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

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. *et al.*,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU *et al.*,

Defendants.

Civil Action No. 1:18-cv-295

PLAINTIFFS' COMBINED OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY TO OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

All now agree that when the Consumer Financial Protection Bureau ("Bureau") issued its "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule, ("2017 Rule"), 82 Fed. Reg. 54,472 (Nov. 17, 2017), the Bureau's Director lacked constitutional authority to act, since he had no colleagues to check him and could be removed by the President only for cause. When the Supreme Court invalidated the Director's removal protection and declared his prior acts "constitutional[ly] defect[ive]," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2208 (2020), a new Director sought to ratify a portion of the 2017 Rule—the so-called "payments provisions." Those provisions, relying on the Bureau's authority to ban "unfair" or "abusive" financial practices, 12 U.S.C. § 5531(b), had limited the ability of payday-loan providers to attempt to withdraw payments for such loans automatically from borrowers' bank accounts, 12 C.F.R. § 1041.7. The Bureau purported to give legal force to those unlawfully issued provisions through a short announcement bereft of any rulemaking process. 85 Fed. Reg. 41,905-02, 41,905 (July 13, 2020) ("ratification"). But the Bureau also issued a rule *revoking* the rest of the 2017 Rule—the "underwriting provisions," which had imposed stringent requirements for payday loan eligibility. *See* 85 Fed. Reg. 44,382 (July 22, 2020) ("revocation").

Ever since then, the Bureau has struggled to explain how its pen-stroke could breathe life into the payments provisions though they were never lawfully adopted—or how it could square that conclusory ratification with revocation of the underwriting provisions, though they had the same (now-rejected) foundations as the (now-ratified) payments provisions. The struggle to explain and defend remains on full display in the Bureau's latest filing in this Court. As proven by its own discussion of this separation-of-powers challenge, the Bureau has no constitutional text, logic, or history on its side, very few cases even remotely on point, and none squarely so. Nor have its defenses of the payments provisions on the merits become any stronger with time.

ARGUMENT

Under the Constitution's logic, history, and precedents, the Bureau's unconstitutional structure infected all its acts, including the notice-and-comment process that led to the issuance of the payments provisions. So those provisions have been void from the start, and to enforce them would require a new and valid rulemaking process, as confirmed by recent Supreme Court decisions. The Bureau's attempts to get around that logic and precedent rely on lower court cases that do not involve ratification of legislative rules, contradict more recent Supreme Court cases, or are readily distinguished on facts that those lower courts themselves emphasized were central to their decision. But even if ratification could somehow give life to invalid rulemakings in some cases, the ratification proposed here is arbitrary and capricious because it reflects abrupt policy changes that the Bureau has never explained and now strains to downplay. The payments provisions also exceed the Bureau's statutory authority and violate the APA, even apart from the defective ratification. For related reasons, the Bureau's denial of a rulemaking petition to correct the most egregious inconsistencies in the provisions was itself arbitrary and capricious, and the Bureau has offered no fresh arguments to show otherwise. Finally, even if the payments provisions are to be upheld, this Court should do what the Bureau still refuses to do: clarify the implementation period to ensure that the purpose of this Court's stay of the 2017 Rule is well-served: that Plaintiffs' members are not punished for seeking—and, through *Seila Law*, winning—relief.

I. The only "cure" for the constitutional defect in a rule proposed by an invalidly structured Bureau is a new rulemaking process, led by a restructured Bureau.

Constitutional logic and precedent confirm that the Bureau's pre-*Seila* structure was itself unconstitutional and rendered all its acts null and void; that the payments provisions were thus never validly adopted; and that they may be enforced only if a lawfully reconstituted Bureau conducts all the procedures required for a rulemaking. The Bureau, lacking any argument on this logic and precedent, appeals to a few lower court cases that are clearly inapposite for a host of reasons.

A. To enforce the policy contained in the payments provisions, the Bureau must conduct a new rulemaking process since its 2017 process was *ultra vires*.

As the Bureau implicitly admits, the 2017 Rule was void *ab initio*, or invalid at the outset. CFPB Br. at 1 (noting "that problem," but contending that it "has been fixed"). The Bureau must concede this obvious point. Before the Supreme Court severed the Director's unconstitutional for-cause removal protection in *Seila Law*, 140 S. Ct. 2183, the Bureau's "leadership by a single individual removable only" for cause "violate[d] the separation of powers," *id.* at 2197. And an agency whose very "composition violates the Constitution's separation of powers" simply "lacks authority to" act. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). All its acts are "constitution[ally] defect[ive]." *Seila Law*, 140 S. Ct. at 2208. Courts have given effect to this principle time and again. *See NLRB v. Noel Canning*, 573 U.S. 513 (2014) (invalidating an order issued by unlawfully composed Board); *Nguyen v. United States*, 539 U.S. 69, 83 & n.17 (2003) (observing that a government body that is not "properly constituted" is not "empowered to exercise" the authority that is otherwise entrusted to it); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (affirming a decision setting aside, as "without legal force and effect," *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986), the order of an official unlawfully insulated from presidential removal); *Intercollegiate Broad. Sys, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340–42 (D.C. Cir. 2012) (vacating Copyright Board decision "[b]ecause the Board's structure was unconstitutional at the time it issued its determination").

It follows that in 2017, the Bureau lacked the power to conduct a notice-and-comment process as required for a legislative rule like the payments provisions. *See* 5 U.S.C. § 553(b).[1] So just as the Supreme Court in *Lucia* held that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official," *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188 (1995)), here the only substitute for a rulemaking tainted by the Bureau's unconstitutional structure is a new notice-and-comment process led by a restructured Bureau.[2]

To escape *Lucia*'s plain holding and logic, the Bureau falls back on one district court's conjecture that perhaps "the 'new hearing' required by *Ryder* (the case that *Lucia* applied) did not need to be a 'completely new proceeding,' but could instead entail a '*de novo* review' of the existing record by officials unaffected by the separation-of-powers violation." Defs.' Combined Cross-Mot. Summ. J. & Opp'n to Pls.' Mot. Summ. J. ("CFPB Mot.") at 18 (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 120 (D.C. Cir. 2015)). But the lower court offered this crabbed reading of *Ryder* well before the *Lucia* Court removed

[1] The Bureau now claims that it *did* have the authority to act, and that *Seila Law* said so when it "rejected the argument that the unconstitutional removal restriction meant that 'the entire agency is unconstitutional and powerless to act.'" CFPB Mot. at 13 (quoting *Seila Law*, 140 S. Ct. at 2208). But in the cited passage, *Seila Law* was saying only that the Bureau would have authority to act *going forward*, since the offending removal provision could and would be severed, thus saving the "remainder of th[e] Act" that created the Bureau. 140 S. Ct. at 2209. If *Seila Law* were *also* declaring that the Bureau had been exercising lawful authority *all along*, it would not have spoken of "the constitutional defect in the" Bureau's civil investigative "demand" that resulted, in the Court's telling, from the agency's defective structure. *Id.*at 2208.

[2] The Bureau thus begs the question when it suggests (at 17) that it "satisfied [the notice-and-comment] requirement when it adopted the Payment Provisions initially." The Bureau could not have satisfied a requirement to do something that it lacked the authority to do, regardless of whether it followed the procedure required of an agency that actually possesses constitutional authority.

any doubt that the remedy for a tainted proceeding is a new one of the same kind. *See* 138 S. Ct. at 2055.

Even less compelling is the Bureau's suggestion that a new rulemaking is unnecessary because Plaintiffs already had a chance to submit comments on the payments provisions. CFPB Mot. at 19. This completely ducks the constitutional issue: Plaintiffs' right to have their comments publicly weighed and addressed by a Director *accountable to the President*, as Article II requires, rather than one who has "no colleagues to persuade, and no boss or electorate looking over [his] shoulder." *Seila Law*, 140 S. Ct. at 2204; *see also id.* at 2197 ("it is 'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey.'" (quoting *Bowsher*, 478 U.S. at 726)). Nor can the Bureau rely on the idea that since Plaintiffs have submitted comments on the payments provisions once, submitting new comments in a new proceeding would make no difference to the outcome. The Supreme Court has squarely rejected the idea that "a litigant challenging governmental action as void on the basis of the separation of powers is . . . required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority." *Id.* at 2196 (citation omitted). In this context, the *ultra vires* "executive act" is *itself* the injury. *Id.*

B. The Bureau cannot cure a constitutionally tainted rule by ratification.

With first principles and Supreme Court precedents arrayed against it, the Bureau cites a smattering of lower court cases from outside this Circuit for the idea that ratification can cure the "constitutional defect" (*id.* at 2208) in this rulemaking.[3] Of course, none of those cases is

[3] The Bureau also cites in passing *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc), *cert. granted by Mnuchin v. Collins*, No. 19-563, 2020 WL 3865249 (July 9, 2020), but that case, which involved unusual facts, did not address ratification at all, and went out of its way

binding here. And all either are distinguishable, rely on a rationale that has since been rejected by the Supreme Court in *Lucia*, or are otherwise unpersuasive. The Bureau's reliance on these cases is therefore unavailing.

1. The circuit court cases cited by the Bureau are inapposite.

First, not a single one of the circuit cases cited by the Bureau involved ratification of a legislative rule, as this case does. They all involved enforcement proceedings or orders, which require nothing like the procedures that are mandated for a rulemaking, and that ratification here would therefore sidestep. *See Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017); *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998); *FEC v. Legi–Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). In *Legi-Tech*, for example, the "procedures" that the challenger wanted the Federal Election Commission to "redo" consisted mostly of bare decisions that would have added little or nothing to the ratification decision itself—including, for example, the decision "whether to initiate an investigation" or "whether to find probable cause." 75 F.3d at 707. The court understandably held that when it comes to decisions to approve or pursue an investigation in advance, for example, the decision to approve it after the fact (i.e., to ratify) is an adequate substitute. But a *post hoc* stroke of the pen is no substitute at all where, as here, the procedures required for an action include substantive engagement with comments, *see* 5 U.S.C. § 553(b)—in this case, a million of them; an initial regulatory flexibility analysis to accompany the notice of proposed rulemaking, *see id.* § 603; a lengthy Small Business Advocacy Review process meant to take

to say that it was not adopting a blanket rule about the appropriate remedy for actions taken by unlawfully constituted agencies. *Id.* at 593.

into account the concerns of small business, *see id.* § 609; 82 Fed. Reg. at 54,509–11 (describing this process for the 2017 Rule, including criticisms of how the Bureau conducted it); and statutorily mandated consultation with other federal agencies, *see* CFPA § 1022(b)(2)(B), 12 U.S.C. § 5512(b)(2)(B); 82 Fed. Reg. at 54,504.[4] There can be no doubt that these procedures would better serve the "purpose[s] of notice-and-comment rulemaking," *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011)—including "fairness and mature consideration of rules having a substantial impact on those regulated," *id.*—if the Director took each step with a "boss or electorate looking over [his] shoulder." *Seila Law*, 140 S. Ct. at 2204.

Second, *Doolin* and *Legi-Tech*—the two circuit court cases relied on (at length) by all the others cited by the Bureau[5]—did not even involve "ratifications" in the sense of approvals of completed actions. Instead, they involved ongoing proceedings that were simply begun by one actor (who lacked authority) and picked up and completed by another (who had authority). For example, *Doolin* upheld a cease-and-desist order issued by an agency director when his improperly appointed predecessor had begun the proceeding with a Notice of Charges. As the

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[4] Indeed, in the wake of *Seila Law*, a valid legislative rule by the Bureau may well require still another procedure—one that even the unconstitutionally structured Bureau never attempted to complete: namely, cost-benefit review by the Office of Information and Regulatory Affairs (OIRA). *See* Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 1993 WL 13149641 (Sept. 30, 1993). To be sure, the Executive Order requiring OIRA review of regulations includes an exemption for "independent regulatory agencies," *id.*, with a cross-reference to a provision listing a number of independent agencies, including the Bureau, *see* 44 U.S.C. § 3502(5). But that exemption expressly assumes what is, after *Seila Law*, no longer true: that the Bureau is an "independent agenc[y]," insulated from Presidential control. So as a matter of statutory interpretation, the exemption no longer clearly applies to the Bureau. And the exemption may be inapplicable as a constitutional matter, too: If the Bureau is no longer an independent agency, after all, exempting its regulations from Presidential oversight may be no more constitutional than exempting the Attorney General's actions from Presidential oversight. Yet if the exemption from OIRA review does not apply to the Bureau's regulations, then the payments provisions must undergo such review to be validly promulgated.

[5] *See Wilkes-Barre*, 857 F.3d at 371–72; *Gordon*, 819 F.3d at 1190–91; *Advanced Disposal*, 820 F.3d at 602–05.

court emphasized, the new director did not "simply writ[e] a letter or memorandum adopting the Notice of Charges as his own," but rather "acted in the normal course of agency adjudication." 139 F.3d at 213. The new director's conclusion that the covered entity was guilty of the charges specified by his predecessor was "necessarily an affirmation of the validity of the charges, and hence a 'ratification,' even though he did not formally invoke the term." *Id.* at 213–14. Likewise, in *Legi–Tech*, the FEC, having been found unconstitutionally structured, restructured itself and then voted to continue with an enforcement proceeding already begun. 75 F.3d at 706. The court found that even if the FEC's structure had rendered void the initiation of the proceeding (which the court doubted, *see id.* at 708), the reconstituted Commission's vote to continue *the very same* proceeding cured any taint, *id.* at 708–09.

Unlike in *Legi-Tech* and *Doolin*, here the official with proper authority *took no part* in the challenged action. The removable Director did not simply pick up where an unduly insulated Director left off; she rubber-stamped the result of an invalid notice-and-comment process, three years after it ended. *Cf. Advanced Disposal*, 820 F.3d at 603 ("[T]he ratifier must make a 'detached and considered judgment,' not simply rubberstamp the earlier action.") (citation omitted). There can be no "considered judgment" under the APA without notice and comment.

Third and finally, in all but one of the circuit cases cited by the Bureau, the same official or officials who took the challenged action also ratified it. And this suggested to the courts that a decision forcing a do-over of the required procedures would be a pointless remedy—not only that the agency would probably reach the same outcome, but that it would not even provide a meaningful reconsideration along the way. *See Wilkes-Barre*, 857 F.3d at 372 ("We further explained in *Legi-Tech* that, 'given human nature,' forcing a properly appointed official to start at the beginning of the process does not necessarily promise a "more detached and 'pure' consideration of the merits of the case") (quoting *Legi-Tech*, 75 F.3d at 709); *see also Advanced Disposal*, 820 F.3d at 602; *Gordon*, 819 F.3d at 1190.[6] In this case, not only is there a different person in charge, but that person is now beholden to the President (who has strong views on consumer regulation), and she affirmatively rejects her predecessor's views on appropriate regulation of payday lenders (with respect to the underwriting provisions) and on the interpretation of the key statutory terms underlying regulation of payday loans. Thus, reconsideration would hardly be *pro forma*; it would necessarily be meaningful.

Thus, none of the circuit cases cited by the Bureau involves anything like what the Bureau wants to defend here—where one official purports to ratify a rulemaking conducted by another official acting *ultra vires*, years after the invalid process had ended, and without an attempt to clear any of the extensive and substantive procedures required for legislative rules. In cases like this, the "proper remedy" for an invalid rulemaking must be a valid one. *See Lucia*, 138 S. Ct. at 2055.

2. The handful of district court cases cited by the Bureau are readily distinguished.

In addition to the few cases involving enforcement actions, the Bureau cites three cases from the same district court in which invalidly adopted rules were said to be ratified without the benefit of new, lawful proceedings. The first problem for the Bureau is that all three cases were

[6] The initial actor and ratifier were different in the remaining circuit case, *Doolin*, but the court there nonetheless thought a do-over pointless on the closely related ground that the result would probably not change. 139 F.3d at 213–14 ("[R]edoing the administrative proceedings would bring about the same outcome—a cease and desist order against the Bank. To require another Director sign a new notice ... would do nothing but give the Bank the benefit of delay ...."). But the Bureau cannot rely on that reasoning here because the Supreme Court has since rejected it, holding that a claimant invoking separation-of-powers principles against an agency action need not show that the government's action "would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority." 140 S. Ct. at 2196 (citation omitted).

decided before the Supreme Court's clarification in *Lucia* that the "proper remedy" for a tainted proceeding is a new one of the same kind. *Id.* But there are other acute problems, too.

The first case cited by the Bureau did not involve a *post hoc* ratification at all. In *Huntco Pawn Holdings, LLC v. U.S. Dep't of Def.*, 240 F. Supp. 3d 206 (D.D.C. 2016), the challengers to a regulation argued that it was not issued by the Secretary of Defense, whose office possessed sole statutory authority to act, simply because its publication in the Federal Register "contain[ed only] the signature block of an employee whose title [was] 'Federal Register Liaison Officer.'" *Id.* at 230–31. There was no evidence that the appropriate officials were *not* "involved in the rulemaking," *id.* at 231, but out of "an abundance of caution," *id.* at 232, a Defense Department official submitted a ratification. In response, the court did *not* suggest that such an official could simply ratify the act of another who had been acting *ultra vires*. Instead, the court found that the "ratification" offered by the Defense Department proved that its office had authorized the rule *from the outset*, and that the rule's signatory was (as the title suggested) merely a liaison between that office and the Federal Register. *See id.* (interpreting statement as "confirming that what the FRLO transmitted to the Federal Register for publication accurately reflects the policy decisions [the statutorily specified] office *made* regarding the promulgation of the Final Rule.") (emphasis added). Here, by contrast, no one suggests that the current Director approved the payments provisions when they were promulgated years earlier, during the tenure of her predecessor, let alone that *any* official exercising lawful authority approved them at that time. *Huntco* gives the Bureau no cover here.

In *State National Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177 (D.D.C. 2016), the same district court found it "particular[ly]" significant that the Bureau Director ratifying a rule was also the Director who had created the rule, *id.* at 183. In the court's telling, the fact that the rule's ratifier had been its author "wiped out" any hope that requiring him to begin anew would provide a meaningful remedy—anything more than a "nominal reconsideration," *id.* at 183, 185. Here, since the ratifier and the initial decision-maker are different, ordering the new Director to undertake her own rulemaking *would* provide meaningful relief.[7]

The only other case accepting ratification of a legislative rule, *Alfa International Seafood v. Ross*, No. 1:17-CV-00031 (APM), 2017 WL 3738397 (D.D.C. June 22, 2017), adds no persuasive value, since it rested entirely on the two above-mentioned cases from the same district. It offered no analysis of its own and cited no other authorities to support ratification of legislative rules. *Id.* at *2 ("In light of [*Huntco* and *State National Bank*], the proper course at this juncture—just months before the Rule goes into effect—is to defer ruling on Plaintiffs' broader challenge to the agency's authority to engage in rulemaking and, instead, afford the Federal Defendants an opportunity to submit a signed statement from a Principal Officer within the Department of Commerce that ratifies the Rule.").

For these reasons, the few non-binding cases from a single district that involved rulemakings like the one at issue here cannot overcome the constitutional and agency principles and Supreme Court precedents establishing that the Bureau must engage in a valid rulemaking if it wishes to enforce a policy that was—by everyone's account—never lawfully adopted.[8]

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[7] *State National Bank* also noted that the plaintiffs' complaint that they never got to make comments before a duly appointed official "rings hollow," 197 F. Supp. 3d at 185, since they did not take that opportunity the first time. In this case, Plaintiffs did submit comments, so they would have availed themselves of the opportunity to have them considered by a duly removable director.

[8] In a footnote, the Bureau attempts to fill the gaps in its legal arguments with a point about policy, raising vague worries about "potential disruption" to mortgage and housing markets. CFPB Mot. at 12 n.4. But its only support for those worries is an amicus brief in *Seila Law* that the Supreme Court ultimately sided against, and that rested all its claims about disruption on the potential that an adverse decision in that case could create "uncertainty" about the validity of various rules issued by the Bureau. *See* Amicus Br. of Mortg. Bankers Ass'n at 4,

II. The Bureau's purported ratification is ineffective and arbitrary and capricious.

Even if ratifications of legislative rules were possible in some cases, the ratification offered here is invalid for several reasons.

A. The Bureau cannot ratify the payments provisions since it lacked the authority to adopt them at the time that they were issued.

First, "[r]atification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved of the agent's prior unauthorized acts." *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018). And under agency law, "it is essential that the party ratifying should be able" "to do the act ratified at the time the act was done," and not only "at the time the ratification was made." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (citation and emphasis omitted). Thus, agency law requires there to have been a principal who had authority to act at the time of the action to be ratified. But there was none here, since the Bureau was unconstitutionally structured when the payments provisions issued.

The Bureau replies that it *did* have the power to act from the start—that it was only the Bureau's agent, the Director, who lacked authority to act, because of his insulation from removal. CFPB Mot. at 13. This is wrong, as *Seila Law* makes clear. The challenge to the CFPB there, as here, did not involve an unlawfully appointed official acting on behalf of a lawfully configured agency. Instead, as *Seila Law* held, the very "structure" of the Bureau itself was "unconstitutional." 140 S. Ct. at 2204; *see also id.* at 2192 (describing the issue as whether

9, 10, 12–14, 17, 18, *Seila Law*, 140 S. Ct. 2183 (No. 19-7), 2019 WL 6910300. Here a ruling for Plaintiffs would leave no uncertainty: a legislative rule issued prior to *Seila Law* would be binding only if and when it was adopted by a valid rulemaking process, undertaken by a duly removable Director. Whether equitable or reliance interests might allow for a different result in a case where a rule has been in force for a long period of time is not at issue here, where the payments provisions have never taken effect.

"the structure of the CFPB violates the separation of powers"). This makes challenges to CFPB actions unlike many other separation-of-powers challenges the Court has faced. *See id.* at 2202 ("The CFPB's single-Director structure is an innovation with no foothold in history or tradition). Since the constitutional defect here goes to "the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf," *RD Legal*, 332 F. Supp. 3d at 785, the Bureau had no authority at the time the payments provisions were issued, and thus cannot ratify those provisions now, *see NRA Political Victory Fund*, 513 U.S. at 98.[9]

The Bureau throws up several responses to this argument, but none of them sticks. First, for the claim that it has had authority to act all along, the Bureau relies on a badly distorted reading of a passage in *Seila Law* that addressed another issue altogether (severability), as explained above. *See supra* p. 4 n.1. Second, and more sweepingly, the Bureau suggests that common law limitations on ratifications in general may not apply to "government-agency ratifications" in particular. CFPB Mot. at 15. But this squarely contradicts a Supreme Court case applying agency-law principles in this very context. *See NRA Political Victory Fund*, 513 U.S. at 98 (treating an unconstitutionally structured agency's claimed ratification as "presumptively governed by principles of agency law").

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[9] The Bureau (at 37–38) attempts to downplay another defect in the Bureau's structure: the extraordinary degree to which its funding stream is insulated from Congress's "power over the purse" under the Appropriations Clause. *See* Plaintiffs' Mot. at 31 (quoting *The Federalist* No. 58, at 359 (James Madison) (C. Rossiter ed., 1961)). The Bureau responds that it was enough for this insulation itself to flow from a statute passed by Congress. CFPB Mot. at 38. Of course, that circular logic would make it impossible for any federal statute ever to violate the Appropriations Clause, because all such statutes are passed by Congress. (It would be akin to suggesting that no federal statute could ever violate the non-delegation doctrine because any power it delegated to others would, by definition, have been delegated by Congress.) The form of budgetary insulation here is a violation if anything could be: the Bureau gets unchecked power to set its own budget up to half a billion dollars, and to demand funds directly from the Federal Reserve without any review by Congress's appropriations committees. *See* 12 U.S.C. § 5497(a)(2)(A), (C).

The Bureau contends that the agency-law principle invoked here (that the ratifier must have had authority at the time of the initial action) was rejected by a recent restatement of agency law. CFPB Mot. at 14. But the *cases* articulating that principle—including a Supreme Court case, and others cited by the Bureau itself—trump restatements, and they have *not* been superseded. *NRA Political Victory Fund*, 513 U.S. at 98 ("[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*."); *Gordon*, 819 F.3d at 1191 (same); *State Nat'l Bank*, 197 F. Supp. 3d at 184. The Bureau never *mentions* the Supreme Court case applying this principle of agency law to governmental ratifications, to say nothing of refuting the principle's clear implications here.

Finally, the Bureau offers no response to the point that, because a ratification operates retroactively, it cannot possibly apply to a legislative rule promulgated in the absence of constitutional authority. To hold otherwise would either permit a person devoid of any lawful authority under the Constitution to create prospectively enforceable legal obligations that bind the public or else authorize retroactive rulemaking in the absence of congressional conferral of that power. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *id.* at 216–25 (Scalia, J., concurring). Neither is permissible.

B. The Bureau's attempted ratification here is arbitrary and capricious.

Even if ratifications of legislative rules were ever possible—and even if they were possible for agencies like the Bureau, whose very *structure* was unconstitutional at the time of the challenged action—the ratification proposed here must fail because it is arbitrary and capricious. Under the APA, agency action is arbitrary and capricious if it marks "an '[u]nexplained inconsistency' in agency policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). And here, Plaintiffs have shown, the Bureau's ratification introduced unexplained inconsistencies because it aimed to revive payments provisions that were based on three premises the Bureau later rejected or rendered false, in the course of revoking the underwriting provisions. *See* Pls.' Mot. Summ. J. ("Plaintiffs' Mot.") at 19–23.

The Bureau's most sweeping reply is that the APA doctrine invoked here requires agencies to explain tensions created by policy *changes*, so it could never apply to ratifications, which merely affirm existing policy. CFPB Mot. at 20–21. This defense, of course, rests on a labeling gimmick. A "ratification" is a substantive change if it ratifies a *since-rejected* policy. If agency action *A* bans a certain practice, action *B* revokes that ban (as going beyond the agency's authority), and then action *C* "ratifies" action *A*, the last step surely reflects an abrupt "change from agency practice," for which the APA requires explanation. *Encino Motorcars*, 136 S. Ct. at 2126. Something similar has happened here, as Plaintiffs have shown. The Bureau issued the payments provisions in 2017. It rejected or rendered false three premises of those provisions, in a 2020 revocation. Then it ratified the 2017 Rule's adoption of the provisions, without even *trying* to explain the about-face.

1. The ratification incoherently blesses a cost-benefit analysis that the Bureau's own actions have since rendered false.

One inconsistency concerns the Bureau's duty to consider "the potential benefits and costs to consumers and covered persons [i.e., lenders], including the potential reduction of access by consumers to consumer financial products." CFPA § 1022(b)(2), 12 U.S.C. § 5512(b)(2). In 2017, the Bureau's analysis expressly assumed that the costs of the payments provisions would be mitigated by operation of the underwriting provisions. *See* 82 Fed. Reg. at 54,846. But the latter have since been revoked, and yet the Bureau has not undertaken a new cost-benefit analysis. Without the ameliorative effect of the underwriting provisions, as a result, the 2020 ratification of the payments provisions is necessarily arbitrary and capricious, since it fails to address or even mention this factor in assessing costs. *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153–54 (D.C. Cir. 2011) (an internally inconsistent cost-benefit analysis is defective); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (defects or "serious flaw[s]" in an agency's cost-benefit analysis "can render the [resulting] rule unreasonable").

The Bureau's half-hearted response is that while "a couple of sentences in the 2017 Rule observed that the Underwriting Provisions would lessen certain impacts of the Payments Provisions," the ensuing "detailed discussion" of costs and benefits did not expressly repeat that point. CFPB Mot. at 22 (citing 82 Fed. Reg. at 54,846). But the Bureau cites no authority for the idea that courts should ignore a substantive point emphasized in one part of the analysis but not repeated later in the very same analysis. And why should they? What matters for judicial review of an agency's reasoning is *whether* a certain premise figures in the analysis, not *where* it appears. The point about mitigation of the payments provisions' costs clearly played a role in the Bureau's cost-benefit analysis in 2017, and the Bureau does not deny it.[10] Since the supposed cause of the mitigation no longer exists, the Bureau's 2020 ratification cannot rely on its 2017 cost-benefit analysis. Its conclusory embrace of the payments provisions is thus arbitrary.

[10] *See* 82 Fed. Reg. at 54,846 ("Note that the Bureau expects that unsuccessful payment withdrawal attempts will be less frequent under the rule. This is because . . . the ability-to-repay provisions or the requirements of the conditional exemption loans will reduce the frequency with which borrowers receive loans that they do not have the ability to repay. This should in turn lessen the impacts of the limitation on payment withdrawal attempts and the number of instances where a lender is required to notify consumers that the lender is no longer permitted to attempt to withdraw payments from a borrower's account.").

2. The ratification marks an about-face on implementation periods.

A second glaring inconsistency between the 2017 Rule and the 2020 ratification concerns the time needed (and provided) to implement the payments provisions. In 2017, the Bureau determined that lenders needed *twenty-one months* to "be able to reasonably adjust their practices to come into compliance with the rule." 82 Fed. Reg. at 54,814. This implementation period, which the Bureau had increased from its original proposal based on feedback received during the notice-and-comment process, reflected the Bureau's effort to balance lenders' interest in an orderly transition with "the interest of enacting protections for consumers as soon as possible." *Id.*

Nonetheless, the ratification of the payments provisions encompasses *no* implementation period. This partial ratification thus jettisons a crucial part of the provisions, *see Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982) (an effective date is "an essential part of any rule") (citation omitted), without any explanation for doing so, *see Encino Motorcars*, 136 S. Ct. at 2126; *see also* Restatement (Third) of Agency § 4.07 (2006) ("A ratification is not effective unless it encompasses the entirety of an act, contract, or other single transaction"); *id.* at Comment *b* ("Burdens" must "accompany benefits," such that a party "may not, by ratifying an act, obtain its economic benefits without bearing the legal consequences that accompany the act.").

The Bureau's first retort is that the ratification changed nothing because the 2017 Rule gave companies until August 19, 2019, to come into compliance, and that date has already passed, so there is nothing left of the implementation period for the ratification to preserve. CFPB Mot. at 19. But this is semantic nonsense. The implementation period never ran its course because this court entered (and has not since lifted) a stay of the 2017 Rule under 5 U.S.C. § 705. Order, ECF No. 53. Since the parties *jointly* moved for a stay with 445 days left of the implementation period, a ratification that left intact the 2017 Rule's decision on implementation would leave 445 days for companies to comply with the payments provisions, as indeed *both* parties requested in their motion for a stay. *See* Joint Motion for Stay at 5, ECF No. 16 ("Jt. Mot."). At a minimum, since this Court granted the stay on November 6, 2018, when Plaintiffs' members had 286 days to come into compliance, the ratification should leave a grace period of at least that length.

The Bureau's stunning follow-up response is that if "some lenders put preparations on hold in hopes that the Payments Provisions would be invalidated before the Court ever lifted the stay, that was a gamble they took," for which the Bureau should not be responsible. CFPB Mot. at 22. But to treat Plaintiffs' reliance on the stay of the rule as a "gamble" defeats the whole purpose of such a stay—which is which is precisely to "preserve the status quo," *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 19 (D.C. Cir. 2012), so as to avoid irreparable injury to covered entities, 5 U.S.C. § 705, including the costs of complying with a regulation that may never take effect (and that it is the entire purpose of the underlying legal challenge to *prevent* from taking effect). Consequently, any reasonable ratification of the 2020 payments provisions would have left intact the portion of the original implementation period that had not yet run by the time the stay was sought or granted—445 days or 286 days. Moreover, the Bureau never mentioned or discussed its newfound "gamble" rationale when its ratification made no provision for an implementation period, so this *post hoc* litigation argument cannot suffice to justify the ratification. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1934 (2020) (Kavanaugh, J., concurring in part) (citing cases rejecting "after-the-fact explanations advanced *by agency lawyers during litigation*"). The ratification's failure to restore the original implementation period renders it inconsistent with the 2017 Rule's analysis, and thus arbitrary and capricious.

3. The ratification is based on the Bureau's inconsistent readings of its UDAAP authority.

In issuing the underwriting and payments provisions in 2017, the Bureau invoked its authority to identify and ban "unfair, deceptive, or abusive acts or practices." 12 U.S.C. § 5531(b) ("UDAAP"). Its 2017 Rule found the practices at issue "abusive" partly on the ground that the practices took "unreasonable advantage" of consumers' "lack of understanding" of associated "risks." *Id.* at (d)(2). And it found the practices "unfair" on the ground that they were likely to cause injuries "not reasonably avoidable by" consumers (which in turn also depended on whether consumers "lack[ed]" "understanding"). 12 U.S.C. § 5531(c)(1)(A)–(B). The problem is that on both of these related concepts—lack of understanding and reasonable avoidability—the Bureau relied on one set of interpretations in its 2017 Rule, and a different set in its revocation of the underwriting provisions. Yet it went on to ratify the *payments* provisions, even though their designation as unfair and abusive rested on the very same now-rejected definitions as the underwriting provisions. The ratification's failure to explain this incoherence renders it arbitrary and capricious.

First, the 2017 Rule determined that, to have an "understanding" of a product's risks, a person must have more than a "general understanding" (or "generalized understanding") of those risks. *See* 82 Fed. Reg. at 54,617, 54,740; *see also id.* at 54,597–98; 54,741. Specifically, the Bureau reasoned in 2017, a consumer must have a sense of the *probability* that the risks in question would eventuate. *See, e.g.*, *id.* at 54,741 (citing a need for knowledge of "the severity of the risk" posed by the practices targeted by the payments provisions); *id.* at 54,597 (need for ability to "gauge the likelihood and severity of the risks" supposedly reduced by the underwriting provisions); *id.* at 54,615 (lamenting consumers' lack of understanding "that a certain risk is very likely to materialize" from use of payday loans). By contrast, in its 2020 revocation of the underwriting provisions, the Bureau determined that consumers need *not* have a sense of specific probabilities: a general understanding of the real risk of harms would be enough. *See* 85 Fed. Reg. at 44390–91, 44394–95, 44,422. Yet its ratification of the payments provisions failed to explain how they could survive now that the Bureau has rejected the definition of "understanding" on which they were based.

The Bureau responds that the 2020 analysis did *not* undercut the basis for the payments provisions, since the payments provisions in 2017 rested on the idea that consumers did not even have *general* knowledge of the risks. CFPB Mot. at 23–24. This is false: the 2017 payments provisions expressly acknowledged that consumers have a "generalized understanding" of the risks and so those provisions were necessarily based on the more stringent (and since-rejected) idea that ignorance of specific risks suffices for "lack of understanding."[11] Thus, the Bureau's

[11] *See* 82 Fed. Reg. at 54,740 ("In the proposal, the Bureau stated that when consumers grant lenders an authorization to withdraw payment from their account, they understand as a general matter that they may incur an [nonsufficient funds] fee from their account-holding institution as well as a returned-item fee charged by the lender. However, the Bureau preliminarily found that *such a generalized understanding does not suffice* to establish that consumers understand the material costs and risks of a product or service. Rather, the Bureau determined that it is reasonable to interpret 'lack of understanding' in this context to mean *more than mere awareness that it is within the realm of possibility* that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product. For example, *consumers may not understand that such a risk is very likely to happen* or that—though relatively rare—the impact of a particular risk would be severe. In this instance . . . the Bureau preliminarily concluded that consumers lack understanding of the risk they are exposing themselves to by granting authorizations to lenders that make covered loans. . . . Consumers' *general understanding* that granting authorization can sometimes lead to fees does not prepare them for the *substantial likelihood* that, in the event their account becomes severely distressed, the lender will continue making payment withdrawal attempts even after the lender should be on notice (from two consecutive failed attempts) of the account's distressed condition.") (emphasis added).

move to the broader definition of "understanding" undermines a premise of the payments provisions that the Bureau has ratified without explaining the reversal. That makes the ratification arbitrary and capricious.

Second, as Plaintiffs demonstrated (at 20–21), the 2020 revocation of the underwriting provisions deemed the potential harms of payday loans "reasonably avoidable" because consumers could avoid them by simply opting not to purchase the loans. This also undercut a premise of the 2017 rule's analysis of the payments provisions, which *rejected* the idea that consumers could avoid harms by declining to purchase the loans that created them. To explain away this glaring inconsistency, the government now replies that the harms targeted by the payments provisions are *harder* for consumers to avoid, because they flow from "lenders' conduct later—after the consumer has taken out the loan and two consecutive payment attempts have failed. At that point in time, consumers no longer have the option to decline the loan, and therefore cannot reasonably avoid the injury or protect their own interests." CFPB Mot. at 26. But the 2020 revocation rejected this reasoning, too—*in so many words*: "[A] finding that consumers lack the means to avoid injury *at a later time* is not generally sufficient [to render the injury "not reasonably avoidable"] if they could do so at an earlier time." 85 Fed. Reg. at 44,397 (emphasis added).

Thus, the Bureau's utterly unexplained (indeed, unconfessed) reversals on the meaning of its UDAAP authority—in going from revocation of the underwriting provisions to ratification of the payments provisions—renders the ratification arbitrary and capricious.

III. The Bureau's payments provisions and denial of Advance Financial's rulemaking petition violate the APA, even apart from the defective ratification.

Plaintiffs showed (at 23–29) that in adopting the payments provisions, the Bureau overstepped its statutory authorizations to ban "unfair" and "abusive" practices, *see* 12 U.S.C.

§ 5531(b); ignored "important aspect[s]" of the problem it attempted to solve, thus rendering its analysis arbitrary and capricious, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); mangled a statutorily required cost-benefit analysis, *see* 12 U.S.C. § 5512(b)(2); and flouted statutory provisions that both forbid the Bureau to "establish a usury limit," *see* CFPA § 1027(o), 12 U.S.C. § 5517(o), and limit or prohibit its reliance on policy considerations in the course of designating practices as abusive or unfair, *see* CFPA § 1031(c)–(d), 12 U.S.C. § 5531(c)–(d).

For example, the 2017 Rule violates the bar on regulations establishing a "usury limit" because it expressly targets installment loans "with an APR of more than 36 percent but not . . . those with a lower APR." 82 Fed. Reg. at 54,732. On this point, the Bureau's reply (CFPB Mot. at 33–34) amounts to the suggestion that nothing could ever count as a "limit" on the charging of high interest rates unless it was a criminal or civil ban on loans *of every possible kind* that charged such rates. But the Bureau nowhere defends this arbitrarily narrow reading of the statutory term "limit." And a ban on *some* loans above a specified interest rate is clearly a "limit" on charging steep interest rates—that is, a "usury limit." Yet this is just what the payments provisions would create.[12]

[12] The 2017 Rule likewise violates statutory restrictions on reliance on public-policy considerations. Plaintiffs' Mot. at 28. The Bureau denies that it relied on public-policy considerations (Mot. at 34) but the record shows otherwise. The rulemaking documents teem with the Bureau's public-policy beliefs that payday loans are too expensive and consumers cannot be trusted to make their own decisions in the marketplace. *See, e.g.*, 81 Fed. Reg. 47,919, 47,912, 47,925, 47, 936, 47,990, 47,993 (July 22, 2016) (criticizing payday loans for "unaffordab[ility]," "substantial fees," "very high total costs of borrowing," and "high cost"). These views sound in public policy, and are not the findings of consumer injury that are both required by statute and that have typically marked proper exercises of unfairness authority. *See* J. Howard Beales, Former Dir., Fed. Trade Comm'n, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003) (available at http://goo.gl/1a1BlQ) ("High prices, for example, are not unfair …."); *id.* (unfairness authority does not allow "trying to second guess market outcomes"); Stephen Calkins, FTC Unfairness: An Essay, 46 Wayne L. Rev. 1935, 1961

The Bureau fares no better in defending its designation of repeated withdrawal attempts (without prior authorization) as "unfair" and "abusive." Those designations hung on the Bureau's view that the alleged injuries created by such attempts could not be reasonably avoided and were not understood by consumers. *See* 82 Fed. Reg. at 54,737–44. And this in turn rested on the Bureau's finding that consumers could not avoid the risks of such repeated withdrawals merely by keeping sufficient funds for repayment in their bank accounts; by renewing their loans; by negotiating repayment options; by invoking their federal rights to issue stop-payment orders or rescind authorized account access; or by not entering into such transactions in the first place. *See* Plaintiffs' Mot. at 25. The Bureau's *ad hoc* attempts to block each of these off-ramps are unavailing. On the last, for instance, the Bureau contends that consumers cannot avoid harm by avoiding these loans because they have "no reason to anticipate the risk of repeated, costly withdrawal attempts upfront." CFPB Mot. at 29. Yet in the portion of the 2017 Rule cited to support this proposition, *see id.* (citing 82 Fed. Reg. at 54,737), the Bureau offers no studies or any other evidence on how likely it is that consumers know of the practice (and potential costs) of withdrawal attempts. That erodes a pillar of the UDAAP analysis underlying the payments provisions, rendering those provisions arbitrary.[13]

The payments provisions are also arbitrary and capricious for "entirely fail[ing] to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. For one thing, in concluding that lenders are the "cause" of the purported injury here, 12 U.S.C.

(2000) (unfair acts traditionally include coercive selling, material misstatements, false statements, and improper post-purchase rights and remedies).

[13] The slipperiness of the Bureau's UDAAP analysis on this and other matters only reinforces Plaintiffs' point that the statute gives the Bureau no intelligible principle to guide its regulation of finance industry practices, and therefore constitutes an unconstitutional delegation of the legislative authority vested in Congress alone. *See* Plaintiffs' Mot. at 31–32.

§ 5531(c)(1)(A), the Bureau ignored the fact that lenders do not cause failed-payment fees or bank-account closures—the banks do that. The Bureau answers that the payday lenders' withdrawal attempts are a but-for cause of the fees and closures, *see* CFPB Mot. at 30, but this misses the point. What the Bureau failed to consider whether it would be more efficient and effective to regulate the conduct and practices of the banks that impose the supposedly injurious fees. The Bureau does not even suggest that it ever considered this obvious option, much less point to any place where it did so adequately. It has surely overlooked an "important aspect of the problem," unreasonably so.

Likewise, in restricting payment-transfer attempts, the Bureau arbitrarily refused to heed important differences among the varieties of payment transfers covered, thus cutting any "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (internal citation omitted). In particular, the Bureau arbitrarily applied the payments provisions to payment-transfer attempts across multiple installments of a multi-payment installment loan, even though those installments are typically spaced two weeks or a month apart, and even though the payments provisions were designed to address a different problem, namely multiple re-presentments in close succession of the *same* payment-transfer request. Plaintiffs' Mot. at 27; *see also* 82 Fed. Reg. at 54,723–24 (criticizing multiple payment-transfer attempts on the same day); *id.* at 54,724 ("lenders attempt to make several debits on their accounts within a short period of time"); *id.* at 54,741 (asserting that consumers lack understanding because "most of them have no basis to recognize that a lender will present multiple times in quick succession"). In response, the Bureau contends that it did conclude that different installments of a loan raise the same concerns (CFPB Mot. at 32), but its only support is a statement in the preamble to the 2017 Rule that admits that the Bureau's study "did not distinguish between re-presentments of the same payment and new presentments for new installments" and speculates that "there is reason to believe" that new presentments for new installments would fail. 82 Fed. Reg. at 54,753. Such superficial speculation, without evidence or any attempt to discern whether this practice is unfair or abusive, fails the test of reasoned decision-making.

Similarly, the 2017 payments provisions limited withdrawal attempts for both debit-card and prepaid-card payments as well as check and ACH payments, even though these transactions differ sharply with respect to the alleged injuries cited by the Bureau. The Bureau's express goal in adopting the payments provisions was to limit the nonsufficient funds fees that consumers may incur when checks bounce and ACH withdrawals fail. *See* 81 Fed. Reg. at 47,929. But debit-card withdrawal attempts *almost never* result in such fees. *See id.* at 48,066. So as the Bureau itself admitted, these "harms underpinning the unfair and abusive practice" simply "would not occur" with the debit-card withdrawals. 82 Fed. Reg. at 54,746. In subjecting such withdrawals to the payments provisions anyway, the Bureau created a sharp *and acknowledged* mismatch between the problem it set out to solve and the solution it adopted, rendering that solution (the payments provisions) arbitrary and capricious.

This inconsistency was raised in numerous comments during the 2017 rulemaking process, as detailed in Plaintiff member Advanced Financial's petition for a rulemaking to correct this error. *See* Petition at 6–8, AR at 18080–82. The Bureau's only response seems to be that while "failed attempts to withdraw payments from [debit-card] accounts may not trigger nonsufficient funds fees, they can trigger overdraft fees." CFPB Mot. at 32; *see also* 82 Fed. Reg. at 54723, 54747. But this ignores a point admitted elsewhere by the Bureau itself—that "[y]our bank or credit union cannot charge you fees for overdrafts on ATM and most debit card transactions *unless you have agreed ('opted in') to these fees*." Gary Stein, *Understanding the*

Overdraft "Opt-in" Choice, Consumer Financial Protection Bureau (Jan. 19, 2017), https://tinyurl.com/y4zuxqvr (emphasis added). This is in contrast to fees on ACH transactions, which "are not subject to an opt-in requirement like overdraft fees on debit card transactions." 82 Fed. Reg. at 54,735. An "injury" that consumers must *opt into* is surely "reasonably avoidable," so it just as surely falls outside the scope of UDAAP and, thus, beyond any possible justification for the payments provisions. The Bureau's refusal to exempt debit-card transactions from those provisions is therefore a *paradigm case* of arbitrariness.

By the same token, the Bureau's denial of Advance Financial's rulemaking petition to fix this glaring irrationality is itself arbitrary and capricious, since by the Bureau's own admission, its denial of that petition added absolutely nothing to its prior explanation—or lack of explanation—for regulating debit-card transactions. *See* CFPB Mot. at 36; *see also, e.g.*, *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984) (subjecting agency denials of rulemaking petitions to arbitrary-and-capricious review); *Weight Watchers Int'l., Inc. v. FTC*, 47 F.3d 990 (9th Cir. 1995) (same); *Gen. Motors Corp. v. Nat'l Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990) (same). This error more than justifies an order requiring the Bureau to grant the petition for a corrective rulemaking.

Finally, the Court should reject the Bureau's attempt to rehabilitate its flawed cost-benefit assessment of the payments provisions. *See* Plaintiffs' Mot. at 28–29. First, the Bureau's contention that the cost-benefit analysis did not rest on the now-rescinded underwriting provisions (CFPB Mot. at 34–35) is wrong for the reasons explained above. *See supra* pp. 15–16. Second, the Bureau does not dispute that the payments provisions will send some loans into collections sooner and concedes that it failed to weigh the costs of such earlier collections. CFPB Mot. at 35. The Bureau's contention that this cost is unimportant and therefore need not have been considered is inconsistent with the statutory directive, which does not distinguish between important and less-important costs, *see* CFPA § 1022(b)(2), 12 U.S.C. § 5512(b)(2), and is belied by the preamble to the 2017 Rule itself, which repeatedly treats collections as a matter of great importance, *see, e.g.*, 82 Fed. Reg. at 54,555 ("Consumers who default can become subject to often aggressive and psychologically harmful debt collection efforts."); *id.* at 54,574 ("collections efforts can include harmful and harassing conduct"); *id.* at 54,589 ("collection … can inflict significant financial and psychological damage on consumers"); *id.* at 54,593 (emphasizing the "harm" caused by defaults). Third, the Bureau is wrong that additional accrued interest is not a cost that consumers will face as a result of the Rule's timing requirements for payment notices. CFPB Mot. at 35. For instance, when a customer triggers the unusual-withdrawal notice requirement (e.g., by seeking an earlier repayment) and the lender lacks the customer's authorization to communicate by e-mail, the lender must deliver that notice by mail and wait six business days before initiating the transfer; this delay will cause the consumer to accrue interest while her loan payment is delayed.

IV. Any ruling upholding the payments provisions ought to clarify the compliance date.

As noted above, the Bureau's ratification does not include a compliance date, and the Bureau appears to take the position that, because the original compliance date of August 19, 2019, has passed, the Bureau can require immediate compliance with the payments provisions in the event the Court enters judgment for the Bureau and lifts the stay. CFPB Mem. at 21–22 & n.10. This is wrong, as the Court should clarify in the event it rules for the Bureau.

Courts reviewing an agency action have authority under 5 U.S.C. § 705 to "postpone the effective date of [the] action" or otherwise "preserve" the *status quo* in order to "prevent irreparable injury" pending judicial review, *id.*, so that review may "proceed in a just manner," *Bauer v. DeVos*, 325 F. Supp. 3d 74, 107 (D.D.C. 2018). *See also Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016).

Indeed, when this Court entered a stay of the 2017 Rule (including the payments provisions) under 5 U.S.C. § 705, Order, ECF No. 53, the Court was acting on *both* parties' submission that "[t]here is no way to know whether Plaintiffs' members will ultimately need to comply with the Payday Rule, a modified payday rule, or no rule at all." Jt. Mot. at 4. In fact, the Bureau had informed this Court in no uncertain terms that it intended to "reconsider the Rule and address the Rule's August 19, 2019 compliance date." Order, at 1. And in a Notice of Proposed Rulemaking, Director Kraninger averred that "[t]he Bureau intends to examine [industry concerns about the payments provisions] and if the Bureau determines that further action is warranted, the Bureau will commence a separate rulemaking initiative." 84 Fed. Reg. 4252, 4253 (Feb. 14, 2019). In all these ways, the Bureau announced that the Rule's content and timing were subject to change, clearly implying that any efforts at compliance with the Rule as issued might prove to be a waste.

Thus, the Bureau itself agreed that compliance should be stayed to free Plaintiffs' members from the burdens of implementation. *See* Jt. Mot. at 4 (informing Court that "[a] stay of the compliance date pending judicial review is necessary" because "Plaintiffs' members will need to make time-consuming and costly changes to their business practices in order to prepare to comply with the Rule"). Indeed, the joint motion expressly asked this Court to "*preserve the amount of time* for bringing their operations into compliance that *Plaintiffs' members currently have* from the date of this motion to the Payday Rule's current compliance date of August 19, 2019," i.e., "445 days." Jt. Mot. at 5 (emphasis added). If the full implementation period were not restored, Plaintiffs' members who reasonably relied in good faith on the stay of the compliance date would find themselves unable to comply quickly and would face substantial costs, burdens, and potential statutory penalties they could have avoided if the Rule had never been stayed. *See* Ex. A, Decl. of James A. Ovenden in Opp'n. Defs.' Mot. Summ. J. (describing reliance on stay by, and burdens of shortened implementation period to, CFSA member Purpose Financial).

As that perverse result confirms, it would be "unfair to penalize [parties] that reasonably relied on" a § 705 stay. Order, *Michigan v. EPA*, No. 98-1497 (D.C. Cir. June 22, 2000); *see also id.* (Since "[a]t the time of the stay, covered states had 128 days left to [comply]," upon dissolution of the stay, they will have "the 127 days . . . that they had remaining when the stay was imposed," an allowance that "does no more than restore the status quo preserved by the stay."). Simply put, because a stay was entered before the Rule's effective date, "no reasonable litigant could have understood that the [deadline] remained in effect or would be enforced against it." *Univ. of Chi. Med. Ctr. v. Sebelius*, 56 F. Supp. 3d 916, 922 (N.D. Ill. 2014). The Bureau's contrary contention—that reliance on a court-ordered stay is a "gamble" that litigants choose to take (CFPB Mot. at 22)—demeans the judicial process and the authority of this Court. Because the stay was requested with 445 days left until the implementation deadline, and it was entered with 286 days remaining, any decision upholding the payments provisions should leave 445 days—or alternatively, 286 days—for companies to comply with those provisions.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' cross-motion for summary judgment and grant summary judgment for Plaintiffs, holding invalid and setting aside the payments provisions and purported ratification under the Constitution and the Administrative Procedure Act. In the alternative, because the Bureau's denial of Advance Financial's rulemaking petition was arbitrary and capricious, the Court should order the Bureau to undertake the rulemaking requested in that petition. And if the Court upholds the payments provisions and ratification, it should clarify that Plaintiffs have 445 days (or 286 days) to come into compliance with them.

Dated: November 20, 2020

Respectfully submitted,

/s/ Laura Jane Durfee

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: November 20, 2020

/s/ Laura Jane Durfee
Laura Jane Durfee
Counsel for Plaintiffs

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

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD. *et al.*, Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU *et al.*, Defendants.	Civil Action No. 1:18-cv-295

DECLARATION OF JAMES A. OVENDEN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, James A. Ovenden, declare as follows:

1. I am the President and Chief Executive Officer of Purpose Financial, Inc. (formerly known as Advance America, Cash Advance Centers, Inc.), a member of plaintiff Community Financial Services Association of America. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment based on my personal knowledge. I am over 18 years old and could testify to the facts set out herein if called upon to do so.

2. Purpose Financial is a leading cash advance company in the United States, with approximately 1,500 centers in twenty-six states. Purpose Financial offers a variety of consumer-finance products, including payday loans, title loans, and installment loans, and is subject to the payments provisions set forth in the Final Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (the "Payday Rule").

3. The payments provisions originally had a compliance date of August 19, 2019. In order to prevent Purpose Financial and other CFSA members from incurring substantial implementation costs that would be unnecessary and unrecoverable in the event the Court invalidated the Payday Rule, CFSA and the Bureau negotiated and filed a joint motion for a stay of the compliance date pending completion of this litigation. In response, the Court stayed the compliance date until further order of the Court.

4. In reliance on the Bureau's representations and the Court's stay order, Purpose Financial has refrained from implementing the complex and costly changes to its business operations that will be required to comply with the payments provisions of the Payday Rule.

5. Before it can operate its business in full compliance with the payments provisions, Purpose Financial would need to implement complex and costly company-wide changes to its information-technology systems, its business practices and policies, and its employee training.

6. For example, a substantial amount of time, cost, and effort is needed to upgrade Purpose Financial's loan-management system, telephony system, and customer communication technology to support the requirements of the payments provisions, including their limitations on electronic withdrawals and their notice and recordkeeping requirements. This will require working with vendors to design and/or provide new functionality or to migrate to different platforms. Once implemented, the new systems will require extensive testing to ensure compliance.

7. A substantial amount of time, cost, and effort is also needed to develop the required new disclosure forms, to create new policies and training manuals, and to train our thousands of employees on how to comply with the payments provisions and how to use the new software functionality.

8. Furthermore, many of the changes needed to upgrade the information-technology systems and the coordination with vendors needed in order to enable compliance with the payment provisions has been delayed due to the immediate and urgent priorities associated with COVID-19, such as addressing consumer needs for convenient remote servicing options and increasing payment accommodation capabilities during these unprecedented times.

9. Assuming the business impacts from COVID-19 normalize in 2021, Purpose Financial estimates that it will take between six and twelve months to implement these measures at a significant cost.

10. A shortened implementation period would likely cost Purpose Financial millions of dollars in additional costs and negatively impact millions of dollars in customer payments processed remotely, among other negative implications beyond those described above. These additional costs would stem principally from the inability to have digitally integrated solutions operative by the time of an earlier compliance date. Thus, if the implementation period is shortened, Purpose Financial would be unable to use electronic means such as e-mail and text to provide required notices to consumers and improved telephony systems and/or payment authorization capabilities to comply with recordkeeping requirements. Instead, the company would either need to use the U.S. mail system to deliver paper notices to its customers or rely on our customers to make cash payments (which do not trigger the payments provisions' notice requirements). Given the urgent need to increase remote servicing capabilities during COVID-19 due to health and safety issues, the company has grave concerns if placed in a position that requires limiting customers solely to cash payments.

11. Each of these alternatives would be substantially more expensive and significantly burdensome on our customers. Based on 2019 loan volumes, mailed notices would cost

approximately $5 million in additional costs annually. Limiting customers to cash payments, rather than providing for remote authorization capabilities for digital payments, would impact approximately $160 million of remote payments annually.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 18, 2020

James A. Ovenden