UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL COMMUNITY REINVESTMENT COALITION, et al.,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Defendant.

Civil Action No. 20-2074 (BAH)

PLAINTIFFS' COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Although federal agencies have significant discretion to enact their policy preferences, their exercise of discretion is subject to important legal constraints. For one, agencies must provide contemporaneous, reasoned explanations for their actions, supported by evidence in the record. In addition, they cannot use rulemaking to implement policy preferences that are counter to those enacted by Congress, and all rulemakings must be grounded in statutory authority. Here, defendant Consumer Financial Protection Bureau (CFPB) ran afoul of these basic principles in enacting a 2020 rule exempting approximately 35% of financial institutions that make mortgage (closed-end) loans and 39.5% of institutions that issue open-end lines of credit from the reporting requirements Congress enacted in the Home Mortgage Disclosure Act (HMDA). CFPB's Final Rule—Home Mortgage Disclosure (Regulation C), 85 Fed. Reg. 28364 (May 12, 2020) (2020 Rule)—is arbitrary, capricious, and contrary to law, and exceeds CFPB's statutory authority.

First, CFPB concedes that the Rule's changes with respect to closed-end lenders were based on incorrect data. This flaw cannot be cured by a mid-litigation "correction notice" or arguments by counsel. Where, as here, an agency discovers that its explicit justifications for a rule were erroneous, it may request a voluntary remand and take further action. Otherwise, the Court must review the Rule as it was issued, in light of the agency's contemporaneous justification. And in that light, the closed-end threshold is arbitrary and capricious.

Second, CFPB identifies no evidence in the record that demonstrates that it considered all relevant factors in coming to its conclusions. This omission is most glaring with respect to the agency's failure to grapple with how both the closed-end and open-end thresholds in the 2020 Rule would impact lenders, consumers, and HMDA data users' pursuit of the statutory goals of combating redlining and lending discrimination—a factor that Congress specifically mandated that CFPB consider. Further, with regard to several factors on both the cost and benefit sides of its

analysis, CFPB erroneously conflates an agency's acknowledgment that such factors exist with a showing that the agency took this evidence into consideration in its decisionmaking process.

In addition, where an agency's stated rationale for a rule is contrary to the rationale underlying its previous rule, the agency must acknowledge and explain its reversal. Here, in 2015, CFPB concluded that a loss of 20% of reportable data in 385 census tracts would substantially impede the public's and public officials' ability to understand access to credit in their communities; in 2020, CFPB concluded that a loss of 20% of reportable data in 1,200 census tracts would not. In its Final Rule, CFPB neither acknowledged the inconsistency of these conclusions—which go to the very heart of the justification for the rule—nor explained it. CFPB's position in this litigation that it was not required to do so lacks merit.

Third, CFPB has failed to show that the 2020 Rule is within its statutory authority. While the agency has the authority to issue "exceptions" for "classes of transactions" where doing so "facilitates compliance," the 2020 Rule cannot be justified on this basis. The agency failed to provide a rational explanation of how exempting nearly 40% of regulated entities from compliance with HMDA "facilitates" compliance with HMDA. Moreover, the Rule does not "except" "classes of transactions," as those terms are used in the statute. Rather, it creates "exemptions" for classes of institutions—a power CFPB does not have. More fundamentally, the power to issue exceptions does not authorize CFPB to undermine a statutory scheme enacted by Congress—particularly where Congress enacted more targeted "exemptions" based on the same burden concerns only two years earlier.

ARGUMENT

I. CFPB's 2020 Rule does not reflect reasoned decisionmaking.

In the 2020 Rule, CFPB justified its decision to increase reporting thresholds on the grounds that doing so would "provide meaningful burden relief" to institutions "while maintaining

reporting sufficient to achieve HMDA's purposes." 2020 Rule, 85 Fed. Reg. at 28370; *see also id.* at 28371, 28374, 28378, 28381. In assessing whether this justification adequately supported CFPB's decision, the Court must "determine whether the agency decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Investment Co. Inst. v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013) (quoting *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985)). Under this standard, agency action is arbitrary and capricious where it is based on a cost-benefit analysis that includes conclusions that are "not sufficiently supported" or contain "illogical" reasoning. *Business Roundtable v. SEC*, 647 F.3d 1144, 1150–51 (D.C. Cir. 2011); *see also Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177–78 (D.C. Cir. 2010); *Council of Parent Attys. & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 54 (D.D.C. 2019); *Sec. Indus. & Fin. Markets Ass'n v. CFTC*, 67 F. Supp. 3d 373, 433 (D.D.C. 2014).

Here, CFPB's 2020 Rule relies on conclusory, irrational, and unsupported assessments of the costs and benefits of greatly reducing the number of institutions subject to HMDA's reporting requirements, particularly to the extent those assessments reflect inadequately explained departures from the agency's prior position. These errors pervade both the cost and benefit side of the ledger, and warrant vacatur.

A. CFPB's assessment of the benefits of the 2020 Rule was seriously flawed.

1. CFPB's reliance on vastly overstated benefits of the closed-end threshold increase renders that provision arbitrary and capricious.

In the 2020 Rule, CFPB explicitly justified raising the closed-end threshold from 25 to 100 on the basis that "institutions that originate between 25 and 99 closed-end mortgage loans will save approximately $11.2 million per year" if exempted from reporting requirements, and that such "meaningful cost savings to institutions" outweighed "the benefit of HMDA data." 2020 Rule, 85 Fed. Reg. at 28374 (discussing depository institutions); *see also id.* at 28383 (using same

calculations for nondepository institutions). CFPB concedes that the $11.2 million per year figure it cited in its contemporaneous justification was radically off and that the actual savings are far lower—only $6.4 million. Given the 1,700 lenders impacted by the Rule, the error means that CFPB assumed a savings of $6588.24 per lender when the true savings was only $3764.71 per lender. This serious flaw undermined the cost-benefit analysis on which CFPB relied in promulgating the rule, and thus renders the provision arbitrary and capricious. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."); *see also Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 123 (D.D.C. 2016) (stating that "where an agency has relied on incorrect or inaccurate data…, its decision is arbitrary and capricious and should be overturned"); *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 195 (D.D.C. 2014) (holding that reliance on inaccurate estimate made action arbitrary and capricious); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 210 (D.D.C. 2008) (vacating action that "relie[d] on admittedly inaccurate [] data").

CFPB asks this Court to ignore the agency's explicit reliance on incorrect figures as justification for the 2020 Rule on two separate theories. First, it asks the Court to defer to a *post hoc*, mid-litigation "correction" and further explanations by counsel. This request is inconsistent with basic principles of administrative law. Second, it contends that CFPB's error is harmless, without pointing to record evidence sufficient to meet the relevant standard.

a. An agency cannot rely on a *post hoc*, mid-litigation "correction" to justify a rule.

CFPB concedes that its contemporaneous justification for the closed-end threshold was based on incorrect data; nonetheless, it asks the Court to disregard that contemporaneous justification and instead defer to the *post hoc* "correction" issued during this litigation. But "[t]he

basic rule is clear: An agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *see also SEC v. Chenery*, 332 U.S. 194, 196 (1947). "Post hoc rationalizations 'are unacceptable substitutions for a *contemporaneous* basis and purpose statement'" as required by 5 U.S.C. § 553(c). *Action on Smoking & Health v. Civ. Aeronautics Bd.*, 713 F.2d 795, 799 (D.C. Cir. 1983) (emphasis in original, quoting *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 817 (D.C. Cir. 1975)).

Contrary to CFPB's suggestion, the rule against relying on *post hoc* justifications is not limited to statements by counsel in litigation. *See* CFPB Mem. (ECF 18) at 21 (stating that "while the Bureau did issue the correction during litigation, it did so through a notice published in the *Federal Register*"). As the Supreme Court has explained, it is "a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves." *Regents*, 140 S. Ct. at 1909.

In light of this principle, when the grounds contemporaneously invoked in support of a rule are inadequate, an agency cannot simply change the reasons it previously gave for its previous action. *See Action on Smoking & Health*, 713 F.2d at 800. This rule applies regardless of why the initial reasons turned out inadequate. As the D.C. Circuit has held, there is no "inherent power to correct mistakes in rules," including "technical errors." *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 753–54. (D.C. Cir. 2001). Rather, when an agency recognizes its error during the course of litigation, the ordinary course of action is for a court to "remand for the agency to do one of two things." *Regents*, 140 S. Ct. at 1907. "First, the agency can offer 'a fuller explanation of the agency's reasoning *at the time of the agency action*.'" *Id.* (quoting *Pension Benefit Guar. Corp. v.*

LTV Corp., 496 U.S. 633, 654 (1990)). Under this course of action, an agency may elaborate on its initial reasons, "but may not provide new ones." *Id*. (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973)). "Alternatively, the agency can 'deal with the problem afresh' by taking *new* agency action." *Id.* (quoting *Chenery*, 332 U.S. at 201).

Given that the presumptive remedy where a court finds an action unsupported by the agency's contemporaneous explanation is vacatur, agencies that identify a deficiency in their actions frequently voluntarily seek a remand. *See* Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 Admin. L. Rev. 361, 375 (2018) (to avoid risk of vacatur, "agencies might seek remands whenever small chinks are discovered in their armor"). Motions for voluntary remand are "commonly grant[ed]" in this circumstance, as courts "prefer[] to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources." *Ethyl Corp. v. Browner*, 989 F.2d 522, 525 (D.C. Cir. 1993). And this tool is available whether an agency seeks to revisit the substance of a challenged action or "to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). The voluntary remand process, however, is not a mere formality allowing an agency to simply delete offending language; as the D.C. Circuit has held, "agency reconsideration of the action under review is part and parcel of a voluntary remand." *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 386–87 (D.C. Cir. 2017) ("a voluntary remand entails further agency action on the agency decision under review").

Here, when CFPB learned, via this litigation, that its stated justification for raising the closed-end threshold was unsupported by the record, and indeed contradicted by other statements in the 2020 Rule, the agency chose not to take this well-trodden path. Instead, while the litigation was pending, six months after the Rule was published, CFPB issued a "notice" purporting to

"correct" "clerical errors" in the rule by swapping out one set of numbers for another. CFPB, Notice, Home Mortgage Disclosure (Regulation C); Correction of Supplementary Information, 85 Fed. Reg. 69119 (Nov. 2, 2020) (Correction Notice). The notice did not explain what CFPB meant by a "clerical error," indicate at what point in the rulemaking process the "clerical error" occurred, or disclaim reliance on the erroneous numbers at the time of the rulemaking.

More importantly, the Correction Notice did not, and could not, displace the agency's contemporaneous explanation. CFPB has pointed to no case where an agency *sua sponte* amended its rationale for a rule mid-litigation, and the court evaluated the rule based on that amended rationale. If permissible, CFPB's approach would make voluntary remands unnecessary, because an agency could simply issue a "correction" notice to revise its rules whenever, during litigation, it discovered an error or something that it could have explained better. That approach is inconsistent with *Chenery*. As the D.C. Circuit has held, "to hold that an agency may correct errors in rules merely by announcing a change would be inconsistent with" the APA's notice-and-comment rulemaking process. *Util. Solid Waste Activities Grp.*, 236 F.3d at 753. Requiring an agency to obtain a remand before it changes a justification for a rule is not "an idle and useless formality," but rather "serves important values of administrative law," *Regents*, 140 S. Ct. at 1909, and the principle that "the Government should turn square corners in dealing with the people," *id.* (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

b. CFPB has not established that its error was harmless.

Because the agency's contemporaneous cost-benefit justification for the change to the closed-end threshold was based on a massive overstatement of the benefits of that change, that portion of the rule should be vacated and remanded. Although CFPB argues otherwise, its reliance on incorrect savings estimates was not a "harmless error." *See* 5 U.S.C. § 706 (stating that, in

conducting judicial review of final agency action, "due account shall be taken of the rule of prejudicial error").

Under the APA, a court may decline to vacate an agency action where "there is not the slightest uncertainty" that an error had no impact on the decision. *Manin v. Nat'l Transp. Safety Bd.*, 627 F.3d 1239, 1243 n.1 (D.C. Cir. 2011) (quoting *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 79 (D.C. Cir. 1999)). This standard is not met simply by an agency assertion, in litigation, that it would have made the same decision even if it had not made a mistake. Such a standard would eviscerate the bar on *post hoc* rationalizations. *Cf. Hermes Consol., LLC v. EPA*, 787 F.3d 568, 580 (D.C. Cir. 2015) (rejecting agency's assertion of harmless error); *Manin*, 627 F.3d at 1243 (same); *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (same).

CFPB suggests that its error here—estimating cost savings at $11.2 million per year rather than $6.4 million per year—was harmless because it was "clerical," not "substantive." CFPB Mem. 20. Its choice of terminology does not sustain its action because agencies lack authority to evade APA requirements to correct "technical errors." *See Util. Solid Waste*, 236 F.3d at 753. Moreover, whether an error is harmless does not depend on how or why the error occurred, but whether it could have "affected the outcome of [the agency's] decision." *PAM Squared at Texarkana, LLC v. Azar*, 436 F. Supp. 3d 52, 59 (D.D.C. 2020) (citing *PDK Labs.*, 362 F.3d at 799). A clerical error is only harmless if, on the face of the action, there is not the "slightest uncertainty" as to whether the error affected the action. *Manin*, 627 F.3d at 1243 n.1.

Here, such uncertainty exists: If the only number considered by the decisionmaker showed a cost savings of $11.2 million, it does not matter if that wrong number was considered due to a clerical error or for some other reason. CFPB cannot credibly assert that it makes no difference

whether increasing the threshold would result in $6.4 million savings to industry or $11.2 million savings to industry, since the agency has justified a rule change *based solely on projected savings to industry*.

In this case, CFPB asserts that the figures included in the Correction Notice were the ones "upon which the Bureau's decision actually relied." CFPB Mem. 20. This assertion, however, is not contained in either the contemporaneous rule *or* the Correction Notice. Accordingly, it is entitled to no deference. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156 (1991) (no deference owed to "*post hoc* rationalizations for agency action, advanced for the first time in the reviewing court"); *see also Chenery*, 332 U.S. at 196. CFPB also argues that the error was harmless because the lower savings figures were referenced in the separate analysis required by section 1022(b) of the Dodd-Frank Act at the end of the Rule's preamble. *See* CFPB Mem. 20. When confronted in litigation with internal inconsistencies in a rule, an agency does not get to pick one and ask the court to disregard the other. And the court cannot speculate on which of the two figures the decisionmaker relied. *Cf. Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 328–29 (D.C. Cir. 2006) ("Arbitrary and capricious review strictly prohibits us from upholding agency action based only on our best guess as to what reasoning truly motivated it."); *PDK Labs.*, 362 F.3d at 799 (declining to apply harmless error doctrine where, on face of the record, it was "impossible to discern" the extent to which the error influenced the decisionmaker). Moreover, the "presumption of regularity" that CFPB invokes to support its labeling of the error "clerical," CFPB Mem. 19 n.10, applies to the agency's contemporaneous statement accompanying the rule. And in that statement, CFPB *explicitly* relied on an $11.2 million savings to industry to justify its rule change. CFPB cannot now claim it relied on a different figure.

Put simply, in the document announcing the 2020 Rule, CFPB identified two vastly different estimates of the savings that would result from raising the closed-end threshold. The agency explicitly relied on the larger one as a justification for doing so. It now acknowledges that larger estimate was unsupported by the record. The closed-end threshold should thus be set aside as arbitrary and capricious.

2. CFPB's projection of savings from the 2020 Rule failed to adequately consider several relevant factors and respond to comments.

Apart from the agency's reliance on a concededly overstated, incorrect savings estimate as to the closed-end threshold, CFPB failed to adequately consider how several relevant factors impacted the actual likely savings to industry that would result from the 2020 Rule and failed to respond meaningfully to comments raising these issues. The Rule is thus arbitrary and capricious. *See*, *e.g.*, *Council of Parent Attys.*, 365 F. Supp. 3d at 54; *Securities Industry*, 67 F. Supp. 3d at 432.

a. Closed-End Threshold

In their opening memorandum, Plaintiffs identified specific factors, each raised in detail by commenters, that CFPB failed to meaningfully consider with respect to the savings to industry associated with increasing the closed-end threshold. *See* Pls.' Mot. for Summ. J. (ECF 14) 24–27. In response, CFPB asks for deference because the agency used the "same methodology" it did in the 2015 Rule (where it reached the *opposite* conclusion), and asks the Court to accept litigation counsel's explanation of how CFPB considered these factors as a substitute for an agency response to comments in the Final Rule. CFPB Mem. 23–34. This argument is particularly deficient as to CFPB's failure to meaningfully consider (1) the fact that institutions would be required to maintain most HMDA data to comply with *other* statutory requirements and (2) that per-institution savings, as opposed to aggregated industry figures, were modest.

i. CFPB did not adequately address the impact of overlapping statutory regulatory requirements.

In response to CFPB's 2019 proposed rule, numerous commenters pointed out that, even if institutions were exempted from HMDA reporting requirements, they would still be required to maintain most of the same data to comply with other statutory and regulatory requirements—thus reducing the true savings to such institutions to a negligible level. *See* Pls.' Mot. for Summ. J. 24–25 (collecting comments and citing requirements). CFPB does not point to any portion of the 2020 Rule where the agency addressed this substantive comment. Instead, CFPB argues that the Court should look to a rule issued five years earlier, because the 2020 Rule "utiliz[ed] the cost estimates provided in the 2015 Rule … with some updates," CFPB Mem. 27 (quoting 2020 Rule, 85 Fed. Reg. at 28390), and, in 2015, the agency mentioned that it considered "alignment of data fields to existing regulations or industry data standards," *id*. at 26 (quoting CFPB, Final rule; official interpretations; Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128, 66287 (Oct. 28, 2015) (2015 Rule)).

CFPB's argument is nonsensical. In 2015, CFPB reached the opposite conclusion that it reached in 2020: It concluded that increasing the threshold to 100 closed-end loans was *not* necessary to avoid unjustifiable costs to industry. 80 Fed. Reg. at 66147. Moreover, the 2015 Rule could not provide an adequate response to comments submitted in 2019, arguing that cost savings in a 2019 proposed rule were overstated because the affected institutions had to collect the data to comply with other (non-HMDA) requirements. Those requirements, and the costs associated with them, had changed since 2015. Indeed, one of the rationales CFPB gave for the 2020 Rule was that it had gathered "new data" as a result of the 2015 Rule that required it to recalculate "both the benefits and burdens of the reporting required under the 2015 HMDA Rule." 2020 Rule, 85 Fed.

Reg. at 28364. The agency cannot rely on the 2015 cost-benefit analysis to support a 2020 Rule when it based the 2020 Rule on the notion that the 2015 cost-benefit analysis needed to be revisited.

The sole case CFPB cites (at 26) for the principle that an agency may rely on a previous rule as a substitute for a response to comments on a new rule is inapposite. In *New Lifecare Hospitals of Chester County LLC v. Azar*, 417 F. Supp. 3d 31 (D.D.C. 2019), the Department of Health and Human Services, in setting a methodology for Fiscal Year 2019, responded to comments challenging the methodology by explicitly incorporating the agency's detailed response to "nearly identical comments" challenging the methodology for Fiscal Years 2016 and 2017. *Id.* at 44. Here, though, the 2020 Rule did not incorporate any prior detailed response to "nearly identical comments," nor could it, because there was neither detailed discussion of this issue nor nearly identical comments in the 2015 rulemaking.

CFPB claims that any failure to address the issue of how other statutory and regulatory requirements made the actual savings to industry *de minimis* was harmless error. According to CFPB, its assessment of savings was based on "18 discrete compliance tasks," only "some" of which overlap with "other statutory or regulatory requirements." CFPB Mem. 27 (citing 2020 Rule, 85 Fed. Reg. at 28389–90, 28389 n.162; 2015 Rule, 80 Fed. Reg. at 66269, 66271–73). This argument is precluded by the prohibition on *post hoc* rationalizations. *See supra* pp. 4–6. None of the citations CFPB provides indicates that CFPB took that overlap into account at all, much less which of the 18 tasks that the agency considered overlap with other statutory or regulatory requirements. Regardless, the fact that only "some" of the 18 tasks used in CFPB's analysis overlap with other requirements—and thus should not have been included in its calculation of savings to industry—does not establish that the agency's assessment of savings was based on a "consideration of the relevant factors," as CFPB suggests, CFPB Mem. 28 (quoting *Tex. Mun. Power Agency v.*

EPA, 89 F.3d 858, 876 (D.C. Cir. 1996)). And it surely does not eliminate "the slightest uncertainty" that excluding duplicative tasks would not have influenced CFPB's final decision, thus precluding a finding of harmless error. *See Manin*, 627 F.3d at 1243 n.1.

ii. CFPB's failure to address the fact that per-institution cost savings would be relatively small was arbitrary.

In the 2020 Rule, CFPB based its determination that raising the reporting threshold for closed-end loans would result in "meaningful cost savings" on its finding that, in the *aggregate*, institutions would save $11.2 million per year. 2020 Rule, 85 Fed. Reg. at 28364. Nowhere in the Rule did CFPB examine whether the raised reporting threshold would result in meaningful cost savings to individual institutions. As explained in Plaintiffs' opening memorandum, the agency's conclusory assertion that $11.2 million in savings (which it now concedes should have been $6.4 million) is "meaningful" becomes arbitrary and capricious when considered at the level of individual institutions. Pls.' Mot. for Summ. J. 26–27. Notably, five years earlier, CFPB *itself* explained that comparable per institution costs were "relatively small" and would not affect the competitive position of impacted lenders. *See* 2015 Rule, 80 Fed. Reg. at 66267.

CFPB's response is two-fold. First, it maintains that it calculated the per institution cost to come up with the aggregate figure and that its method of calculating that figure was reasonable. CFPB Mem. 30. The question, however, is not whether CFPB ever *calculated* the per institution cost, but whether it considered the per-institution cost when it concluded that the rule change would result in meaningful cost savings, and whether such a conclusion would be reasonable, especially given CFPB's earlier conclusion that similar per institution costs were *not* meaningful. Whether cost savings would be meaningful at a per-institution level is plainly a relevant factor in a cost-benefit driven rule. Because there is no evidence that CFPB considered this relevant factor, it acted arbitrarily and capriciously. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*

Ins. Co., 463 U.S. 29, 43 (1983) (stating that agency action is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem").

Second, CFPB—with no citation to the record—states that it "reasonably concluded that the estimated per-institution cost savings would provide meaningful relief to newly excluded institutions" and that this conclusion merits deference. CFPB Mem. 31. But the only sentence in the 2020 Rule that CFPB cites to support this argument is the agency's *conclusion* "that increasing the closed-end threshold to 100 will provide meaningful burden relief for lower-volume depository institutions while maintaining reporting sufficient to achieve HMDA's purposes." 85 Fed. Reg. at 28374, *quoted in* CFPB Mem. 31. That paragraph does not say anything about "per-institution cost savings," much less that the agency considered those savings. In addition, the paragraph makes no attempt to reconcile CFPB's 2015 statement that annual compliance costs of $1,900 for financial institutions are "relatively small," with its assertion that $2,200 in costs for those same institutions in 2020 were "meaningful." *Cf.* Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm (reflecting that $1,900 in October 2015 was equivalent to $2,048.24 in May 2020, adjusted for inflation). Although CFPB cites cases about the deference generally given to agency assessments of the significance of costs, none of those cases concern an unexplained, unacknowledged agency inconsistency. *See* CFPB Mem. 31 (citing *Center for Auto Safety*, 751 F. 2d at 1348; *Olivares v. TSA*, 819 F.3d 454, 466 (D.C. Cir. 2016)).

In short, had CFPB acknowledged and explained its conclusion that what was meaningless in 2015 was meaningful in 2020, that explanation may have been entitled to deference. It offered no such acknowledgment or explanation. Thus, the inconsistency is a basis for vacatur. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Bauer v. DeVos*, 325 F. Supp. 3d 74, 109 (D.D.C. 2018).

b. Open-End Threshold

In the 2020 Rule, CFPB provided separate contemporaneous rationales for its change to the closed-end loan reporting threshold and its change to the open-end threshold. *See* 85 Fed. Reg. at 28368–74, 28381–84 (justifying changes to closed-end threshold); *id.* at 28374–80, 28384–85 (justifying changes to open-end threshold). These separate rationales reflected both that the changes concern different regulatory provisions and also that they concern different sets of lenders and consumers. Although the two explanations both relied on cost-benefit assessments, the agency (rationally) considered different factors in making the assessments for the two provisions. Accordingly, Plaintiffs' opening memorandum addressed the inadequacies of these two explanations separately. *See* Pls.' Mot. for Summ. J. 24–27 (closed-end threshold), 27–28 (open-end threshold).

CFPB chose not to address Plaintiffs' separate arguments separately, instead saying that "the arguments for both are largely the same," CFPB Mem. 26 n.11, and citing almost exclusively the record as to the *closed*-end threshold. But the arguments are not entirely the same, and to the extent that CFPB failed to respond to Plaintiffs' specific arguments about the open-end threshold and to rely on evidence in the record about the open-end threshold, it has waived its response.

With respect to the open-end threshold, Plaintiffs have explained that the agency's assertion that the "new development" of an increased number of institutions that were issuing more than 100 open-end lines of credit from 2013 to 2018 *de facto* supported raising the threshold, without any explanation why that was so, reflected arbitrary and capricious decisionmaking. *See* Pls.' Mot. for Summ. J. 27–28 (citing 2020 Rule, 85 Fed. Reg. at 28378). In the 2020 Rule, the agency did not identify any increased per institution cost, and it did not consider whether the increased number of institutions was the result of new market entrants or smaller institutions increasing their loan volume. Nor did CFPB acknowledge that an increased number of lenders

engaged in a higher volume of a kind of lending activity that the agency previously acknowledged was particularly high-risk and prone to be abusive suggested that it was *more* important to capture data from these lenders, not less. *See* 2015 Rule, 80 Fed. Reg. at 66148–50, 66157–62.

CFPB's memorandum alludes to this argument only in a footnote. *See* CFPB Mem. 30–31 n.13. As the D.C. Circuit has explained, "A footnote is no place to make a substantive legal argument …; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014). This principle applies to federal agencies, like other litigants. *See*, *e.g.*, *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, Civ. Action No. 19-3283 (RDM), 2020 WL 5995206, at *10 (D.D.C. Oct. 8, 2020); *O.A. v. Trump*, 404 F. Supp. 3d 109, 132 n. 8 (D.D.C. 2019). Thus, CFPB has waived any argument on this issue.

Furthermore, CFPB's footnote is not responsive to Plaintiffs' argument. CFPB does not dispute that it cited the increase in the number of lenders making more than 100 open-ended loans as a reason for raising the threshold—without explaining why that was so and without considering that this increase demonstrated an increased need to capture this segment of the market. And CFPB does not address its failure to consider the resulting increase in data loss from this "new development." Instead, CFPB states that it did not *only* rely on this increase, but also on other factors that it asserts were "reasonable." CFPB Mem. 30–31 n.13. But CFPB provides no support for the suggestion that a court is required to ignore an agency's reliance on unreasonable or illogical factors in advancing a cost-benefit-based rationale for an action, where the agency *also* relied on reasonable factors. *Cf. Owner-Operator Independent Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (stating that an agency's consideration of one kind of "cumulative fatigue" in its cost-benefit model did not excuse its unexplained failure

to consider another kind of cumulative fatigue). In issuing the 2020 Rule, the agency stated that it relied on the increased number of institutions making more than 100 open-ended loans as a reason to exempt lenders making more than 100 but less than 250 open-ended loans from the requirements of the statute, 85 Fed. Reg. at 28378, and the Court must take the agency at its word.

With respect to the open-end threshold, Plaintiffs also argued that CFPB failed to adequately account for the facts that institutions would incur overlapping burdens due to other legal requirements, and that CFPB's reliance on aggregate figures and conclusion that they represented "meaningful" burden, without considering how meaningful the burden would be to individual institutions, was arbitrary and capricious. Pls.' Mot. for Summ. J. 28. In response, CFPB relies on its general methodology for calculating costs and benefits rather than addressing the specific, flawed justifications it provided. That response is inadequate as to open-end loans for the same reasons it is inadequate as to closed-end loans. *See supra* pp. 13–14.

B. CFPB's dismissal of the harms of the 2020 Rule was arbitrary, capricious, and contrary to law.

CFPB's cost-benefit justification for the 2020 Rule is flawed for the additional reason that it failed to meaningfully consider the costs to society and consumers from eliminating statutory reporting obligations for nearly two thousand lenders. Plaintiffs' opening memorandum pointed out that CFPB's treatment of these costs consisted of calculating "effects on market coverage" and—without analyzing *which* lenders would be newly excluded or what that data loss would actually mean for consumers, state and local governments, and others—stating that these effects were not meaningful, despite contrary evidence in the record and contrary prior statements by CFPB. *See* Pls.' Mot. for Summ. J. 28–30. CFPB's response appears to be that calculating the reduction of market coverage and acknowledging that there is data loss was sufficient. Calculating costs, however, is not the same as meaningfully considering costs, and "[s]tating that a factor was

considered … is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986).

1. CFPB did not meaningfully consider non-quantifiable costs to consumers.

Because CFPB, in violation of both the APA and the Dodd-Frank Act, 12 U.S.C. § 5512(b)(2)(A)(i), failed to consider costs to consumers that it deemed non-quantifiable, its action was arbitrary, capricious, and contrary to law. *See* Pls.' Mot. for Summ. J. 30–33. CFPB does not appear to dispute that it was required to consider these costs. Rather, CFPB counters that it "discussed—qualitatively—the impact that increasing the reporting thresholds would have on consumers," citing three pages in the section 1022(b) analysis of the 2020 Rule. CFPB Mem. 36 (citing 2020 Rule, 85 Fed. Reg. at 28392, 28397, and 28402). It is unclear to what in those three pages CFPB is referring; CFPB points to no language constituting such a "discussion." Although CFPB acknowledged on those pages that there *might* be qualitative costs to consumers, that acknowledgement fails to show that CFPB *considered* such costs in its decisionmaking.

The two paragraphs in the 2020 Rule that CFPB devoted to costs to consumers associated with the increased closed-end threshold illustrate this point. There, CFPB stated, "The decreased data about excluded institutions may lead to adverse outcomes for some consumers." 85 Fed. Reg. at 28397. The agency did not discuss what those adverse outcomes would be or how they would impact the statutory goal of increasing transparency in the residential mortgage market and thus combating discrimination and helping governments, nonprofits, and lenders better serve the needs of communities. *See* Pls' Mot. for Summ. J. 5–8 (discussing how HMDA data is used). And the agency did not discuss the role HMDA data plays in allowing federal and state agencies to review lender compliance with fair lending and consumer protection laws. *See*, *e.g.*, Pls.' Mot. for Summ. J. 5–6.

Rather, the agency said that it "did not … receive any comments that quantify the losses" and that it "currently lacks sufficient data to quantify these costs other than the estimated numbers of covered loans and covered institutions under the two alternative proposed thresholds." *Id.* at 28398. Absolutely nothing in these paragraphs, or anywhere else in the 2020 Rule, suggests that CFPB actually *considered* the qualitative harms to consumers in adopting the higher closed-end threshold. The same goes for the single paragraph discussing the costs to consumers of doubling the open-end loan threshold: "The decreased data concerning affected financial institutions may lead to adverse outcomes for some consumers …. The Bureau has no quantitative data that can sufficiently measure the magnitude of any such impact of setting the permanent open-end threshold at 200." 85 Fed. Reg. at 28402. Difficulties in quantifying costs, however, do not provide a basis to refuse to consider them. *See*, *e.g.*, *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *Securities Industry*, 67 F. Supp. 3d at 430.

CFPB's cursory treatment of the impacts on consumers of the scope of coverage thresholds in the 2020 Rule stands in sharp contrast to its discussion of those same impacts in 2015. *See*, *e.g.*, 80 Fed. Reg. at 66282–83. CFPB's response that the 2020 Rule did not repeal *the entire* 2015 Rule, but only the loan thresholds, CFPB Mem. 37, is a *non sequitur*. In 2015, CFPB discussed in detail how increasing "transactional coverage will benefit consumers by providing a more complete picture of the dwelling-secured lending market," explaining, for example, how doing so would "improv[e] fair lending analyses," "improve the ability of public officials to distribute public-sector investment so as to attract private investment to areas where it is needed," and "reduce the chance of regulatory gaming by financial institutions." 2015 Rule, 80 Fed. Reg. at 66283. Nowhere in the 2020 Rule did CFPB even acknowledge that reducing transactional coverage would have related impacts.

None of the case law cited by CFPB (at 36) suggests that such a cursory assertion that costs detailed in the record by commenters "may" exist, accompanied by a statement that the costs are not quantifiable, meets CFPB's obligations. In *Cigar Ass'n of America v. FDA*, for example, the court upheld an agency's failure to conduct a quantitative analysis of benefits of a rule where it explained why quantification was not possible *and* "provided substantial detail on the benefits of the rule." 480 F. Supp. 3d 256, 276 (D.D.C. 2020). Here, CFPB's acknowledgement that there "may" be harms includes no "substantial detail." Rather, CFPB's "discussion" of harms to consumers was essentially "to note the concerns of others and dismiss those concerns in a handful of conclusory sentences." *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), *cert. granted*, 141 S. Ct. 890 (Dec. 4, 2020), *motion to vacate and remand pending*. It was thus arbitrary and capricious and, because the Dodd-Frank Act required meaningful consideration of these harms, contrary to law.

2. CFPB's conclusions about the insignificance of data losses were arbitrary and capricious.

In justifying the 2020 Rule, CFPB summarily dismissed the data losses that would result from raising the thresholds for both open-end and closed-end lending. 85 Fed. Reg. at 28371–72 (closed-end depository institutions), 28382–83 (closed-end non-depository institutions), 28378–79 (open-end). CFPB's primary response is that its conclusions as to what sort of data losses are significant are entitled to absolute deference as a "policy judgment." *See* CFPB Mem. 39. But while the agency has latitude in making policy decisions, the APA requires that those decisions be based on consideration of relevant factors, including public comments, and be supported by the record. To the extent that those decisions rely on conclusions inconsistent with those reached by the agency previously, the agency must acknowledge and explain that departure. CFPB did not meet these standards. CFPB's cursory explanation failed to show a "rational connection between

the facts found and the choice made," *State Farm*, 463 U.S. at 43 (citation omitted), particularly with respect to the impacts of its action on specific communities and institutions. Because the agency failed to demonstrate it adequately considered relevant factors, CFPB is not entitled to deference to its thinly reasoned conclusions.

a. CFPB's conclusion that a loss of 20% of data in 1200 census tracts was not meaningful was unreasonable and an unacknowledged, unexplained reversal of position.

CFPB's conclusion that the data losses resulting from the 2020 Rule would not be significant are "factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). In 2015, CFPB stated that a loss of 20% of reportable data in 385 census tracts "would substantially impede the public's and public officials' ability to understand access to credit in their communities." 80 Fed. Reg. at 66147–48. In 2020, CFPB stated that such a loss in 1,200 census tracts would "permit the public and public officials to identify patterns and trends at the local level." 2020 Rule, 85 Fed. Reg. at 28383. These statements are inconsistent—as CFPB concedes. CFPB Mem. 43. Accordingly, CFPB was required to acknowledge and explain its departure from the earlier factual findings. *See Fox*, 556 U.S. at 515; *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1289 (D.C. Cir. 2019).

CFPB suggests that the agency met its burden because it acknowledged that the 2020 Rule *en toto* reflected a reversal of the agency's opinions as to the appropriate cost-benefit balance of reporting. *See* CFPB Mem. 41–43. The agency was required, however, to address its about-face on factual determinations, not simply the bottom-line policy change.[1] "An agency cannot simply

[1] To the extent CFPB asserts that its statement that it was generally "revisiting the balance it struck in the 2015 Rule" fulfilled its obligation to address specific departures from previously expressed positions, CFPB Mem. 42, this argument is in tension with its suggestion that it was entitled to rely on its consideration of the relevant factors in 2015 as a justification for its failure to do so in 2020. *See supra* pp. 11–12.

disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring), *quoted in Mozilla Corp. v. FCC*, 940 F.3d 1, 55 (D.C. Cir. 2019). But that is exactly what CFPB did here in asserting that a 20% data loss in 1200 census tracts would not substantially harm the usefulness of HMDA data, without any acknowledgment or explanation that it had earlier made the opposite factual determination. This situation is thus like that in *United Steel*, where the D.C. Circuit found that an agency acted arbitrarily and capriciously in changing an examination requirement, even though the agency acknowledged it was changing the examination requirement. 925 F.3d at 217–18. There, the agency had justified its change with a finding that increased flexibility would improve miner safety—without acknowledging or addressing its prior finding that increased flexibility would *not* improve miner safety. *Id.* at 217–18. *See also Air Alliance Houston v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (agency's failure to explain departure from prior factual conclusions about need for compliance periods was arbitrary and capricious); *Nw. Immigrant Rights Proj.*, 2020 WL 5995206, at *28 (failure to reconcile justification that fee increases would not impact demand for services with prior statement that they would was likely arbitrary and capricious). As in *United Steel*, because the agency did not acknowledge or explain its about-face, it acted arbitrarily and capriciously.

b. CFPB failed to adequately consider the disproportionate nature of the data loss.

In addition to its unreasonable assessment of the data loss across all census tracts, CFPB failed to adequately consider which data it was losing—both in terms of the segments of the regulated industry and in the communities covered. First, CFPB did not consider the unique value of data from smaller institutions, which both prior CFPB statements and multiple commenters explained is particularly valuable data. *See* Pls.' Mot. for Summ. J. 34–35 (citing 2015 Rule, 80

Fed. Reg. at 66276). In its memorandum, CFPB does not address this point directly but states that the Bureau "examined the potential effect on available data at the census tract level." CFPB Mem. 38 (citing 85 Fed. Reg. at 28383). But in the 2020 Rule, CFPB did not connect its use of census tract analysis to the significant concerns raised by commenters about the value of small institution data. *See* Pls.' Mot. for Summ. J. 34–35 (collecting comments). These concerns were not limited to geographic impacts. For example, the Attorney General of New York noted that, under the proposed rule, nearly all credit unions in the state would become exempt, leading to a loss of data for that entire category of institutions. *See* N.Y. Att'y Gen. Comments II, AR3733 at 2–3. The 2020 Rule does not indicate that CFPB considered this concern or any other concerns based on the unique value of small institution data—a value that CFPB recognized five years earlier. *See* 2015 Rule, 80 Fed. Reg. at 66276.

Second, CFPB failed to adequately grapple with the disproportionate impacts on rural and low-to-moderate income tracts. As explained in Plaintiffs' opening memorandum, these impacts were a major concern of commenters, *see* Pls.' Mot. for Summ. J. 36–37, and CFPB *acknowledged* that these tracts would "lose proportionately more data," 85 Fed. Reg. at 28403. Although Congress has explicitly directed the agency to consider the impact of its rules "on consumers in rural areas," 12 U.S.C. § 5512(b)(2)(A)(ii), nowhere in the 2020 Rule did CFPB indicate that it considered this disproportionate loss in formulating the rule. CFPB's response that it *calculated* the disproportionate impact on these tracts in its section 1022(b) analysis, CFPB Mem. 40, does not provide evidence that it also *considered* the impact in formulating the rule. *See supra* pp. 17–18. CFPB's argument that it used the disproportionate impacts on rural and low-to-moderate income tracts to explain why it was not raising the closed-end loan thresholds above 100, CFPB

Mem. 40 (citing 85 Fed. Reg. at 28373), does not show that or how CFPB took the disproportionate impacts into effect in choosing the thresholds it *did* set.

Third, apparently resting on its request for deference more generally, CFPB offers no specific response to Plaintiffs' detailed argument as to CFPB's inadequate discussion of the impact of the increased closed-end threshold on the multi-family market. *See* Pls.' Mot. for Summ. J. 37–38. Deference does not apply, however, to CFPB's unexplained conclusion that a loss of data for 13% of multifamily applications and originations by depository and non-depository institutions was an inconsequential "limited decrease," particularly in light of comments about the disproportionate impact of this loss on certain communities. *See id.* at 38 (collecting comments). While CFPB has discretion "to make policy judgments," CFPB Mem. 39, in exercising that discretion, it must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quotation omitted). The Court owes no deference "to the agency's conclusory [and] unsupported suppositions." *Chestnut Hill Benevolent Ass'n v. Burwell*, 142 F. Supp. 3d 91, 98 (D.D.C. 2015) (cleaned up).

II. CFPB's invocation of its "exception" authority was arbitrary and capricious, and its action exceeded the scope of that authority.

Congress has determined that certain institutions must report data for covered transactions pursuant to HMDA, 12 U.S.C. § 2803(a), subject to certain "exceptions," *id.* at § 2803(g), and "exemptions," *id*. at § 2803(i), which Congress has altered over time, most recently in response to concerns about burden and to "provide tailored economic relief." *See* Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), Pub. L. No. 115-174, 132 Stat. 1296 (2018). In enacting the 2020 Rule, CFPB went beyond the exceptions and exemptions that Congress created by excluding otherwise-covered entities from HMDA reporting. This action may

be upheld only if it complied with a delegation of authority by Congress. *See*, *e.g.*, *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989) (stating that general rulemaking authority does not confer authority to create exceptions based on a cost-benefit assessment).

Here, CFPB relies solely on its authority under HMDA section 305(a) to "provide for such adjustments and exceptions for any class of transactions" that CFPB deems "necessary and proper to effectuate the purposes of [HMDA], and prevent circumvention or evasion thereof or to facilitate compliance therewith." 12 U.S.C. § 2804(a).[2] The 2020 Rule does not fall within the scope of that authority. First, CFPB failed to provide a rational explanation of how exempting more than 35% of a regulated industry from compliance with HMDA "facilitates compliance" with HMDA. Second, the 2020 Rule is not an "exception for [a] class of transactions"; it is an exemption for institutions, which the statutory scheme treats differently.

A. Exempting institutions from compliance with HMDA does not "facilitate compliance" with HMDA.

In its memorandum, CFPB asserts that "Congress delegated broad authority to the Bureau to establish 'exceptions for any class of transactions' that, 'in the judgment of the Bureau,' are 'necessary and proper to,' among other things, 'facilitate compliance with [HMDA].'" CFPB Mem. 45 (quoting 12 U.S.C. § 2804(a)). Plaintiffs dispute the breadth of that authority, but the parties agree that the statute provides a real limit: The agency must ground its invocation of its authority on a finding that exceptions are necessary and proper to "facilitate compliance with HMDA" or one of the "other things" listed in HMDA section 305(a). CFPB failed to show that its

[2] In the Final Rule, CFPB invoked its general rulemaking authority pursuant to section 1022(b)(1) of the Dodd-Frank Act, 12 U.S.C. § 5512(b)(1), as legal authority for its actions. 85 Fed. Reg. at 28367. Yet CFPB's memorandum states that it did *not* do so. *See* CFPB Mem. 45 n.17. Regardless, as Plaintiffs explained in their opening brief, that provision did not provide CFPB with authority to enact the 2020 Rule. *See* Pls.' Mot. for Summ. J. 44–45.

action complied with this limit. Its action was thus arbitrary and capricious, and in excess of statutory authority.

CFPB makes two relevant arguments as to how the 2020 Rule "facilitated compliance with HMDA."[3] First, it claims that reducing burden facilitates compliance with HMDA. CFPB Mem. 52. CFPB may be correct that reducing burden for entities *with* HMDA obligations may facilitate their compliance with those obligations. But that is not what CFPB did here. Rather, CFPB deemed certain entities no longer subject to HMDA at all—which no more "facilitates compliance" with HMDA then repealing the statute in its entirety. The 2020 Rule does not "make [it] easier" to comply or "help bring [compliance] about." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/facilitate (defining "facilitate"). For many institutions, the 2020 Rule excuses compliance altogether. The Rule thus stands in sharp opposition to other "exceptions" promulgated by CFPB—where CFPB has made it easier for institutions to comply with the reporting requirements to which they are subject. For example, in the 2015 Rule, CFPB excepted reporting of certain repurchases of loans through interim funding agreements that, if reported, would "distort HMDA data without providing meaningful information that furthers HMDA's purposes." 80 Fed. Reg. at 66174. Similarly, the agency excepted non-dwelling-secured home improvement loans, based on concerns that inclusion would "distort the overall quality of the HMDA dataset." *Id.* at 66154. In both cases, the agency determined that the exceptions for classes of transactions, the reporting of which would not support HMDA's purpose, would

[3] Whether or not it was rational for CFPB to conclude that reducing burden has net benefits, CFPB Mem. 50–51, is a separate question from whether doing so "facilitates compliance" and thus was within the scope of its authority. *Cf. City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) ("[T]he question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.").

facilitate compliance by institutions that would nonetheless continue to be subject to HMDA reporting requirements as to other loans.

Moreover, CFPB's argument that any reduction of burden "facilitates compliance" would read the conditions on CFPB's section 305(a) exception authority out of the statute. Congress did not allow CFPB to grant *any* exception it wants—only those "necessary and proper to effectuate the purposes of [HMDA], and prevent circumvention or evasion thereof, or to facilitate compliance therewith." 12 U.S.C. § 2804(a). If any exception that reduces burden satisfied the "facilitate[s] compliance" condition, the limitation on CFPB's ability to grant exceptions would be mere surplusage; no "exception" would not also "facilitate compliance." But "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 522 U.S. 167, 174 (2001)). Thus, the plain text contradicts CFPB's interpretation. "When statutory text informed by structure and context is clear, 'that is the end of the matter.'" *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 1013 (D.C. Cir. 2021); *see Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (stating that agency interpretation warrants no deference where it is inconsistent with the statutory text).

Second, CFPB argues that setting a uniform threshold for both depository and non-depository institutions facilitates compliance. Whether or not correct, that response has nothing to do with the exceptions created by the 2020 Rule. In 2015, CFPB "establish[ed] a uniform loan-volume threshold applicable to depository and nondepository institutions." 85 Fed. Reg. at 28381 n.129; *see also* 2015 Rule, 80 Fed. Reg. at 66128. In 2020, CFPB increased those uniform thresholds, noting that it was "maintain[ing] the simplicity of this aspect of the reporting regime."

85 Fed. Reg. at 28381; *see also id.* at 28384. That CFPB did not depart from uniform thresholds in 2020 does not mean that the changes it *did* make facilitate compliance.

B. The exception authority does not allow CFPB to exempt broad categories of lenders based on loan volume or its assessment of burden.

Even where CFPB has adequately supported a finding that an action "facilitates compliance," that action is only within its exception authority if it is an "exception[] for a[] class of transactions." 12 U.S.C. § 2804(a). CFPB's exemption of more than 35% of regulated entities is not an "exception" and does not address a "class of transactions." The agency's contrary argument does not merit *Chevron* deference as it suggests. *See* CFPB Mem. 44.

Relying on the Supreme Court's decision in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), CFPB argues that the agency has broad discretion to make adjustments to the scope of HMDA coverage. CFPB Mem. 43–44. That reliance is mistaken. In *Mourning*, the Supreme Court held that the rulemaking provision of the Truth in Lending Act (TILA) authorized the Federal Reserve Board to define the "circumstances in which a seller who regularly extends credit" must make statutory disclosures. 411 U.S. at 362. The Supreme Court's decision grounded the agency's authority in its power to make "classifications as were reasonably necessary to insure that" TILA's objectives were fulfilled. *Id*. at 366. The case did not concern the "exception" authority of the agency. Moreover, as the D.C. Circuit explained last year, *Mourning* "was decided decades ago, before the Supreme Court issued *Chevron*, changing the framework for judicial review of agency action. And *Mourning* has been effectively diluted by later cases." *N.Y. Stock Exchange LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) (citations omitted).

Under current law, "a 'necessary or appropriate' provision in an agency's authorizing statute does not necessarily empower the agency to pursue rulemaking that is not otherwise authorized." *Id.* at 556 (citing *Michigan v. EPA*, 576 U.S. 743 (2015)). And CFPB is only

authorized to make "exceptions for any class of transactions." 12 U.S.C. § 2804(a). It went beyond that authority here for two independent reasons: (1) it excluded a class of institutions, not transactions, and (2) in doing so, it went beyond the minor alterations of coverage contemplated by the term "exception."

1. CFPB did not except transactions; it exempted institutions.

Although CFPB relies on the fact that the 2020 Rule "excepts less than 2% of closed-end transactions and less than 5% of open-end transactions that were previously required to be reported under the 2015 Rule," CFPB Mem. 46, the 2020 Rule does not "except" *transactions* at all. Rather, it "exempts" more than 35% of covered *institutions*. Congress did not authorize CFPB to do so.

CFPB argues that it has authority to "except" transactions "based on a characteristic of the institution making the transaction." CFPB Mem. 48. This approach is inconsistent with the statutory text and structure, which draws a clear line between *exceptions* (applying to classes of transactions) and *exemptions* (applying to classes of institutions). For data from a loan to be subject to HMDA reporting, the loan must be (1) a covered transaction and (2) made by a covered institution. *See* 12 U.S.C. § 2803(a)(1).[4] When, in HMDA, Congress has referred to an exclusion of certain kinds of *transactions*, it has used the term "exception," as in the case of section 305(a). But where it refers to excluded institutions, it has consistently used the term "exemption." For example, 12 U.S.C. § 2803(g) is entitled "Exceptions" and excludes certain kinds of mortgage loans from reporting requirements. On the other hand, 12 U.S.C. § 2803(i), is entitled

[4] Section 2803(a)(1) limits covered transactions to "mortgage loans" and covered institutions to "depository institutions." Both of these terms are further defined and are broader in scope than they may first appear. *See* 12 U.S.C. § 2802(2) (defining "mortgage loan"); *id.* at 2802(3), (5) (defining "depository institution" to include any entity "engaged for profit in the business of mortgage lending").

"Exemptions" and excludes institutions from reporting. Similarly, both 12 U.S.C. § 2805 and 12 U.S.C. § 2808(a) (twice) use the terms "exempt" or "exemption" to refer to institutions excluded from reporting.[5]

In neither the 2020 Rule nor CFPB's memorandum does the agency attempt to explain its position that the power to "except" includes the power to "exempt." But it is a basic principle of statutory interpretation "that where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007). When Congress has sought to give the agency the power to "exempt" institutions, it has explicitly done so. *See*, *e.g.*, 12 U.S.C. § 2808(a). The fact that Congress has consistently maintained an exemption/exception distinction throughout repeated amendments of the statute reinforces this point—as does the fact that *Congress* enacted partial exemptions in 2018 with an explicit goal of providing limited regulatory relief, without suggesting CFPB had authority to adopt additional exemptions on its own. *See* EGRRCPA § 104(a)(2), 132 Stat. 1300 (enacting 12 U.S.C. § 2803(i)(1)–(3)). CFPB may believe that Congress should have gone further than it did in 2018, but the agency does not have the power to substitute its judgment for that of Congress.

Based on the plain text and structure of the statute, the power to except classes of transactions does not include the power to exempt classes of institutions. CFPB's interpretation of

[5] Although CFPB is correct that one of the uses of the word "exempt" was added in 1991, CFPB Mem. 48, the other has been part of HMDA since 1975. *See* Home Mortgage Disclosure Act of 1975, P.L. 94-200, § 309, 89 Stat. 1124 (1975). Plaintiffs do not argue, as CFPB suggests, that the 1991 amendment "implicitly limited the broader exception authority in section 2804." *See* CFPB Mem. 48. Rather, they argue that Congress's consistent use of the term "exempt" shows that the exception authority is not and *never* was as broad as CFPB asserts. *See also Consumers Union of U.S. v. Federal Reserve Board*, 938 F.2d 266, 273 (D.C. Cir. 1991) (questioning broad interpretation of identical exception authority).

its section 305(a) authority therefore fails at *Chevron* step one. *See American Lung Ass'n*, 985 F.3d at 1013.

2. The power to "except" does not include the power to eviscerate.

Not only does CFPB lack authority to make "exceptions" for certain classes of institutions, it lacks authority to gut the disclosure requirements that Congress created in order to shed sunlight on inequitable lending practices. *See* Pls.' Mot. for Summ. J. 40–41 (collecting cases). CFPB's primary response appears to be that the statutes at issue in two of the cases cited in Plaintiffs' memorandum did not concern the words "except" or "exception," but rather "modify" and "adjustment." *See* CFPB Mem. 47 (discussing *Amgen, Inc. v. Smith*, 357 F.3d 103 (D.C. Cir. 2004), and *MCI Telecommc'ns Corp. v. AT&T*, 512 U.S. 218 (1994)). True enough. But that distinction fails to address the import of both cases: that Congress's delegation of authority to make certain changes—whether they be called modifications, adjustments, or exceptions—does not confer authority to radically alter a statutory scheme. And CFPB fails to address *Consumers Union*, 938 F.2d 266, *discussed in* Pls.' Mot. for Summ. J. 43–44, which involves a statute that uses the word "exception"—language in TILA that is identical to the language in HMDA section 305(a). There, the D.C. Circuit remanded a rule to the Federal Reserve Board where the Board had failed to provide a limiting principle for an interpretation of its authority to provide exceptions under TILA in a way that would "give the Board authority to override the clear language of other provisions." 938 F.2d at 273. Similarly, here, CFPB provided no limiting principle for an interpretation of section 305(a) that would enable it to use its exception authority to release swaths of lenders from the obligations imposed by HMDA.

CFPB claims that its action does not impose a "severe restructuring of HMDA's reporting scheme" because it "estimates that more than half of the institutions required to report under the

2015 Rule will still be required to report under the 2020 Rule." CFPB Mem. 47. CFPB cannot be correct, however, that an action qualifies as a permitted "exception" so long as it excludes no more than 50% of covered institutions from HMDA's requirements. The power to except transactions cannot reasonably be read to confer power to release 50% of the industry from statutory requirements. *See MCI Telecomms.*, 512 U.S. at 228 (power to "modify" does not include power to exempt 40% of industry).

This is particularly so given Congress's explicit judgment two years earlier, in enacting the EGRRCPA. While CFPB is correct that the EGRRCPA "demonstrates Congress's judgment that there was need for additional regulatory relief for certain institutions," CFPB Mem. 53, the statute also demonstrates Congress's judgment that that relief should be limited to partial "exemptions" for a smaller set of institutions, accompanied by additional safeguards and requiring further study by the Comptroller General, EGRRCPA §§ 104(a)(2), 104(b), 132 Stat. 1300–01, and that the decision to issue further exemptions on this basis lies with Congress, not a regulatory agency.

CONCLUSION

Because CFPB's 2020 Rule is arbitrary, capricious, and contrary to law, and in excess of statutory authority, Plaintiffs' motion for summary judgment should be granted and Defendants' cross-motion for summary judgment should be denied. The Court should declare unlawful and set aside the 2020 Rule.

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Respectfully submitted,

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