No. 21-50826

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED;
CONSUMER SERVICE ALLIANCE OF TEXAS,

Plaintiffs-Appellants,

v.

CONSUMER FINANCIAL PROTECTION BUREAU; ROHIT CHOPRA, IN HIS OFFICIAL CAPACITY AS DIRECTOR, CONSUMER FINANCIAL PROTECTION BUREAU,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas
No. 1:18-cv-00295 (Yeakel, J.)

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CERTIFICATE OF INTERESTED PERSONS

No. 21-50826, Community Financial Services Association of America, Ltd. et al. v. Consumer Financial Protection Bureau et al.

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

1. Plaintiff-Appellant **Community Financial Services Association of America, Ltd.** (CFSA), which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Plaintiff-Appellant **Consumer Service Alliance of Texas** (CSAT), which has no parent corporation and no publicly held corporation owns 10% or more of its stock.

3. Defendants-Appellees **Consumer Financial Protection Bureau** (CFPB or Bureau); **Rohit Chopra, in his official capacity as Director, Consumer Financial Protection Bureau**.

4. Former Defendants-Appellees **David Uejio, in his official capacity as Acting Director, Consumer Financial Protection Bureau**; **John Michael Mulvaney, in his official capacity as Acting Director, Consumer Financial Protection Bureau**; **Kathleen Kraninger, in her official capacity as Director, Consumer Financial Protection Bureau**.

5. *Amici Curiae* **Public Citizen, Inc.**; **Americans for Financial Reform Education Fund**; **Center for Responsible Lending**; **National Consumer Law Center**.

6. Movant to Intervene as Defendant **Cooperative Baptist Fellowship**.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist the Court in resolving novel remedial questions concerning an agency's power to address rulemaking errors occasioned by structural constitutional defects. While the rulemaking question is an issue of first impression, this Court, en banc, is poised to address similar questions of remedy and ratification in *CFPB v. All American Check Cashing*, No. 18-60302, and *Collins v. Yellen*, No. 17-20364.

Additionally, oral argument would assist the Court in resolving important substantive and remedial questions, under the Consumer Financial Protection Act and the Administrative Procedure Act, concerning a significant rule promulgated by the Consumer Financial Protection Bureau.

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INTRODUCTION

The Court should reverse the judgment below upholding the Consumer Financial Protection Bureau's 2017 rule on small-dollar lending. The Rule violates the Constitution, the Consumer Financial Protection Act ("CFPA"), and the Administrative Procedure Act ("APA").

The Supreme Court has already held that an unconstitutionally insulated director led the Bureau when it promulgated the Rule. This separation-of-powers violation requires the Rule to be set aside and enjoined, especially because nobody disputes that the statutory removal restriction in fact prevented President Trump from firing the director before he finalized the Rule. The Bureau's later "ratification" of a part of the Rule cannot cure the constitutional violation or supplant valid notice-and-comment rulemaking. The ratification is also arbitrary and capricious because the Bureau's simultaneous repeal of the Rule's other provisions eliminated the core justifications for the ratified provisions.

Additionally, the challenged Rule violated the CFPA and the APA from day one. The Bureau's paternalistic effort to shield consumers from costs for which they freely and knowingly bargained exceeds the Bureau's statutory authority to define unfair and abusive acts and practices. And it is arbitrary and capricious, both as a whole and in its extension to certain practices that do not present the harms that the Bureau says the Rule is meant to address.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over these federal claims pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. The district court entered a final order and final judgment disposing of all parties' claims on August 31, 2021. ROA.1758–82. This Court has jurisdiction under 28 U.S.C. § 1291 because Plaintiffs filed a timely notice of appeal from those final decisions on September 9, 2021. ROA.1786.

STATEMENT OF THE ISSUES

1. Should a CFPB rule be held unlawful and set aside where a statute unconstitutionally restricted the President's removal authority, and the President, but for that restriction, would have replaced the director before the rule was promulgated?

2. Should the Rule be held unlawful and set aside because the Bureau's self-funding mechanism violates the Appropriations Clause and the Bureau's rulemaking authority violates the nondelegation doctrine?

3. Did the Bureau's attempted "ratification" of the Rule's payment provisions violate the CFPA and APA because the Bureau failed to comply with basic rulemaking requirements and eliminated the original justifications for the payment provisions when it simultaneously repealed the Rule's other provisions?

4. Are the payment provisions outside the Bureau's statutory authority or arbitrary and capricious under the APA, either in whole or in certain applications?

STATEMENT OF THE CASE

A. The Consumer Financial Protection Act

The 2010 CFPA established the Bureau as an "independent" regulatory agency headed by a single director for a five-year term. 12 U.S.C. § 5491(a)–(c). The Act originally limited the president's ability to remove the Bureau's director, *id.* § 5491(c)(3), but the Supreme Court invalidated that provision while this case was pending, *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

Congress vested the Bureau's rulemaking authority in "[t]he Director." 12 U.S.C. § 5512(b)(1). Under the Director's supervision, the Bureau may "prescribe rules … identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with" certain consumer transactions. *Id.* § 5531(b) ("UDAAP" or "UDAAP authority"). Congress, however, limited the Bureau's power so that consumers could make their own "responsible decisions about financial transactions." *Id.* § 5511(a)–(b); *see also id.* § 5512(b)(2)(A). These limits include narrowly defining the practices that can be regulated as "unfair," *id.* § 5531(c)(1), or "abusive," *id.* § 5531(d).

B. Payday and Installment Loans

The loans at issue here are short- and medium-term, small-dollar consumer-finance products provided by non-bank lenders to consumers lacking access to more traditional forms of credit. *See* Dennis Shaul, Community Financial Services Association of America, Comment Letter on Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans, at 6–14 (Oct. 7, 2016) ("Shaul Comment") (ROA.1032–40). A typical payday-loan transaction involves a two-week or thirty-day loan for a few hundred dollars with a service charge of about $15 per $100 borrowed. *Id.* at 7 (ROA.1033). A typical installment loan involves a higher principal amount to be paid back over multiple installments. *Id.* at 54–58 (ROA.1080–84). Preauthorized repayment, through post-dated checks, regularly scheduled bank withdrawals, or other payment mechanisms is a common feature of many of these loans. *See* 82 Fed. Reg. 54,472, 54,499 (Nov. 17, 2017). As in other contexts (*e.g.*, automatic bill payment), the use of preauthorized payments provides numerous consumer benefits, including greater access to credit, substantial convenience, fewer missed payments, and lower costs. *See, e.g.*, *id.* at 54,720; Shaul Comment at 43–46 (ROA.1069–72).

C. 2017 Rule and Ensuing Litigation

1. In 2016, President Obama's CFPB director, Richard Cordray, invoked the Bureau's UDAAP authority to propose a rule that would fundamentally alter the

small-dollar-lending industry. The rulemaking straddled the administrations of Presidents Obama and Trump: Cordray finalized the rule in November 2017 during the first year of the Trump administration. It is uncontested that, but for the later-invalidated removal restriction, President Trump would have replaced Cordray before he finalized the Rule. *See* Appellee's Opp'n Mot. Extend Stay, Dkt. 00516052020 (Oct. 12, 2021) ("Opp'n"). Cordray himself explained that "the threat that I would be fired as soon as President Trump took office loomed over everything." Richard Cordray, *Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy* 185 (2020); *see also* Kate Berry, *In Tell-All, Ex-CFPB Chief Cordray Claims Trump Nearly Fired Him*, American Banker (Feb. 27, 2020), https://www.americanbanker.com/news/in-tell-all-ex-cfpb-chief-cordray-claims-trump-nearly-fired-him. This threat loomed largest over what Cordray described as his "last big fight," "the payday lending rule." Cordray, *supra*, at 198. Cordray even "prepare[d] a lawsuit to contest a firing." *Id.* at 185.

But "President Trump was advised to hold off on firing Cordray because the Supreme Court had not yet weighed in on [the] 'for cause' provision," Berry, *supra*, while the D.C. Circuit, less than one month into Trump's term, had vacated and agreed to reconsider en banc a decision invalidating the removal provision. *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Feb. 16, 2017) (per curiam); *see also* Cordray, *supra*, at 187 ("[o]ur pending [en banc] request … made it harder to fire

me”). Eventually, the President and Cordray “negotiated a temporary truce to await … legal …events.” Cordray, *supra*, at 187. Before the courts could rule, Cordray finalized the Rule and resigned.

2. The Rule originally imposed two major limits on practices the Bureau designated as “unfair” and “abusive.” *First*, its “underwriting provisions” prohibited making payday loans unless the borrower could satisfy a draconian “ability to repay” test that would have eliminated more than 90% of all such loans. 12 C.F.R. § 1041.4 (repealed); 82 Fed. Reg. at 54,826–27. The Bureau would later repeal these provisions. *See infra* pp. 7–8.

Second, the Rule’s “payment provisions” restricted covered lenders’ ability to obtain loan payments via preauthorized account access. When such a transfer-payment fails because the consumer has insufficient funds, the consumer’s bank may charge him a nonsufficient-funds (“NSF”) fee. 82 Fed. Reg. at 54,723. To limit the amount of times a consumer can be charged a fee for the same payment, NACHA, the organization that governs the ACH network, prohibits entities from attempting to collect the same payment more than three times. *Id.* at 54,502, 54,728. The Bureau went further, forbidding a covered lender to attempt an authorized withdrawal from a bank account after the lender’s second consecutive attempt failed due to insufficient funds, unless the lender obtains the consumer’s new and specific authorization for further withdrawals. 12 C.F.R. § 1041.7. And, unlike NACHA,

the Bureau applied its rule to debit- and prepaid-card payments, which do not typically result in NSF fees, and across separate payments of installment loans, which typically occur after a consumer has had an opportunity to replenish the funds in his bank account. 82 Fed. Reg. at 54,746, 54,753.

3. In April 2018, Plaintiffs sued to enjoin the Rule arguing that the CFPA's removal restriction was unconstitutional and rendered the rule invalid. ROA.54. They also argued that the Rule exceeds the Bureau's statutory authority and otherwise violates the APA. *Id.* The Bureau announced that it would reconsider the Rule, so the district court stayed the litigation and the Rule's compliance date.

In early 2019, the Bureau initiated rulemaking proceedings to revoke only the underwriting provisions. *See* 84 Fed. Reg. 4,252 (Feb. 14, 2019). It acknowledged certain key flaws in the Rule, including that the prior director had misinterpreted the scope of the Bureau's UDAAP authority. *Id.* Commenters, including Plaintiff CFSA, also urged revocation of the payment provisions, pointing out that they suffered from similar legal flaws, including the same misinterpretation of UDAAP authority that formed one basis for the Bureau's revocation of the underwriting provisions.

On June 29, 2020—while this case was stayed and the revocation rulemaking was pending—the Supreme Court held that the Bureau was unconstitutionally

structured and invalidated the CFPA's removal restriction. *Seila Law*, 140 S. Ct. at 2207, 2209–11.

Eight days later, the Bureau announced a final rule revoking the underwriting provisions. *See* 85 Fed. Reg. 44,382 (July 22, 2020) ("Revocation Rule"). Among other things, the Revocation Rule disavowed the UDAAP legal standard used in the 2017 Rule, and adopted what the Bureau determined was the correct interpretation of the relevant statutory language. *Id.* at 44,390–94. The Bureau, however, refused to address comments about the payment provisions because those provisions were "outside the scope" of the rulemaking. *Id.* at 44,388, 44,444.

The Bureau at the same time released a perfunctory notice purporting to "affirm[] and ratif[y] the payment[s] provisions of the 2017 Final Rule." 85 Fed. Reg. 41,905-02 (July 13, 2020). This purported ratification occurred outside notice-and-comment rulemaking and failed to address how the Bureau could ratify components of a rule that had relied (in the Bureau's own assessment) on an incorrect interpretation of UDAAP authority. *Id.* The Bureau also denied a 2018 petition from CFSA member Advance Financial requesting amendment of the payment provisions. *See* ROA.1019–26.

The district court lifted the litigation stay, ROA.635–36, and Plaintiffs amended their complaint to add claims challenging the Bureau's ratification and the

denial of Advance Financial's petition, ROA.639–80. Following motion practice, the court granted summary judgment for Defendants. ROA.1758–82.

The court first concluded that the unconstitutional removal provision did not render the Rule void *ab initio*. Its entire analysis rested on one block-quoted passage from *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which explains only that agency actions taken by unconstitutionally insulated officers are not always automatically void. *See* ROA.1763. It then concluded that Plaintiffs received a "meaningful remedy" when the subsequent Director ratified the payment provisions without actually undertaking notice-and-comment rulemaking. ROA.1764. The court also rejected Plaintiffs' statutory arguments, primarily reasoning that the Bureau's initial rulemaking combined with the unilateral ratification satisfied the agency's statutory duties. *See* ROA.1764–72.

On September 9, 2021, Plaintiffs timely filed their notice of appeal. ROA.1786. On October 14, 2021, this Court granted a stay pending appeal. Dkt. 00516055854 (Oct. 14, 2021).

SUMMARY OF THE ARGUMENT

The decision below upholding the Rule should be reversed for several independent reasons.

I. The Rule was issued by an unconstitutionally structured agency after President Trump was prevented from removing Director Cordray. Both the normal

rules for Article II violations and basic remedial principles compel invalidation of the Rule. The Supreme Court's recent decision in *Collins v. Yellen* in no way alters these principles or requires a different result.

Collins' case-specific analysis of the appropriateness of the far-reaching, retrospective monetary relief at issue there does not apply to the prospective relief sought here. In any event, the *Collins* test for retrospective monetary relief *confirms* the Rule's invalidity because it is undisputed that the later-invalidated removal restriction in fact prevented President Trump from firing Director Cordray before Cordray promulgated the 2017 Rule.

Ratification cannot cure this constitutional defect because a valid legislative rule requires a valid, prospective rulemaking.

The Rule is also unconstitutional because the Bureau's self-funding mechanism violates the Appropriations Clause and because the UDAAP authority on which the Rule is based violates the non-delegation doctrine.

II. Even if ratification could sometimes cure defects in rulemaking, the Bureau's ratification of the payment provisions violates both the CFPA and APA.

The "ratification" substantively consisted of a single, perfunctory paragraph, a footnote, and a signature. But because the ratification resulted in a legislative rule, the Director needed to, but did not, undertake notice-and-comment rulemaking. Nor did she conduct, much less explain, the cost-benefit or UDAAP analyses required

by the CFPA. At best, she impermissibly and retroactively relied on a stale 2017 rulemaking record to justify her unexplained unilateral action.

The "ratification" is also arbitrary and capricious because it cannot be reconciled with the Bureau's simultaneous revocation of the Rule's underwriting provisions. The Revocation Rule squarely rejected the Bureau's prior, unlawful interpretations of UDAAP authority, which formed the basis for both the revoked underwriting provisions and the "ratified" payment provisions. The Revocation Rule also ripped away a foundational premise of the Bureau's 2017 cost-benefit analysis, namely that the underwriting provisions would greatly constrain the number of loans requiring application of the payment provisions, thereby significantly reducing the overall costs of those provisions. And the Bureau has never conducted a cost-benefit analysis to justify the costs of the payment provisions without the underwriting provisions.

III. Ratification and revocation rulemaking aside, the payment provisions themselves have always been arbitrary and capricious and inconsistent with several statutory limits on the Bureau's authority. No permissible interpretation of the CFPA brings regulation of preauthorized payment-transfer attempts for which consumers freely and knowingly bargain within the Bureau's UDAAP authority. And the Bureau's 2017 rationales fail to comport with baseline APA requirements like relying on the actual evidence presented to justify agency actions.

While the entire Rule is defective, it at least must be set aside and enjoined insofar as it irrationally extends the payment provisions to (1) separate installments of multi-payment installment loans and (2) payments made by debit cards and prepaid cards. These transactions do not engender the harms targeted by the Rule, and applying the Rule to them makes consumers, lenders, and the public worse off.

After all these errors, the Bureau had another chance to address rulemaking deficiencies when Advance Financial submitted a rulemaking petition seeking reasonable amendments to the defective payment provisions. But the Bureau also arbitrarily denied this petition. At the very least, the Bureau should be required to complete a minimally competent notice-and-comment rulemaking addressing the concerns raised in the rulemaking petition.

STANDARD OF REVIEW

This Court "reviews a district court's grant of summary judgment de novo, applying the same legal standards as the district court." *Petro Harvester Operating Co., L.L.C. v. Keith*, 954 F.3d 686, 691 (5th Cir. 2020). The issues presented herein are legal and "purely a matter of construction of the APA," CFPA, and Constitution. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001). The agency's "conclusions of law" "are not given deference." *Id.*

ARGUMENT

I. THE RULE IS INVALID BECAUSE IT WAS PROMULGATED BY A DIRECTOR UNCONSTITUTIONALLY EXERCISING GOVERNMENTAL AUTHORITY

Plaintiffs are entitled to prospective relief to remedy constitutional deficiencies in the Rule and 2016–2017 rulemaking proceedings. The Bureau lacked authority to promulgate the Rule in 2017 because its director at the time was unconstitutionally insulated from Presidential removal. Since the director was not subject to plenary Presidential control due to the removal restriction, he could not lawfully exercise this executive power—that power could only be exercised by the President or his removable-at-will alter egos. Only a new notice-and-comment rulemaking, led by a removable-at-will director, can remedy the constitutional deficiency.

Collins does not alter this analysis. Assuming *arguendo* that *Collins* informs the remedial inquiry, it confirms Plaintiffs' entitlement to a remedy because the removal restriction in fact prevented President Trump from firing the unconstitutionally insulated director before he promulgated the Rule. The Bureau's attempted "ratification" cannot cure this constitutional defect. And, in any event, the Bureau's actions cannot stand because the Bureau's self-funding mechanism violates the Appropriations Clause and the Bureau's UDAAP rulemaking violates the non-delegation doctrine.

A. The Separation-of-Powers Violation Identified in *Seila Law* Renders the Rule Invalid

The ruling in *Seila Law*—that the CFPA's removal restriction violated separation-of-powers principles—renders the Rule invalid. An agency whose very "composition violates the Constitution's separation of powers" simply "lacks authority to" act. *FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). Under the "normal rules for Article II violations," "[w]hether unconstitutionally installed or improperly unsupervised, officials cannot wield executive power except as Article II provides." *Collins*, 141 S. Ct. at 1799 (Gorsuch, J., concurring in part). Thus, where a party timely challenges agency action by an unconstitutionally structured agency, the default remedy to "cure the constitutional error" is to set aside or enjoin the original action and require the agency to conduct the tainted agency proceeding anew. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *see also 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"). That is why, for instance, the Supreme Court in *Bowsher* affirmed a decision setting aside the order of an official unlawfully insulated from presidential removal as "without legal force and effect," *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986). *See Bowsher v. Synar*, 478 U.S. 714, 736 (1986).

A legislative rule like the Rule here must undergo valid notice-and-comment procedures supervised by a lawfully constituted agency before it can take effect. *See* 5 U.S.C. § 553; 12 U.S.C. § 5512(b); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). The CFPA vests the Bureau's rulemaking authority in "[t]he Director." 12 U.S.C. § 5512(b)(1). From the time the Bureau initiated the challenged rulemaking proceeding through promulgation of the final rule in 2017, there was no lawful director to exercise rulemaking authority. Rather, that power could only be lawfully exercised by a removable-at-will director since that executive power is exclusively vested in the President and his "alter ego" subordinates—not interlopers free from the President's control. Therefore, the Rule is invalid, and the Bureau must undertake a new notice-and-comment rulemaking if it wishes to make the payment provisions effective.

B. To the Extent It Applies, *Collins* Confirms That the Rule Is Invalid

Below, the Bureau argued, and the district court thought, that the Supreme Court's recent decision in *Collins* limited the equitable relief available here. That is incorrect. The *Collins* framework does not apply to rulemaking challenges. But even if it does, *Collins* requires relief here because the statute's removal provision in fact prevented President Trump from firing Director Cordray before Cordray finalized the Rule.

1. *Collins*, at most, established a new standard only for the far-reaching "retrospective relief" at issue there—unwinding financial transactions involving hundreds of millions from the Treasury. 141 S. Ct. at 1772–73, 1780. Under those circumstances, an unconstitutional removal provision does not automatically require that *all* agency actions "be completely undone." *Id.* at 1787–88 & n.24. Rather, to obtain such "retrospective relief," a plaintiff must show that the "unconstitutional provision … inflict[ed] compensable harm" by, for example, "stand[ing] in the way" of presidential removal. *Id.* at 1788–89.

Regardless of how *Collins* informs the *retrospective* calculation, *Collins* does not limit *prospective* relief (like the injunction sought here) that would follow from an unlawful removal provision. *See id.* at 1780, 1787 (noting that intervening events mooted the requested prospective relief). As Justice Gorsuch explained, the Court's opinion is "a product of its unique context" and does not question the Court's prior precedent that "in the past consistently vindicated Article II both in reasoning and in remedy" by "authorizing more meaningful relief in other situations." *Id.* at 1799 (Gorsuch, J., concurring in part); *see also id.* at 1793 n.5 (Thomas, J., concurring) (relying on *Seila Law* to explain that the "combination" of an unlawful removal provision and statutory enforcement provisions "can produce a separation-of-powers violation that renders Government action unlawful").

In cases seeking prospective relief, courts apply the ordinary rule that acts by officers subject to unconstitutional removal restrictions must be invalidated. *See Seila Law*, 140 S. Ct. at 2196; *Bowsher*, 478 U.S. at 734. This makes perfect sense. An officer not subject to plenary Presidential control cannot properly exercise the "executive power" vested exclusively in the President—only the President's alter ego may do so. Thus, a limited-removal CFPB director was not a proper officer authorized to exercise the statute's grant of authorities. Indeed, restrictions on the President's removal power are greater infringements on the President's Article II power than restrictions on appointment since "once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher*, 478 U.S. at 726. It would therefore be illogical to suggest that an improper appointment that only indirectly affects the officer's performance is always subject to prospective relief, while a removal restriction, which more directly affects Presidential control and the manner in which the officer performs his duties, is subject to prospective relief only in the bizarrely limited circumstances hypothesized by the Bureau.

Thus, *Collins*' fact-specific exception for retrospective relief cannot be extended to the prospective context without running headlong into core Article II and remedial principles. There is also an obvious practical difference between retrospective and prospective relief. The *Collins* plaintiffs wielded the constitutional

structural flaw as a sword to attack the validity of long-completed transactions; Plaintiffs here invoke the Constitution as a shield against the Bureau's unlawful exercise of prospective rulemaking authority. *See NRA Pol. Victory Fund*, 6 F.3d at 828 (granting relief from agency action to parties that "raise [a] constitutional challenge as a defense"). The factbound need to avoid far-reaching financial disruption in *Collins* is wholly inapplicable to the prospective relief sought here. *See* 141 S. Ct. at 1789 (focusing on "compensable" harm); *id.* at 1799 (Gorsuch, J., concurring in part); *id.* at 1793 n.5 (Thomas, J., concurring).

Plaintiffs here timely challenged an invalid rulemaking, which produced a Rule that has never taken effect. The relief sought will entail no disruption, no unwinding of transactions, and no harm to the federal fisc. Accordingly, Plaintiffs are "entitled to relief," which at least includes a new notice-and-comment proceeding before a constitutionally structured agency. *Lucia*, 138 S. Ct. at 2055; *see also Ryder v. United States*, 515 U.S. 177, 182–83 (1995).

2. In any event, even if *Collins* does inform the analysis here, its framework plainly requires setting aside the Rule. *Collins* held that plaintiffs are "entitle[d]" even to retrospective relief if a removal provision "inflict[ed] compensable harm" by, for example, actually "prevent[ing]" the President from removing a director he wished to replace. 141 S. Ct. at 1788–89. The district court skipped over this step of the *Collins* analysis. Applied here, it confirms that

Plaintiffs are entitled to relief because the removal provision "st[oo]d in the way" of removal. *Id.* at 1789.

No one seriously contends that, absent the restriction, Director Cordray would have been the lone Obama holdover to continue to serve in the Trump Administration. Rather, it is beyond dispute—and, indeed, the Bureau does not dispute—that before Director Cordray promulgated the Rule, "President [Trump] … would [have] remove[d] [him] if the [unconstitutional] statute did not stand in the way." *Id.*; *see also supra* pp. 4–6 (detailing how the removal restriction thwarted President Trump's removal of Cordray). Plaintiffs therefore satisfy any *Collins* standard.

Below, the Bureau did not dispute any of this, but instead cited the 2020 "ratification" as evidence that a Trump-appointed director would have promulgated the payment provisions. That is as irrelevant as it is unknowable. *Collins* affords relief once a plaintiff establishes (as here) that the unconstitutional removal provision stood in the way of a desired removal. Neither *Collins* nor any other precedent calls for further analysis of a "counterfactual world" to determine whether a different director would have promulgated a different rule containing the challenged provisions. Indeed, *Seila Law* flatly rejects the notion that "a litigant wishing to challenge an executive act on the basis of the President's removal power must show that the challenged act would not have been taken if the responsible

official had been subject to the President's control." *Seila Law*, 140 S. Ct. at 2196; *see also NRA Pol. Victory Fund*, 6 F.3d at 824–25 (challengers "need not show that the [agency] would have acted differently if it were constitutionally composed"). In contrast, the Bureau's counterfactual test ("only when … inability to fire … affect[s] the complained-of decisions") appears only in Justice Kagan's *Collins* concurrence, *see* 141 S. Ct. at 1801, which of course cannot redefine the majority's test, *see Maryland v. Wilson*, 519 U.S. 408, 413 (1997).

In short, the Court need only ask whether the removal restriction thwarted President Trump's desire to fire Director Cordray before the Rule's promulgation. There is no dispute that it did. Thus, the removal provision resulted in harm: an illegal rule promulgated by a director unconstitutionally exercising the President's executive power. The appropriate remedy is a new rulemaking.

Finally, even if relevant, it is quite doubtful that a Trump appointee would have taken the same action as Cordray on the payment provisions. That Director Kraninger perfunctorily "ratified" the existing provisions in 2020 says nothing about whether a (likely different) director appointed by President Trump in 2017 would have agreed with the provisions in the first instance or undertaken the "immense challenge," Cordray, *supra*, at 203, of considering and responding to over a million

public comments and finalizing those provisions in a rule, let alone a rule with identical requirements and the same administrative record.[1]

C. "Ratification" Cannot Cure the Constitutional Defect

The Bureau's 2020 "ratification" of the payment provisions cannot cure the constitutional injury caused here by the removal restriction. Ratification is an agency-law concept that allows a principal to approve the prior unauthorized actions of an agent. The Government has only recently relied on this common-law agency law—developed primarily through private, quasi-contractual precedent—to justify unlawful actions taken by unconstitutionally structured, statutorily created administrative agencies. While undoubtedly more convenient for the Government, this nascent, meretricious application of private "agency" law should not be stretched to allow circumvention of basic due-process and statutory protections that provide guardrails for legislative rulemaking. Ratification of acts taken by unconstitutionally structured agencies is inconsistent with both agency law and first principles of constitutional and administrative law.

1. Under black-letter agency law, "it is essential that the party ratifying should be able … to do the act ratified" *both* "at the time the ratification was made"

[1] At a minimum, there is no path to affirmance on the current record. To the extent *Collins* applies and presents a factual question—on removal before promulgation or on the Bureau's unprecedented counterfactual test—summary judgment was inappropriate and this Court should at least remand for discovery. *See* Fed. R. Civ. P. 56.

and "at the time the act was done." *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994). In other words, ratification requires two entities—a principal who had authority to act at the time in question, and an agent who did not. But here there was no entity—neither Bureau nor director—with such authority at the time the Rule was promulgated.

The statute vests rulemaking power in the director as head of the Bureau. 12 U.S.C. §§ 5491(b), 5512(b)(1). But when the Rule was finalized, neither Director Cordray nor the Bureau through him was properly exercising that power because the unconstitutional removal provision had thwarted President Trump's effort to install his own director. *See supra* pp. 4–6, 18–19. So the ratification theory's foundational principal-agent model has no purchase here. Simply put, ratification is impossible because the constitutional infirmity in this case concerns the unlawful exercise of governmental authority by the Bureau and its director, not the authority of an agent to make decisions on behalf of the Bureau or its director. Thus, "the effort of the [Bureau] to authorize the [Rule] did not breathe life into it." *NRA Pol. Victory Fund*, 513 U.S. at 90.

2. More fundamentally, ratification of an otherwise invalid rule is inconsistent with principles of constitutional and administrative law. That follows directly from the Supreme Court's decision in *Lucia v. SEC*, which vacated an adjudication conducted by an improperly appointed officer. Once the *Lucia* Court

found that the proceeding suffered from constitutional structural defects, it did not even entertain the possibility that a duly appointed officer could simply ratify the prior decision. Instead, the Court held that "the 'appropriate' remedy for" an unconstitutionally structured agency proceeding is "a *new 'hearing* before a properly appointed' official." 138 S. Ct. at 2055 (emphasis added). And *Lucia* did not break new remedial ground. It instead followed the foundational principle that "[w]here no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached." *Norton v. Shelby County*, 118 U.S. 425, 449 (1886); *Ringling v. City of Hempstead*, 193 F. 596, 601 (5th Cir. 1911) ("An unconstitutional law is null and void, and proceedings had under it afford no basis for subsequent ratification or retroactive validation.").

A meaningful remedy—here, a new rulemaking—is also required by the Supreme Court's holdings that separation-of-powers "remedies are designed" in part "to create '[]incentive[s] to raise'" structural constitutional challenges. *Lucia*, 138 S. Ct. at 2055 n.5 (quoting *Ryder*, 515 U.S. at 183 (alteration in original)). And this Court has consistently avoided construing the APA in a way that encourages rote rubberstamping like the ratification at issue here. *See, e.g.*, *Glob. Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1299 n.10 (5th Cir. 1983) ("There is a strong institutional interest in preventing agencies from promulgating inadequately considered rules in

the perhaps half-formed belief that the courts will surely think of some way of upholding them.").

Ratification is especially inappropriate in the context of an invalid legislative rule because such a rule requires more than a director's signature. Agencies must clear a number of hurdles, including a regulatory flexibility analysis that gives voice to small businesses, *see* 5 U.S.C. §§ 603–04, 609, and extensive engagement with public comments (here numbering over a million). Congress did not create this elaborate procedure as an empty song and dance. Rather, a valid rulemaking ensures "fairness and mature consideration of rules having a substantial impact on those regulated." *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011). And "no party can be adversely affected by an agency rule that should have been but was not submitted for notice and comment." *Shell Offshore Inc.*, 238 F.3d at 631. To comply with the Constitution, the CFPA, and the APA, a validly constituted agency led by lawfully removable director must supervise the rulemaking from start (developing the notice of proposed rulemaking) to finish (promulgating the final rule).

At a minimum, a constitutional defect demands at least the same remedy that flows from statutory missteps. Where errors require an agency to revisit its action, the agency "must comply with the procedural requirements for new agency action." *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020); *see also* 5 U.S.C. § 706(2) (requiring courts to "hold unlawful and set aside agency

action"). In particular, where a rulemaking is substantively or procedurally improper—under the APA or an agency's organic statute—the Court normally vacates or enjoins the invalid rule and remands to the agency "for further rulemaking proceedings." *Chem. Mfrs. Ass'n v. EPA*, 885 F.2d 253, 266 (5th Cir. 1989); *see also Shell Offshore Inc.*, 238 F.3d at 631. The default remedial practice is not to ask whether the current agency head(s) approve the end result of the defective rulemaking anyway. Rather, the agency head(s) must "make an active inquiry into the facts and … take whatever steps are required to comply with the [agency's] legislative mandate." *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 824 (D.C. Cir. 1975).

3. "[T]he Supreme Court has not decided whether structural constitutional defects can be cured by ratification." Order, *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, No. 17-cv-1323 (D. Del. Oct 13, 2021) (Bibas, J., sitting by designation). The non-binding, out-of-circuit ratification cases cited by the district court and Bureau do not establish ratification as an appropriate remedy for the unlawful rulemaking here. Almost all of those cases involved ratification of actions, like enforcement decisions and administrative complaints, that (in contrast to a

rulemaking) an agency head could take unilaterally at any time without statutorily prescribed notice-and-comment procedures.[2]

For example, the district court primarily relied on *CFPB v. Gordon*, where the Ninth Circuit upheld the Bureau's ratification of the commencement of an enforcement action. 819 F.3d 1179, 1191–92 (9th Cir. 2016). The district court reasoned that "*Gordon* identifies the Bureau as the principal—and presumably the Director as its agent." ROA.1765. Putting aside whether that is true for enforcement actions, it cannot be for rulemakings. The CFPA allows "[t]he Bureau [to] act in its own name and through its own attorneys" in bringing enforcement actions. 12 U.S.C.

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[2] The lone exception is *Moose Jooce v. FDA*, which does address a ratified rulemaking, but the argument there was under-developed and the plaintiffs had not challenged ratification below. 981 F.3d 26, 29 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021). Rather than deem the argument forfeited, the D.C. Circuit rejected it based on a single inapposite D.C. Circuit precedent that predated *Lucia* and *Seila Law* and blessed ratification of an enforcement decision. *Id.* (citing *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996)). *Moose Jooce* is also distinguishable because, unlike here, the agency and its head concededly had authority to promulgate the rule; the question was whether a subordinate officer could exercise rulemaking power delegated to her by the commissioner. *See supra* pp. 21–22 (explaining why this case does not fit that paradigm). Moreover, the case was a "poor vehicle" to address ratification because the plaintiffs conceded that a commissioner who ratified the rule could have relied on the original rulemaking record "consistent with the APA." Opp'n Br. at 19–20, *Moose Jooce*, 141 S. Ct. 2854 (No. 20-1203) (Government representing to the Supreme Court that the ratification issue was not presented); Pet. at 19 n.16, *Moose Jooce*, 141 S. Ct. 2854 (No. 20-1203). That key premise is a *central* disputed issue here. *See infra* Parts II & III.

§ 5564(b). But only "[t]he Director may prescribe rules … as may be necessary or appropriate to enable the Bureau" to carry out the CFPA. *Id.* § 5512(b)(1).

And this dispositive distinction aside, it is difficult to envision agency actions more fundamentally poles apart for remedial purposes than rulemakings and enforcement decisions. Whether to initiate a court action or internal administrative complaint revolves around "internal [agency] deliberations," and in almost all cases, courts have "no statutory authority to review the [agency's] decision to sue." *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996).

Rulemakings, in contrast, *require* public input and compilation of a publicly available record. 5 U.S.C. § 553. When challenged, the agency must justify its rule in court based on the contemporaneously developed record. Tellingly, the district court's own cited authority even distinguishes other agency actions from defective rulemaking proceedings, where courts "require[] the agency to initiate new rulemaking proceedings before re-promulgating the vacated rule" because the APA requires "new notice-and-comment proceedings … for a new rulemaking." *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 125 (D.C. Cir. 2015) (cited at ROA.1775).

In short, the Bureau's cases establish only that ratification is effective when the successor follows the procedure required of the prior unconstitutional decision-maker, *e.g.*, exercising the agency head's unilateral discretion. They do not allow

the successor to ignore and violate procedures required of *all* agency actors. Rulemaking and adjudication require certain procedures before making a decision. Labeling the decision a "ratification" does not authorize ignoring these generally applicable procedures. The fact that the initial decision was unconstitutional does not somehow *enhance* the successor's power by enabling her to violate procedural norms.

Thus, none of the out-of-circuit cases involve 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 only "proper remedy" for an invalid rulemaking is a valid rulemaking. *Lucia*, 138 S. Ct. at 2055.

D. The Rule Is Also Invalid Because the Bureau's Structure Continues to Violate Core Separation-of-Powers Principles

In all events, the challenged actions *remain* invalid because the Bureau continues to violate two additional core separation-of-powers principles.

1. The Bureau's funding mechanism usurps Congress's role in the appropriation of federal funds. The Constitution's Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. In violation of this provision, the Bureau takes federal money without an appropriations act: The

Director has exclusive authority to set the Bureau's budget and is exempt even from mere "review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(1)–(2). This unconstitutional arrangement renders invalid any assertion of the Bureau's regulatory authority.

The Bureau and the district court suggested that the 12% cap of the Federal Reserve's operating expenses remedied any Appropriations Clause issue because Congress passed that statute. ROA.1773. But whether a separation-of-powers violation exists does not "depend on … whether the encroached-upon branch approves the encroachment." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010). Condoning this "ok by Congress" analysis would mean no federal statute could ever violate the Appropriations Clause, because Congress passes all such statutes.

Here, the form of budgetary insulation 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). And because of the President's veto and removal power, it is highly unlikely that future Congresses can exercise *any* oversight over the Bureau's budget as currently structured. *See also* Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733, 1737 (2013) (explaining that self-funding is "the ultimate

weapon of legislative entrenchment"). Given the Bureau's vague statutory charge, the President could require the Director to requisition up to half a billion dollars to carry out any number pet projects, confident that Congress will be unlikely to muster a veto-proof super-majority to change the Bureau's budget or budgeting process.

2. The Bureau also usurps Congress's role by unconstitutionally exercising legislative powers granted exclusively to Congress. U.S. Const. art. I, § 1. Under existing doctrine, when Congress bestows authority on agencies, it must articulate an intelligible principle. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–22 (1935). There is no intelligible principle in delegating appropriations to the Director, 12 U.S.C. § 5497(a), or in the vague and sweeping UDAAP authority invoked to justify the Rule, *id.* § 5531(b).

Additionally, the delegation here clearly violates the version of the non-delegation doctrine now endorsed by a majority of the current Supreme Court. The Bureau's UDAAP authority—used in the Rule to "write a code of conduct governing private conduct"—does not "fill up the details" of a policy decision made by Congress, constitute executive fact-finding, or execute a non-legislative responsibility. *Gundy v. United States*, 139 S. Ct. 2116, 2131–32, 2136–37, 2144 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *see also id.* at 2130–31 (Alito, J., concurring in the judgment); *id.* at 2130 (majority op.) (noting that Justice Kavanaugh took no part in *Gundy*); *Paul v. United States*, 140 S. Ct. 342

(2019) (Kavanaugh, J., respecting the denial of certiorari) (endorsing the nondelegation approach articulated by "Justice Gorsuch's thoughtful *Gundy* opinion"). For this reason, too, the Rule is invalid.

II. THE BUREAU'S ATTEMPTED "RATIFICATION" FAILS ON ITS OWN TERMS

Even if agencies could theoretically ratify invalidly promulgated rules, *this* ratification was unlawful and arbitrary and capricious. The Director substantively "ratified" the payment provisions in one paragraph and a footnote, noting only that she was "familiar with the payment provisions and has also conducted a further evaluation of them for purposes of th[e] ratification." 85 Fed. Reg. at 41,906.

The Director lacks authority under the APA and CFPA to retroactively rubberstamp a stale rulemaking proceeding. Additionally, the ratification is arbitrary and capricious because it cannot coexist with the revocation rulemaking.

A. The Ratification's Retroactive Rulemaking Violates the APA and CFPA

The Bureau's ratification seeks to "prescribe law," and thus constitutes a "rule." 5 U.S.C. § 551(4). The ratification accordingly was a "rule making": the "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5). But the ratification did not undergo notice-and-comment, and thus cannot have binding effect. *See Shell Offshore Inc.*, 238 F.3d at 631.

Putting aside the dispositive notice-and-comment failure, an agency "may not exercise its authority 'in a manner that is inconsistent with the administrative

structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). And assuming *arguendo* the Director can make rules via a conclusory memo, she still must comply with CFPA limitations on rulemaking authority. These limitations include the statutory directives to conduct a cost-benefit analysis, 12 U.S.C. § 5512(b)(2), and conclude that an "act or practice" is unfair or abusive, *id.* § 5531.

When reviewing agency action, courts cannot fill in the blanks for agencies or rely on agency memoranda lacking sufficient explanation. *See Regents*, 140 S. Ct. 1891 (vacating an agency Secretary's decision by memo where it "fail[ed] to adequately address important factors bearing on her decision"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). While the ratification alludes to an "evaluation" of the payment provisions, it does not explain how ratification complies with the Director's statutory duties. And the footnoted reference to the stale and unlawful 2016–2017 rulemaking proceeding cannot carry the Director's burden. *See Regents*, 140 S. Ct. at 1909 & n.3 (explaining that agency actions require "contemporaneous explanations").

Furthermore, the *prospective* nature of the Director's rulemaking authority is incompatible with the *retroactive* nature of ratification. In "ratif[ying]" the 2017 Rule, the Bureau unlawfully purported to "relate[] back" the ratification to "the Rule published on November 17, 2017," 85 Fed. Reg. at 41,905—and to its stale

rulemaking record—without identifying any authority to promulgate retroactive rules. Congress must expressly convey "the power to promulgate retroactive rules." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *id.* at 222 (Scalia, J., concurring) (noting that there is no "general authority to issue retroactive rules"). The CFPA does not convey that authority here. *Cf.* 12 U.S.C. § 5531.

Condoning this ratification contravenes the Constitution, the APA, and the CFPA. And approving such a "remedy" gives a blank check to all agency heads to retroactively, unilaterally legislate by fiat.

B. The Ratification Is Arbitrary and Capricious Because the 2020 Revocation Rulemaking Eliminated the Justifications for the Payment Provisions

The ratification cannot coexist with the Bureau's 2020 rulemaking revoking the underwriting provisions. The ratification acknowledged the Revocation Rule but purported to be "independent of that rule." 85 Fed. Reg. at 41,905. But the Revocation Rule eliminated key justifications for the payment provisions, thus rendering the Bureau's ratification of those provisions arbitrary and capricious.

"[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (cleaned up). If the Bureau ratified the 2017 Rule, it must "defend its actions based on the reasons it gave when it acted." *Regents*, 140 S. Ct. at 1909. The Bureau failed to do that.

Instead, it ratified a 2017 analysis that rested on at least two premises that the Bureau had just rejected in the course of revoking the underwriting provisions.

1. The ratification is inconsistent with the Bureau's interpretation of its UDAAP authority

a. As originally promulgated in 2017, the payment provisions rested on UDAAP interpretations that the Bureau later rejected in revoking the underwriting provisions. The Rule found the practices at issue "abusive" partly on the ground that they took "unreasonable advantage" of consumers' "lack of understanding" of associated "risks." 82 Fed. Reg. at 54,744; 12 U.S.C. § 5531(d)(2). And it found the practices "unfair" because they were likely to cause injuries "not reasonably avoidable by" consumers (which also depended on whether consumers "lack[ed]" "understanding"). 82 Fed. Reg. at 54,740–41; 12 U.S.C. § 5531(c)(1)(A)–(B). Therefore, both the "abusive" and "unfair" designations sprang from the Bureau's interpretation of the circumstances giving rise to consumers' lack of "an understanding of the likelihood and magnitude of risks of harm associated with payday loans." 84 Fed. Reg. at 4,270; *see also* 82 Fed. Reg. at 54,472, 54,597–98, 54,617, 54,740–41. But in the 2020 rulemaking, the Bureau simultaneously rejected that definition of consumer "understanding" as too stringent and unsupported by the statutory text.

Specifically, the Bureau's 2020 revocation faults the 2017 Rule for concluding that an industry practice might be unfair or abusive whenever consumers

lack a "*specific* understanding of their *individualized* risk" associated with the practice. 85 Fed. Reg. at 44,390 (emphasis added); *see also, e.g.*, *id.* at 44,394. Rather, the Bureau explained in 2020, consumers need only have a "general" understanding of the risks at stake; "understand[ing] their individualized risk" is not necessary. *See id.* at 44,391, 44,394. But the interpretation rejected in 2020 undergirded the payment provisions in 2017: Under the Bureau's 2017 analysis, it was insufficient that consumers would "understand as a general matter that they may incur … fee[s]" for failed payment-transfer attempts, 82 Fed. Reg. at 54,740; for the practice to be non-abusive, consumers must also have been aware of the *particular degree* of the "severity of the risk they are exposing themselves to in the circumstances," *id.* at 54,741.

This revised, broader definition of consumer "understanding" was the basis for the revocation rulemaking and the 2020 repeal of the underwriting provisions. But without any explanation or even acknowledgement, the Bureau turned around and *ratified* the payment provisions, even though they were based on the same narrower definition that the Bureau had simultaneously rejected in a rulemaking.

The Bureau created a similar inconsistency as to whether the prohibited payment practices are "abusive" because they take advantage of consumers' inability to protect their own interests. The 2017 Rule rejected the argument that consumers could guard their own interests "by not taking out loans in the first place." *Id.* at

54,743. But the Revocation Rule concludes that consumers' "access to alternative sources of credit" proves that they *can* protect their interests by declining to take out a loan in the first place. 85 Fed. Reg. at 44,424. In this respect, too, the Bureau's ratification arbitrarily (and without explanation or acknowledgement) blessed regulations based on a 2017 UDAAP analysis that the Bureau had since squarely rejected in rulemaking.

A similar conflict exists between the Bureau's 2017 and 2020 analyses of what it means for a particular practice's harmful effects to be "not reasonably avoidable," which goes to whether the practice is "unfair" under the CFPA. The 2017 Rule declared that a consumer's decision "not to participate in the market is not considered to be a valid means of reasonably avoiding" an alleged injury. 82 Fed. Reg. at 54,737. But the Revocation Rule regards it as "well-established that consumers can reasonably avoid injury through … 'anticipatory avoidance,'" such as by "declin[ing] a product or service." 85 Fed. Reg. at 44,397. The Bureau explained that is true where, as here, consumers "in the market for covered loans do not face a take-it-or-leave-it choice," but rather "can potentially access formal credit options with varied terms and conditions and other informal credit options, such as borrowing from family and friends." *Id.*

In sum, the Bureau ratified payment provisions that rest on what the Bureau acknowledged during the revocation rulemaking to be an unduly narrow view of

consumer understanding. The breezy ratification failed not only to explain this tension but also failed to say *anything at all* about the Bureau's rationale for blessing the payment provisions notwithstanding its revised interpretation of its UDAAP authority. That is quintessential arbitrary-and-capricious agency action.[3]

b. Instead of reviewing the agency's change in position, the district court summarily concluded that "no substantive consideration about this [UDAAP] process has changed." ROA.1770. The Bureau has likewise argued that its fundamental change in position on UDAAP authority "had no bearing on the Payment Provisions." Opp'n 16. But under the APA, the Bureau cannot ratify an action perched on a UDAAP analysis that it has simultaneously dismantled root-and-branch in a rulemaking proceeding, much less do so without explaining or even acknowledging the contradiction. "That omission alone renders [the Director's] decision arbitrary and capricious." *Regents*, 140 S. Ct. at 1913.

[3] Additionally, the 2020 revocation found the 2017 Rule's analysis on underwriting to be riddled with legal and factual errors of all kinds, including misreadings of the underlying statutes, *see* 85 Fed. Reg. at 44,428; over-readings of the evidence, *id.*; miscalculations of costs and benefits, *id.* at 44,406; and over-breadth of remedies, *id.* at 44,420; *see also infra* Part III (discussing similar errors in payment provisions). The Bureau should not have assumed that the 2017 payment provisions were free of similar flaws, and its failure to address whether there were similar errors in the 2017 Rule's analysis of payments is yet another reason why the ratification is arbitrary and capricious.

The Bureau also argued that its 2020 analysis does *not* undercut the 2017 rationale for the payment provisions because consumers (1) do not even have *general* knowledge of the risks arising from the prohibited payment practices, and (2) cannot reasonably avoid the risk of fees once they already had agreed to the loan. ROA.1155–56. But this is false on both counts.

First, the 2017 Rule expressly acknowledged that consumers have a "generalized understanding" of the risks of fees resulting from multiple payment attempts, so the payment provisions were necessarily based on the more stringent (and since-rejected) idea that ignorance of specific risks suffices for "lack of understanding."[4] The Bureau's move to the broader definition of "understanding" therefore undermines a premise of the payment provisions, and the Bureau's ratification without explanation of the reversal was arbitrary and capricious.

Second, the revocation of the underwriting provisions considered potential harms arising after the consumer already had agreed to the loan, and deemed such

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[4] *See, e.g.*, 82 Fed. Reg. at 54,740 ("[W]hen consumers grant lenders an authorization to withdraw payment …, they understand as a general matter that they may incur an NSF fee from their account-holding institution as well as a returned-item fee charged by the lender…. [*S*]*uch a generalized understanding does not suffice* …. [I]t 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 …. 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. (emphasis added)).

harms "reasonably avoidable" because consumers could avoid them by simply opting not to purchase the loans. This undercut the 2017 Rule's analysis of the payment provisions, which *rejected* the idea that consumers could avoid harms by declining to purchase the loans that created them. The revocation thus contradicted the 2017 reasonable-avoidability reasoning too: "[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).

In short, on both of the related statutory concepts (abusive and unfair) the Bureau relied on one set of interpretations in its 2017 Rule, and a diametrically opposed set in revoking the underwriting provisions. The Bureau's unexplained (indeed, unconfessed) acceptance in the ratification of the defunct 2017 interpretations renders the ratification arbitrary and capricious.

2. The ratification is inconsistent with the Bureau's cost-benefit analysis

The CFPA requires the Bureau to conduct a cost-benefit analysis in connection with its rulemakings. 12 U.S.C. § 5512(b)(2). And it is well-settled that defects or "serious flaw[s]" in an agency's cost-benefit analysis "can render the [resulting] rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *accord Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153–54 (D.C. Cir. 2011) (similar).

The Bureau's 2017 cost-benefit analysis of the payment provisions turned on the ameliorative impacts of the underwriting provisions, which the revocation rulemaking completely removed. The 2017 cost-benefit analysis expressly concluded that the operation of the underwriting provisions (also known as the "ability-to-repay provisions") would "lessen the impacts of" the payment provisions:

> [T]he 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.

82 Fed. Reg. at 54,846. This foundational premise, propping up the evaluation of the payment provisions' costs, no longer stands given the Bureau's decision to simultaneously revoke the underwriting provisions while "ratifying" the payment provisions.

As the Bureau has conceded, it "expected that the Underwriting Provisions would have a major impact" and would "reduce the volume of storefront payday loans by as much as 93 percent." Opp'n 3–4 (citing 82 Fed. Reg. at 54,826). By the Bureau's own calculations, this 93% reduction would cover those loans where the consumer was most unlikely to repay (*i.e.*, the loans most affected by the payment

provisions). Therefore, by the Bureau's own admission, the payment provisions now will impose substantially higher costs on lenders than the Bureau took into account in 2017. Yet it ratified the rule anyway, without conducting a new cost-benefit analysis or even acknowledging this changed circumstance. This clearly contravenes the APA and CFPA.

The district court failed to grapple with this fundamental inconsistency after crediting the Bureau's litigation position that "the consideration of the crossover impact of the Underwriting Provisions on the Payment Provisions was limited to a couple of sentences on which the 2017 Rule's cost-and-benefit analysis did not rely." ROA.1767. But the 2017 cost-benefit analysis *did* rely on those statements. The Bureau located the above-quoted mitigation analysis within its cost-benefit analysis, specifically in a section labeled, "G. Benefits and Costs of the Rule to Covered Persons and Consumers—Payments and Notices." 82 Fed. Reg. at 54,846. And neither the district court nor the Bureau cited authority for the idea that courts should ignore a substantive point because it was articulated in only "a couple of sentences."

What matters for judicial review of an agency's reasoning is whether a certain premise figures in the analysis, not where it appears or how long it is. The point about mitigation of the payment provisions' costs clearly played a foundational role in the Bureau's 2017 cost-benefit analysis, and the Bureau does not meaningfully deny it. Since the supposed cause of the mitigation no longer existed when the

Bureau ratified the payment provisions, the Bureau's 2020 ratification cannot rely on its 2017 cost-benefit analysis. Its conclusory embrace of the payment provisions is thus arbitrary and capricious.

3. These inconsistencies underscore the need for a new rulemaking

The numerous inconsistencies in the Bureau's actions illustrate why a court should not condone "ratification" of an unlawfully supervised rulemaking that occurred years in the past. Requiring a new proceeding before the Bureau can impose the payment provisions may seem like a "formality" but it "serves important values of administrative law," including: "agency accountability, by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority." *Regents*, 140 S. Ct. at 1909 (cleaned up). "Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions." *Id.* (cleaned up).

The required UDAAP evaluations and cost-benefit analyses do not occur in a vacuum. They are dynamic inquiries. Legal interpretations change, and factual conditions do too. A contemporaneous notice-and-comment rulemaking develops an accurate agency record that benefits the agency and the public by giving all "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). None of that occurred here. The ratification must be set aside.

III. THE PAYMENT PROVISIONS ARE THEMSELVES UNLAWFUL AND ARBITRARY AND CAPRICIOUS

Independent of the unlawful ratification, the payment provisions as promulgated in 2017 must be set aside. *First*, the Bureau lacked UDAAP authority to promulgate the payment provisions from the start; the CFPA does not permit the Bureau to "protect" consumers from terms that they freely and knowingly accept. *Second*, the payment provisions are arbitrary and capricious because the entire Rule rests on a defective analysis. *Third*, and at the least, extending the payment provisions to debit and prepaid cards and across separate payments of installment loans is arbitrary and capricious.

A. The Payment Provisions Fall Outside the Bureau's UDAAP Authority

"[I]f the agency applies an incorrect legal standard," its decision must be set aside. *Gen. Land Off. v. U.S. Dep't of Interior*, 947 F.3d 309, 320 (5th Cir. 2020); *see Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1383 (D.C. Cir. 1985) (holding agency rules must be set aside when they do not "reasonably accommodate the policies of a statute"). That happened here. The Bureau based the payment provisions on unreasonable and overbroad interpretations of its UDAAP authority, including interpretations that the Bureau itself now recognizes were incorrect.

1. Multiple preauthorized payment-transfer attempts are not an "unfair" practice

The Bureau cannot ban multiple preauthorized payment-transfer attempts because the practice is not "unfair." A practice is "unfair" only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by" them and "is not outweighed by countervailing benefits." 12 U.S.C. § 5531(c)(1)(A)–(B). This statutory provision is inapplicable for several reasons.

First, the prohibited payment practices fall outside the definition of "unfair" because the asserted injuries to consumers are "reasonably avoidable." "In determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010) (interpreting provision of the FTC Act on which CFPA was modeled). An injury is reasonably avoidable if consumers "have reason to anticipate the impending harm and the means to avoid it," or if consumers are aware of, and are reasonably capable of pursuing, avenues toward mitigating the injury after the fact. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365–66 (11th Cir. 1988); *accord Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168–69 (9th Cir. 2012) ("The disclaimer and the terms and conditions were enough to give a reasonable consumer 'reason to anticipate' the possibility of fees"). In one case, for example, "the fact that [a consumer] was required to check the box indicating his assent before completing the application meant that he could have aborted his

application upon reading the terms and conditions. This provided 'the means to avoid' the alleged harm." *Davis*, 691 F.3d at 1169; *see also id.* ("The question … is not whether subsequent mitigation was convenient or costless, but whether it was 'reasonably possible.'"). As discussed above, the Bureau in its 2020 revocation rulemaking agreed that consumers can "reasonably avoid injury" by "declin[ing] a product or service" for alternatives (even informal alternatives, like borrowing from relatives). 85 Fed. Reg. at 44,397.

The injuries allegedly caused by the payment transfers prohibited by the Rule (*e.g.*, insufficient-funds fees) are reasonably avoidable. Preauthorized payment-transfer attempts are, by definition, transfers for which consumers provide advance authorizations when they take out a loan based on fully disclosed terms. A consumer can reasonably avoid any injuries by declining to take out the loan, pursuing alternatives sources of credit, or not authorizing automatic withdrawals. After taking out a loan, a consumer can reasonably avoid any injuries by sufficiently funding his account, negotiating revised repayment options, or invoking his rights under federal law to issue stop-payment orders or rescind account access. *See* Shaul Comment at 79 (ROA.1105).

Absent deception or coercion, which the Bureau has never alleged here, any "injury" caused by a financial product freely offered in the marketplace is "reasonably avoidable" as a matter of law, since the consumer has a "free and

informed choice" not to purchase the product. *Neovi*, 604 F.3d at 1158. There is no dispute that payday and installment borrowers receive the terms of their loans and assent to those terms. Clearly, if checking a box indicating assent amounts to the means to avoid harm, then payday- and installment-loan consumers likewise are able to avoid the Bureau's alleged harm.

Second, the Bureau overstepped its statutory charge (and also acted arbitrarily and capriciously) when it concluded that lenders "cause" the purported injury. 12 U.S.C. § 5531(c)(1)(A). Consumers' banks—not lenders—cause failed-payment fees or bank-account closures. Lenders do not impose, collect, or otherwise control bank fees. Moreover, they do not intend to subject their borrowers to these bank fees and do not know the details of fees related to accounts that they do not own. If the Bureau is concerned about bank fees, it should regulate banks.

2. Multiple preauthorized payment-transfer attempts are not an "abusive" practice

The Bureau also cannot regulate automatic withdrawals as an "abusive" practice for reasons similar to those described above. *See supra* Part III.A.1. To be deemed "abusive" (under the two statutory prongs that the Bureau invoked to justify the payment provisions in 2017, *see* 82 Fed. Reg. at 54,744), a practice must take "unreasonable advantage" of the consumer's (A) "lack of understanding … of the material risks, costs, or conditions," or of (B) "inability … to protect [his] interests." 12 U.S.C. § 5531(d)(2).

The Bureau's paternalistic and atextual importation of a consumer's specialized or specific understanding of risks and alternatives into the statutory prongs on "unreasonable advantage" and "inability … to protect" has never been a rational UDAAP interpretation. The Bureau has consistently acknowledged that consumers "understand as a general matter that they may incur" fees when they have insufficient funds in their accounts. *See* 82 Fed. Reg. at 54,740. And its 2017 analysis on alternatives ignored that even consumer groups and those supportive of the Rule admitted that consumers had "diverse" and "extensive" alternatives to protect their interests including "credit cards, certain bank and credit union products, non-recourse pawn loans, employer funds, charitable funds, and payment plans … made available by utilities and others." *Id.* at 54,579.

As the Bureau has now confirmed based on the statute's plain language, a general understanding of the risk of fees precludes a finding that a practice takes advantage of consumers' "lack of understanding," and the 2017 findings to the contrary were not "adequately supported." *See* 85 Fed. Reg. at 44,394, 44,396. And consumers' "access to alternative sources of credit" precludes a finding that they are unable to protect their own interests. *See id.* at 44,424; *id.* (noting even more "[n]ewly available alternatives"). The Bureau's revocation rulemaking simply recognized what the CFPA always meant when applied to actual evidence: there is no statutory basis to regulate automatic withdrawals as an "abusive" practice.

B. The Payment Provisions Are Arbitrary and Capricious

A rule is arbitrary and capricious where the agency has made "a clear error of judgment," "entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence before the agency." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As this Court recently recognized, arbitrary-and-capricious "review is 'not toothless'"; instead "it has serious bite." *Wages & White Lion Invs., L.L.C. v. FDA*, No. 21-60766, 2021 WL 4955257, at *3 (5th Cir. Oct. 26, 2021) (citing *Regents*, 140 S. Ct. at 1909). Here, the payment provisions are arbitrary and capricious because the Bureau failed to consider an essential aspect of the problem and lacked a rudimentary evidentiary basis for its decisions.

First, the Bureau failed to consider the payment provisions' important countervailing effects, such as the increased likelihood that a loan will enter into collections sooner than it would have (if it would have at all)—an issue crucial to consumers and on which the Bureau is utterly silent. *See* 82 Fed. Reg. at 54,846–48. Additional defaults cause significantly more collection lawsuits, which increases the consumer's cost of credit through attorney fees and related costs. The Bureau needed to weigh whatever purported benefits the payment provisions provide against the costs of cutting off consumers' access to essential lines of credit and imposing concomitant collections costs.

Second, while the Bureau's data is out of date now, it was already stale in 2016–2017. The Bureau acted based "upon insufficient empirical data" that was contradicted by "numerous studies submitted by commenters that reached the opposite result." *Bus. Roundtable*, 647 F.3d at 1150–51. As even commenters supportive of some of the Bureau's efforts acknowledged, "[m]uch of the NPRM relie[d] on the analysis of data gathered by the CFPB for a period of 18 months in 2011 and 2012." *See* William D. Sullivan, NACHA, Comment Letter on Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans, at 5 (Sept. 13, 2016), https://www.regulations.gov/comment/CFPB-2016-0025-208541 ("NACHA Comment"). This stale data myopically focused on "ACH payment request behavior" to the exclusion of other payment methods. *See* 82 Fed Reg. at 54,847. The Bureau also extrapolated statistics from its data that the studies did not justify. NACHA Comment at 5 & n.6; *see also* 85 Fed. Reg. at 44,396, 44,422.

C. Extension of the Payment Provisions To Debit and Prepaid Cards and Across Separate Installments of Multi-Payment Installment Loans Is Arbitrary and Capricious

At a minimum, the Rule is arbitrary and capricious because it extends to (1) separate installments of multi-payment installment loans and (2) debit- and prepaid-card payments. These payments and payment-transfer methods do not engender the harms targeted by the provisions.

An agency must establish a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. In particular, a rule is arbitrary and capricious where there exists a "mismatch between the problem and the [agency's] solution," *Time Warner Ent. Co., L.P. v. FCC*, 56 F.3d 151, 185 n.10 (D.C. Cir. 1995), or where the rule is "irrationally overbroad," *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999); *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) ("Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided."). The Rule is irrationally overbroad because it applies in two scenarios that fail to serve the payment provisions' ostensible purpose. This mismatch between problem and solution at least requires tailored relief.

1. Separate Installments. The Rule arbitrarily limits payment-transfer attempts across separate installments of a multi-payment installment loan, even though those installments are typically spaced two weeks or a month apart and typically occur after the borrower's account has been credited with a new deposit (such as a biweekly or monthly paycheck). 82 Fed. Reg. at 54,472–73. Because those payment-transfer attempts do not raise the concerns undergirding the payment provisions, the application of the payment provisions to these transactions must be set aside.

The Bureau made clear the problems it perceived with multiple payment-transfer attempts. It emphasized that "some lenders make multiple attempts to collect payment on the same day" or "within a short period of time," thus "contributing to the unpredictable nature of how payment attempts will be made and further exacerbating fees on consumer accounts." *Id.* at 54,723–24. The data on which the Bureau relied (*see id.* at 54,721 n.922) likewise showed that the Bureau was concerned with repeated payment attempts "on the same day" or over a short period of time. *See* CFPB, *CFPB Report: Online Payday Loan Payments* 15–19 (Apr. 2016), https://files.consumerfinance.gov/f/201604_cfpb_online-payday-loan-payments.pdf. The Bureau even contrasted the disfavored practice of close-in-time payment attempts with attempts that occur "on days when the account receives a recurring deposit" (such as a paycheck). *Id.* at 15; *see also id.* at 17 (data "suggest that lenders are re-submitting payment requests following failed payment requests, … rather than simply waiting for the next scheduled payment date and submitting a payment request for that payment"). Moreover, in concluding that consumers cannot reasonably avoid the harm—a crucial part of the statutory inquiry—the Bureau emphasized that "subsequent presentments can occur very quickly, often on the same day, making it difficult to ensure funds are in the right account before the re-presentment hits." 82 Fed. Reg. at 54,737.

Payment-transfer attempts on subsequent installments of a multi-payment installment loan do not present the same risks or unavoidability of harm that the Bureau claimed as the basis for the payment provisions. Longer periods between installments leave consumers more opportunity to avoid fees by replenishing funds or renegotiating the loans' terms. In particular, loan installments are typically timed to correspond to the borrower's employment income, thereby "ensur[ing] funds are in the … account before the re-presentment hits." *Id.* Additionally, because each installment constitutes a separate and distinct payment, no reasonable consumer would be surprised by a lender's execution of preauthorized transfer attempts across multiple installments. There is therefore an utter "mismatch," *Time Warner*, 56 F.3d at 185 n.10, and no "rational connection," *Motor Vehicle Mfrs.*, 463 U.S. at 56, between the identified harms and applying the payment provisions to separate installments of an installment loan.

The Bureau nevertheless refused to exempt payment-transfers across separate installments because doing so would "add considerable complexity to the rule." 82 Fed. Reg. at 54,753; *see also* 81 Fed. Reg. 47,864, 48,062 (July 22, 2016) (notice of proposed rulemaking). But the Bureau did not justify this assertion with reasoned analysis or record evidence. *See Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 565 (D.C. Cir. 1997) (setting aside provision based on concerns of "administrative convenience" because court found it unclear "administrative burdens [were] as

heavy" as agency claimed). And the administrative record undermines the Bureau's bare assertion. As explained by NACHA, the organization that governs the ACH network, differentiating between "reinitiations from recurring installments" is not a "significant issue in practice." NACHA Comment at 4. That is why NACHA's own standards, which already impose industrywide limits on ACH representments, *see supra* p. 6, "effectively differentiates those transactions." NACHA Comment at 4. The Bureau's rank speculation—unsupported by any evidence and contradicted by the record—is quintessential capriciousness.

2. Debit and Prepaid Cards. The Rule also arbitrarily treats debit- and prepaid-card payments the same as check and ACH payments, even though the former do not give rise to the fees that, in the Bureau's assessment, justify the Rule.

According to the Bureau, the Rule is needed to protect consumers because "each additional attempt by the lender is *likely to trigger substantial additional fees* for the consumer but is unlikely to result in successful collection." 82 Fed. Reg. at 54,733 (emphasis added). The Bureau acknowledged, in contrast, that "the harms underpinning the unfair and abusive practice" "would not occur" if consumers are "not charge[d] NSF, overdraft, return payment fees, or similar fees" and do not face account closures. *Id.* at 54,746. The Bureau "conclude[d] that the rule does not need to cover those instances." *Id.* But as even the Bureau acknowledged, unlike check

and ACH payments, debit-card payments almost never result in NSF fees or overdraft fees, and only some prepaid cards could incur fees. *See id.* at 54,747.

In simplest illustrative terms, when a lender attempts to deposit a check or initiate an ACH transfer, and the consumer's balance is insufficient, the consumer's bank typically charges an NSF fee. The Bureau studied ACH transfers and found that consumers may incur up to $100 in NSF fees from their account-holding institution after two failed attempts to withdraw funds. *Id.* at 54,733.

As for overdraft fees, the Bureau explained:

> Generally, if you overdraw your checking account by a check or ACH, your bank or credit union's overdraft program will pay for the transaction and charge you a fee. By allowing your account balance to fall below $0, your bank or credit union will also effectively take the repayment right out of your next deposit. At most institutions, the overdraft fee is a fixed amount regardless of the transaction amount, and you can incur several overdraft fees in a single day.

Gary Stein, *Understanding the Overdraft "Opt-in" Choice*, CFPB (Jan. 19, 2017), https://www.consumerfinance.gov/about-us/blog/understanding-overdraft-opt-choice; *see also* 12 C.F.R. § 1005.17 (requirements for overdraft services).

But other payment transactions are different. First, as the Bureau admitted, debit-card transactions do not typically result in NSF fees. When a lender tries to initiate payment through a debit card, the bank will typically either accept or decline the authorization request, without imposing any fee if the request is denied for

insufficient funds. *See* 82 Fed. Reg. at 54,750. And according to the Bureau's own conclusions, "certain prepaid cards" fall into the category of debit cards where "the accounting-holding institution may not charge a fee." *Id.* at 54,734.[5]

Second, debit and prepaid cards will not cause overdraft fees unless consumers have "opt[ed] in" to these fees with the banks; ACH and check transactions, in contrast, are not subject to an opt-in requirement. *See id.* at 54,723 n.942, 54,735; *see also* 12 C.F.R. § 1005.17(b) (opt-in requirement).

Given the absence of NSF and overdraft fees for debit- and prepaid-card transactions, the extension of the Rule to those transactions violates the stricture that a rule is "irrationally overbroad" if it applies to circumstances where the identified harms do not exist. *Nat'l Mining Ass'n*, 172 F.3d at 913. Moreover, an "injury" that consumers must opt into is "reasonably avoidable," so it falls outside the scope of UDAAP and beyond any possible justification for the payment provisions. At a minimum, it was incumbent on the Bureau to study these payment methods specifically, instead of relying only on inapplicable ACH data to reach its conclusions. *See* CFPB, *Online Payday Loan Payments*, *supra*, at 5–9.

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[5] While "[s]ome prepaid card providers charge fees for returned or declined payment," "[t]here does not appear to be a standard charge … [and] the fees currently appear to be lower than those on depository accounts. The Bureau … observed fees ranging from 45 cents to $5." 82 Fed. Reg. at 54,723 & n.936.

Ultimately, the Bureau denied an exclusion for debit- and prepaid-card payments "in light of the narrow range" where an exception would apply, and because an exception might pose "administrative challenges" and "residual risk to consumers." 82 Fed. Reg. at 54,750; *see also id.* at 54,747. But the entire point of an exception is that it covers a narrow range of circumstances. And no record evidence demonstrates that exempting a small universe of transactions would create administrative/compliance burdens. The Bureau has promulgated more complicated exclusions, which it has no problem administering. *See, e.g.*, 12 C.F.R. § 1041.8(a)(1)(ii) (conditional exclusion for certain transfers by account-holding institutions). The unsupported assertion that an exclusion would increase compliance burdens by requiring lenders to "juggl[e] multiple, disparate processes and procedures depending on payment type," 82 Fed. Reg. at 54,747, ignores that different payment types have always been subjected to different compliance regimes. The Bureau thus already forces lenders to employ "multiple, disparate processes and procedures depending on payment type." *Id.*; *see, e.g.*, 12 C.F.R. §§ 1005.1–1005.20, 1026.10(b)(3).

Likewise, there is no record evidence of residual risk to consumers. To the contrary, the only residual costs to consumers derives from the *inclusion* of debit or prepaid cards that do not engender the Bureau's cited harms. The payment provisions will significantly increase compliance costs in terms of notifications,

communications, and litigation. Alternative means of collection, such as litigation, obviously impose far greater costs than virtually nonexistent fees.

Finally, the denial (ROA.1019–26) of the rulemaking petition seeking amendment of the Rule to exclude debit- and prepaid-card payments (ROA.984–1018) was arbitrary and capricious for the same reasons. In particular, the denial failed to explore whether—much less explain how—these transfers would count as unfair and abusive under the new and narrower UDAAP standard articulated in the Revocation Rule. *See Geller v. FCC*, 610 F.2d 973, 980–81 (D.C. Cir. 1979) (requiring reexamination of agency order denying rule-modification petition where existing rule depended on a "justification [that had] long since evaporated").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the order and judgment below and remand with instructions to enter summary judgment in favor of Plaintiffs and to vacate and set aside the 2017 Rule and the 2020 ratification.

November 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 15, 2021, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: November 15, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) & (7)(B), and Fifth Circuit Rule 32.1 & 32.2. Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 12,970 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

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