No. 24-2154

IN THE
United States Court of Appeals for the Eighth Circuit

MINNESOTA BANKERS ASSOCIATION; LAKE CENTRAL BANK,
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION; MARTIN J. GRUENBERG, in his official capacity as Chairman of the Federal Deposit Insurance Corporation,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
No. 23-cv-2177-PAM/ECW
Hon. Paul A. Magnuson

BRIEF OF AMERICAN BANKERS ASSOCIATION AND 44 STATE BANKERS ASSOCIATIONS AS *AMICI CURIAE* FOR APPELLANTS SUPPORTING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are associations of federally insured and regulated financial institutions. Their members are subject to the extensive regulatory power of the Federal Deposit Insurance Corporation ("FDIC") and have been directly impacted—both legally and practically—by the Final Institution Letter ("FIL") issued by the FDIC and challenged here: FIL 32. *Amici* also have an interest in ensuring that guidance documents remain an effective means of communication between agencies and the banks that they regulate—not a covert method of promulgating legislative rules without fair notice, an opportunity for input from the regulated industry, or appropriate channels for accountability and judicial review.

Amicus curiae American Bankers Association is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its more than two million employees.

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

ABA members are located in each of the 50 States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. ABA members have been directly impacted by and will suffer the legal consequences of the guidance at issue here, FIL 32.

The remaining *amici* are State Bankers Associations, listed in Exhibit A attached to this brief. These organizations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations) at the state and local level. Members of each of these State Bankers Associations have been directly impacted by and will suffer the legal consequences of the guidance at issue here, FIL 32.

INTRODUCTION AND SUMMARY

FIL 32 constitutes final agency action because it carries the force and effect of law. FIL 32 exposes banks that fail to conform to its mandate to significantly higher civil money penalties than they would be subject to for engaging in exactly the same practices before it was issued. And FIL 32 subjects regulated banks to such severe and assured adverse consequences that it is binding in practice; no rational bank can ignore FIL 32 and risk the extraordinary range of adverse

consequences the FDIC can impose for non-compliance with FIL 32 without instituting a single enforcement proceeding—such as constraints on the bank's ability to contract for growth and operate. And that is so even though the NSF fee practices targeted by FIL 32 are not "unfair" under the Federal Trade Commission Act ("FTCA") and even though compliance with FIL 32 is enormously costly and impractical, particularly for smaller regulated banks. The district court erred in failing to conduct a pragmatic inquiry into the consequences of FIL 32 within the context of the statutes and regulations that govern banks' relationship with the FDIC, and as a result, disregarded FIL 32's finality.

By refusing to acknowledge the legal and practical consequences of FIL 32, the district court's ruling sets a dangerous precedent. It undermines key purposes underlying the Administrative Procedure Act: due process, public accountability, and the importance of judicial review of agency action. FIL 32 is a classic example of why the APA's rulemaking procedures are important: without them, the FDIC has issued an unfairly retroactive rule without considering critical public input and without providing fair warning. Moreover, shielding FIL 32

from review under the APA is particularly concerning in the context of the FDIC because so much of the FDIC's extensive authority over banks is already effectively immune from judicial review. Finally, and even more troubling, the FDIC's exercise of rulemaking here raises the specter of agencies promulgating de facto legislative rules disguised as guidance, even after Congress has expressly stripped them of rulemaking authority.

FIL 32 should be deemed reviewable final agency action, and the decision of the district court should be reversed.

ARGUMENT

I. FIL 32 Constitutes Final Agency Action Because It Has Direct Legal Consequences.

FIL 32 constitutes final agency action. The FDIC has never disputed that FIL 32 meets the first prong of the two-part finality test under *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Because FIL 32 constitutes "'authoritative guidance,'" it represents the "consummation" of the FDIC's decisionmaking process. *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 957 (D.C. Cir. 2019). The sole question before this Court, then, is whether FIL 32 has "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 178; *see* App. 202 R. Doc. 34, at 4

Add. 4; (dismissing action on the grounds that FIL 32 has "no[] … legal consequences"); App. 204 R. Doc. 34, at 6 Add. 6 (standing determination rises and falls with finality analysis). The answer is an emphatic *yes*.

Solely because the FDIC published FIL 32, banks that fail to comply with its dictates will be subject to significantly higher penalties under 12 U.S.C. § 1818(i)(2)(C)(i). *Infra* 6-10. On top of that, FIL 32 puts banks to an impossible choice between "costly compliance" and the full force of the FDIC's wide-ranging supervisory authority—which includes the power to severely limit a bank's operations, or even shut down the bank entirely. *Cf. Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019) (agency guidance non-final because it "put no party to the choice between costly compliance and the risk of a penalty of any sort"); *see infra* 10-21. In light of the "specific statutes and regulations that govern" banks, the "concrete consequences" of FIL 32 require banks to fall in line with whatever the FDIC directs. *Ipsen*, 943 F.3d at 956. The "'present-day binding effect'" of FIL 32 renders it final agency action. *Iowa League of Cities v. EPA*, 711 F.3d 844, 862 (8th Cir. 2013).

A. One of the key, and indisputably legal, consequences flowing from FIL 32 is the significantly enhanced statutory penalties it triggers. The Supreme Court, this Court, and other courts of appeal have all acknowledged that increased penalties arising from the issuance of an interpretive rule or guidance document is a "legal consequence" within the meaning of *Bennett*. *See Sackett v. EPA*, 566 U.S. 120, 126 (2012) (finding agency action to carry "legal consequences" where it "exposes [regulated parties] to double penalties in a future enforcement proceeding"); *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1001 (8th Cir. 2015), *aff'd on other grounds*, 578 U.S. 590 (2016) (similar); *Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1209 (D.C. Cir. 2021) (similar).

Noncompliance with FIL 32 leads directly to increased statutory penalties. In enforcement proceedings, the FDIC is entitled to assess civil monetary penalties for violations of "any law or regulation." 12 U.S.C. § 1818(i)(2). These penalties are divided into three tiers. The highest, "[t]hird tier" penalties, are authorized for only those cases where a bank "*knowingly*" commits a violation. *Id.* § 1818(i)(2)(C)(i) (emphasis added). FIL 32 puts banks on notice that failure to revise

disclosures on NSF fees, implement new systems to avoid multiple NSF charges on the same transaction, or take full corrective action for NSF fees assessed in the past—including the payment of full restitution to purportedly injured customers—constitutes a legal violation, according to the FDIC. *See* App. 54-57 R. Doc. 13-2 Add. 10-13. A bank that fails to comply with FIL 32 could be found to have committed a "knowing" violation—making the bank subject to third tier penalties—if a court were to agree with the FDIC's legal interpretation. And the markup is extraordinary: Whereas a second tier penalty might cost a bank up to $61,238 a day per violation, a third tier penalty could cost a bank up to *$2,449,575* a day per violation—a forty fold increase in potential penalties because of FIL 32. Notice of Inflation Adjustments for Civil Money Penalties, 89 Fed. Reg. 1917, 1918 (Jan. 11, 2024).

Courts have often held that authoritative agency guidance (like FIL 32) carries legal consequences where it provides notice of the agency's interpretation of the law and exposes regulated parties who fail to comply with that interpretation to heightened penalties for "knowing" or "willing" violations. *See, e.g.*, *Hawkes Co.*, 782 F.3d at 1001 (guidance document final because it could not be ignored without

risk of "substantial" penalties for a "knowing CWA violation"); *Bellion Spirits*, 7 F.4th at 1209 (where guidance document announces that certain conduct would "contravene the governing regulations," it could be "use[d] … as evidence of willfulness"); *Ipsen Pharms.*, 943 F.3d at 956-57 (guidance "relevant evidence" that regulated party "would be subject to enhanced penalties for a 'knowing' or 'willful' violation" of law); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1030 (D.C. Cir. 2016) (legal consequences flow where guidance letter could be read as a "stand-alone trigger for willfulness penalties"). In effect, FIL 32 constitutes the "denial of [a] safe harbor" from the enforcement of third-tier penalties under § 1818(i)(2)(C)(i). *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016). It removes from the bank "any colorable argument [it] might have in an enforcement action that it was acting without knowledge of [the FDIC's] position." *Ipsen*, 943 F.3d at 957; *see Bellion*, 7 F.4th at 1209 (finality based on legal consequence of "extinguishing any willfulness defense").

Indeed, in other regulatory contexts, courts have adopted the position that *even if* a "regulated party adopts a 'reasonable' interpretation of an 'ambiguous' statute, it can nonetheless be deemed

liable for 'knowingly'" violating that statute "if it 'had been warned away from that interpretation' by authoritative agency guidance." *Ipsen*, 943 F.3d at 957-58. In other words, even if a bank reasonably disagrees with the FDIC's interpretation of what constitutes "unfair or deceptive acts or practices" under 15 U.S.C. § 45(a), the bank may still be assessed the two-million-dollar-a-day penalties for "knowing" violations of the FTCA, penalties that would not be available absent FIL 32.

In addition, in any action to enforce § 5 of the FTCA, the FDIC can seek restitution if the bank acted with "reckless disregard for the law"—a condition more likely to be met if the agency issued guidance on the subject. 12 U.S.C. § 1818(b)(6)(A). That also increases a bank's exposure to liability, solely because of FIL 32.

The risk that the FDIC might seek excessive civil money penalties and restitution for noncompliance with FIL 32 is not speculative. Rather, FIL 32 expressly states that "violations of the law due to re-presentment NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination," "will" lead

to "appropriate enforcement actions," including "civil money penalties and restitution." App. 57 R. Doc. 13-2, at 5 Add. 13,

In sum, FIL 32 operates as a "stand-alone trigger" for higher penalties and other remedies. *See Rhea Lana*, 824 F.3d at 1032. The agency "warning" regarding what constitutes an unfair or deceptive act under the FTCA meets the "legal consequences" prong of the finality test. *Ipsen*, 943 F.3d at 956 (citing *Sackett*, 566 U.S. at 126).

B. As part of the "'pragmatic'" approach courts must take to the finality analysis, *Hawkes*, 578 U.S. at 599, the full range of FIL 32's consequences must be considered to evaluate whether it imposes "an immediate and significant practical burden" on regulated entities, *CSI v. Aviation Servs., Inc. v. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. 2011). Contrary to the district court's opinion, App. 205 R. Doc. 34, at 7 Add. 7, FIL 32 need not itself carry the "force and effect of law" to be final if it is *practically* binding regardless, *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 406 (D.C. Cir. 2020). Here, the "substantial … [enforcement] penalties" to which banks are exposed as a result of FIL 32 render this so-called guidance final. *Hawkes*, 578 U.S. at 594; *see, e.g.*, *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114 (D.C. Cir.

2021) (guidance document final where "violating the Guidance exposes [regulated entities] to enforcement actions … [and] may cost [those entities] that practice the prohibited [conduct] their accreditation"); *Iowa League*, 711 F.3d at 863-64 (declaring guidance document a legislative rule in disguise after employing a "functional analysis" and determining that the risk of "'adverse consequences'" posed by non-compliance made the document "'binding as a practical matter'"). The risks of non-compliance are too great for any bank to treat FIL 32 as merely advisory.

The first such penalty has already been discussed above: a potential increase in civil penalties that could amount to millions of dollars of liability that a bank would not be subject to absent FIL 32. *Supra* 6-8; 12 C.F.R. § 263.65. The banks the FDIC regulates simply would not risk incurring the massive liabilities posed by third tier civil monetary penalties, or restitutionary payments, even if they reasonably believed, in good faith, that the FDIC's interpretation of the law was wrong. *Supra* 9; *Ipsen*, 943 F.3d at 957-58. And banks that disagree with the FDIC's interpretation must also consider consequences not directly imposed by the FDIC: Other agencies responsible for

regulating banks have imposed increased restitution orders and civil penalties on the grounds that the bank was "aware" its practices violated the law based on guidance documents issued by the FDIC. *See, e.g.*, Consent Order, *Regions Bank*, 2022-CFPB-008 (Sept. 28, 2022), https://tinyurl.com/yeyz527a (CFPB action assessing $141 million in restitution and $50 million in penalties against bank based on guidance documents issued by the Federal Reserve and the FDIC). Simply put, a bank cannot risk noncompliance with FIL 32.

Banks face consequences beyond increased liability. The FDIC can seek significant injunctive relief in any action to enforce § 5 of the FTCA, including restrictions on the growth of the bank, requirements to obtain new management, and any "other action the [FDIC] determines to be appropriate." 12 U.S.C. § 1818(b)(6)(F). The FDIC may even terminate the bank's status as an insured depository institution—that is, effectively shut down the bank. 12 U.S.C. § 1818(a)(2).

But these enforcement remedies do not reflect the full extent of the consequences banks could face if they decline to comply with FIL 32. In order to constitute final agency action, a guidance document need not "flatly prohibit [a bank] from acting" in a particular fashion; "it is

enough" if the agency action has "present[] and direct[]" consequences on the operations of the regulated entity, including by "defeat[ing] a party's ability to enter into an advantageous business arrangement." *Spirit Airlines, Inc. v. U.S. Dep't of Transp. & Fed. Aviation. Auth.*, 997 F.3d 1247, 1252 (D.C. Cir. 2021). Here, the FDIC's extensive supervisory authority over banks—much of which operates outside the purview of traditional checks on administrative agencies (*see infra* 28-32)—will require banks to implement the mandates of FIL 32 immediately, or else risk a significant curtailment of their operations and ability to enter into advantageous business arrangements for growth. And that is true even if the FDIC never brings a single formal enforcement action against a bank.

Most banks subject to FDIC supervision undergo a "full-scope, on-site examination," during which the FDIC assesses the bank for compliance with the law every year, 12 U.S.C. § 1820(d)(1), or every 18 months, FDIC, Risk Management Manual of Examination Policies 1.1-4-5 (July 8, 2024), https://tinyurl.com/mr2vupcx. So the *latest* point at which most banks will be scrutinized for failure to implement FIL 32—and be vulnerable to penalties for running afoul of the FDIC's

interpretation of the law—is a year and a half from the issuance of the guidance. At the conclusion of each of these examinations, the FDIC examiner is required to assign the bank what is called a CAMELS rating. *See supra,* FDIC, Risk Management Manual of Examination Policies 16.1-10.

A CAMELS rating is assessed according to the Uniform Financial Institutions Rating System, a series of metrics used by all regulatory agencies responsible for overseeing banks. *See id. at* 1.1-3; *see generally* 62 Fed. Reg. 752 (Jan. 6, 1997). CAMELS stands for "capital, assets, management, earnings, liquidity, and susceptibility to market risk." There is no requirement that the examiner "average" these components into a single rating; a significantly concerning factor on its own may result in a downgraded rating. Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Appeals of Material Supervisory Determinations*, 92 Wash. U. L. Rev. 1101, 1107-08 (2015). Violations of § 5 of the FTCA "may result in a downgrade of the institution's … risk management rating." FDIC, Consumer Compliance Examination Manual VII-1.9 (June 2022), https://tinyurl.com/3vkwx5vx.

As scholars have recognized, CAMELS ratings are "serious business for financial institutions." Hill, *supra*, 92 Wash. U. L. Rev. at 1108. Although not issued under formal enforcement proceedings, CAMELS ratings nevertheless concretely "affect [a bank's] rights and obligations." Daniel K. Tarullo, *Bank Supervision & Administrative Law*, 2022 Colum. Bus. L. Rev. 279, 282 (2022). Specifically, a CAMELS rating triggers a number of collateral effects within the complex regulatory system overseeing banks:

- A low CAMELS rating may prevent a bank from participating in mergers, acquisitions, or the opening of new bank branches. *See, e.g.*, 12 C.F.R. § 208.6(b)(1); *see also* 89 Fed. Reg. 29,229, 29,230 (Apr. 19, 2024); Office of the Comptroller of the Currency, *CAMELS Ratings and Their Information Content* 3, https://tinyurl.com/yprmsrhc ("CAMELS ratings may need to be remedied before banks are allowed to take certain actions, such as merging with or acquiring other institutions, paying dividends, opening new branches, or engaging in new activities.").

- It may require the bank to pay a higher deposit premium. *See* Assessments, Revised Deposit Insurance Assessment Rates, 87 Fed. Reg. 64314, 64336 (Oct. 24, 2022).
- It may result in a bank being labeled not "well-managed," restricting the bank's affiliates from engaging in certain underwriting, investment advisory, and insurance activities. *See* 12 C.F.R. § 362.17(e); see 12 U.S.C. §§ 1841(o)(9), 1843(l)(1); 12 C.F.R. §§ 362.4(c), 362.18.
- And a bank with a low CAMELS rating may be subjected to stricter—and more frequent—supervisory treatment. 12 C.F.R. § 337.12(b)(3).

As this brief survey illustrates, CAMELS ratings have a significant, direct effect on a bank's ability to grow and operate.

The district court's narrow focus on whether the FDIC had "institute[d] any enforcement actions based on FIL 32," App. 205 R. Doc. 34, at 7 Add. 7, completely overlooks the extensive supervisory authority the FDIC may wield over banks without ever conducting a formal proceeding—not to mention the ways in which FIL 32 immediately *increases* potential liability for violations if an enforcement

proceeding is ever brought. Contrary to the district court's conclusion, highly impactful "'adverse consequences'" *directly* and *immediately* flow from non-compliance with FIL 32. *Iowa League*, 711 F.3d at 863-64. These "'concrete consequences'" cannot be ignored as part of the finality analysis, which demands a "'pragmatic'" inquiry into the effects of a given agency action "'as a result of the specific statutes and regulations that govern it.'" *Ipsen*, 943 F.3d at 956; *see Cal. Cmtys*, 934 F.3d at 632 ("[A]gency action is 'a chameleon that takes its color from its context.'"). In the context of the FDIC's supervisory authority over banks, FIL 32 is binding as a legal *and* practical matter.

C. The only way for a bank to avoid the risk of significant penalties and other adverse consequences described above is to fold to the FDIC's demands and overhaul their policies related to NSF representment fees. Yet compliance with FIL 32, in and of itself, creates "immediate and significant practical burden[s]" for regulated banks, *CSI Aviation*, 637 F.3d at 412—particularly for the mid-size and community banks that have minimal capacity to alter longstanding NSF fee practices on a dime. Because FIL 32 puts banks to the "painful choice between costly compliance" and the risk of the substantial

penalties discussed above, FIL 32 is final agency action. *CSI Aviation*, 637 F.3d at 412; *see supra* 6-17.

For a bank to ensure that it is not committing an unfair or deceptive act or practice, according to FIL 32, it must (1) identify whether its core processing systems assess multiple NSF fees on the same transaction; (2) revise its disclosures to ensure that customers are adequately informed of this practice; (3) ensure that, to the extent NSF fees are charged at all, those fees are not charged in such short succession that a customer has no opportunity to restore their account to a positive balance in between representments; and (4) provide restitution to customers harmed by the imposition of multiple NSF fees in the past. *See* App. 54-57 R. Doc. 13-2, at 2-5 Add. 10-13. Moreover, these corrective measures must be undertaken and completed "prior to the start" of the bank's next "consumer compliance examination," or else examiners will "cite UDAP violations." App. 56 R. Doc. 13-2, at 4 Add. 12. That means a bank has, at most, a year and a half to complete the corrective measures listed above. *Supra* 13-14.

As Plaintiffs pointed out in the operative complaint, compliance with FIL 32 presents an enormous task for banks. Merchants, not

banks, control whether and when a transaction is re-presented to a depository institution when a payment is denied for insufficient funds. App. 15-17 R. Doc. 13, at ¶¶ 38-42. Moreover, the core processing systems banks have historically used treat each re-presentment from a merchant as a new item for processing purposes—not automatically identifying it as a re-presentment of a previously denied payment request. App. 16-17 R. Doc. 13, at ¶ 42. For a bank to ensure that it did not run afoul of FIL 32, then, required a substantial overhaul of existing core processing systems to make it possible to identify re-presented transactions. *See* App. 28 R. Doc. 13, at ¶ 84 (explaining that the demanded "changes to complex core processing systems are very likely cost-prohibitive, if not impossible"); *see also* N.Y. Dep't of Fin. Servs., Industry Ltr: Avoiding Improper Practices Related to Overdraft & Non-Sufficient Funds Fees (July 12, 2022), https://tinyurl.com/bddvywhh (recognizing that banks were unlikely to be able to "uniliteral[ly] eliminat[e]" NSF fees because altering banks' core processing systems to avoid them completely would be "technically impracticable").

FIL 32's requirement of restitution payments to "harmed" customers presents an even greater challenge. Because existing core processing systems generally did not identify which "items" presented to the depository institution were re-presentments, the only way to comply with FIL 32 was to attempt to "manually identify[] the specific transactions that could require restitution under FIL 32." App. 14 R. Doc. 13, at ¶ 33. This used significant manpower, requiring employees to comb through records and match presentments with similar or identical dollar amounts in a short period of time in connection with the same consumer—which might not even resolve the issue, since merchants sometimes break up re-presentments into multiple transactions. *Id.* FIL 32 specifies that such a lookback review must be conducted for *at least* the past two years——no matter how difficult, or potentially impossible, it is for a bank to accurately identify which NSF fees were unfair to customers. App. 57 R. Doc. 13-2, at 5 Add. 13. Although FIL 32 suggests that such backward-facing restitution will only be required where there is a likelihood of "substantial consumer harm," *id.*, the vagueness of that undefined standard provides banks with no choice but to overcorrect to play it safe and perform the

lookback if there is *any* chance a failure to do so might result in adverse consequences.

The district court's decision overlooked these practical effects—brushing aside the enormous costs banks would necessarily incur to avoid adverse consequences from non-compliance with FIL 32. The practical burden FIL 32 imposes underlines the need for immediate judicial review.

* * *

FIL 32 has a "powerful coercive effect." *Hawkes*, 782 F.3d at 1002 (quoting *Bennett*, 520 U.S. at 169). It has concrete legal and practical consequences banks cannot avoid without incurring significant compliance costs. And whatever caveats the FDIC might include in the guidance to indicate that it is non-binding, the "draconian penalties" banks face as a direct result of the issuance of FIL 32 means they are left with little "practical alternative but to dance to the [FDIC's] tune." *Id.* (quoting *Sackett*, 566 U.S. at 132 (Alito, J., concurring)). Such a

definitive exercise of authority over regulated banks must be subject to review for compliance with the APA's requirements.

II. The District Court's Ruling Will Permit The FDIC To Promulgate Improper Legal Rules Without Fair Process Or Accountability.

The APA was enacted in 1946 "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)). Critical among the APA's "check[s] upon administrators" is the requirement of notice-and-comment for rulemaking under 5 U.S.C. § 553(b)-(c): "Before an agency makes a rule, it normally must notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision in a statement of the rule's basis and purpose." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring).

Those notice-and-comment procedures serve a dual purpose. First, they provide fair notice to regulated parties and allows public participation in agency lawmaking. *See FCC v. Fox TV Stations, Inc.*,

567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Blinken*, 4 F.4th at 115 (recognizing that "[t]he notice-and-comment process makes an agency consider" the "types of concerns" raised by "novel[]" interpretations of the law). Second, notice-and-comment furthers separation-of-powers principles by providing a clear avenue for judicial review of agency action that binds the public (like FIL 32, *supra* 4-22). *See* 5 U.S.C. § 706. In such cases, "the supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied." *Loper*, 144 S. Ct. at 2259 (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936)).

But where a legislative rule is disguised as a mere policy statement or piece of interpretive guidance, an agency may effectively bind the public and wield the force of law while both eliding notice-and-comment requirements and denying regulated parties any opportunity for pre-enforcement judicial review. *See* 5 U.S.C. § 553(b)(A) (exempting interpretive rules from notice-and-comment); *Cal. Cmtys*, 934 F.3d at 634-35 (explaining that whether an agency action is "final"

and thus subject to judicial review depends on whether it is a "legislative rule"). As commentators have noted, such legislative-rules-in-disguise create "a giant loophole in the APA: agencies can issue de facto regulations at will, simply by calling them 'guidance,' with no say from individuals and firms who will be effectively bound." Nicholas Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 Yale J. Reg. 165, 169 (2019).

It is more important now than ever for courts to properly police the boundary between illicit legislative rules promulgated as guidance and proper interpretive rules or general statements of policy. *See* Am. Bankers Ass'n, *Effective Agency Guidance* (Feb. 2024), https://tinyurl.com/4c69cn5f (distinguishing effective agency guidance from guidance that operates as a binding legislative rule). Previously, agencies were incentivized to undergo notice-and-comment rulemaking (unlike guidance) despite the lengthy time and effort it requires because "[l]egislative rules generally receive *Chevron* deference, [whereas] interpretive rules and general statements of policy often do not." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.). But *Chevron* is no longer the law. *Loper*, 144 S. Ct. at

2273. With that incentive removed, agencies may increasingly turn to guidance in order to exert power over regulated entities, given that "guidance can be produced and altered much faster, in higher volume, and with less accountability than legislative rules," Parrillo, *supra*, at 168.

Yet the district court provided only a cursory assessment whether FIL 32 constitutes a legislative rule. The district court was satisfied purely by "boilerplate" language offered by the FDIC as a matter of course that FIL 32 is non-binding—even though courts have routinely held that such language is insufficient to transform what would otherwise be a legislative rule into mere guidance. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see* App. 205 R. Doc. 34, at 7 Add. 7 (relying on the FDIC's pronouncement that "'supervisory guidance does not have the force and effect of law.'"). Such an approach, which privileges the agency's characterizations and caveats over the actual legal and practical consequences of a guidance document, would permit agencies to "disguise its promulgations [of legislative-rules-in-disguise] through superficial formality, regardless of the brute force of reality." *Iowa League*, 711 F.3d at 862.

By shielding FIL 32 from judicial review and the requirements of notice-and-comment rulemaking and judicial review, the district court's opinion undermines the due process and separation-of-powers concerns outlined above, *supra* 22-23; *see infra* 26-32. The district court's failure to scrutinize FIL 32 for binding effect here is also particularly concerning in light of the allegation at the center of this case: That the FDIC lacks even the power to issue legislative rules to enforce § 5 of the FTCA at all. *Infra* 32-34.

A. FIL 32 illustrates precisely why notice-and-comment procedures are important where legislative rulemaking is concerned. "Notice and comment gives [the public] fair warning of potential changes in the law and an opportunity to be heard on those changes." *Azar v. Allina Health Servs.*, 587 U.S. 566, 583 (2019). With FIL 32, the FDIC deprived banks of both.

To start, the retroactive effect of FIL 32 is extremely unfair—raising due process concerns. "Retrospective laws are, indeed, generally unjust; and … neither accord with sound legislation nor with the fundamental principles of the social compact." *Eastern Enters. v. Apfel*, 524 U.S. 498, 533 (1998) (quoting 2 J. Story, Commentaries on the

Constitution § 1398 (5th ed. 1891)). The FDIC not only sprung a novel interpretation of the FTCA on banks by announcing that certain NSF fees constitute an unfair or deceptive act or practice, but further established that banks would be responsible for taking "corrective" action insofar as they had assessed NSF fees that harmed customers in the past—long before banks had any notion that they might be committing any legal violation. *See* App. 54-57 R. Doc. 13-2, at 2-5 Add. 10-13. This restitution requirement plainly "deprive[s] [regulated parties] of legitimate expectations and upset[s] settled transactions." *Eastern Enters.*, 524 U.S. at 533 (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)). It is exactly why the APA was designed to ensure "fair warning" of changes in the law.

FIL 32 also illustrates the dangers of failing to solicit public input before putting a new rule into effect: skirting notice-and-comment is inefficient as a policy matter. Had the FDIC undergone notice-and-comment, as it should have, banks could have explained to the FDIC that merchants are better positioned to prevent substantial consumer injury resulting from multiple re-presentments in a short time, whereas it is much more difficult for banks' core processing systems to change to

identify transactions that have already been presented. App. 38-39 R. Doc. 13, at ¶¶ 113-14. Banks could also have explained that it is not practicable to carve through records and identify consumers harmed by NSF fees to whom they should pay restitution. App. 39 R. Doc. 13, at ¶ 115. The fact that the FDIC has already revised its guidance once within a year illustrates that its trial-and-error approach to informal rulemaking is highly costly for regulated parties.

Notice-and-comment procedures are the means "'by which federal agencies are accountable to the public.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020). But by allowing the FDIC to promulgate FIL 32 as unreviewable guidance, the FDIC escapes accountability for a deeply unfair rule that is wrong as both a matter of law and policy.

B. As a result of the district court's ruling, it is also highly likely that the FDIC's erroneous interpretation of the FTCA and its application to NSF fees will never be tested by the courts—even as banks subject to the FDIC's extensive regulatory power will necessarily bend to the demands of FIL 32. That violates a key principle recently underlined by the Supreme Court's decision in *Loper*: in order to "fulfill

their obligations under the APA," courts must "police the outer statutory boundaries" of legislative delegations to agencies, "ensure that agencies exercise their discretion consistent with the APA," and "set aside [agency] action inconsistent with the law as they interpret it." 144 S. Ct. at 2268, 2261.

Banks are heavily regulated. The thoroughgoing supervision—including the regular, on-site exams conducted by agencies in which a bank's management is interviewed and its records scrutinized—has made banks uniquely sensitive to agency guidance. *Parrillo*, *supra*, at 193-95 (discussing the "intense interaction" between banks and supervising regulatory agencies and the well-recognized fact that the "bank-agency relationship promotes compliance with guidance"). Along with the yearly examinations, the FDIC's regulatory authority includes the "supervisory ratings" discussed above, *supra* 13-17, as well as the "wide range of approvals required for various bank activities." Tarullo, *supra*, at 282. In fact, at least one scholar—who made his career as a bank regulator—has acknowledged that the "capacious statutory enforcement authority" granted to the FDIC is not adequately policed

by the APA, identifying a "disconnect between administrative law and banking supervision." *Id.* at 281-82, 286.

Concerningly, much of the FDIC's regulatory activity occurs beyond the purview of the courts. As scholars have noted, while there is a statutory appeals process in place to review (for example) a CAMELS rating—which is extraordinarily impactful for banks—the appeals process is widely considered to be ineffective. Hill, *supra*, at 1110; *see also* Tarullo, *supra*, at 342. Between 1995 and 2012, for example, even as thousands of banks were rated each year, only 63 banks chose to go through the FDIC appeals process. Hill, *supra*, at 1106. Meanwhile, the FDIC contended that its assignment of CAMELS ratings are judicially unreviewable and solely a matter of agency discretion. *See Builders Bank v. FDIC*, 846 F.3d 272, 275 (7th Cir. 2017), *as modified after remand*, 922 F.3d 775 (2019). While at least one court has disagreed, *id.* at 276, the FDIC's position illustrates the extent to which the FDIC largely operates unconstrained by traditional checks on administrative agencies.

Other barriers to judicial review exist in this context. FDIC enforcement actions can only be brought administratively, so the FDIC

itself serves as the ultimate judge of claims that its own enforcement attorneys present—subject to constitutional constraints, *see SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). Most banks are understandably unwilling to risk the consequences of formal enforcement actions—where the FDIC routinely enforces its own view of the law. And for "smaller banks," "expensive court challenges to administrative action are rarely a realistic option"—meaning the FDIC's word is almost always likely to be the final word. Tarullo, *supra*, at 286. Nor do banks have the ability to request a declaratory judgment determining whether the FDIC's view of the law is or is not actually unlawful. *See Bd. of Governors of Fed. Res. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (interpreting anti-injunction provision of 12 U.S.C. § 1818(i)(1) to prevent banks from petitioning the courts for a declaratory judgment).

Indeed, FDIC enforcement often happens not just in the shadow of judicial review—but out of the public eye as well. Banks are *prohibited* from disclosing the results of FDIC examinations: for example, under the FDIC's rules, a bank cannot publicly complain about its CAMELS rating without facing administrative and criminal sanctions for revealing confidential supervisory information. *See* 12 C.F.R.

§ 309.5(g)(8); 12 C.F.R. § 309.6. Without the safety valve of the public and press, regulated banks lack yet another tool to reign in administrative overreach that is available to other regulated parties.

If the FDIC can wield rulemaking power through guidance and avoid judicial review of its statutory interpretations, that will compound the lack of transparency—and accountability—already seriously lacking where FDIC regulatory authority is concerned. Without judicial review under the APA, FDIC guidance that carries very real legal consequences and significant practical burdens on agencies could be entirely insulated from judicial review, undermining a core tenet of the APA and our constitutional framework.

C. Finally, permitting the FDIC to promulgate *de facto* legislative rules establishing lawful and unlawful behavior under § 5 of the FTCA is all the more concerning because Congress specifically stripped the FDIC of such authority. *See* App. 45-46 R. Doc. 13, at ¶¶ 136-41.

No provision of federal law authorizes the FDIC to promulgate rules interpreting the FTCA. Such rulemaking authority is reserved for the Federal Trade Commission. 15 U.S.C. § 45(a)(2). In fact, the FDIC had been vested with rulemaking authority in the past, 15 U.S.C.

§ 57a(f)(1) (2009), but Congress repealed that authority when it enacted the Dodd-Frank Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, Title X, § 1092(2). Now, the Consumer Financial Protection Bureau has authority to issue guidance and rules interpreting a separate prohibition on "unfair, deceptive, or abusive" acts or practices contained in the Consumer Financial Protection Act, 12 U.S.C. §§ 5512(b)(1), 5531, 5536—but again, the FDIC has no such authority. Indeed, "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines," was transferred from the FDIC to the CFPB on July 21, 2010. 12 U.S.C. § 5581(a)(1)(A), (b). Even the FDIC has acknowledged that the only "official interpretations" of what constitutes "unfair or deceptive acts" comes from *other* agencies; not from itself. FDIC, Fin. Institution Ltr. 26-2004 (Mar. 11, 2004), https://tinyurl.com/8u4z7cx2.

It thus isn't even clear whether the FDIC has the power to issue guidance interpreting section 5 of the FTC Act (or the CFPA's prohibition on unfair practices)—let alone a legislative rule interpreting that provision disguised as an interpretive rule, like FIL 32. Shielding

FIL 32 from judicial review thus risks creating a pathway for an agency that Congress has affirmatively decided should *not* interpret what is or is not an "unfair" practice to create rules that effectively bind a wide swathe of the nation's banks, particularly its community banks. After all, given the FDIC's enforcement power (*see supra* 4-17)—banks will comply with FIL 32 regardless of whether the FDIC's authority to issue this interpretation would never hold up in court.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 21(d)(1) because this brief contains 6,488 words, excluding the parts of the brief exempted by Fed. R. App. P.32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on August 1, 2024.

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Exhibit A
State Bankers Associations

1. Alabama Bankers Association
2. Alaska Bankers Association
3. Arizona Bankers Association
4. California Bankers Association
5. Colorado Bankers Association
6. Connecticut Bankers Association
7. Delaware Bankers Association
8. D.C. Bankers Association
9. Florida Bankers Association
10. Georgia Bankers Association
11. Hawaii Bankers Association
12. Idaho Bankers Association
13. Illinois Bankers Association
14. Indiana Bankers Association
15. Kansas Bankers Association
24. Nevada Bankers Association
25. New Hampshire Bankers Association
26. New Jersey Bankers Association
27. New Mexico Bankers Association
28. New York Bankers Association
29. North Carolina Bankers Association
30. Ohio Bankers League
31. Oklahoma Bankers Association
32. Oregon Bankers Association
33. Pennsylvania Bankers Association
34. Rhode Island Bankers Association
35. South Carolina Bankers Association
36. Tennessee Bankers Association
37. Texas Bankers Association
38. Vermont Bankers Association

16. Kentucky Bankers Association
17. Louisiana Bankers Association
18. Maine Bankers Association
19. Maryland Bankers Association
20. Massachusetts Bankers Association
21. Michigan Bankers Association
22. Mississippi Bankers Association
23. Montana Bankers Association
39. Virginia Bankers Association
40. Washington Bankers Association
41. West Virginia Bankers Association
42. Wisconsin Bankers Association
43. Wyoming Bankers Association
44. Puerto Rico Bankers Association