No. 24-10367

In the United States Court of Appeals for the Fifth Circuit

TEXAS BANKERS ASSOCIATION; AMARILLO CHAMBER OF COMMERCE; AMERICAN BANKERS ASSOCIATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; LONGVIEW CHAMBER OF COMMERCE; INDEPENDENT COMMUNITY BANKERS OF AMERICA; INDEPENDENT BANKERS ASSOCIATION OF TEXAS,

Plaintiffs-Appellees,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; JEROME POWELL, in his official capacity as Chairman of the Board of Governors of the Federal Reserve System; FEDERAL DEPOSIT INSURANCE CORPORATION; MARTIN GRUENBERG, in his official capacity as Chairman of the Federal Deposit Insurance Corporation; OFFICE OF THE COMPTROLLER OF THE CURRENCY; MICHAEL J. HSU, in his official capacity as Acting Comptroller of the Currency,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas No. 2:24-cv-0025 (Hon. Matthew Kacsmaryk)

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CERTIFICATE OF INTERESTED PERSONS

Case No. 24-10367

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellees:

- Texas Bankers Association
- Amarillo Chamber of Commerce
- American Bankers Association
- Chamber of Commerce of the United States of America
- Longview Chamber of Commerce
- Independent Community Bankers of America
- Independent Bankers Association of Texas

Defendants-Appellants:

- Office of the Comptroller of the Currency and Michael J. Hsu in his official capacity as Acting Comptroller of the Currency
- Board of Governors of the Federal Reserve System and Jerome Powell in his official capacity as Chairman of the Board of Governors
- Federal Deposit Insurance Corporation and Martin Gruenberg in his official capacity as Chairman of the FDIC

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Counsel further certifies that the Texas Bankers Association, Amarillo Chamber of Commerce, American Bankers Association, Chamber of Commerce of the United States of America, Longview Chamber of Commerce, Independent Community Bankers of America, and Independent Bankers

Association of Texas have no parent company and that no public company owns 10% or more of its shares.

/s/ *Sarah M. Harris*
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellees Texas Bankers Association, Amarillo Chamber of Commerce, American Bankers Association, Chamber of Commerce of the United States of America, Longview Chamber of Commerce, Independent Community Bankers of America, and Independent Bankers Association of Texas—collectively the "trade associations"—agree with Defendant-Appellants, the federal banking agencies, that oral argument is appropriate in this case.

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUE 1
INTRODUCTION 1
STATEMENT OF THE CASE 4
A. The Community Reinvestment Act of 1977 4
B. Implementing Regulations and CRA Amendments 5
C. The Challenged Final Rules 10
D. The District Court's Preliminary-Injunction Ruling 17
SUMMARY OF ARGUMENT 20
STANDARD OF REVIEW 25
ARGUMENT 26
I. The Final Rules Unlawfully Evaluate Banks' Performance Nationwide, Not Within the Bank's "Community" 26
A. A Bank's "Community" Is a Limited Geographic Area 27
B. The Relevant "Community" Is the Area Around a Bank's Deposit Facilities 34
C. A Bank's "Community" Has a Uniform Meaning for All Banks 40
D. The Major Questions Doctrine Further Undermines the Agencies' Interpretation 43
II. The CRA Only Allows Evaluation of Banks' Performance as to Community *Credit* Needs 46
A. "Credit" Means Lending, Not Deposits 47
B. Deference Cannot Save the Agencies' Interpretation 52
III. The Final Rules Inflict Quintessential Irreparable Harm Through Significant, Unrecoverable Compliance Costs 54
IV. The Balance of the Equities Favors a Preliminary Injunction 61
CONCLUSION 65

TABLE OF AUTHORITIES

Page

CASES

Airlines for Am. v. Dep't of Transp., 110 F.4th 672 (5th Cir. 2024) 55, 58
Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.,
594 U.S. 758 (2021)..43, 58, 62
Alabama v. North Carolina, 560 U.S. 330 (2010) 29
All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226 (5th Cir. 2023)................45
Babb v. Wilkie, 589 U.S. 399 (2020) 49
Baylor Univ. Med. Ctr. v. Heckler, 758 F.2d 1052 (5th Cir. 1985)...................53
Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.,
31 F.4th 337 (5th Cir. 2022) 26
Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567 (5th Cir. 1974) 57
Career Colls. & Schs. of Tex. v. Dep't of Educ.,
98 F.4th 220 (5th Cir. 2024) 27
CFTC v. Schor, 478 U.S. 833 (1986) 32, 36
Chamber of Comm. v. Dep't of Lab., 885 F.3d 360 (5th Cir. 2018)...................63
Dep't of Educ. v. Louisiana, 144 S. Ct. 2507 (2024)..64
In re: MCP No. 185, 2024 WL 3650468 (6th Cir. Aug. 1, 2024)........................44
Loper Bright Ents. v. Raimondo, 144 S. Ct. 2244 (2024)................22, 46, 53-54
Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022)...............................19, 43, 54
Louisiana v. Dep't of Educ., 2024 WL 3452887 (5th Cir. July 17, 2024).........64
Macquarie Infrastructure Corp. v. Moab Partners, LP,
601 U.S. 257 (2024)..28
Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.,
439 U.S. 299 (1978)...33, 39
Merck & Co., Inc. v. Dep't of Health & Hum. Servs.,
962 F.3d 531 (D.C. Cir. 2020)..53
Mourning v. Family Publ'ns Serv., 411 U.S. 356 (1973)............................ 52-53
Nat'l Ass'n of Priv. Fund Managers v. SEC,
103 F.4th 1097 (5th Cir. 2024) 27
Ne. Bancorp, Inc. v. Bd. of Govs. of Fed. Reserve Sys.,
472 U.S. 159 (1985)...28, 38
NFIB v. OSHA, 595 U.S. 109 (2022)...43
Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002)...........................53
Rest. Law Ctr. v. Dep't of Lab., 66 F.4th 593 (5th Cir. 2023)...............26, 55, 57

Page

Cases—cont'd:

Richlin Sec. Serv. v. Chertoff, 553 U.S. 571 (2008) 30
Roland Machinery Corp. v. Dresser Indus.,
749 F.2d 380 (7th Cir. 1984) 58
Rotkiske v. Klemm, 589 U.S. 8 (2019) 41
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 53
Spivey v. Chitimacha Tribe of La., 79 F.4th 444 (5th Cir. 2023) 42
Tennessee v. Cardona, 2024 WL 3453880 (6th Cir. July 17, 2024) 64
Texas v. Biden, 10 F.4th 538 (5th Cir. 2021) 61
Texas v. EPA, 829 F.3d 405 (5th Cir. 2016) 55
United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963) 38, 40
Van Buren v. United States, 593 U.S. 374 (2021) 28
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 58

STATUTES AND REGULATIONS

5 U.S.C. § 702 54
12 U.S.C.
§ 22 38
§ 1843(*l*)(2) 5, 11
Community Reinvestment Act (CRA), 12 U.S.C. § 2901 *et seq.* 2
§ 2901(a) 30
§ 2901(a)(1) 4, 30, 38, 49
§ 2901(a)(2) 5, 49
§ 2901(a)(3) .... *passim*
§ 2901(b) .... *passim*
§ 2902(1) 16
§ 2902(3) 5, 11
§ 2902(4) 7, 31, 37
§ 2903(a)(1) .... *passim*
§ 2903(a)(2) 5, 11
§ 2903(b) .... *passim*
§ 2903(c)(1) 47
§ 2903(c)(1)(A) 2, 5, 11
§ 2903(c)(2)(A) 2, 47
§ 2905 .... 5, 52

Page

Statutes and Regulations—cont'd:

Community Reinvestment Act (CRA), 12 U.S.C. § 2901 *et seq.*—cont'd:
§ 2906(a)(1) .... *passim*
§ 2906(b) 35
§ 2906(b)(1) 31
§ 2906(b)(1)(B) 2, 7-8, 35
§ 2906(b)(2) 2, 31, 47, 53
§ 2906(d)(1) 42
§ 2906(d)(2) 42
§ 2906(d)(3)(A) 8
§ 2906(e)(1) 2, 7, 35
§ 2906(e)(2) 8
§ 2907 .... 30, 51
§ 2907(a) 2
§ 2907(a)(1) 47
§ 2908(a) 2, 47
28 U.S.C. § 1391 17
Pub L. No. 103-328, § 110, 108 Stat. 2364 36
12 C.F.R.
§ 25 (1979) 6
§ 25.3 (1979) .... *passim*
§ 25.7 (1979) 6
§ 25.22 (1997) 9
§ 25.24 (1997) 9
§ 25.23 (1997) 9
§ 25.41 (1997) 9
43 Fed. Reg. 47,144 (Oct. 12, 1978) 6, 36
60 Fed. Reg. 22,156 (May 4, 1995) 8-9, 54
61 Fed. Reg. 54,647 (Oct. 21, 1996) 34
81 Fed. Reg. 48,506 (July 25, 2016) 15, 34
87 Fed. Reg. 33,884 (June 3, 2022) 11
89 Fed. Reg. 6574 (Feb. 1, 2024) .... *passim*

Page

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Funk & Wagnall's Standard College Dictionary (1973) 28-30, 48
H.R. 4893, 106th Cong. § 102 (2000) 10
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Oxford Advanced Learner's Dictionary of Current English (1974) 48
Random House Dictionary of the English Language (1973) 48
S. Rep. No. 103-240 (1994) 8, 40
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Susan Wachter, *Modernizing the CRA (While Preserving Its Spirit)* (Dec. 2019), https://tinyurl.com/4netzbyp. 9
Webster's New Collegiate Dictionary (1976) 32

Page

Other Authorities—cont'd:

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STATEMENT OF THE ISSUE

Whether the district court abused its discretion in granting a preliminary injunction against the Community Reinvestment Act Final Rules, 89 Fed. Reg. 6574 (Feb. 1, 2024), where the court held that: (1) appellees were likely to succeed on the merits because the Final Rules exceed the agencies' statutory authority; (2) appellees' members face immediate, unrecoverable costs to comply with the rules; and (3) the balance of the equities and public interest favor an injunction.

INTRODUCTION

For much of the twentieth century, banks and other financial institutions accepted deposits across the community where they operated, from affluent and lower-income depositors alike. But "instead of reinvesting" deposits "in that community" by extending loans community-wide, government policies and private actors fostered so-called redlining. *See* 123 Cong. Rec. 17,630 (June 6, 1977) (statement of sponsor Sen. William Proxmire). Some financial institutions "actually or figuratively dr[e]w a red line on a map around [] areas of their city"—often low-income or inner-city neighborhoods—and refused to lend there. *See id.*

In response, Congress enacted the aptly-named 1977 Community Reinvestment Act (CRA), 12 U.S.C. § 2901 *et seq.*, and directed federal banking agencies to "assess [a bank's] record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods." *Id.* § 2903(a)(1). The CRA refers to a bank's "community" as the particular area surrounding places where banks accept deposits, i.e., offices, branches, and ATMs. *See id.* § 2906(b)(1)(B), (e)(1). And the CRA repeatedly requires evaluation of whether banks are reinvesting in those communities by serving "community *credit* needs," i.e., by extending loans throughout the whole community. *Id.* §§ 2903(c)(1)(A), (c)(2)(A), 2906(b)(2), 2908(a) (emphasis added); *accord* §§ 2901(a)(3), (b), 2903(a)(1), (b), 2906(a)(1), 2907(a).

Thus, from 1978 until now, agency regulations interpreted the CRA as requiring assessments of banks' performance in *extending loans* within the cities or equivalent geographical areas where banks maintained deposit-taking facilities. Congress' amendments to the CRA endorsed those interpretations. That approach helped level the playing field for lower-income borrowers within banks' communities.

But now, the Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), and Federal Reserve seek to rewrite

the CRA via byzantine, 649-page, 60,000-word Final Rules. Claiming a need to modernize the CRA to account for online banking, the Final Rules jettison 50 years' worth of agency rules in favor of novel, cumbersome, and unlawful bank performance tests. For many large and intermediate banks (i.e., banks that hold $600 million or more in assets), the Final Rules redefine a bank's "community" to extend nationwide—not simply to the cities, towns, or equivalent areas surrounding banks' depository facilities. Yet the agencies tellingly never define the word "community," let alone justify why a bank's "community" could span the nation. Further, the Final Rules go far beyond evaluating banks' performance serving community *credit* needs by asserting newfound authority to assess any banking activity with a "sufficient nexus" to credit needs, including large banks' performance in offering low-cost deposit products and services.

Together, those novel requirements would empower the agencies to evaluate banks based upon amorphous judgments about what products and services banks should offer to particular customers. Worse, because low CRA ratings can stymie banks from engaging in a wide range of activities, from mergers to opening new branches, these novel requirements would allow the agencies to seize expansive control over banks' operations. The CRA does not

permit that result. Indeed, Congress has repeatedly rejected the very modernizing initiatives that the agencies would now impose by fiat.

The district court in no way abused its discretion in granting a preliminary injunction to enjoin these Final Rules, which defy the CRA's text, violate the major questions doctrine, and unquestionably inflict irreparable harm. In the agencies' own telling, the Final Rules will inflict $90 million in unrecoverable compliance costs on banks—and that figure significantly underestimates the likely burden. The balance of equities and public interest likewise favor injunctive relief given the patent unlawfulness of these rules. The CRA's success in addressing redlining does not give the agencies a blank check to retool the statute in search of a new mission.

STATEMENT OF THE CASE

A. The Community Reinvestment Act of 1977

In the CRA, Congress recognized that federally-regulated banks and other depository institutions were already "required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business." 12 U.S.C. § 2901(a)(1). Congress found that those communities needed "credit services as well as deposit services," and expressly defined the CRA's purpose as

serving the "*credit* needs of the local communities in which [banks] are chartered." *Id.* § 2901(a)(2)-(3) (emphasis added).

To stop redlining, Congress directed federal agencies charged with supervising banks—OCC, FDIC, and the Federal Reserve—"to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." *Id.* § 2901(b). The agencies thus examine each bank based on its "record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods." *Id.* § 2903(a)(1). The agencies use those ratings to determine whether banks should be allowed to engage in important transactions, like mergers or opening new bank branches. *Id.* §§ 2902(3), 2903(a)(2), (c)(1)(A); *see id.* § 1843(*l*)(2).

B. Implementing Regulations and CRA Amendments

Ensuing regulations and statutory amendments have reaffirmed that the CRA evaluates whether banks that accept deposits within particular communities are serving the *lending* needs of those communities.

1. ***1978 Regulations.*** The agencies' inaugural "[r]egulations to carry out the [CRA's] purposes," 12 U.S.C. § 2905, defined a bank's "local community" as the areas surrounding the bank's deposit-taking facilities. *See*

43 Fed. Reg. 47,144 (Oct. 12, 1978) (codified at 12 C.F.R. § 25 *et seq.* (1979)). The regulations then required examiners to assess banks' performance in *lending* across that defined community.

The regulations interpreted a bank's "local community" as "contiguous areas surrounding each office or group of offices" of the bank—namely, its main office, branch offices, and any "off-premises electronic facility that receives deposits" for just that "depository institution." 12 C.F.R. § 25.3(b) (1979). Banks could "delineate" their "local community" using "metropolitan statistical areas [] or counties" surrounding depository facilities, areas around facilities where the banks "make[] a substantial portion of [their] loans and … areas equidistant" from those facilities, or "any other reasonably delineated local area" that "does not exclude low- and moderate-income neighborhoods." *Id.* Further, "[e]ach institution's entire community … consist[ed] of one or more local communities" where the bank maintains depository facilities. 43 Fed. Reg. at 47,144; *see* 12 C.F.R. § 25.3(a)-(b) (1979).

The regulations then prescribed factors for assessing whether banks met *lending* needs in their local communities, such as whether banks excluded creditworthy borrowers from loans based on their neighborhood's income level. 43 Fed. Reg. at 47,146; 12 C.F.R. § 25.7 (1979).

2. ***CRA Amendments.*** Through multiple amendments, Congress endorsed the regulations' focus on ensuring that banks that accept deposits in a particular community do not discriminate against lower-income borrowers within that community.

In 1978, Congress created a special rule for banks serving geographically disparate military personnel: "A financial institution whose business predominately consists of serving the needs of military personnel *who are not located within a defined geographic area* may define its 'entire community' to include its entire *deposit* customer base without regard to geographic proximity." 12 U.S.C. § 2902(4) (emphasis added). As to other institutions, Congress left intact—and implicitly endorsed—the regulations' definition of "local communities" as defined geographical areas surrounding deposit-taking facilities.

In 1994 amendments, Congress defined banks' assessment areas—i.e., the relevant community where examiners evaluate the bank's lending activities—based on the location of a bank's "domestic branch[es]." *Id.* § 2906(b)(1)(B). Congress defined "domestic branch[es]" as "any branch office or other facility of a regulated financial institution that *accepts deposits*, located in any State." *Id.* § 2906(e)(1) (emphasis added). Congress then

defined the bank's assessment area as the "metropolitan area" surrounding banks' deposit-taking facilities. *Id.* § 2906(b)(1)(B); *see id.* § 2906(e)(2) (defining "metropolitan area"); *id.* § 2906(d)(3)(A) (similar approach for "rural areas"). Congress thus tracked longstanding regulations defining a bank's local community to include "contiguous areas surrounding each office or group of offices" where banks accepted deposits. 12 C.F.R. § 25.3(b) (1979).

Congress viewed that geographical focus as necessary to "ensure[] that the [CRA's] principles … will be observed under the system of interstate banking" then emerging. S. Rep. No. 103-240, at 15 (1994). Other 1994 legislative reforms loosened federal restrictions on national banks' ability to acquire other banks and open interstate branches. By tying CRA evaluations to metropolitan areas where banks accept deposits, banks could not obscure redlining by "redesignat[ing] the geographic area of service on which its CRA record is judged to include the entire United States." *Id.* at 18.

3. ***Ensuing Regulations***. From 1995 until now, the agencies assessed whether banks served the lending needs of local communities surrounding banks' deposit-taking facilities. The 1995 regulations, for example, reiterated that banks' "assessment areas" were "geographic area(s)" "in which the bank has its main office, its branches, and its deposit-taking ATMs." 60 Fed. Reg.

22,156, 22,184 (May 4, 1995) (codified at 12 C.F.R. § 25.41(c)(2) (1997)). Those assessment areas also include "the surrounding geographies" of the bank's main office, branches, and deposit-taking ATMs "in which the bank has originated or purchased a substantial portion of its loans." *Id.*

The regulations likewise exclusively considered banks' *lending* activities within their assessment areas. The aptly-named "Lending Test" evaluated the quantity and distribution of various loans across borrower income levels within banks' assessment areas. 12 C.F.R. § 25.22 (1997). The "Investment Test" considered investments that help meet lending needs in assessment areas. *Id.* § 25.23. And the "Service Test" assessed the accessibility of "retail credit delivery systems," plus services promoting community development, in those areas. 60 Fed. Reg. at 22,166-67 (codified at 12 C.F.R. § 25.24 (1997)); *accord* OCC, FRB, & FDIC, *Large Institution CRA Examination Procedures* 2-12 (Apr. 2014), https://tinyurl.com/4hbhb237.

4. ***Failed Legislation***. Since 1995, the rising popularity of telephone-based and online banking services has prompted calls for Congress to revamp the CRA. *E.g.*, Susan Wachter, *Modernizing the CRA (While Preserving Its Spirit)* 2, 4-5 (Dec. 2019), https://tinyurl.com/4netzbyp. First in 2000 and then three more times (in 2001, 2007, and 2009), legislators proposed amendments

to assess banks' lending activities more broadly instead of merely assessing banks' lending activities within communities where banks' deposit-taking facilities were located.[1] None passed.

C. The Challenged Final Rules

1. The CRA has "made great progress in eliminating redlining and promoting reinvestment in redlined neighborhoods." Richard Marsico, *Democratizing Capital: The History, Law, and Reform of the Community Reinvestment Act*, 49 N.Y.L. Sch. Rev. 717, 719 (2005); *accord* Cal. Br. 1-2; Lawyers' Cmte. Br. 3, 5. In 2022, banks provided over $227 billion in capital to low- and moderate-income communities via mortgages and small business loans. ROA.587. Bank examiners recently identified only about 1% of banks as needing improvement, reflecting banks' "deep commitment to supporting their communities." Michelle Bowman, *Statement on the Community Reinvestment Act Final Rule* (Oct. 24, 2023), https://tinyurl.com/5n6csd94.

That success stems in no small part from the significant consequences of poor CRA ratings. Banks' CRA ratings affect whether banks can obtain approval for new charters, deposit insurance, new branches or other facilities

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[1] H.R. 4893, 106th Cong. § 102 (2000); H.R. 865, 107th Cong. § 102 (2001); H.R. 1289, 110th Cong. § 103 (2007); H.R. 1479, 111th Cong. § 103 (2009).

that accept deposits, office or branch relocations, and mergers or acquisitions. 12 U.S.C. §§ 2902(3), 2903(a)(2). Poor CRA ratings can also stop bank holding companies from engaging in various activities. *Id.* § 2903(c)(1)(A); *see id.* § 1843(*l*)(2).

2. In June 2022, OCC, FDIC, and the Federal Reserve proposed rules to "strengthen and modernize" CRA assessments. 87 Fed. Reg. 33,884, 33,888 (June 3, 2022). Over the strenuous dissents of two FDIC directors and one Governor of the Federal Reserve Board, the agencies approved the Final Rules on October 24, 2023.[2] 89 Fed. Reg. 6574 (Feb. 1, 2024).

The Final Rules and preamble span 649 triple-column pages and some 60,000 words. The rules completely overhaul CRA assessments, prescribing intricate and costly tests to assess banks' CRA performance on the ground that modern-day banking has outpaced the CRA framework. *See id.* at 6576-77. Four new tests replace the previous ones:

[2] Bowman, *supra*; *Statement by Jonathan McKernan, Director, FDIC, Board of Directors on the Final Rule Implementing the Community Reinvestment Act* (Oct. 24, 2023), https://tinyurl.com/3d5heatp; *Statement by Vice Chairman Travis Hill on the Final Rule on Community Reinvestment Act Regulations*, FDIC (Oct. 24, 2023), https://tinyurl.com/4uh4ppvb.

Retail Lending Test. Like previous regulations, this test assesses banks' performance in serving the lending needs of local communities surrounding where banks take deposits (branches, ATMs, etc.). The Final Rules label those areas as "Facility-Based Assessment Areas." *Id.* at 7114.

In a break with previous regulations, the Final Rules add two new types of assessment areas that have nothing to do with where banks take deposits:

- Retail Lending Assessment Areas: metropolitan areas (or all nonmetropolitan counties in a state) where the bank originated certain *loans* (i.e., at least 150 closed-end home mortgages or 400 small-business loans)—regardless of whether the bank maintains a deposit-taking facility there. *Id.* at 7114-15.

- Outside Retail Lending Area: a "nationwide" area covering the rest of the United States, except (1) counties in nonmetropolitan areas of a state where the bank did not originate any loans of specific types and (2) anywhere other assessment areas already cover. *Id.* at 7115; *accord* Govt Br. 11-12.

Together, many banks would effectively be assessed based on their lending activities nationwide. *See* ROA.328, 332.

The Final Rules apply differently to banks depending on their asset size—i.e., whether a bank is "large" (assets of at least $2 billion), "intermediate" (assets of $600 million–$2 billion), or "small" (assets under $600 million). Large banks are generally subject to both new assessment areas, and thus assessed nationwide (except for any areas within a particular

nonmetropolitan area of a state where the bank extended no loans). *See* 89 Fed. Reg. at 7115; *accord* Govt Br. 11-12. Intermediate banks are assessed on their nationwide performance extending loans if they extend less than 50% of loans in communities around their deposit-taking facilities. *Id.* at 7109-10, 7115. When examining banks' lending performance beyond communities where banks accept deposits, examiners must consider whether loans are distributed evenly across borrowers and geographies of different income levels, compared to other banks. *Id.* at 6789-90.

Retail Services and Products Test. The Final Rules add another new test assessing banks based on their *deposit* activities, not merely lending. The test evaluates banking services that banks provide through bank branches, ATMs, and online and mobile banking. The test also evaluates whether banks offer deposit products with low-cost features (i.e., free checking). And the test gauges how available and widely used these services and products are to low- and moderate-income communities. *Id.* at 6926-27, 6931-32, 6945-46.

Community Development Financing Test. This qualitative test assesses a bank's community-development loans and investments by comparing them to its deposits and peer-based benchmarks. *Id.* at 6953.

Community Development Services Test. This test employs a "largely qualitative" review of how much banks contributed to community development based on factors like how many hours of community development service the bank performed. *Id.* at 6992.

The following chart summarizes the four new tests and the weight they receive in overall ratings:

	Retail Lending Test	Retail Services & Products Test	Community Development Financing Test	Community Development Services Test
Who Is Evaluated	• Large and Intermediate Banks • Small Banks may opt in to new test or are subject to existing lending test	• Large Banks	• Large Banks • Intermediate Banks may opt in to new test or are subject to existing community-development test.	• Large Banks
Weight It Receives in the Total CRA Rating	• Large Banks: 40% • Intermediate Banks: 50% • Small Banks: 100%	• Large Banks: 10%	• Large Banks: 40% • Intermediate Banks: 50%	• Large Banks: 10%

2. The agencies acknowledged that the Final Rules depart from previous regulations. The Final Rules recognize that the agencies previously defined the bank's "community" as the immediate geographical area surrounding deposit-taking facilities. *Id.* at 6577. Nonetheless, the agencies asserted "[l]egal authority" to redefine the relevant "community" as anywhere

banks extend certain loans or have significant numbers of borrowers, regardless of whether banks accept deposits nearby. *Id.* at 6738, 6759.

Further, the agencies recognized that "the operational provisions of the CRA instruct[] the agencies to evaluate a bank's record of meeting the *credit needs* of its communities." *Id.* at 6943 (emphasis added). For 50 years, previous regulations thus assessed banks' *lending* performance.[3] *Supra* pp. 6, 9. But the Final Rules assert that banks' deposit activities have a "sufficient nexus" to "the provision of credit" to feature in the CRA analysis. 89 Fed. Reg. at 6943.

Two different agency principals—FDIC director Jonathan McKernan and Federal Reserve Governor Michelle Bowman—took the unusual step of questioning whether "regulators have statutory authority" to consider "lending activities outside a bank's facility-based assessment areas" and "deposit products, free-checking accounts, and other non-credit products." McKernan, *supra*; *see* Bowman, *supra*. Yet the agencies pressed ahead, citing

[3] A non-binding 2016 guidance document suggested that examiners consider deposit products, without explaining the statutory basis or requiring compliance. Govt Br. 8 (citing 81 Fed. Reg. 48,506, 48,542-43 (July 25, 2016)).

the expansion of online banking services and the need to "[a]dapt to changes in the banking industry." 89 Fed. Reg. at 6575.

3. The agencies offered no "evidence … to support th[e] premise" that "banks are not doing enough to meet the credit needs of their communities." Bowman, *supra.* Meanwhile, the agencies estimate that their overhaul of the CRA would impose a compliance burden of $91.8 million just "during the first 12-month period of the final rule's implementation." 89 Fed. Reg. at 7106.[4] And the agencies estimate that banks would collectively expend over 470,000 hours each year to comply with new information-gathering requirements. *Id.* at 7101-06. Regulated banks estimated the costs of compliance with the proposed rules at over $566 million in the first year for large banks alone—six times the agencies' estimate. ROA.69, 294.

Those enormous costs—and the lack of evidence that the new rules are necessary—prompted three different agency principals to object to the counterproductive costs of "materially chang[ing] the way banks think about

[4] The agencies later issued a proposed supplemental rulemaking purporting to "correct[]" the $91.8 million figure as reflecting the costs of "full compliance" by 2026. ROA.546-547. That estimate covers only OCC-regulated banks, i.e., national banks and federal savings associations—not state-chartered banks, holding companies, savings banks, and state savings associations, all of which are subject to the Final Rules. ROA.539; *see* 12 U.S.C. § 2902(1).

and choose to make investments in their communities." Bowman, *supra; accord* McKernan, *supra* (lacking "confidence that [the rule's] benefits will exceed its costs"); Hill, *supra* (rules "blow[] far past" the point where the "costs of added complexity outweigh the benefits").

D. The District Court's Preliminary-Injunction Ruling

Appellees are trade associations representing banks of all sizes that would be forced to comply with the Final Rules. ROA.276-338. Appellees include Texas-based trade associations—the Texas Bankers Association, Independent Bankers Association of Texas, Longview Chamber of Commerce, and Amarillo Chamber of Commerce—all of whom represent Texas banks that face immediate expenditures to decipher and comply with the Final Rules. Days after the Final Rules' publication, appellees filed this suit and moved for a preliminary injunction in the U.S. District Court for the Northern District of Texas to protect members from shouldering millions of dollars in immediate compliance costs. The agencies have never disputed that venue lies there.[5]

[5] One group of amici accuses appellees of "judge[]shopping" into the Northern District of Texas. Civil Rights Orgs. Br. 7. That accusation is baseless mudslinging. Undisputedly, the Amarillo Chamber of Commerce is headquartered in the Northern District of Texas's Amarillo Division, so venue is proper. *Id.* at 14-15; 28 U.S.C. § 1391(c)(2), (e)(1). Amici also omit that Anonymous Bank A, a member of several of the trade associations, is headquartered in Amarillo and will be significantly affected by the Final

On March 29, 2024, the district court issued a thorough, 23-page opinion granting a preliminary injunction. The court enjoined enforcement of the Final Rules against appellees and their members, and stayed the Final Rules' April 1, 2024 effective date and implementation dates of January 1, 2026 and January 1, 2027. ROA.608.

As to the preliminary-injunction factors, the court held that appellees were likely to succeed on the merits because the Final Rules exceed the agencies' statutory authority. *First*, the rules' broad definition of a bank's "community" misinterprets the CRA, which uses the word "community" to refer to a specific, geographical area—namely, areas surrounding the bank's physical deposit-taking facilities. ROA.594-596. As the court explained, "[i]n modifying 'community,' the word 'entire' merely clarifies that the *whole* community must be served—it does not change what a 'community' *is*." ROA.594. *Second*, by evaluating banks based on deposit-related products and services, the Rules violate the CRA's separate requirement "in every operative provision" that "only *credit* need be considered." ROA.599-600. The

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Rules, as detailed in the bank's declaration. ROA.281, 287, 326-329. Other trade groups—including ones with state-wide or national scope—frequently join challenges to onerous agency rules.

court held that the major questions doctrine further undercuts the agencies' novel assertions of power to "assess banks *wherever* they conduct retail lending" and to rewrite the CRA in ways Congress rejected. ROA.600-601.

As to irreparable harm, the court found that complying with the Final Rules would force appellees' members to incur significant nonrecoverable compliance costs that were far "more than *de minimis*." ROA.601-602 (quoting *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022)). Those costs include "complicated, time-consuming system overhauls and database updates and the need to conduct program planning, upgrade vendor relationships, and hire more IT." ROA.601 (cleaned up).

Finally, the court held that the balance of equities and the public interest favored injunctive relief. ROA.606. The agencies pointed to rule provisions they described as "beneficial," including regulatory relief for smaller banks. ROA.531. But the court explained that "delaying possibly salutary provisions" is not "sufficient reason to deny injunctive relief," especially given the Final Rules' likely unlawfulness and appellees' strong showing of irreparable harm. ROA.608 (citation omitted).

The agencies appealed. ROA.619. The district court stayed further proceedings—including on appellees' additional Administrative Procedure Act claims—pending this appeal. ROA.631-632.

SUMMARY OF ARGUMENT

The district court was well within its discretion to preliminarily enjoin the Final Rules.

I. As the district court held, appellees are likely to succeed on the merits because the Final Rules plainly exceed the agencies' statutory authority. To start, the Final Rules would evaluate many large and intermediate banks based on their performance extending loans across the entire *nation*. But the CRA only authorizes assessments of a bank's "record of meeting the credit needs of its entire *community*, including low- and moderate-income neighborhoods." 12 U.S.C. § 2903(a)(1) (emphasis added). The CRA's repeated references to a bank's "community" do not plausibly encompass the entire United States, and indeed refer to areas surrounding banks' deposit-taking facilities (i.e., offices, branches, and ATMs).

A. A "community" ordinarily means a "particular place or region"—not the entire United States. Accompanying statutory language reinforces that a bank's community is a limited geographic area. The agencies do not even

dispute appellees' definition of "community," instead interpreting the phrase "*entire* community" as conveying extraordinary breadth. But "entire" just means "whole," and a bank's "whole" community is still a defined place, not the whole country.

B. The Final Rules also contravene CRA provisions defining the *relevant* community. CRA section 2906—the provision specifically instructing how CRA evaluations work—defines the "community" whose "credit needs" banks should meet as the "entire community" immediately surrounding where a bank accepts deposits, regardless of income level. For the last 50 years, the agencies defined a bank's "community" as the city or comparable area surrounding a bank's offices, branches, or ATMs. Congress ratified the agencies' interpretation by borrowing its focus on deposit-taking facilities when amending the CRA and adding section 2906. That longstanding interpretation accords with the CRA's mission to stop redlining—the practice of accepting deposits from within a community, but then refusing to extend loans to lower-income neighborhoods.

C. The Final Rules depart from the CRA's text by defining a bank's "community" differently depending on the bank's size and borrowers' locations. The CRA's text treats a bank's "community" or "entire community"

as a uniform concept. Where Congress wanted to differentiate among banks for particular purposes, Congress did so, but conspicuously did *not* give the agencies authority to define a bank's "community" differently depending on a bank's distinguishing features.

D. The major questions doctrine further undermines the agencies' interpretation. Congress must speak clearly before arrogating to the agencies wide-ranging powers of economic significance. Here, the agencies implausibly interpret the CRA as granting them carte blanche to rate banks based on virtually any product or service offered nationwide. The Final Rules would inflict at least $90 million in compliance costs before the new assessment regime is effective, never mind afterwards, and threaten banks with an inability to merge or open new branches based on poor CRA ratings. Congress did not grant the agencies such sweeping power, and repeatedly rejected the very calls to modernize the CRA that the agencies are now implementing themselves. The agencies' remarkable demand for deference to their interpretation of a bank's "entire community" is legally groundless, especially post-*Loper Bright*.

II. As the district court held, the Final Rules further trample the CRA's statutory limitations by mandating evaluation of some banks' *deposit* products

and services. The CRA repeatedly limits the agencies to assessing banks' performance in meeting community "credit needs"—i.e., lending—not accepting deposits. 12 U.S.C. § 2903(a)(1).

A. Throughout the CRA, Congress mandated that the agencies assess banks' records of meeting community "credit needs." The ordinary meaning of "credit" is "a loan of money" "by a bank." By evaluating banks' deposit-related services and products, the Final Rules assess the antithesis of lending: customers depositing money with a bank, not borrowing money from it. Congress expressly recognized that "credit" and "deposit" services are separate categories, and directed agencies to focus on credit alone. That tracks the CRA's purpose: to encourage banks to *lend* across communities where banks were soliciting deposits.

The agencies' contrary interpretation—that "credit needs" encompass any product or service that is useful to helping customers access credit—is atextual and nonsensical. That approach would open the floodgates to grading banks based on countless activities that the agencies might consider desirable for accessing credit. When Congress wanted to include more attenuated activities beyond lending, Congress said so expressly. The agencies' interpretation of "credit needs" is also at odds with the Final Rules, which

arbitrarily define "credit needs" expansively for large banks and more narrowly for other banks.

B. The agencies demand deference to their interpretation of "credit needs," but agencies' statutory interpretations do not receive dispositive deference. The agencies' newfound interpretation is not even persuasive, given that the agencies have jettisoned their longstanding interpretation that deposit products should not be considered.

III. The district court rightly held that appellees' member banks face a "substantial threat of irreparable injury" absent a preliminary injunction because the Final Rules inflict immediate, unrecoverable compliance costs. ROA.601. Banks must immediately invest in deciphering and operationalizing byzantine rules that upend the CRA-ratings regime that has been in place for decades. Banks would have to overhaul current compliance systems, develop and test new computer programs, conduct program planning, upgrade vendor relationships, and hire additional IT staff—tasks that even the agencies agree will require at least $90 million in compliance costs before the new CRA assessment regime takes effect. 89 Fed. Reg. at 7106.

The agencies dismiss the compliance costs here as *de minimis* relative to banks' overall expenses and resources. This Court's cases resoundingly

reject that subjective approach to irreparable harm, which contravenes long-established equitable principles. The agencies also portray the compliance costs as insufficiently imminent, but plaintiffs' declarations—which the district court credited—show that banks must start compliance tasks immediately.

IV. The balance of the equities and the public interest favor an injunction. The agencies and public face no countervailing harms if the Final Rules continue to be preliminarily enjoined. The current CRA regime successfully addresses redlining. The agencies primarily claim that existing regulations do not address the rise of online banks that operate outside brick-and-mortar offices. But policy arguments cannot justify rewriting the CRA's text, and the Final Rules subject thousands of banks that do not solely operate online to a burdensome new regime. The agencies also tout the benefits of two new bank-examination tests that appellees do not challenge. Whatever those benefits are, they cannot salvage a rule whose unlawful tests are inextricably bound up with the rest of its prescriptions.

STANDARD OF REVIEW

To obtain a preliminary injunction, plaintiffs must "show [they are] likely to prevail on the merits and also demonstrate a substantial threat of irreparable injury if the injunction is not granted; the threatened injury

outweighs any harm that will result to the non-movant[s] if the injunction is granted; and the injunction will not disserve the public interest." *Rest. Law Ctr. v. Dep't of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023) (cleaned up). This Court "review[s] the grant of a preliminary injunction for abuse of discretion." *Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 31 F.4th 337, 346 (5th Cir. 2022). District courts' "[f]actual findings that support the injunction are reviewed for clear error while legal rulings are reviewed *de novo*." *Id.*

ARGUMENT

I. The Final Rules Unlawfully Evaluate Banks' Performance Nationwide, Not Within the Bank's "Community"

Under the CRA, banking agencies "shall … assess" a bank based on its "record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods." 12 U.S.C. § 2903(a)(1); *accord id.* § 2906(a)(1). The Final Rules would now define a bank's "entire community" for some large banks and some intermediate banks to extend throughout the United States, regardless of the bank's physical footprint. 89 Fed. Reg. at 6575, 7115; Govt Br. 11-12.

That interpretation is untenable for multiple independent reasons. A bank's "community" is a smaller geographical area, not the whole country. Further, the bank's relevant "community" for CRA purposes is the immediate

area surrounding the bank's deposit-taking facilities, i.e., offices, branches, and ATM machines. And, contrary to the Final Rules, a bank's "community" does not vary depending on a bank's assets. 89 Fed. Reg. at 7139.

A. A Bank's "Community" Is a Limited Geographic Area

First, the Final Rules are unlawful because a bank's "'community' necessarily involves a limited geographic area," as the district court held. ROA.593. In directing the agencies to evaluate whether banks meet the credit needs of their "entire community," the CRA did not authorize the agencies to evaluate whether banks meet the credit needs of the whole nation, as the Final Rules do for many large and intermediate banks. That problem alone dooms the rules.

1. Start with the ordinary meaning of "community." Such statutory terms are "generally interpreted in accordance with their ordinary meaning … at the time Congress enacted the statute," as reflected in contemporaneous dictionaries. *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1110 (5th Cir. 2024) (citations omitted); *see Career Colls. & Schs. of Tex. v. Dep't of Educ.*, 98 F.4th 220, 240 (5th Cir. 2024).

Here, contemporaneous dictionaries confirm that a "community" means "the people living in a particular place or region and usually linked by common

interests." *Webster's Third New International Dictionary* (1976).[6] By definition, a "particular place or region" is not the whole United States.

That understanding of "community" tracks how banking worked when the CRA was enacted in 1977. Most banks had one location, so a bank's "community" was local. *See* Robert Avery et al., *Changes in the Distribution of Banking Offices*, Fed. Res. Bull. 707, 708 (Sept. 1997), https://tinyurl.com/ytd38sxs (57.5% of banks had a single office in 1975). State and federal laws barred interstate bank branching, and many state laws restricted *intra*state branching—especially beyond the city, town, or region of a bank's main office. *See Ne. Bancorp, Inc. v. Bd. of Govs. of Fed. Reserve Sys.*, 472 U.S. 159, 171-72 (1985); *accord* Colleen Coyne, Note, *Deregulation of the Banking Industry in the 1980s*, 86 W. Va. L. Rev. 189, 189-90 (1983). Congress thus referred to a bank's "community" to capture the idea that banks that took deposits from particular places owed obligations to lend there too.

2. Statutory context further informs statutory meaning. *Macquarie Infrastructure Corp. v. Moab Partners, LP*, 601 U.S. 257, 258 (2024); *Van*

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[6] *Accord Funk & Wagnall's Standard College Dictionary* (1973) (similar); *American Heritage Dictionary* (1976) ("district or locality in which" a "group of people liv[e] … under the same government"); *Black's Law Dictionary* (4th ed. 1968) ("[n]eighborhood; vicinity, synonymous with locality")

Buren v. United States, 593 U.S. 374, 389-92 (2021). Here, accompanying statutory language reinforces that a bank's "community" does not mean the entire United States.

Neighborhoods. The CRA directs that agencies assess the banks' record in meeting credit needs of the bank's "entire community, including low- and moderate-income *neighborhoods*." 12 U.S.C. § 2903(a)(1) (emphasis added); *accord id.* § 2906(a)(1). Congress uses the word "including," followed by a list of examples, to illustrate a general concept. *See Alabama v. North Carolina*, 560 U.S. 330, 341 (2010).

Here, the general concept is that "low and moderate-income neighborhoods" are illustrative subsets of the "entire community." Neighborhoods are smaller geographic groupings, usually defined by particular blocks within a metropolitan area. *See, e.g.*, *Webster's Third* (1976) ("a loosely cohesive community within a larger unit (as a city, town)").[7] Congress thus reinforced that the "entire community" means the collection of neighborhoods across a place—i.e., a city or town. No one would sensibly refer

[7] *Accord Funk & Wagnall's Standard College Dictionary* (1973) ("[a] comparatively small populated region or district possessing some quality or character that distinguishes it from other areas").

to a bank's "entire community" as "the United States, including low- and moderate-income neighborhoods."

Local Communities. Throughout the CRA, Congress interchangeably referred to banks' obligation to meet the credit needs of their "communities," "local communities," and "entire communit[ies]." *See* 12 U.S.C. §§ 2901(a)-(b), 2903(b) ("local communities"); *accord id.* §§ 2901(a)(1), 2907 ("communit[y]"); *accord id.* §§ 2903(a)(1), 2906(a)(1) ("entire community"). When Congress appears to use "terms … interchangeably" within the same statute, the terms presumptively carry the same meaning. *See Richlin Sec. Serv. v. Chertoff*, 553 U.S. 571, 578 (2008).

Congress' repeated mention of *local* communities is particularly telling, because "local" ordinarily means "[p]ertaining to, characteristic of, or confined to a relatively small area, region, or neighborhood." *Funk & Wagnall's Standard College Dictionary* (1973).[8] As the district court recognized, it would be "inexplicable" for Congress to prolifically emphasize a bank's obligation to serve the credit needs of its "local communities" if Congress

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[8] *Accord Black's Law Dictionary* (4th ed. 1968) ("belonging or confined to a particular place"); *Webster's Third* (1976) (an area that is "not general or widespread" and is "primarily serving the needs of a particular limited district").

meant the agencies to judge banks on their nationwide lending performance. ROA.595.

Assessment Areas. Congress provided that the agencies should rate a banks' record of "meeting community credit needs" based on banks' performance in each metropolitan area in which [the bank] maintains one or more domestic branch offices." 12 U.S.C. § 2906(b)(1)-(2). By separating out CRA assessment areas into geographic subunits, Congress treated a bank's "community" as a defined geographic area.

Military Exception. Congress created a special definition of "entire community" for banks that predominantly "serv[e] the needs of military personnel who are not located within a defined geographic area." *Id.* § 2902(4). Those banks alone "may define [their] 'entire community' to include [their] entire deposit customer base *without regard to geographic proximity*." *Id.* (emphasis added). That special rule shows that a bank's "entire community" otherwise *does* require "geographic proximity" and a "defined geographic area." Not only that, Congress adopted this exception against the backdrop of agency regulations defining a bank's "community" as a fixed geographic area surrounding the bank's offices. *Supra* pp. 5-6; 12 C.F.R. § 25.3(b) (1979). That implicit ratification of the agencies' statutory interpretation is

"persuasive evidence that the interpretation is the one intended by Congress." *See CFTC v. Schor*, 478 U.S. 833, 845-46 (1986) (citation omitted).

3. Below, the agencies conceded that "'community' generally has a geographic meaning, such as 'the people with common interests living in a particular area.'" ROA.505 (quoting *Webster's New Collegiate Dictionary* (1976)). And the agencies do not now offer any definition of "community"—the critical word in the CRA. The agencies (at 19-22) simply contend that the phrase "*entire* community" conveys extraordinary breadth, so that a bank's community extends to "geographic areas where a bank provides customers with retail loans" and (for many banks) covers the whole United States.

That interpretation over-reads the word "entire" to supplant the undisputed meaning of "community." All agree that "entire" means "comprehensive" or "whole." But a whole community, excluding no part, still means a whole, defined geographical subunit, not the whole United States—so banks must serve *all* parts of that defined geographical area, not just the affluent ones. ROA.593-594. Again, if the word "entire" transformed a "community" into the whole nation, Congress would not plausibly have described banks' performance in their "communities," "local communities," and "entire communities" as interchangeable concepts. *Supra* pp. 30-31. Nor

would Congress plausibly have mentioned "low-income neighborhoods" as key subsets of the "community." *Supra* pp. 29-30.

The agencies (at 25 n.8) point out that, for banks with multiple deposit-taking facilities, agency regulations have long defined the bank's "entire community" as comprised of all the communities surrounding any given office, branch, or ATM. *Accord, e.g.*, 12 C.F.R. § 25.3(b) (1979). That point just underscores that the agencies have defined an "entire community" differently from their newly minted position. Now, the Final Rules define a bank's "entire community" to conceivably encompass anywhere in the United States, regardless whether the bank accepts deposits there. *See* 89 Fed. Reg. at 7115.

The agencies' argument also proves too much. If the CRA always defined banks' "entire community" to extend nationwide, then decades of agency rules were apparently ultra vires. For decades, banks have used mail, telephone, and online banking services to extend loans to places where banks may not maintain offices, branches, or ATMs. *E.g.*, *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 309-12 & n.20 (1978) (mail); Teresa Morisi, *Commercial Banking Transformed by Computer Technology*, 119 Monthly Lab. Rev. 30, 31-32 (1996) (telephone and online).

Yet, until last year, the agencies' regulations prohibited bank examiners from assessing banks' CRA performance outside the areas surrounding banks' deposit facilities. *Supra* pp. 5-6, 8-9. The agencies (at 38) portray non-binding guidance as suggesting that the agencies viewed banks' "entire community" to include "areas away from deposit-taking facilities." Not so: that guidance merely suggested that *if* a bank "adequately addressed the needs of borrowers within its assessment area(s)"—i.e., its entire community—the agencies would give "[f]avorable consideration" for loans granted outside assessment areas. 61 Fed. Reg. 54,647, 54,656 (Oct. 21, 1996); *accord* 81 Fed. Reg. 48,506, 48,538 (July 25, 2016). Regardless, guidance cannot supplant the agencies' binding regulations. It defies credulity that the agencies disregarded their supposed CRA obligations for decades and only discovered the true meaning of banks' "entire community" recently.

B. The Relevant "Community" Is the Area Around a Bank's Deposit Facilities

Not only do the Final Rules misinterpret "community" to extend anywhere banks make a certain volume of loans, or even nationwide, the Final Rules also misapprehend the CRA's definition of the *relevant* community. As the CRA's text repeatedly specifies, the "community" whose "credit needs" banks should meet is the "community" immediately surrounding where a bank

accepts deposits. For the last 50 years, the agencies themselves defined a bank's community as the city or comparable area surrounding a bank's offices, branches, or ATMs. Congress endorsed that understanding when amending the CRA. The agencies cannot now redefine banks' "community" to extend nationwide (as in the Outside Retail Lending Area), or to any areas where a bank has a certain concentration of loans (as in the Retail Lending Assessment Areas). *E.g.*, 89 Fed Reg. at 7114-15; *accord* Govt Br. 11-12.

1. The CRA's text is dispositive. Section 2906 requires examiners to evaluate how a bank meets credit needs within its assessment areas, i.e., "each metropolitan area in which [the bank] maintains one or more domestic branch offices." 12 U.S.C. § 2906(b)(1)(B). Those assessment areas combined constitute a bank's "community." *Id.* § 2906(b). Critically, the CRA defines "domestic branch offices" as "any branch office or other facility of a [bank] that *accepts deposits*," i.e., bank offices, branches, and ATMs. *See id.* § 2906(e)(1) (emphasis added). Thus, if a bank opens an office, branch, or ATM somewhere, the CRA prescribes that the bank will be judged on its lending performance in the immediately surrounding metropolitan area.

Section 2906 is strong evidence that Congress viewed a bank's "community" as the areas surrounding deposit-taking facilities because that

provision comes from the agencies' longstanding regulations. Again, those regulations defined a bank's "community" as the metropolitan or nonmetropolitan areas surrounding banks' deposit-taking facilities. 43 Fed. Reg. at 47,144, 47,147; *supra* pp. 5-6. Congress incorporated that approach into section 2906. *Compare* Pub L. No. 103-328, § 110, 108 Stat. 2364, *with* 12 C.F.R. § 25.3(a)-(b) (1979). Where "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation," courts "cannot but deem that construction virtually conclusive." *Schor*, 478 U.S. at 845-46 (citation omitted).

The agencies (at 30) acknowledge that section 2906 is limited to "geographic areas where banks have 'domestic branches,'" but deem these requirements non-exclusive. Congress did not inexplicably laser-focus on just one area while failing to require bank examiners to inquire into banks' broader "community" at all. Section 2906 effectuates the CRA by prescribing how the agencies must evaluate banks and how they should define the relevant metropolitan areas surrounding banks' branches, offices, and ATMs. Congress left no room for agency freelancing to expand the bank's relevant "community."

2. Other provisions reinforce that, for CRA purposes, banks are judged based on how well they serve the lending needs of the communities *where banks maintain deposit facilities*.

Military Exception. As discussed, section 2902(4) governs banks that predominantly "serv[e] the needs of military personnel who are not located within a defined geographic area." 12 U.S.C. § 2902(4). Even when authorizing those banks to define their "entire community" differently, Congress limited that "entire community" to "include [their] entire *deposit* customer base without regard to geographic proximity." *Id.* (emphasis added). Congress, in other words, retained the CRA's focus on whether banks' lending practices benefit the customers who *make deposits*. If Congress believed that banks should ordinarily be assessed nationwide, or in areas where the bank's *borrowers* reside, that wording is inexplicable.

Chartered to Do Business. Since 1977, the CRA has also provided that banks have an obligation to meet the "credit needs of the local communities *in which they are chartered to do business*." *Id.* § 2901(a)(3) (emphasis added). A bank charter is a license to undertake "operations of discount and deposit" in a single geographic location—the "State, Territory, or District, and the particular county and city, town, or village" where the bank's main office is

located. *See id.* § 22 (describing charters for national banks). Particularly in 1977, when the CRA was enacted, bank charters authorized banks to accept deposits and make loans within just one State or region of a state because state and federal laws barred interstate branch locations and restricted intrastate branching. *See Ne. Bancorp*, 472 U.S. at 171-72; *supra* p. 28.

The agencies (at 25-27) contend that because bank charters authorize banks to engage in myriad activities—including lending—the CRA's reference to serving communities "in which [banks] are chartered to do business" must extend beyond where banks operate deposit-taking facilities. But the operative text refers to "communities *in which [banks] are chartered to do business*," i.e., the specific location where charters authorize bank operations. 12 U.S.C. § 2901(a)(1) (emphasis added). Just because bank charters generally authorize banks to perform certain types of activities does not mean that banks are *chartered* anywhere any type of bank customer resides. Banks have "place[d] loans and solicit[ed] deposits outside their home area"—i.e., their chartered location—since before the CRA. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 325 (1963). Yet Congress wanted banks to be evaluated in the communities where banks were "chartered," not where banks' customers were located.

Moreover, the agencies' redefinition of a bank's "community" as anywhere the bank does business rests on a faulty premise. Banks extend loans from wherever the bank is chartered, *not* where customers reside. Even in the 1970's, "the convenience of modern mail" made it so that Minnesota residents could "receive loans" from a bank chartered in Omaha "without ever visiting Nebraska"—but the loans were still "extended … in Nebraska," not Minnesota. *Marquette Nat'l*, 439 U.S. at 311. Defining a bank's "community" based on where a borrower resides, as the Final Rules would do, 89 Fed. Reg. at 7114-15, strains any understanding of a bank's relevant community past the breaking point.

3. Congress and the agencies' longstanding consensus that a bank's "community" for CRA purposes is the area surrounding its deposit-taking facilities tracks the CRA's mission. Congress, after all, enacted the CRA to stop redlining—the practice of accepting deposits from within a community, but then refusing to extend loans to lower-income neighborhoods in that community. Checking for mismatches between banks' deposit and lending activities within the same community is fundamental to the CRA's design.

The agencies (at 2, 8-11, 35-36, 52) now say the CRA's mission should be retooled because banks increasingly conduct activities online, not from

depository facilities. Even before the CRA, however, banks conducted activities away from depository facilities, including "plac[ing] loans and solicit[ing] deposits." *Phila. Nat'l*, 374 U.S. at 325. Congress presumably knew how banks operated. But Congress tailored the CRA's mission to a particular concern: banks were not lending in areas around banks' actual locations, and Congress wanted to "encourage bankers to get out of the office and walk around the block and find loan opportunities at home." 123 Cong. Rec. at 17,630 (statement of sponsor Sen. William Proxmire). In 1994, when Congress removed federal restrictions on interstate branching, Congress reaffirmed that the agencies should continue evaluating banks' lending practices within communities surrounding their physical locations to "ensure[] that the [CRA's] principles … will be observed under the system of interstate banking." S. Rep. No. 103-240, at 15 (1994). Even as the banking system evolved, Congress focused on banks' lending activities surrounding depository facilities. Changing the CRA's ambit is a task for Congress, not agencies.

C. A Bank's "Community" Has a Uniform Meaning for All Banks

The Final Rules also fail because the CRA nowhere empowers the agencies to define a bank's "community" differently depending on the bank's size or proportion of loans to different locales.

1. The CRA uniformly evaluates regulated banks based on their performance in "meeting the credit needs of [their] entire communit[ies]." 12 U.S.C. §§ 2903(a)(1), 2906(a)(1). Likewise, the CRA treats all "regulated financial institutions" as equally under an "affirmative obligation to help meet the credit needs of the local communities in which they are chartered." *Id.* § 2901(a)(3). Those provisions cover all types of banks and refer to a bank's "community" or "entire community" as a uniform concept. Even if one bank's "community" might encompass Cleveland and another's spans Montgomery, the CRA prescribes apples-to-apples comparisons of how banks serve their relevant communities' credit needs. While the evaluation metrics might, of course, account for distinctions between banks that affect their performance (such as size), the statutory definition of "community" is static. As the agencies note, "[w]here statutory text includes no exceptions," only Congress can add them—not courts or agencies. Govt Br. 20 (citing, *e.g.*, *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019)). The agencies cannot selectively rewrite the phrase "entire community" to mean different things for different banks.

Congress knew how to differentiate among banks for particular purposes, but did not authorize the agencies to define a bank's "community" differently depending on a bank's distinguishing features. For instance,

Congress authorized the agencies to consider additional factors when assessing whether "a nonminority-owned and nonwoman-owned financial institution" is meeting community credit needs. 12 U.S.C. § 2903(b). And Congress prescribed special rules for how the agencies should evaluate institutions "with interstate branches" or "with branches in 2 or more States within a multistate metropolitan area." *Id.* § 2906(d)(1)-(2). "Congress's inclusion of [] exception[s] precludes judicial imagination of others." *Spivey v. Chitimacha Tribe of La.*, 79 F.4th 444, 447 (5th Cir. 2023).

2. The Final Rules impermissibly flout the CRA's text by defining a bank's "entire community" differently depending on the bank's size and borrowers' locations. Under the Final Rules, large and intermediate banks' "entire community" can extend nationwide. 89 Fed. Reg. at 7114-15; *accord* Govt Br. 11-12. Yet small banks' "entire community" does not extend nationwide, unless the small banks opt for that definition. 89 Fed. Reg. at 7115. The meaning of the bank's "entire community" is not even uniform *among* large and intermediate banks. If intermediate banks extend 50% or more of their loans to customers within the same metropolitan areas where their deposit facilities are located, their "entire community" stops there. But if those banks extend, say, only 49% of their loans in areas near their deposit

facilities, the banks' "entire community" extends nationwide. *Id.* Congress did not empower the agencies to vary the meaning of a bank's "community."

Indeed, the agencies' chief argument on appeal refutes the legality of the agencies' own rules. The agencies now contend that a bank's "entire community" can leave no part out because "Congress did not indicate that the [agencies] should categorically exclude geographical areas where a bank provides customers with retail loans." Govt Br. 20. If so, the agencies cannot selectively gerrymander the definition of "community" based on extra-statutory criteria.

D. The Major Questions Doctrine Further Undermines the Agencies' Interpretation

1. Under the major questions doctrine, courts require a clear statement when agencies assert authority "to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (citation omitted); *accord Louisiana*, 55 F.4th at 1029. Courts are generally skeptical of agency attempts to "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond [agencies'] initial assignment" because, as the saying goes, "Congress does not usually hide elephants in mouseholes." *NFIB v. OSHA*, 595 U.S. 109, 125 (2022) (citation omitted). "The more an agency

asks of a statute, … the more it must show in the statute to support its rule." *In re: MCP No. 185*, 2024 WL 3650468, at *3 (6th Cir. Aug. 1, 2024). And suspicion is especially warranted when agencies purportedly discover expansive powers after decades of reaching the opposite conclusion.

Here, the agencies ask a great deal. As the agencies candidly acknowledge, the Final Rules would open banks to new examinations of nationwide practices, to the tune of $90-plus million in compliance costs even before the first evaluations occur, never mind thereafter. *See* 89 Fed. Reg. at 7106. The agencies are equally forthright that this massive overhaul is apparently necessary to update the CRA because of the "wide diversity in business practices of banks" and "the changes in the financial services industry … since the CRA was enacted in 1977." *Id.* at 6587. According to the agencies, these changes (plus "changes in technology") "have resulted in banks' entire communities extending beyond" facilities where banks accept deposits, *id.* at 6738—even though Congress has long endorsed the agencies' previous, longstanding, and far narrower interpretation of banks' "entire communities." *Supra* pp. 31-32, 35-36.

Modernizing the CRA is a job for "Congress, not the banking agencies." Bowman, *supra*; *accord* McKernan, *supra*. Congress did not insert copious

references to a bank's "community" throughout the CRA as an open-ended invitation for the agencies to assess the adequacy of banks' business practices based on whatever criteria the agencies wish, wherever they wish. Quite the contrary, Congress repeatedly considered but rejected bills that resemble the Final Rules, and repeatedly has ratified the agencies' prior views. *Supra* pp. 9-10 & n.1. The agencies' sweeping assertions of authority would open the door for them to use the CRA as roving authority to examine *any* banking practices—including *deposit* practices—anywhere in the United States, untethered to any statutory criteria beyond "adequately serving" the credit needs of people somewhere in the United States. 89 Fed. Reg. at 6577, 6585. As the district court held, that vast assertion of authority is the type of agency self-empowerment that the major questions doctrine forbids. ROA.600-601.[9]

[9] Some amici deem the major questions doctrine inapplicable to the Final Rules because they supposedly involve "process-oriented" agency action. Lawyers' Cmte Br. 17-19. Not so: CRA evaluations set substantive criteria for ratings that the agencies can rely on to deny banks' applications for deposit facilities and other critical business endeavors. *E.g.*, 12 U.S.C. § 2903(b). Regardless, this Court has vacated the only decision remotely supporting a substance vs. process limitation on the major questions doctrine. *See All. for Fair Bd. Recruitment v. SEC*, 85 F.4th 226 (5th Cir. 2023), *reh'g en banc granted and decision vacated*, 2024 WL 670403.

2. Far from deferring to Congress, the agencies (at 35-37) remarkably demand that this Court give "weight" to the agencies' "experience and judgment in interpreting the statute" to account for "the changing nature of banking." But agencies no longer receive deference for their statutory interpretations. Courts judge statutory meaning for themselves, and "may" consider agencies' interpretations only if the court finds those interpretations persuasive. *Loper Bright Ents. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024).

Moreover, it is a bit much for the agencies to tout their experience interpreting the CRA when the Final Rules jettison 50 years of the agencies' prior statutory interpretations. Agency interpretations "which have remained consistent over time" are more persuasive than newfound interpretations issued decades after a statute's enactment. *See id.* If any interpretation should receive any deference whatsoever, it is appellees' interpretation—the interpretation the agencies espoused for decades.

II. The CRA Only Allows Evaluation of Banks' Performance as to Community *Credit* Needs

The Final Rules also contravene the CRA's discrete limitation that the agencies can only assess banks' performance in meeting community "*credit* needs." 12 U.S.C. § 2903(a)(1) (emphasis added). As the district court held, the Final Rules independently exceed the agencies' statutory authorities

because the Retail Services and Products Test would assess large banks' provision of *deposit* products and services, which are entirely distinct from extending credit. ROA.597-600. The CRA's text, statutory context, history, and other indicators of statutory meaning foreclose the agencies' novel assertion of power to evaluate banks' provisions of any product or service with a "sufficient nexus" to "the provision of credit." 89 Fed. Reg. at 6943.

A. "Credit" Means Lending, Not Deposits

1. More than a dozen times throughout the CRA, Congress mandated that the agencies assess banks based on their records of meeting community "credit needs," full stop. *See* 12 U.S.C. §§ 2901(a)(3), (b), 2903(a)(1), (b), (c)(1), (c)(2)(A), 2906(a)(1), (b)(2), 2907(a)(1), 2908(a). "[I]n every operative provision," Congress thus "specified that only *credit* need be considered." ROA.599. That statutory command to focus on "credit needs" precludes the agencies from expanding the CRA's remit to community deposit needs or any banking needs that supposedly have a "sufficient nexus" to providing credit. 89 Fed. Reg. at 6943.

"Credit" means "a loan of money" "by a bank," i.e., providing money to a customer in exchange for agreed-upon repayment terms and interest. *E.g.*,

Webster's Third (1976).[10] By mandating consideration of whether banks are "meeting the credit needs" of the "community," Congress thus directed the agencies to assess whether banks are meeting communities' needs for *loans*, i.e., money borrowed from the bank. *See* 12 U.S.C. § 2903(a)(1).

By evaluating banks' *deposit*-related services and products, the Final Rules assess the antithesis of lending: customers depositing money with a bank, not borrowing money from it. The ordinary meaning of 'deposit" is "placing … money in the custody of a bank," not obtaining a loan from it. *E.g.*, *Black's Law Dictionary* (4th ed. 1968).[11] The CRA's plain text thus prohibits the agencies from straying beyond assessing banks' performance in meeting community credit needs into other areas of banks' businesses, least of all deposit needs.

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[10] *Accord Funk & Wagnall's Standard College Dictionary* (1973) (synonym: "a loan"); *American Heritage Dictionary* (1976) (same); *Oxford Advanced Learner's Dictionary of Current English* (1974) ("money advanced or loaned (by a bank, etc.)").

[11] *Accord Random House Dictionary of the English Language* (1973) ("money placed in a bank account or an instance of placing money in a bank account); *Funk & Wagnall's Standard College Dictionary* (1973) ("[s]omething entrusted for safekeeping, especially money placed in a bank"); *American Heritage Dictionary* (1976) (similar).

Indeed, Congress expressly recognized that "credit" and "deposit" services are distinct categories, and directed the agencies to evaluate only the former. Congress recognized that "the convenience and needs of communities include the need for *credit services* as well as *deposit services*." 12 U.S.C. § 2901(a)(2) (emphases added). Congress found that banks were already "required by law to demonstrate that their *deposit* facilities serve the convenience and needs of the communities in which they are chartered." *Id.* § 2901(a)(1) (emphasis added). Congress thus empowered banking agencies "to encourage [banking] institutions to help meet the *credit* needs of the local communities in which they are chartered"—not "credit and deposit needs." *Id.* § 2901(b) (emphasis added).

Congress' single-minded focus on "credit needs" throughout the rest of the CRA is strong evidence that Congress intentionally excluded "deposit needs" from the agencies' remit. ROA.599-600; *see Babb v. Wilkie*, 589 U.S. 399, 412 (2020). And for good reason: the CRA's raison d'être was to thwart redlining, the practice of accepting deposits from throughout a community while failing to lend to lower-income neighborhoods within that community. The CRA thus understandably focused on banks' records of meeting community *credit* needs, not credit and deposit needs together.

2. The agencies' counterarguments are unsupportable. The agencies focus on the statutory word "needs," which the agencies define as "a lack of something requisite, desirable, or useful." Govt Br. 41 (internal quotations omitted). But the agencies' conclusion (at 41-42) that the phrase "credit needs" must mean any banking activity that is "requisite, desirable, or useful" to banking "customers' ability to access credit" is atextual and nonsensical. In the phrase "credit needs," *credit* is the "requisite, desirable, or useful" thing that community members may "lack." The definition of "needs" is not license for the agencies to transform the word "credit" into anything "useful" to ultimately obtaining credit. On that reasoning, the agencies could penalize banks with low ratings for failing to open new branches, or failing to offer free financial counseling to people with low credit scores, or to do anything else the agencies consider "useful" to "customers' ability to access credit."

The agencies (at 42) offer purported statutory examples of activities beyond lending that can count toward "meeting the credit needs" of the community. But those examples further refute the agencies' interpretation, showing that when Congress wanted to include more attenuated activities beyond lending, Congress said so expressly.

Take section 2903(b), which allows examiners to consider banks' "capital investment, loan participation, and other ventures undertaken by the institution in cooperation with minority- and women-owned financial institutions and low-income credit unions *provided that these activities help meet the credit needs of local communities in which such institutions and credit unions are chartered*." 12 U.S.C. § 2903(b) (emphasis added). The "provided" clause suggests that capital investment, loan participation, and other activities do *not* normally serve a community's credit needs. Those activities only count if the bank undertakes them in conjunction with minority or women-owned institutions or low-income credit unions, and only if those activities actually serve relevant local communities' credit needs.

Section 2907 creates a similar exception: Banks that "donate[], sell[] … on favorable terms, or make[] available on a rent-free basis" branches located in "predominantly minority neighborhood[s]" to "any minority" or "women's depository institution," may be able to count the "amount of the contribution" toward whether the bank serves the community's credit needs. That exception reflects that the bank may make it easier for a different institution within a minority-owned neighborhood to operate within that community, thereby serving the community's credit needs. Again, Congress confirmed that such

activities ordinarily do *not* count toward banks' performance in meeting community credit needs.

Finally, the agencies' statutory interpretation of "credit needs" is at war with the Final Rules' contours. If access to deposit services inherently relates to serving credit needs, the phrase "credit needs" should always incorporate deposit-related services. *See* 89 Fed. Reg. at 6925, 6943. Yet the Final Rules maintain that "credit needs" include deposit-related services only for *large banks*, i.e., banks that have at least $2 billion in assets. *Id.* at 7121. And the Final Rules do not even evaluate whether banks' deposit services ultimately ameliorate community "credit needs." The Final Rules just rate banks based on the accessibility of deposit-related products and services in a vacuum. *See id.* at 7120-22. That the Final Rules themselves do not comport with the agencies' statutory interpretation is further proof that the agencies strayed well outside the CRA's statutory lines.

B. Deference Cannot Save the Agencies' Interpretation

The agencies demand judicial deference to their interpretation of "credit needs" based on their authority to promulgate "[r]egulations to carry out the [CRA's] purposes," 12 U.S.C. § 2905. Govt Br. 42-43 (citing *Mourning v. Family Publ'ns Serv.*, 411 U.S. 356, 369 (1973)). That call for deference flouts

the Supreme Court's admonition that "courts, not agencies … decide *all* relevant questions of law." *Loper Bright*, 144 S. Ct. at 2261 (citation omitted). Congress defined the CRA's purposes in the CRA's text as ensuring banks adequately serve community "credit needs." 12 U.S.C. §§ 2901(a)(3), 2903(a)(1), 2906(b)(2).

The agencies cannot end-run that limitation by claiming (at 42-43) the power to regulate any banking service or product that the agencies view as "reasonably related" to credit needs. *See Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1062 (5th Cir. 1985); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002).[12] Congress only granted the agencies the power to examine banks' provision of "credit."

The agencies' claim of statutory authority to examine any bank product or service with a "sufficient nexus" to "credit needs" lacks even the "'power to persuade.'" *See Loper Bright*, 144 S. Ct. at 2259, 2262 (quoting *Skidmore v.*

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[12] The agencies' "reasonably related" standard comes from a pre-*Chevron* decision, *Mourning*, 411 U.S. at 369, that appears to have been superseded by modern decisions requiring courts to "employ all the tools of statutory interpretation" to determine whether an agency has authority to promulgate a regulation. *Merck & Co., Inc. v. Dep't of Health & Hum. Servs.*, 962 F.3d 531, 536 (D.C. Cir. 2020) (cleaned up). After *Loper Bright*, the "reasonably related" standard is even less tenable because agencies' statutory interpretations can never receive dispositive deference. 144 S. Ct. at 2261-62.

Swift & Co., 323 U.S. 134, 140 (1944)). Far from being "consistent over time," the agencies' interpretation of "credit needs" to include deposit products and services conflicts with their longstanding position in rulemakings. *Contra id.* at 2262. The agencies' 1995 rule even interpreted the CRA to *not* require banks to have "low-cost checking accounts" and disavowed measuring "service performance on the basis of deposit growth," since such a metric would not be "clearly related to helping to meet the credit needs of the community." 60 Fed. Reg. at 22,167. Insofar as the agencies' interpretations have any power to persuade, the clear winner is the agencies' long-held interpretation—not today's about-face.

III. The Final Rules Inflict Quintessential Irreparable Harm Through Significant, Unrecoverable Compliance Costs

"[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs" because the Administrative Procedure Act does not waive the government's sovereign immunity for damages. *Louisiana*, 55 F.4th at 1034 (citation omitted); *see* 5 U.S.C. § 702. As the district court held, that is exactly the "substantial threat of irreparable injury" appellee trade associations' member banks confront. *See* ROA.601. Those banks must begin incurring significant costs complying with the rules while litigation proceeds, yet cannot recover those costs later.

Id. This Court's precedent forecloses the agencies' contention (at 45-50) that compliance costs here are not irreparable because they are supposedly *de minimis* relative to banks' overall resources or insufficiently immediate.

1. This Court has repeatedly deemed compliance costs irreparable harm. The cost for power plants and steel mills to comply with new Environmental Protection Agency emissions regulations qualify as irreparable harm because "emission controls take several years to install" and "installation" must "begin … almost immediately." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016). Costs airlines would incur to "reengineer[] their websites to comply" with a Department of Transportation rule were likewise irreparable harm. *Airlines for Am. v. Dep't of Transp.*, 110 F.4th 672, 677 (5th Cir. 2024). So were restaurants' costs to "institute … measures to track employee time to comply" with a Department of Labor rule regulating tipped workers. *Rest. Law Ctr.*, 66 F.4th at 598.

By that metric, compliance costs associated with these Final Rules plainly constitute irreparable harm. The agencies themselves initially estimated compliance costs of over $90 million in the Final Rules' first year alone, then (in an unfinalized supplemental rulemaking) claimed that figure reflected compliance costs up to the point of the Final Rules' first round of

assessments, with further compliance costs to come. ROA.546-547, 601-604 & n.6; 89 Fed. Reg. at 7106.

If anything, the agencies severely underestimated compliance costs. The Final Rules would require banks to overhaul current compliance systems, develop and test new computer programs, conduct program planning, upgrade vendor relationships, hire additional IT staff, and evaluate the potential impact on their business strategies and related plans. ROA.602-604 (citing relevant declarations); *accord* ROA.282-283, 287-289, 295-297, 310-311, 319-320, 323-324, 327-328, 331-332, 336-337. Absent a preliminary injunction, banks would have to start incurring those compliance costs well before the Final Rules take effect, during the pendency of this litigation. *See id.* Even the amicus bank supporting the agencies concedes that it is incurring costs now to prepare for future CRA "examinations to ensure successful outcomes," which requires "strategically develop[ing] and efficient[ly] implement[ing] programs" that meet "regulatory expectations." Beneficial Bank Br. 12.

2. The agencies (at 45-47) dismiss compliance costs here as *de minimis* relative to banks' overall expenses and resources, and urge a sliding-scale test where irreparable harm depends on the challenger's relative resources. That

subjective, eye-of-the-beholder approach to irreparable harm is contrary to this Court's precedents and longstanding equitable principles.

As this Court has explained, in determining whether costs are irreparable, the key inquiry is "not so much the magnitude" of the costs "but the[ir] irreparability." *Rest. Law Ctr.*, 66 F.4th at 597 (citation omitted). If a party's costs from interim compliance with a regulation "cannot be recovered in the ordinary course of litigation," those costs constitute irreparable harm. *Id.* (citation omitted). Thus, in this Court's foundational case on *de minimis* harm, this Court held that cutting down trees along a river's bank would inflict irreparable harm even though many other trees remained in the relevant national forest. *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 575-76 (5th Cir. 1974).

Ever since, this Court has asked whether compliance costs are objectively more than *de minimis*, not whether particular plaintiffs would have trouble weathering them. For instance, restaurants faced irreparable harm because compliance costs involved hiring new managers and 8-10 hours per week of added work—without regard to whether particular restaurants could easily absorb those costs. *Rest. Law Ctr.*, 66 F.4th at 599-600. Airlines faced irreparable harm because "reengineering their websites" would inflict

costs—no matter whether particular airlines considered those expenses insignificant. *Airlines for Am.*, 110 F.4th at 677. Likewise, the Supreme Court held that landlords suffered irreparable harm from lost rental payments arising from the CDC's eviction moratorium, full stop—regardless of whether particular landlords would consider the lost rent financially onerous. *Realtors*, 594 U.S. at 765.

That approach tracks long-established equitable principles, under which plaintiffs suffered irreparable harm warranting injunctive relief so long as they had no adequate remedy at law—i.e., a remedy for money damages—that would compensate unrecoverable costs incurred while litigation proceeded. *See* Samuel Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1026-27 & n.161 (2015); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (irreparable harm and no adequate remedy at law are "closely related, if not identical"). Irreparable harm has long been understood in objective terms as "harm that cannot be prevented or fully rectified by the final judgment"—i.e., by money damages for costs incurred if the agencies' rule is ultimately vacated. *See Roland Machinery Corp. v. Dresser Indus.*, 749 F.2d 380, 386 (7th Cir. 1984). Irreparable harm is not measured by the depth of the injured party's pockets.

The agencies' contrary approach would jettison those longstanding principles and destabilize the law. One litigant might not be able to shoulder $50,000 in compliance costs over the course of the year because of existing expenses. Another might have abnormally deep pockets due to recent business successes. Still another might initially seem able to shoulder compliance costs without feeling any pinch, yet could fare differently if a recession descended. A decision classifying particular compliance costs as irreparable harm in one case would be meaningless in others. Litigants would have to litigate the exact same compliance costs in every case relative to their own financial circumstances. This Court should reject that novel, relativistic concept of irreparable harm.

3. The agencies (at 47-48) portray compliance costs as insufficiently imminent to qualify as irreparable harm, contending that the tests appellees challenged would not be in place for over two years from the Final Rules' adoption so banks' compliance activities now are "premature." Plaintiffs' declarations—which the district court credited (ROA.605-606) and the agencies do not refute—show that notwithstanding the lead time, banks must start onerous compliance tasks immediately. Banks must devote significant resources to figuring out how these byzantine rules will even operate; in the

words of one dissenting agency principal, "big chunks of the rule remain unfinished works in progress" that are difficult to understand how to follow. McKernan, *supra*; *see also* ROA.282-283, 319, 328, 332-333. Before the preliminary injunction was entered, banks had already begun overhauling their compliance systems, developing and testing new computer programs, hiring additional IT staff, and evaluating the potential impact on their business plans and strategies. ROA.282-283, 288-289, 295-297, 327-328; *supra* p. 56.

The agencies (at 48-49) demur that the "bulk of compliance activities" are not immediate. But even if banks faced *greater* compliance costs later, the district court correctly found that banks would also need to incur unrecoverable compliance costs now to develop the infrastructure necessary to comply with the Final Rules. ROA.605-606. Appellees' unrebutted declarations substantiate these points. *Id.* (citing ROA.282, 295). Even the agencies' own bank amicus confirms that it needs a long runway to develop new compliance programs for the Final Rules. Beneficial Bank Br. 12-14. As the district court found, "the necessity of swift action is obvious" given that the agencies have issued 649-page rules that overhaul countless aspects of CRA evaluations in unprecedented ways. ROA.605.

Finally, the agencies (at 49-50) claim that because they plan to issue guidance to simplify compliance costs, any unrecoverable compliance costs that banks incur beforehand should not count. The idea that agencies can defeat preliminary injunctions by vaguely promising to issue guidance later is absurd. Appellees' members face irreparable harm now, and courts assess the need for preliminary injunctions based on the record on hand. Banks cannot wait for the agencies to make good on promises to simplify extraordinarily complex rules, then rush to implement new guidance at some unspecified time.

IV. The Balance of the Equities Favors a Preliminary Injunction

1. Whereas the Final Rules inflict a clear risk of irreparably harming appellees' members, the agencies and public face no countervailing harms if the Final Rules continue to be preliminarily enjoined. For the past 50 years, agency regulations have interpreted the CRA just as appellees do. The agencies have identified no urgent need to abandon statutory interpretations that banks and the public, and the agencies themselves have depended on for a half-century.

Likewise, there is "generally no public interest in the perpetuation of unlawful agency action" like the Final Rules. *See Texas v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (citation omitted). Whatever the case for modernizing the

CRA, "[i]t is up to Congress, not the [agencies], to decide whether the public interest merits" changes to the Act. *See Realtors*, 594 U.S. at 766; *contra* Beneficial Bank Br. 16-19; Cal. Br. 4-9, 17-26.

2. The agencies' counterarguments are unpersuasive. The agencies (at 51-52) fault the district court for not "more carefully assess[ing] whether existing regulations … are adequately fulfilling th[e] public interest." They cite the growth of online banks, which do not have brick-and-mortar deposit facilities and do most of their lending away from their physical headquarters but are assessed only in the area around their headquarters. No policy arguments can justify defying the CRA's text. Regardless, the agencies' newfound reliance on online banks cannot save the Final Rules, which sweep far beyond online banks and overhaul CRA assessments for large and intermediate banks, primarily online or not. *E.g.*, 89 Fed. Reg. at 6575.

The agencies (at 53) question the district court's balancing of the equities by faulting the court's reliance on a survey of banks. Specifically, the district court highlighted projections that 28.2% of surveyed banks would reduce lending to avoid triggering Retail Lending Assessment Area evaluations. ROA.317, 606. Those findings are obviously relevant to the equities given that reduced lending would undermine the CRA's purpose of serving community

credit needs. The agencies (at 53) disagree with separate survey results where 62.8% of banks believed compliance costs would increase; the agencies insist 70% of banks would face the same or lower costs. But the court did not rely on that particular estimate. ROA.317, 606. And the equities would not favor the agencies regardless of this survey. The Final Rules clearly impose unrecoverable compliance costs; the agencies acknowledge these costs total some $90 million; the agencies are repudiating 50-year-old interpretations without identifying any need for sweeping changes; and the Final Rules vastly exceed the agencies' statutory powers.

Finally, the agencies (at 53-54) tout the benefits of two new bank-examination tests that appellees do not challenge. Whatever those benefits are, they cannot salvage a rule whose unlawful tests are inextricably bound up with the rest of its prescriptions. The Final Rules are a "comprehensive regulatory package" that are "plainly not amenable to severance." *See Chamber of Comm. v. Dep't of Lab.*, 885 F.3d 360, 388 (5th Cir. 2018). The agencies do not even argue that the challenged provisions are severable, or that it would be possible to otherwise tailor injunctive relief.

For good reason: The Final Rules assign specific weights to each of the four tests to get to 100%, and never indicate how to re-weigh remaining tests

if some are held invalid. The two challenged tests comprise 50% of large and intermediate banks' CRA ratings, and there is no indication how evaluations would proceed should the tests be severed. *See* 89 Fed. Reg. at 6576. If the Retail Lending Test remains enjoined, for instance, it is anyone's guess whether the agencies would evaluate banks based only on the other three tests or adopt something else.

Courts cannot effectively rewrite the regulations by picking and choosing the weight that remaining tests get. *See Dep't of Educ. v. Louisiana*, 144 S. Ct. 2507, 2510 (2024) (declining to partially stay injunctions against entire Title IX rule because the "allegedly unlawful provisions" were "intertwined with and affect[ed] many other provisions of the new rule"); *accord Louisiana v. Dep't of Educ.*, 2024 WL 3452887, at *2 (5th Cir. July 17, 2024); *Tennessee v. Cardona*, 2024 WL 3453880, at *4 (6th Cir. July 17, 2024). As the district court held, "delaying possibly salutary provisions" is not "sufficient reason to deny injunctive relief" given the Final Rules' likely unlawfulness and appellees' strong showing of irreparable harm. ROA.608 (citation omitted).

* * *

Enjoining these Final Rules was no abuse of discretion. In defiance of the CRA's text and the agencies' own longstanding interpretations, the Final Rules unlawfully attempt to rewrite the CRA into a roving bank-examination statute. The Final Rules would force banks to incur undisputed compliance costs totaling tens of millions of dollars. The public interest and the equities favor halting unlawful agency action. And for good reason. Congress enacted the Community Reinvestment Act to fulfill an important but limited mission: to halt redlining. That Congress succeeded is reason for celebration, not grounds for agencies to unilaterally revamp that legislation to address different issues.

CONCLUSION

The Court should affirm the judgment of the district court.

Dated: September 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the Fifth Circuit by using the appellate NextGen system. I certify that all participants in the case are registered NextGen users and that service will be accomplished by the appellate NextGen system.

Dated: September 18, 2024

/s/ *Sarah M. Harris*
Sarah M. Harris

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, that the attached Brief of Appellees contains 12,921 words and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point CenturyExpd BT.

Dated: September 18, 2024

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