IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., et al., Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION, et al., Defendants.	Civil Action No. 14-953-GK

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Community Financial Services Association of America, Ltd., and Advance America, Inc., submit the following memorandum of points and authorities in support of their motion for a preliminary injunction.

INTRODUCTION

This is a case of federal regulatory officials arrogating to themselves the illegitimate power to deprive Americans of their good names, their livelihoods, and their constitutional rights. As alleged in our complaint, for over three years leading officials at the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Board of Governors of the Federal Reserve System ("the Board") (collectively, "Defendant Agencies") have been carrying out a back-room campaign to coerce regulated banks to terminate the accounts of customers in industries that are disfavored by the Defendants. Defendants have acted without statutory authority, without observing the formal procedures required by law, and without providing the affected parties with any notice or opportunity to defend themselves, their livelihoods, and their good names.

Even before the commencement of discovery, substantial evidence has already come to light of how Defendant Agencies have waged—and are continuing to wage—their campaign to shut down the payday lending industry. Defendants have disparaged the good names not only of individual payday lenders, but also of the payday lending industry as a whole, and Defendants have made clear to regulated banks that refusal to cut off payday lenders will result in regulatory retaliation. In short, the Defendant Agencies offered America's bankers a Hobson's choice: close the accounts of your customers in the payday lending industry, or be subjected to burdensome and harsh regulatory consequences. Powers intended to protect the safety of our financial system have thus been abused in an attempt to destroy a lawful and legitimate industry, to the detriment of Americans who rely on that industry to make ends meet.

This Court must now act and put an end to this unlawful administrative conduct. For as the Seventh Circuit recently explained in another case involving unlawful efforts by government officials to harm a disfavored business, no public official is "permitted to issue and publicize dire threats against [businesses which] process payments made through [another business's website], including threats of prosecution (albeit not by him, but by other enforcement agencies that he urges to proceed against them), in an effort to throttle [the plaintiff's business]":

> For where would such official bullying end, were it permitted to begin? Some public officials doubtless disapprove of bars, or pets and therefore pet supplies, or yard sales, or lawyers, or "plug the band" (a listing of music performances that includes such dubious offerings as "SUPERCELL Rocks Halloween at The Matchbox Bar & Grill"), or men dating men or women dating women—but ads for all these things can be found in non-adult sections of Backpage and it would be a clear abuse of power for public officials to try to eliminate them not by expressing an opinion but by threatening credit card companies or other suppliers of payment services utilized by customers of Backpage, or other third parties, with legal or other coercive governmental action.

Backpage.com, LLC v. Dart, 807 F.3d 229, 235 (7th. Cir. 2015).

Preliminary injunctive relief is needed immediately because the effects of Defendants' campaign of backroom strong-arming are now reaching crisis stage as banks have continued terminating their relationships with payday lenders. Indeed, the members of Plaintiff Community Financial Services Association of America ("CFSA"), including Plaintiff Advance America, have lost dozens of long-standing, essential banking relationships and have been turned away from scores of other financial institutions.

The need for immediate relief is now urgent. Plaintiff Advance America was recently informed that the only national bank that was still willing to work with Advance America has succumbed to regulatory pressure to terminate the relationship, thus cutting off access to basic banking service at over 1,200 Advance America locations. Although the Defendants' campaign of regulatory intimidation has already destroyed some smaller businesses, Advance America had, until now, been able to find banks willing to continue doing business. The situation has become life-threatening. Immediate judicial intervention is thus needed if irreparable harm is to be averted.

BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff CFSA is a national membership organization for businesses offering short-term, small-dollar loans and other financial products and services. Plaintiff Advance America is a member of CFSA. Like every CFSA member, Advance America is licensed in every state where it offers short-term, small-dollar loans. In addition to abiding by all applicable state and federal laws, CFSA members, including Advance America, adhere to a rigorous set of industry best practices. And like most of CFSA's members, Advance America has experienced a spate of bank terminations, losing critical financial services that are essential to its business. *See, e.g.*, Declaration of Christian Rudolph ¶ 3 (Oct. 2, 2014), Doc. 23-1 ("Rudolph Decl.") (Advance America); Declaration of Dennis Shaul ¶ 3 (Oct. 2, 2014), Doc. 23-9 (CFSA members); Declaration of Joseph Riggs ¶ 7 (Oct. 2, 2014), Doc. 23-8 ("Riggs Decl.") (Emergi-Cash).

The reason for this rash of terminations was at first mysterious. The banks seemed to have simply begun closing the accounts of payday lenders indiscriminately and *en masse*. And it became clear that the banks were not terminating the accounts voluntarily. Some CFSA members were told that "the bank's decision was not related to any shortcomings in [the lender's] compliance program." Declaration of Jose Gonzalez ¶ 3 (Oct. 2, 2014), Doc. 23-2 ("Gonzalez Decl."); *see also* Declaration of Mark McDonald ¶ 11 (Oct. 2, 2014), Doc. 23-5 ("McDonald Decl."); Declaration of Brian K. Lynn ¶ 5 (Oct. 2, 2014), Doc. 23-7 ("Lynn Decl."). Others were told that their bank would have preferred to maintain the relationship, Gonzalez Decl. ¶ 3, and even that their bankers expressed hope the relationship might one day resume, McDonald Decl. ¶¶ 12, 14. Indeed, as one bank officer frankly communicated to Advance America, the "decision to terminate the Advance America relationship had nothing do with anything that Advance America had done." Rudolph Decl. ¶ 8. From the outset, these terminations did not seem to be the work of a single federal regulatory agency, as CFSA members were seeing relationships terminated by banks under the supervision of the OCC, the Board, and the FDIC. *See* Second Amended Complaint ¶ 80 (Sept. 25, 2015), Doc. 64 ("SAC").

It soon began to emerge that this spate of terminations was being "driven by regulatory pressures relating to these industries." Rudolph Decl. ¶ 6. The banks were not making these decisions for themselves; instead "there was a 'third person' in the room making the decision." *Id.* ¶ 8. Indeed, banks soon confirmed that the Defendant Agencies were, in fact, directing them to terminate their relationships with CFSA members and other payday lenders. *E.g.*, Declaration of Michael Durbin ¶ 5 (Oct. 2, 2014), Doc. 23-3 ("Durbin Decl.") ("Bank of Kentucky communicated verbally to Community Choice that this was being done because bank regulators had directed the bank to terminate its relationship with all payday lenders.").

Ed Lette, the founder, President, and CEO of Business Bank of Texas, has described an example of Defendants' use of regulatory pressure to cause banks to terminate their relationships with payday lenders. Until recently, Business Bank of Texas had an established and mutually beneficial relationship with Power Finance Texas, a payday lender and member of CFSA. *See* Declaration of Ed Lette ¶ 2 ("Lette Decl.") (attached as Exhibit 1); Second Declaration of Dennis Shaul ¶ 6(f) ("Second Shaul Decl.") (attached as Exhibit 2). Business Bank of Texas conducted significant due diligence into Power Finance Texas, including inspecting three years of financial statements and tax returns of Power Finance Texas and related businesses. Lette Decl. ¶ 3. Business Bank of Texas concluded that having Power Finance Texas as a customer would negatively affect neither the bank's safety and soundness nor its reputation. *Id*. Despite this, the OCC forced Business Bank of Texas to terminate its relationship with Power Finance Texas. During a recent meeting, Scott Ward, an assistant Deputy Controller in the OCC's San Antonio office, told Mr. Lette that the bank would incur reputational risk if Business Bank of Texas continued to provide ACH services to Power Finance Texas and other small lenders. *Id.* ¶¶ 6–7. Despite Mr. Lette's disagreement with this assessment, Mr. Ward left no doubt that the relationship would have to end and Business Bank of Texas was left with no choice but to drop Power Finance Texas as a customer. *Id*. ¶ 8. In the absence of this pressure, Business Bank of Texas would not have terminated the relationship, and in the absence of continuing regulatory pressure Mr. Lette is confident that the relationship would be restored. *Id*. ¶ 9.

This joint effort to destroy payday lending is now known by the name that it was given by Department of Justice officials who joined in and coordinated the effort to cut off payday lenders' access to the banking system: Operation Choke Point. Even though Plaintiffs have not yet had an opportunity to take discovery into how Defendant Agencies came to collaborate in their effort to destroy payday lending, preliminary investigations conducted by Congress and by FDIC's Inspector General have revealed much, though far from all, about how this campaign began and evolved.

First, the impetus for this campaign against payday lending came from the very top. At FDIC, for example, there was a meeting held in Washington, D.C., in late 2010 or early 2011, at which the Senior Deputy Director of the Division of Supervision and Consumer Protection instructed the Regional Directors to require any institution that was found to be facilitating payday lending to submit a plan for exiting that line of business.[1] In May 2012, Chairman Gruenberg confirmed to a group committed to eradicating payday lending that "FDIC [was] deeply concerned about these continued reports of banks engaging in payday lending and the expansion of payday lending activities under third-party arrangements" and assured them that he had "asked the FDIC's Division of Depositor and Consumer Protection to make it a priority to investigate reports of banks engaging in payday lending and recommend further steps by the FDIC."[2] In March 2013, as he prepared to speak to several large nationwide banks regarding their relationship with the payday lending industry, Chairman Gruenberg asked his staff to provide him with information on how "large nationwide banks are facilitating payday lending through," among other things, "[e]xtending lines of credit to payday lenders" and providing "payment processing for payday lenders." [3] Those officials made clear in their response that they were "looking into avenues by which the FDIC can potentially prevent our banks from facilitating payday lending."[4]

The message emanating from Washington was heard loud and clear in the field offices around the country. Three of the FDIC's regional directors, for example, stated that "it was their perception that senior FDIC executives in Washington, D.C., up to and including the former and current FDIC Chairmen, had serious concerns regarding the facilitation of payday lending by

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[1] *See* OFFICE OF INSPECTOR GENERAL, REPORT NO. AUD-15-008: THE FDIC'S ROLE IN OPERATION CHOKE POINT AND SUPERVISORY APPROACH TO INSTITUTIONS THAT CONDUCTED BUSINESS WITH MERCHANTS ASSOCIATED WITH HIGH-RISK ACTIVITIES at 27 (Sept. 2015), Doc. 76-1 ("FDIC IG Report").

[2] Letter from Martin J. Gruenberg, Acting Chairman, FDIC, to Lisa Donner, Executive Director, Americans for Financial Reform (May 29, 2012), Doc. 76-2.

[3] Exhibit B to Pls.' Second Notice of Suppl. Supp. at FDICHOGR00006054–55 (Dec. 12, 2014), Doc. 52-2 (Emails between Surge Sen, Section Chief, Div. of Consumer & Depositor Prot., FDIC, and Marguerite Sagatelian, Senior Counsel, Consumer Enforcement Unit, Legal Div., FDIC (Mar. 8, 2013)).

[4] *Id.*

FDIC-supervised institutions." FDIC OIG Report at 28. Indeed, they "believed that there was a general expectation from executives in Washington, D.C., to discourage institutions from facilitating payday lending." *Id*. These Regional Directors, in turn, made clear to their examiners that these commands from Washington were to be obeyed: the former FDIC Atlanta Regional Director expressed to his staff his view that "[p]ay day lenders bring . . . nothing good for our banks," *id.* at 23, and directed that "[a]ny banks even remotely involved in payday [sic] should be promptly brought to my attention," *id.* The Inspector General found that some of the FDIC-supervised banks that were pressured to terminate payday lenders realized that "the ultimate direction came from the FDIC's Washington, D.C., office." *Id.* at 35.

Internal agency communications have revealed, moreover, that this campaign against payday lending has had nothing to do with ensuring the safety and soundness of the banking system. The Defendant Agencies have instead acted out of "[p]ersonal animus towards payday lending,"[5] seeking to give effect to their "personal moral judgments," STAFF REPORT OF THE H. COMM. ON OVERSIGHT & GOV'T REFORM, FDIC'S INVOLVEMENT IN "OPERATION CHOKE POINT" at 15 (Dec. 8, 2014), Doc. 52-1 ("REP."), about payday lending and to accomplish goals that were "entirely outside of FDIC's mandate," *id.* at 10. High-level officials openly expressed that they regarded payday lending as "unsavory"[6] and "a particularly ugly practice."[7] One official frankly stated that he "literally can not stand pay day lending" and that he "sincerely" and

[5] Plaintiffs' Second Notice of Suppl. Supp. at 5 (Dec. 12, 2014), Doc. 52 ("Pls.' Second Notice") (Email from a Counsel, Legal Div., FDIC, to Marguerite Sagatelian, Senior Counsel, Consumer Enforcement Unit, FDIC (Aug. 28, 2013, 9:32 AM) *quoted in* REP. at 10).

[6] *Id.* at 4 (Email from a Counsel, Legal Div., FDIC, to Marguerite Sagatelian, Senior Counsel, Consumer Enforcement Unit, FDIC (Aug. 28, 2013, 9:32 AM)).

[7] *Id.* (Email from a Counsel, Legal Div., FDIC, to Marguerite Sagatelian, Senior Counsel, Consumer Enforcement Unit, FDIC (Mar. 9, 2013, 2:53 PM)).

"passionate[ly]" believes that payday lenders "are abusive, fundamentally wrong, hurt people, and do not deserve to be in any way associated with banking."[8]

Because they did not—and do not—have the statutory authority to destroy lawful and legitimate businesses, the Defendant Agencies elected to abuse the authority that they possess in order to accomplish their aims. The Defendant Agencies first promulgated an amorphous and subjective standard of "reputation risk." The Defendant Agencies then embarked on a behind-closed-doors campaign to coerce banks to terminate payday lenders by threatening regulatory retaliation against banks that continued doing business with payday lenders.

"Reputation risk" has been the fulcrum of Operation Choke Point, the lever used by the Defendant Agencies to drive the banks to cut off payday lenders from the banking and financial systems. Traditional safety and soundness criteria were objective, crafted to protect the banks from genuine threats to their financial soundness. Such standards, of course, would not have permitted the examiners to single out businesses that, although unpopular with officials in Washington, were nevertheless perfectly lawful and financially sound. To carry out Operation Choke Point, therefore, a more subjective standard was needed, one that would permit the examiners to give force to subjective beliefs and private animus.

Reputation risk provided Operation Choke Point with the tool that it needed to turn banks against law-abiding customers. Reputation risk had traditionally referred to the risk that a bank might acquire a bad reputation by providing poor service to its customers, or by contracting with third-parties who provide poor service to the bank's customers in the name of the bank.[9] In 2008,

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[8] *Id.* (Email from Thomas J. Dujenski, Regional Dir., Atlanta Region, FDIC, to Mark Pearce, Dir., Div. of Consumer Prot., FDIC (Nov. 26, 2012, 4:47 PM) *quoted in* REP. at 14).

[9] In 2003, the bank regulators first acknowledged that services provided by third parties in the name of the bank could affect the reputation of the bank itself because of the increased risk of confusion on the part of the customer as to who is providing the service. *See* Press Release, FDIC,

however, the FDIC began to expand the concept to include any publicity about a third party that provides customer service in the name of the bank "whether or not the publicity is related to the institution's use of the third party."[10] Reputation risk then evolved to encompass even a risk posed to a bank by negative publicity associated with one of its customers. Reputation risk had thus become a standard that "can all too easily become a pretext for the advancement of political objectives, which can potentially subvert both safety and soundness and the rule of law."[11]

This subversion of the banks and of the rule of law is precisely what has occurred. With this evolved standard in hand, Operation Choke Point was able to demand that banks seek not to protect their own reputations, but rather that they pass judgment on the reputations of their customers—while deferring, of course, to the value judgments of their regulators about their customers. Federal regulators had thus transformed their authority to supervise safety and soundness into a power to advance their private political agenda by controlling who may gain access to the banks. For while published guidance offers little clue as to what constitutes a reputation risk, the regulators themselves have left no doubt about the final judgments they expect the banks to make.

Indeed, the three Defendant Agencies sought to brand several entire industries as reputation risks. Congressional investigators learned, for example, that officials at the Defendant Agencies have worked to associate payday lending with pornography. They did so by ensuring that the Chairman's talking points and his correspondence with Congress always mention

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NCUA, OTS, OCC, WEBLINKING: IDENTIFYING RISKS AND RISK MANAGEMENT TECHNIQUES 3–4 (Apr. 23, 2003), *available at* https://goo.gl/9NXeG8.

[10] *Guidance for Managing Third-Party Risk*, Financial Institution Letter FIL-44-2008 at 3 (June 6, 2008), *available at* https://goo.gl/6X9vQM.

[11] Letter from Rep. Jeb Hensarling, Chairman, H. Comm. on Fin. Servs., to Janet Yellen, Chair, The Federal Reserve System (May 22, 2014).

pornography in close proximity with payday lending; they did this to convey a "good picture regarding the unsavory nature of the businesses at issue."[12] One official insisted on repeatedly associating payday lending with pornography and on-line gambling—despite legal counsel's concern that the agency would seem to be passing moral judgments on the industry—because he felt "strongly that including payday lenders in the same circle as pornographers and on-line gambling businesses will ultimately help with the messaging on this issue."[13]

Lest there be any doubt as to its "messaging on this issue," Defendant FDIC eventually published its now-notorious list of "high-risk" industries. This list expanded on the strategy of associating lawful industries of which the Defendant Agencies disapproved, like payday lending, ammunition sales, gun sales, and coin dealers, with immoral and even illegal activities, such as Ponzi schemes, racist materials, and, once again, pornography:

Ammunition Sales	Life-Time Memberships
Cable Box De-scramblers	Lottery Sales
Coin Dealers	Mailing Lists/Personal Info
Credit Card Schemes	Money Transfer Networks
Credit Repair Services	On-line Gambling
Dating Services	PayDay Loans
Debt Consolidation Scams	Pharmaceutical Sales
Drug Paraphernalia	Ponzi Schemes
Escort Services	Pornography
Firearms Sales	Pyramid-Type Sales
Fireworks Sales	Racist Materials
Get Rich Products	Surveillance Equipment
Government Grants	Telemarketing
Home-Based Charities	Tobacco Sales
Life-Time Guarantees	Travel Clubs

[12] Email from a Counsel, Legal Division, FDIC, to Marguerite Sagatelian, Senior Counsel, Consumer Enforcement Unit, FDIC (Aug. 28, 2013 9:32) *quoted in* REP. at 10.

[13] Pls.' Second Notice at 5 (Email from a Counsel, Legal Div., FDIC, to Marguerite Sagatelian, Senior Counsel, Consumer Enforcement Unit, FDIC (Aug. 28, 2013 9:32 AM) *quoted in* REP. at 11).

REP. at 3. This list made perfectly clear that the vague and malleable the concept of reputation risk provided regulators with a tool they needed to compel banks to close the bank accounts of businesses they disfavored and, thus, to attempt to purge those merchants from American commerce.

With their new tool in hand, the bank examiners began to go bank-to-bank and demand that the accounts of specific customers be closed as "reputationally risky." In the back rooms of banks around the country, examiners explained that banks that continue to serve customers that the government has labeled reputational risks would suffer harsh regulatory consequences. As one examiner reportedly told a banker who initially resisted this pressure: "I don't like this product and I don't believe it has any place in our financial system. Your decision to move forward will result in an immediate unplanned audit of your entire bank."[14] The regulators' message could not be clearer: If your bank refuses to turn against its payday lender customers, we will turn against your bank.

The Inspector General's report corroborates the accounts that CFSA members have heard from their banks about the pressure to terminate payday lenders that is being applied by Defendants. SAC ¶¶ 82–83. The Report describes how one bank was subjected to a back-room campaign of threats of retaliation and repeated examinations for a full eight months solely because it had a single payday lender as a customer. FDIC IG Report at 25–27. Although the bank "expressed disappointment with the FDIC's supervisory approach, particularly its ability to pressure an institution to terminate a business relationship when there were no safety and

[14] *Guilty until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's Operation Choke Point*: *Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 5 (July 17, 2014) (statement of Chairman Bob Goodlatte), https://goo.gl/LcXMGI.

soundness considerations other than potential reputation risk," it was nevertheless left with no choice but to terminate that lender. *Id.* at 27.

Finally, these investigations have confirmed that these abusive regulatory practices were not the work of rogue agents in the field—Washington was kept fully apprised of the methods used and the progress made in the campaign to destroy payday lending. The details regarding the progress of the campaign were communicated from the field back to the FDIC Chief of Staff, the Directors of the pertinent FDIC divisions, and to numerous FDIC staff and legal counsel in Washington. In one case, when a bank expressed reluctance to terminate a longstanding and law-abiding customer, it was informed that the consequences would be extreme and was even told that FDIC was not concerned if a "piss ant, $200 million bank failed."[15] When a bank official stood up and declared that this "conduct was shameful," that "no bank should be treated like that by their regulator," and that the examiner was "evil," the examiner's chilling response was that "he was only following orders from FDIC Washington management."[16] Indeed, the termination of banking services to payday lenders was considered a matter to be shared and celebrated with the Washington office. For example, upon learning that one "bank with ach is getting out of payday ach and all ach activities," Regional Director Dujenski wrote to the Director of DCP in Washington, Mark Pearce, to tell him the good news: "now that is something to celebrate on Thanksgiving!" FDIC IG Report at 23 (quoting Email from Former Atlanta Regional Director to Director, DCP, Nov. 21, 2012). These officials did more than simply acquiesce in the policy; they celebrated its success in denying Americans their due process rights. Defendant Agencies

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[15] OFFICE OF INSPECTOR GENERAL, REPORT NO. OIG-16-001, REPORT OF INQUIRY INTO THE FDIC'S SUPERVISORY APPROACH TO REFUND ANTICIPATION LOANS AND THE INVOLVEMENT OF FDIC LEADERSHIP AND PERSONNEL 83 (Feb. 2016), *available at* https://goo.gl/fjR8JH.
[16] *Id.* at 70.

even adopted a chilling euphemism for these threats and intimidation: "moral suasion." Plaintiffs' Third Notice of Suppl. Supp. at 3 (Mar. 29, 2016), Doc. 82.

Plaintiffs filed suit on June 10, 2014, seeking declaratory and injunctive relief to put an end to this lawless campaign of regulatory coercion. During the intervening 29 months, the Defendant Agencies have continued to pursue their campaign to choke off the short-term, small-dollar loan industry from its access to the financial system. *See, e.g.*, Second Shaul Decl. ¶¶ 5-6. While Operation Choke Point has succeeded in forcing some payday lenders—including CFSA member DollarSmart Money Centers, to exit the industry, *id.* ¶ 7—the majority of CFSA members, including Advance America, have been able to survive by finding banks that remained willing to serve payday lenders or by making alternative arrangements outside of the banking system. Matters have, however, now taken a dramatic turn for the worse; indeed, the situation for the payday lending industry appears to have reached a tipping point. In the past month alone, Advance America has lost five of its remaining banking relationships. Second Declaration of Christian Rudolph ¶¶ 6–16 ("Second Rudolph Decl.") (attached as Exhibit 3). One of these, U.S. Bank, has been providing financial services to over 1,200 Advance America locations, as well as meeting Advance America's payroll and other corporate banking needs. *Id.* ¶ 8. In just one month, Advance America has lost banking services at 64 percent of its storefronts. *Id.* ¶ 14. Other CFSA members and former members are reporting that they too have recently been notified that U.S. Bank will be closing their accounts. Second Shaul Decl. ¶ 6. One lender, a CFSA board member, has now lost banking services for 214 branch locations. *Id.* One former CFSA member that was recently terminated by U.S. Bank lost banking services for several storefront locations. *Id*. The loss of the extensive banking services that were being provided by U.S. Bank cannot be made by good through stopgap, ad hoc measures. Second Rudolph Decl. ¶

11. The situation confronting Advance America, therefore, as well as many of CFSA's members, is now urgent and dire.

For this reason, Plaintiffs now move for a preliminary injunction to prohibit the Defendant Agencies, pending resolution of this case on the merits, from continuing their campaign of threats and coercion aimed at causing banks to terminate their relationships with Advance America and the other members of CFSA.

A preliminary injunction is the appropriate and necessary remedy to prevent the ongoing and irreparable injury of the Plaintiffs who have been targeted by the Defendant Agencies. First, Plaintiffs are likely to succeed on the merits of their claims; indeed, this Court has already confirmed that Plaintiffs have alleged a cognizable, justiciable challenge to Operation Choke Point under the Due Process Clause. Plaintiffs also submit, respectfully, that they are ultimately likely to succeed on their claims under the Administrative Procedure Act. The Defendant Agencies have both damaged the reputation of the entire short-term, small-dollar loan industry and, more directly and specifically, deprived Advance America and the other members of CFSA of their own good names. Defendants' campaign against payday lenders has deprived Advance America and the other members of CFSA of their rights to hold bank accounts in the pursuit of their chosen line of lawful business. In so doing, the Defendant Agencies have refused to afford Plaintiffs the notice and opportunity to be heard required by the Due Process Clause of the Fifth Amendment and the APA.

Second, Plaintiffs face irreparable injury in the absence of a preliminary injunction. Every day that Operation Choke Point remains in effect, CFSA's members, including Advance America, are being deprived of due process of law—a *per se* irreparable injury. In addition, payday lenders—and by extension the millions of under-banked Americans they serve—depend on their relationships with banks for survival. As the reach of Operation Choke Point grows, CFSA's members, including Advance America, find they have fewer and fewer alternatives and are finding it more and more difficult to remain in business. As demonstrated above, the situation confronting Plaintiffs and the entire payday lending industry has reached crisis proportions.

The balance of equities also weighs in favor of preliminary injunctive relief. Defendant Agencies would retain the full range of their safety and soundness powers to ensure the stability of the financial system, and various other agencies (including especially the Consumer Financial Protection Bureau) would have broad powers to protect consumers from mass market fraud and other unlawful practices. Until the merits are finally adjudged, equity is best served by preservation of the "status quo" in which payday lenders are permitted to retain their banking relationships, and thus to remain in business, while the government retains its full complement of regulatory powers to ensure the financial stability of the banking system and to protect consumers against unlawful lending practices.

Finally, the public interest not only weighs in favor of a preliminary injunction, it necessitates one. Because of the Defendant Agencies' campaign to "protect" consumers from payday lenders, millions of "unbanked" and other disadvantaged consumers will be left without any access to short-term credit at all. These Americans will be forced to turn to detrimental alternatives, such as over-drafting their accounts and incurring heavy fees, missing payments and risking interruptions in vital services, and possibly turning to unregulated, unlawful, and expensive sources of credit. And the public interest is always best served by enjoining likely violations of constitutional rights.

Protecting consumers from credit fraud is, of course, a commendable goal. But the manner in which the Defendant Agencies have chosen to pursue that ostensible goal betrays that their true intent has always been to eradicate a disfavored industry. Rather than to eliminate the bad apples in an otherwise lawful and needed industry, the Defendant Agencies set about to choke off the life-sustaining financial oxygen that the entire industry, and millions of under-banked individuals, depend upon. This covert and indiscriminate assault was carried out in violation of the Due Process Clause of the Fifth Amendment.

ARGUMENT

A plaintiff seeking a preliminary injunction "carries the burden of persuasion by a clear showing 1) of a substantial likelihood of success on the merits, 2) of irreparable injury if the injunction is not issued, 3) that the injunction would not substantially injure other interested parties, and 4) that the injunction is in the public interest." *Spadone v. McHugh*, 842 F. Supp. 2d 295, 300 (D.D.C. 2012) (citing *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)).[17]

I. CFSA and Advance America Have Demonstrated a Substantial Likelihood of Standing.

The Court has jurisdiction to issue preliminary injunctive relief because Plaintiffs have demonstrated a substantial likelihood of their standing. Where, as here, a plaintiff seeks injunctive relief, "he must establish an ongoing or future injury that is 'certainly impending'; he

[17] The D.C. Circuit has held that these "four factors should be balanced on a sliding scale, and a party can compensate for a lesser showing on one factor by making a very strong showing on another factor." *In re Navy Chaplaincy*, 516 F. Supp. 2d 119, 122 (D.D.C. 2007) (citing *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005)); *accord Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009). The D.C. Circuit has, however, yet to resolve the question whether the so-called "sliding-scale" approach to weighing the four preliminary injunction factors, which "allow[s] that a strong showing on one factor could make up for a weaker showing on another," *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011), remains valid following the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). *See, e.g.*, *League of Women Voters of United States v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016); *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 505 n.1 (D.C. Cir. 2016). Because Plaintiffs satisfy each of the four preliminary injunction factors, the Court need not decide that question here.

may not rest on past injury." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)). "[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Accordingly, when moving for a preliminary injunction, a plaintiff "must show a 'substantial likelihood' of standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015).

This Court has already ruled that Plaintiffs have alleged injury-in-fact that is reasonably traceable to the Defendants' coercion of the banks. *See Community Fin. Servs. Ass'n of America, Ltd. v. FDIC,* 132 F. Supp. 3d 98, 108–15 (D.D.C. 2015) (Kessler, J.) ("*CFSA*"). The Court also specifically ruled that "Plaintiffs have alleged facts sufficient to show that there is a 'substantial likelihood' that a favorable ruling by this Court would redress their injuries." *Id.* at 115.[18] While the suit remains in its preliminary stages, Plaintiffs have, as discussed above, *see supra* at 3–14, already submitted substantial evidence regarding the nature of their ongoing injuries and the conduct of the Defendant Agencies that has caused those injuries. Plaintiffs are also submitting affidavits herewith that establish the ongoing and life-threatening nature of their injuries—and,

[18] On October 29, 2015, Defendants filed a second motion to dismiss seeking dismissal of Plaintiff CFSA for want of associational standing. *See generally* Defs.' Mot. to Dismiss Pl. CFSA for Lack of Associational &Organizational Standing (Oct. 29, 2015), Doc. 73; Corrected Mem. in Supp. of Defs.' Mot. to Dismiss Pl. CFSA (Nov. 6, 2015) Doc. 75. Plaintiffs have responded, demonstrating that this motion is meritless. Pls.' Mem. of P. & A. in Opp'n to Defs.' Mot. to Dismiss (Nov. 12, 2015), Doc. 76. The motion remains pending. Because Advance America has standing, however, the Court has jurisdiction to entertain this motion and need not address CFSA's standing. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (holding that, in suit brought by members of Congress, members of union, and union itself, where members of union had standing, the Court "need not consider the standing issue as to the Union or Members of Congress"); *Secretary of Interior v. California*, 464 U.S. 312, 319 n.3 (1984) (holding that "[s]ince the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's").

in particular, of the recent loss by Plaintiff Advance America of a key banking relationship that places its commercial viability in question—and their consequent need for immediate preliminary injunctive relief. Plaintiffs have, in sum, made the requisite showing of a "substantial likelihood" of standing required for injunctive relief.

II. <u>Plaintiffs Are Likely To Succeed on the Merits</u>.

Whether Plaintiffs are likely to succeed on the merits is the "first and most important factor" in the preliminary injunction analysis. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). To satisfy this factor, Plaintiffs need only establish that they are "more likely than not to succeed on the merits of their case." *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011).

A. CFSA and Advance America are likely to succeed on the merits of their Due Process challenges to the Defendant Agencies' actions. As this Court ruled in its Memorandum Opinion and Order denying Defendants' motions to dismiss, Advance America and CFSA "sufficiently alleged that their liberty interests are implicated by Defendants' alleged actions and that the alleged stigma has deprived them of their rights to bank accounts and their chosen line of business, so as to state a claim for violation of constitutional due process." *CFSA*, 132 F. Supp. 3d at 124. Either of these tangible injuries standing alone would support a claim under the Due Process Clause. Even at this early stage in the litigation, therefore, Plaintiffs have met their burden of persuasion and made a clear showing that they are more likely than not to succeed on the merits of their claims. There is substantial credible evidence already in the record establishing the back-room campaign of regulatory coercion by which Defendants have gone about stigmatizing Advance America and the other members of CFSA in a determined effort to deny them access to the banking system and thus to disable them from carrying on their chosen line of business.

The government deprives a person of a liberty interest when it stigmatizes that person, and that stigma has the effect of "depriv[ing] them of some benefit to which they have a legal right" or of "broadly preclud[ing] [him or her] from pursuing a chosen trade or business." *General Elec. Co. v. Jackson*, 610 F.3d 110, 121 (D.C. Cir. 2010) (quotation marks omitted) (citing *Paul v. Davis*, 424 U.S. 693 (1976)). This rule applies equally to corporations like Advance America and CFSA's other members. *See Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003). In order to prevail on the merits of such a due process claim, a party "must show not only that the government harmed [its] reputation, but also that the resulting stigma altered [its] status in a tangible way." *Id.* at 644 (quotation marks and alterations omitted).

Defendant Agencies damaged CFSA's members' reputations by branding them with labels such as "fraudsters," "high-risk businesses," "unsavory," "ugly," and "reputation risks." Even now, before discovery has commenced, the record establishes that Defendants were communicating to banks that Plaintiffs' products have no "place in our financial system," and characterizing Plaintiffs as "unsavory"[19] and engaged in "a particularly ugly practice."[20] Agency leaders have declared that payday lenders are "abusive, fundamentally wrong, hurt people, and do not deserve to be in any way associated with banking."[21]

The courts have held that far less suffices to establish a cognizable injury to reputational interests under the Due Process Clause. *See, e.g.*, *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (individuals labeled susceptible to "excessive drinking" and deprived of right to purchase alcohol asserted claim under Due Process Clause); *Kartseva v. Department of State*, 37 F.3d 1524, 1530 (D.C. Cir. 1994) (even "suggest[ion]" that a "finding of 'counterintelligence

[19] *See supra* note 6.
[20] *See supra* note 7.
[21] *See supra* note 8.

concerns' " had motivated termination decision "might be sufficiently stigmatic" to cause broad preclusion from working as a Russian translator). For example, the District Court for the District of Columbia has held that a chemical company that was labeled "not worthy of being trusted with common chemicals" by agents of the federal government had asserted a cognizable injury to reputation under the Due Process Clause. *See PDK Labs Inc. v. Reno*, 134 F. Supp. 2d 24, 33 (D.D.C. 2001) (Kennedy, J.) (quoting *Chemicals for Research & Indus. v. Thornburgh*, 762 F. Supp. 1394, 1398–99 (N.D. Cal. 1991)).

The evidence gathered by congressional and IG investigators and placed before the Court further establishes that Defendants deliberately sought to associate payday lenders with pornographers, Ponzi schemes, and disreputable enterprises in order to cast their entire business in a negative light. As the D.C. Circuit has explained, "[w]hen the government [has] attache[d] an inherently pejorative and damaging term . . . to a product, . . . the probability of economic harm" to the purveyor of that product "increases exponentially." *Tozzi v. United State Dep't of Health & Human Servs.*, 271 F.3d 301, 309 (D.C. Cir. 2001). Plaintiffs anticipate that formal discovery will only supplement this already substantial body of evidence and confirm beyond doubt what Plaintiffs have been told informally by their bankers for years: namely, that Defendants have conducted a thorough-going campaign of regulatory coercion to destroy the reputations of the Plaintiffs, so that they might thereby destroy Plaintiffs themselves.

As this Court ruled in denying Defendants' motions to dismiss, this harm to Plaintiffs' reputational interests, standing alone, "is insufficient to implicate due process interests." *CFSA*, 132 F. Supp. 3d at 123 (citing *Jackson*, 610 F.3d at 121 (citing *Paul v. Davis*, 424 U.S. 693, 708 (1976))). There must also be some tangible injury, either in the form of a deprivation of some benefit to which Plaintiffs have a legal right, or in the form of a broad preclusion of the Plaintiffs from their chosen field:

> In addition to stigma or reputational harm, the plaintiff must be able to show "that (1) the government has deprived them of some benefit to which they have a legal right, e.g., the right to be considered for government contracts in common with all other persons; or (2) the government-imposed stigma is so severe that it broadly precludes plaintiffs from pursuing a chosen trade or business."

Id. (citing *Jackson*, 610 F.3d at 121).

Plaintiffs have already submitted significant evidence supporting their claim that they have suffered both of these additional injuries. First, Defendants' campaign has sought to deprive Plaintiffs of their right to access the financial products and banking services necessary to their commercial viability. In *National Council of Resistance of Iran v. Department of State*, the D.C. Circuit ruled that an organization labeled a terrorist organization asserted a valid claim because the stigma imposed by that label also resulted in its being "deprived of the previously held right to . . . hold bank accounts . . . ." 251 F.3d 192, 204 (D.C. Cir. 2001). So too here: the labels that the Defendant Agencies have affixed to payday lenders are depriving them of their previously held right to hold bank accounts and to access the financial system.

Second, and still more injurious, the stigma has "seriously affected" and threatens to destroy the ability of Advance America and of the other members of CFSA to pursue their chosen trade. *Trifax*, 314 F.3d at 644. A plaintiff need not prove that it has been "completely barred from engaging in [its] calling or business," but must show only that the government's action has had "the 'broad effect of largely precluding' the plaintiff from pursuing a business." *PDK Labs, Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 9 (D.D.C. 2004) (quoting *Kartseva*, 37 F.3d at 1528). In *PDK Labs, Inc. v. Ashcroft*, for example, the Drug Enforcement Agency sought to choke off a disfavored drug company's access to supplies of essential precursor chemicals by damaging its reputation with both foreign and domestic suppliers and coercing those suppliers not to do business with the plaintiff. In granting the plaintiff's motion for summary judgment, the court held in that "DEA's efforts at making domestic ephedrine unavailable to PDK, because DEA had scared all would-be domestic sellers, had the direct and 'broad effect of largely precluding' PDK from engaging in its core business, threatening its survival as an ongoing concern." *Id.* at 15 (Kennedy, J.) (quoting *Kartseva*, 37 F.3d at 1528). Operation Choke Point aims to work the same deprivation by using similar means against payday lenders to those that the Court held to be unlawful in *PDK Labs*. Operation Choke Point is thus likewise unlawful.

Finally, these deprivations have been accomplished without any due process whatsoever. Indeed, Operation Choke Point was conceived as an effort to accomplish goals not authorized by statute, using means not permitted by the Constitution. Congress passed no law outlawing payday lending. The Defendant Agencies have not promulgated a lawful regulation, developed through notice and comment, and rooted in statutory authority, outlawing or even addressing payday lending. And CFSA's members have not received the notice and opportunity to be heard that would be required to sanction them individually in the absence of such validly-promulgated generalized bans. Yet they are nonetheless in the process of being banned from the banking system and from commerce altogether.

In sum, Operation Choke Point mirrors the very scheme that this Court struck down in *PDK Labs* and should meet the same fate.

B. Plaintiffs respectfully submit that they also have a substantial likelihood of success on the merits of their contentions that Defendants' campaign of regulatory directives and backroom coercion aimed at denying lawful payday lenders access to banking services was procedurally deficient, substantively contrary to law, and arbitrary and capricious within the meaning of the APA. *See* Plaintiffs' Response to Defendants Motion to Dismiss at 27–41 (Oct. 2, 2014), Doc. 23.[22]

III. Plaintiffs Will Suffer Irreparable Harm Unless an Injunction Issues.

The second prong of the preliminary injunction test requires CFSA and Advance America to establish that they will likely suffer irreparable harm unless an injunction issues. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The *Winter* inquiry requires the Court to assume the likelihood of success on the merits and then ask "whether that violation, if true, inflicts irremediable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006). The requisite harm "must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

CFSA's members, including Advance America, will suffer irreparable injury satisfying *Winter* unless an injunction issues. First, under settled D.C. Circuit precedent, the abrogation of constitutional due process rights for any duration establishes a *per se* irreparable injury. Second, CFSA's members, including Advance America, will suffer economic injuries that constitute 1) a threat to their existence, 2) unascertainable damages, and 3) a substantial loss that is irretrievable due to sovereign immunity.

A. Advance America and the Other Members of CFSA Will Suffer a *Per Se* Irreparable Injury in the Absence of an Injunction Against the Agencies' Due Process Violations.

"It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). In

[22] Plaintiffs recognize, of course, that this Court has dismissed their APA claims (Counts I–III, V–VII, IX–XI, and, to the extent they are based on violations of the APA, Counts IV, VIII, and XII) on the ground that Plaintiffs failed to allege final agency action. While Plaintiffs do not expect this Court to revisit these claims at this time, they do wish to preserve them for appeal.

particular, this Circuit has recognized abrogation of due process rights as a *per se* irreparable harm. *See Gordon v. Holder*, 826 F. Supp. 2d 279, 296 (D.D.C. 2011), *aff'd*, 721 F.3d 638 (D.C. Cir. 2013) ("In light of [the plaintiff's] likelihood of success on his claim that the [challenged legislative] provisions violate due process, the Court finds that this potential deprivation of constitutional rights constitutes irreparable harm."). Thus, in order to show an irreparable injury in the context of a due process claim, a plaintiff need only plead that the deprivation of due process is "that the harm has occurred . . . and is *likely* to occur again." *Henke v. Department of the Interior*, 842 F. Supp. 2d 54, 59 (D.D.C. 2012); *see also Elk Assocs. Funding Corp. v. U.S. Small Bus. Admin.*, 858 F. Supp. 2d 1, 31 (D.D.C. 2012).

As set forth above, the Defendant Agencies are carrying out a campaign of regulatory coercion that is working an ongoing and worsening deprivation of payday lenders' liberty interests without due process of law. CFSA has thus demonstrated the likely occurrence of a substantial and continuing *per se* violation of its due process rights unless an injunction issues.

B. CFSA's Members, Including Advance America, Will Suffer an Irreparable Economic Injury in the Absence of an Injunction.

While this Court and the D.C. Circuit have held that "economic loss does not, in and of itself, constitute irreparable harm," *Wisconsin Gas Co.*, 758 F.2d at 674, courts in this circuit have recognized three significant exceptions to that rule: existential economic harm, unascertainable harm, and damages that would be unrecoverable on account of sovereign immunity, each of which, standing alone, would warrant the issuance of preliminary injunctive relief. Unless an injunction issues, Plaintiff Advance America and the other members of CFSA will suffer all three of these injuries.

1. *CFSA's Members, Including Advance America, Will Suffer Existential Economic Injuries Unless an Injunction Issues.*

This Court has recognized irreparable economic injury upon "a showing that 'the economic loss would significantly damage [the] business above and beyond a simple diminution in profits.' " *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 67–68 (D.D.C. 2000) (concluding loss of significant portion of business was irreparable) (quoting *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000)). Even "monetary loss may constitute irreparable harm," therefore, "where the loss threatens [the business'] existence." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

Plaintiffs Advance America and CFSA have demonstrated that Advance America and many of CFSA's other members are threatened with existential economic harm unless an injunction issues to prevent Defendant Agencies' efforts to cut off their access to essential business services. A variety of banking services are essential to CFSA's member's businesses. *See, e.g.*, Second Shaul Decl. ¶ 4. For example, without merchant services (credit/debit card processing), a payday lender cannot accept non-cash payment for the various financial services it offers in addition to payday loans. Without access to the ACH network, the lenders cannot collect on past-due loans. Without treasury services, the lenders must resort to alternative, riskier, and more-costly cash management solutions, such as armored cars and secure depositaries, and they cannot even pay their employees. These existential threats should come as no surprise, given that Operation Choke Point aims to stifle the payday loan industry.[23]

Both the nature of the campaign carried out by Defendant Agencies and the nature of the harm they are inflicting are similar to those addressed in *Backpage.com, LLC v. Dart*, a case in

[23] STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., REP. ON THE DEPARTMENT OF JUSTICE'S 'OPERATION CHOKE POINT': ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? 5 (Comm. Print 2014), https://goo.gl/TZTEuv.

which the Seventh Circuit enjoined a campaign by a sheriff who had "decided to proceed against [a local business] not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers." 807 F.3d 229, 231 (7th Cir. 2015). The Court of Appeals dismissed the possibility that the business might be able to survive by using cash or Bitcoin, and instead found it dispositive that the sheriff, like the Defendant Agencies in this case, had acted with the intention of inflicting irreparable injury:

> But even short of that, Sheriff Dart's campaign of suffocation would be bound to cause irreparable injury to Backpage, and irreparable injury is the essential condition of preliminary relief, which is all that is at stake in this appeal. It was Sheriff Dart's intention to harm Backpage irreparably; in an email to members of the press his Director of Communications stated that Backpage had made its adult ads free in response to the credit card companies' decision not to allow their credit cards to be used to pay for ads on Backpage's website, but continued: "We were ready for this and not concerned. It's unsustainable for them to maintain all of their lobbying, legal battles and all the money it takes for their server space without any revenue coming in." In other words, Backpage is doomed.

Id. at 238 (citation omitted). CFSA Members and Advance America may be able to survive for a time using armored cars and other alternatives to the banking system. But it is the aim and the inevitable result of Operation Choke Point to harm payday lenders irreparably. That is all that is required to meet the standard for a preliminary injunction.

Plaintiffs have thus established that they will suffer irreparable economic injury threatening the existence of Advance America and the other CFSA member institutions unless an injunction issues.

2. *CFSA's Members, Including Advance America, Will Suffer Economic Injuries that Yield Unascertainable Monetary and Reputational Damages Unless an Injunction Issues.*

Courts have recognized that economic harm may be irreparable if the scale of the harm is "unascertainable." *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (citing *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973)) ("irreparable injury is suffered when monetary damages are difficult to ascertain or inadequate”). For example, courts have recognized that injury to a business’s reputation, which might be dismissed as mere economic injury, is in fact irreparable because it is impossible to quantify. *See Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 213 (D.D.C. 2012) (citing *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (explaining that damage to a business’s good name may constitute irreparable injury)).

Similarly, this Court has recognized that the loss of business relationships may constitute irreparable harm as these losses cannot be remedied by monetary damages. *See Nalco Co. v. EPA*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011) (finding “at least some degree of irreparable injury” based on loss of “long-standing clients” (alteration omitted)). CFSA members, including Advance America, have lost relationships with dozens of banks, including JPMorgan Chase, Bank of America, Wells Fargo, Capital One Bank, and FifthThird Bank. *See, e.g.*, Rudolph Decl. ¶ 3; Durbin Decl. ¶ 4; Declaration of Roger Dean ¶¶ 30–32 (Oct. 2, 2014), Doc. 23-4 (“Dean Decl.”); Lynn Decl. ¶ 4; Riggs Decl. ¶ 7. The costs of doing business in this uncertain and ever-shifting environment are high. *See, e.g.*, Durbin Decl. ¶ 10 (loss of one relationship added $1,250,000 per year in additional borrowing costs and $600,000 in additional labor costs). But the value of the lost relationships with these financial institutions—and with the individual bank officers with whom CFSA members had hard-earned reputations as excellent customers and excellent working relationships—cannot be quantified. *See, e.g.*, Dean Decl. ¶¶ 4–23 (describing 13-year relationship between Axcess Financial and relationship team at Fifth Third Bank); McDonald Decl. ¶ 6; Riggs Decl. ¶¶ 4–5. Choked of the financial oxygen they need to do business, CFSA members have also had to dismiss many of their employees, losing professional talent that will be difficult, if not impossible, to replace. Declaration of Robert K. Zeitler, Sr. ¶

14 (Oct. 2, 2014), Doc. 23-6. Operation Choke Point has brought about its intended effect by decimating CFSA member institutions' long-standing banking relationships. Advance America and the members of CFSA have thus suffered unascertainable economic damages that are properly considered irreparable.

3. *Because the Government Is Immune from Claims for Money Damages, CFSA's Members, Including Advance America, Will Suffer Irretrievable Economic Injuries Unless an Injunction Issues.*

Finally, the economic harm that the Defendant Agencies have caused, regardless of its scale, is irreparable for the simple reason that the Defendant Agencies are immune from suit for money damages. While this Court has acknowledged differing opinions on the question whether mere ongoing economic harm is enough to establish irreparable injury when recovery is barred by sovereign immunity, it has firmly acknowledged that sovereign immunity has some role to play in the irreparable injury analysis.

Some decisions have held that economic damages rendered irretrievable by sovereign immunity constitute *per se* irreparable harm. *Nalco Co.*, 786 F. Supp. 2d at 188. Other opinions have expressed the view that the harm must be substantial, even if the bar is lower when the defendant is immune from damages. *Woodstream Corp. v. Jackson*, 2011 WL 8883395, at *8 (D.D.C. June 3, 2011). Whatever rule this Court chooses to apply, CFSA will suffer irreparable injury unless an injunction issues.

Defendant Agencies are impervious to monetary judgments. *See* 5 U.S.C. § 702 (allowing actions seeking relief "other than money damages"). Thus, if this Court adopts the ruling in *Nalco*, the economic injury sustained by CFSA's members, including Advance America, constitutes irreparable harm because plaintiffs may not recover damages from defendants. But even under the *Woodstream* framework, CFSA's members, including Advance America, have also established an irreparable injury. As noted above, the loss of essential banking services threatens the very existence of the CFSA members and has already destroyed long term business relationships. As previously demonstrated, the threat of existential harm is sufficient to establish irreparable harm even in the absence of sovereign immunity. Plaintiffs have clearly demonstrated "substantial" harm sufficient to justify a finding of irreparability in light of the Defendant Agencies' immunity to money judgments.

IV. **The Injunction Would Not Substantially Injure Other Interested Parties.**

Next, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Here, the balance of the equities tips decidedly in Plaintiffs' favor. As set forth above, CFSA's members, including Advance America, are experiencing ongoing constitutional violations and are threatened with potentially existential economic injuries. By contrast, enjoining the Defendant Agencies from exerting coercive regulatory pressure on banks to terminate the accounts of law-abiding customers will not impair the government's efforts to ensure the safety and soundness of the banking system. They would be enjoined only from continuing to violate the Constitution of the United States. The prudential regulators will retain authority to conduct examinations and to take appropriate corrective actions when they find that a financial institution within their jurisdiction is not complying with the law. Indeed, Defendant Agencies have consistently denied that they are pressuring banks to terminate their relationships with payday lenders. Putting the overwhelming evidence to the contrary aside for the moment, it is hard to conceive of what injury would arise from a preliminary injunction forbidding Defendants from exerting the sort of coercion they deny exerting. The relief would only signal to the banks that federal bank supervisors do not have the power to coerce and threaten them when they are simply serving their law-abiding customers.

V. **The Entry of a Preliminary Injunction Serves the Public Interest.**

Finally, the public interest weighs heavily in favor of the entry of a preliminary injunction. As the D.C. Circuit has recognized, unconstitutional governmental action "that would also have severe economic effects is not in the public interest." *Gordon v. Holder*, 721 F.3d 638, 652 (D.C. Cir. 2013). Not only are the agency actions challenged here unconstitutional, they will also have serious negative economic consequences. As Congress recognized when it prohibited CFPB from imposing rate limitations on short-term loans, 12 U.S.C. § 5517(o), the public interest is served by permitting responsible, law-abiding businesses to offer payday loans. When under-banked individuals encounter unexpected financial need, payday loans from responsible lenders like CFSA's members are their safest, cheapest source of credit. *See, e.g.*, Todd J. Zywicki & Astrid Arca, *The Case Against New Restrictions on Payday Loans* at 3, MERCATUS CENTER, GEORGE MASON UNIVERSITY (Jan. 2010), https://goo.gl/bt1we3 (observing that when short-term, small-dollar loans become less available, "[c]onsumers are left with fewer choices, higher borrowing costs, and less flexibility"). Yet if Operation Choke Point is not enjoined, millions of Americans may be left without access to short-term credit as CFSA's members are forced out of business.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' application for a preliminary injunction setting aside the aforementioned agency actions and forbidding Defendants and their officers, agents, and employees from implementing, applying, or taking any action whatsoever designed to pressure banks to terminate business relationships with law-abiding payday lenders.

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Respectfully submitted,

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