, so that section is applicable to this AD, which addresses the commenter's concern. The FAA does not find it necessary to provide an additional statement regarding this issue in this AD. Therefore, the FAA has not changed this AD regarding this issue.

Request To Allow Alternative Corrosion-Inhibiting Compounds (CICs)

Delta Airlines (DAL) generally supported the NPRM but requested that the FAA allow operators to use their CICs, which are controlled by their FAA-principal maintenance inspector (PMI), for their corrosion prevention and control program (CPCP). DAL stated that the instructions in the service information include the reapplication of CICs. DAL commented that the CICs do not always align with the CIC products specified in the service information, which forces operators to apply for an AMOC for use of their preferred CICs.

In addition, DAL stated that corrosion is not the subject of the unsafe condition in the proposed AD, and operators should be able maintain their airplanes at their discretion through their FAA-accepted programs. DAL commented that CICs that are PMI accepted have shown an equivalent level of safety, and their use should continue to be accepted