No. 21-50826

**IN THE 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
Case No. 1:18-cv-00295-LY

BRIEF OF APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

The Bureau believes that oral argument would facilitate this Court's consideration of the issues in this case.

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INTRODUCTION

Plaintiffs, two payday-loan trade groups, seek to invalidate a commonsense consumer-protection rule. The rule says that certain lenders, after two unsuccessful attempts to withdraw money from a borrower's account, must obtain new authorization from the borrower before trying to withdraw from the account again. The current practice by covered lenders of repeatedly debiting borrowers' accounts, even after multiple attempts have failed, significantly harms borrowers (who are likely already in financial distress) by triggering a variety of hefty fees and even leading to closure of borrowers' accounts. At the same time, the practice produces only minimal benefits for lenders, since repeat withdrawal attempts rarely succeed (but cost lenders little to try).

Plaintiffs challenge the rule as arbitrary, capricious, and outside the Bureau's statutory authority. Their arguments, however, largely amount to policy disagreements with the reasonable choices the Bureau made and thus provide no grounds for invalidating the rule. Plaintiffs also err in claiming there is any inconsistency between the rule's payment protections and a later rulemaking the Bureau undertook to rescind other provisions not at issue in this appeal. Finally, Plaintiffs' view that the rule must be invalidated based on a statutory removal provision that caused them no actual harm is directly foreclosed by the Supreme

Court's recent decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). Their efforts to find some other constitutional problem with the rule are equally without merit.

The Court should affirm the district court's judgment in favor of the Bureau.

JURISDICTIONAL STATEMENT

Plaintiffs asserted claims under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment in favor of the Bureau on August 31, 2021. ROA.1758-82. Plaintiffs filed a timely notice of appeal on September 9. ROA.1786-88. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Through notice-and-comment rulemaking, the Bureau identified as unfair and abusive a narrowly defined payment practice that causes substantial harm to ordinary borrowers without even providing much benefit to lenders. Did the Bureau act arbitrarily, capriciously, or outside its authority in doing so?

2. The rule was issued at a time when the Bureau's Director was purportedly removable by the President only for cause—but multiple Directors appointed by, and removable at will by, President Trump and President Biden have ratified or approved the relevant rule provisions well before they will take effect. Are Plaintiffs nonetheless entitled to complete invalidation of those provisions?

3. As it has long done for other agencies, Congress chose to fund the Bureau through its organic statute rather than through annual spending bills. In funding the Bureau by statute, did Congress violate the Appropriations Clause's requirement that no money be drawn from the Treasury except by appropriations "made by Law"?

STATEMENT

A. The Consumer Financial Protection Act

The Bureau was established as part of the Federal Reserve System by the Consumer Financial Protection Act of 2010 ("CFPA"), Pub. L. No. 111-203, Tit. X, 124 Stat. 1955. The Bureau is charged with implementing the federal consumer financial laws, including for purposes of ensuring "consumers are protected from unfair, deceptive, or abusive acts and practices." 12 U.S.C. § 5511.

The Bureau is generally authorized to issue regulations under the federal consumer financial laws, including rules proscribing "unfair" and "abusive" practices. *Id.* §§ 5512(b), 5531(b). The CFPA defines an unfair practice as one where "the Bureau has a reasonable basis to conclude" that "[1] the … practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers," and that "[3] such substantial injury is not outweighed by countervailing benefits to consumers or to competition." *Id.* § 5531(c)(1). It defines an abusive practice to include those that "take[]

unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; [or] (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." *Id.* § 5531(d)(2). The Bureau may issue disclosure rules to ensure consumers receive information relevant to "the costs, benefits, and risks associated with" a consumer financial product or service. *Id.* § 5532(a).

As enacted, the CFPA purported to limit the grounds on which the President could remove the Bureau's single Director. *Id.* § 5491(c)(3). The Supreme Court held in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), that this for-cause removal provision was invalid but that it was severable from the rest of the statute. As a result, although the Director cannot be shielded from at-will removal, the other provisions of the CFPA "remain fully operative." *Id.* at 2209 (plurality); *see id.* at 2245 (Kagan, J., concurring in the judgment with respect to severability).

The CFPA provides that the Bureau receives up to a capped amount of funds each year from the combined earnings of the Federal Reserve System. 12 U.S.C. § 5497(a). Since 2013, that cap has been set at 12 percent of the Federal Reserve System's 2009 operating expenses, adjusted annually for inflation. *Id.* § 5497(a)(2)(A)(iii), (B). The Bureau may draw an amount, up to but not exceeding this cap, as "determined by the Director to be reasonably necessary to

carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year)." *Id.* § 5497(a)(1).

B. The Challenged Rule

The Bureau published the challenged rule in 2017. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017). As issued, the rule had two major components. First, the "Underwriting Provisions" would have imposed significant new requirements on covered lenders to ensure that borrowers had the ability to repay their loans. Although the Underwriting Provisions were the primary focus of Plaintiffs' initial complaint in this case, the Bureau later rescinded those Provisions and they are not at issue here.

Second, the "Payment Provisions"—the part of the rule that Plaintiffs challenge here—prohibit covered lenders from continuing to attempt to withdraw payment from a borrower's account in circumstances where the attempt is likely to result in substantial fees for the borrower, without much chance of resulting in payment for the lender. Specifically, the rule identifies it as both an unfair and an abusive practice for covered lenders to continue attempting to debit a borrower's account after two prior attempts have failed for lack of sufficient funds, unless the lender obtains new authorization from the borrower to withdraw from the account. *See* 12 C.F.R. §§ 1041.7, 1041.8. Lenders can continue seeking payment through

other means; they just cannot continue attempting to withdraw payment from that account until the consumer providers new authorization.[1]

In issuing the rule, the Bureau found that, in contrast to lenders in other markets, lenders of covered loans often repeatedly try to withdraw payment even after initial attempts have failed for insufficient funds. 82 Fed. Reg. at 54720-24. These repeat attempts may come in quick succession, multiplying the harm to consumers and making it more difficult for consumers to avoid that harm. *See, e.g.*, *id.* at 54723-24 (reporting that in a sample of payments by online payday lenders, roughly one-third of withdrawal attempts were made on the same day as another payment attempt, with lenders attempting as many as 11 withdrawals in one day). Covered lenders also initiate withdrawals in other ways that consumers are unlikely to anticipate and that can lead to more failed attempts—for example, by breaking payments into multiple smaller payment requests or attempting to collect payment on a different date from the one the consumer agreed to. *E.g.*, *id.* at 54501, 54723-24.

These practices cause significant harm to ordinary borrowers who are likely already in financial distress. Each failed withdrawal attempt can cause borrowers to incur fees, including nonsufficient fund (NSF) fees, overdraft fees, and lender-

[1] The rule also requires lenders to provide consumers with advance notice about certain upcoming withdrawals from their accounts that consumers may not expect. *See* 12 C.F.R. § 1041.9. Plaintiffs do not specifically challenge these requirements.

imposed return fees. *Id.* at 54725-26, 54734-35. These fees can quickly add up to hundreds of dollars as lenders continue sending withdrawal requests. *See id.* at 54725. In addition, repeat failed withdrawal attempts make it more likely a bank will terminate the consumer's account, potentially cutting off the consumer's access to the banking system. *Id.* at 54725-26.

The Bureau found that, for a host of reasons, it was very difficult for consumers to predict or guard against these harms. *E.g.*, *id.* at 54726-28, 54736-37. Although borrowers may understand they are authorizing payment through a particular channel, such as ACH withdrawal, covered lenders frequently use those payment methods in ways that consumers would not reasonably expect, that are not typical in other markets, and that in some cases violate the terms of the authorization. *Id.* at 54499-503, 54721. For example, as noted, lenders sometimes split payments into multiple withdrawal requests or repeatedly submit requests, sometimes many times per day. *Id*. at 54723-24. Or they may attempt to collect payment on a different date from the one stated on a check or original authorization. *Id.*

Even where a borrower becomes aware that the lender is initiating repeated failed withdrawal attempts, it may be difficult to avoid further harm. Revoking a lender's authorization, for instance, can be challenging because covered lenders sometimes require written notice days in advance, purport to prohibit revocation,

charge fees for revoking authorization, require authorization for a different type of account access before one authorization may be revoked, or even automatically try to collect payment through another channel if a consumer does revoke authorization for a certain payment method. *E.g.*, *id.* at 54726-28, 54742 n.1030. Some payment methods, such as remotely created checks (RCCs) and remotely created payment orders, "are virtually impossible to stop" because they are generated by the lender. *Id.* at 54727. In addition, lenders' practice of initiating multiple withdrawal attempts in quick succession makes it that much harder for consumers to block access or transfer funds into the account before fees pile up. *Id.* at 54501, 54737.

At the same time that the proscribed payment practice causes so much harm to ordinary borrowers, it rarely results in payment for the lender. *Id.* at 54500. After two failed attempts, a third attempt succeeds only about a quarter of the time, and further attempts are even less likely to succeed. *Id.* The cost to lenders of initiating a withdrawal attempt is generally nominal, however. *Id.* at 54501.

To address these harmful practices, the Payment Provisions bar lenders from attempting to withdraw payment for a covered loan from a borrower's account after two consecutive attempts have failed due to lack of sufficient funds, unless the borrower provides new authorization to do so. *See* 12 C.F.R. § 1041.8. The rule

established August 19, 2019, as the compliance date for the Underwriting Provisions and Payment Provisions. 82 Fed. Reg. at 54472.

C. This Litigation and Revision of the Rule

Plaintiffs filed suit in April 2018, primarily challenging the Underwriting Provisions. Their complaint alleged that the CFPA's removal provision was unconstitutional and required setting aside the rule. ROA.38-40. It argued at length that the Underwriting Provisions were unlawful. ROA.40-50. And it included one paragraph (out of 121) disputing the validity of the Payment Provisions. ROA.50.

The Bureau by that time was headed by Acting Director Mick Mulvaney. As Acting Director, Mr. Mulvaney was removable at will by President Trump. *See Collins*, 141 S. Ct. at 1781-83. Following Acting Director Mulvaney's arrival, the Bureau announced that it intended to engage in a rulemaking process to reconsider the original rule. *See* CFPB, Statement on Payday Rule (Jan. 16, 2018), https://go.usa.gov/xQ6SE. In light of that ongoing effort, the Bureau joined Plaintiffs' request in this case that the district court stay the rule's compliance date while the Bureau conducted its rulemaking. The court granted that request and stayed the compliance date pending further order. It also stayed the litigation.

While the Bureau was engaged in its rulemaking, President Trump nominated and the Senate confirmed Kathleen Kraninger as Director. Several months after Director Kraninger's arrival, the Bureau issued a proposed rule to

rescind in full the Underwriting Provisions but leave in place the Payment Provisions. 84 Fed. Reg. 4252 (Feb. 14, 2019). The Bureau finalized that rule in July 2020. 85 Fed. Reg. 44382 (July 22, 2020). And following the Supreme Court's holding in *Seila Law* that she was removable by the President at will, Director Kraninger considered the Payment Provisions and expressly ratified them. 85 Feg. Reg. 41905 (July 13, 2020). That ratification noted that Director Kraninger was ratifying all "procedural steps that were necessary to issue the payment provisions, including the decision to propose the payment provisions for public comment." *Id.* at 41906 n.10.

After the Bureau completed its rulemaking, this case resumed. Plaintiffs filed an amended complaint refocusing their challenge on the remaining portion of the rule—*i.e.*, the Payment Provisions—and the parties filed cross-motions for summary judgment. The district court granted judgment to the Bureau, upholding the Payment Provisions in full. ROA.1758-81. The court held that Plaintiffs' claim that the CFPA's removal provision meant the rule was invalid when issued was foreclosed by the Supreme Court's decisions in *Collins* and *Seila Law*. ROA.1763-67, 1774-75. It rejected Plaintiffs' other claims, including that the rule was arbitrary and capricious, exceeded the Bureau's authority, and rested on a faulty analysis of the benefits and costs it would produce. The court found that some of these arguments were "barebones" and "baseless." ROA.1779.

SUMMARY OF ARGUMENT

Plaintiffs seek to set aside a reasonable consumer-protection rule. The rule bars a narrowly defined payment practice with respect to certain, typically small-dollar, consumer loans. Under the rule, it is unfair and abusive for a lender of a covered loan to continue attempting to withdraw money from a borrower's account after two prior attempts have failed for lack of sufficient funds, unless the lender obtains new authorization from the borrower to do so. The rule does not otherwise limit lenders' ability to seek payment on a covered loan.

Plaintiffs claim this straightforward and limited proscription is arbitrary, capricious, and beyond the Bureau's authority. To the contrary, the harmful conduct the rule addresses is a paradigmatic example of an unfair and abusive practice and squarely within the Bureau's purview. The practice causes significant harm to ordinary borrowers, including because failed withdrawal attempts trigger fees for the borrower, while producing little benefit to lenders because withdrawal attempts rarely succeed after multiple prior attempts have failed. Yet because it costs lenders so little to initiate a withdrawal attempt, lenders all too often choose to try anyway, with serious consequences for borrowers that those borrowers cannot reasonably avoid. Much as Plaintiffs would prefer as a policy matter that lenders be able to engage in the unfair and abusive practice that the rule prohibits,

neither that policy preference nor any of their specific arguments demonstrate that the Bureau's reasoning was arbitrary and capricious.

Plaintiffs seek to set aside the rule based on a number of constitutional theories as well. But their claim that the rule is invalid because it was issued before the Supreme Court held that the Bureau's Director is removable at will does not survive *Collins v. Yellen*, 141 S. Ct. 1761 (2021). Plaintiffs cannot show under *Collins* that the CFPA's invalid removal provision caused them harm, including because the relevant parts of the rule have now been approved by multiple officials who were appointed by, and removable at will by, both President Trump and President Biden. Plaintiffs' remaining constitutional arguments are no more persuasive. The Court should uphold the challenged provisions in full.

STANDARD OF REVIEW

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *accord Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 433 (5th Cir. 2021). "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *Prometheus Radio*, 141 S. Ct. at 1158. A court "will uphold an agency's action if its reasons and

policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (quotation marks omitted).

Constitutional issues are reviewed *de novo*. *Huawei*, 2 F.4th at 433.

ARGUMENT

I. The Payment Provisions reasonably address a narrowly defined unfair and abusive payment practice that harms ordinary borrowers.

Some lenders' practice of making repeat withdrawal attempts from borrowers' accounts after multiple attempts have already failed for insufficient funds causes significant harm to borrowers and rarely ends in payment for the lender. In issuing the Payment Provisions, the Bureau reasonably determined that this practice is unfair and abusive, including because borrowers typically have no reason to expect, and lack the means to prevent, the harms that can accrue from lenders repeatedly submitting debit attempts against an empty account. Plaintiffs challenge the rule as arbitrary, capricious, and outside the Bureau's authority, but their arguments do not withstand scrutiny.

A. The Bureau reasonably determined that the proscribed payment practice is unfair and abusive.

In issuing the Payment Provisions, the Bureau determined that the proscribed payment practice is both unfair and—for two separate reasons—abusive. *See* 12 C.F.R. § 1041.7. Each of these three determinations provides an

independent basis to uphold the rule's targeted proscription. Each of these determinations was reasonable and well within the Bureau's authority.

1. The Bureau reasonably determined that the proscribed payment practice is unfair.

Under the CFPA, the Bureau may find a practice unfair where it "has a reasonable basis to conclude" that "[1] the act or practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers; and [3] such substantial injury is not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c). The Bureau found that the proscribed practice met these elements and explained those findings at length. 82 Fed. Reg. at 54720-44. Plaintiffs dispute only the first two elements but fail to show that the Bureau's reasoning was arbitrary.

Substantial injury. The Bureau found that each failed withdrawal attempt subjects borrowers to harm in the form of fees that can add up to hundreds of dollars and that repeat failed attempts also make it more likely that a bank will terminate a consumer's account. *Id.* at 54725-26, 54734-35. The Bureau noted that preauthorized withdrawals are governed in certain respects by other laws.[2] Yet the

[2] For example, the Electronic Fund Transfer Act (EFTA) and its implementing rule, Regulation E, give borrowers a right to stop payment on certain preauthorized transfers. *See* 82 Fed. Reg. at 54499, 54501-02 & n.308. Payments sent over the ACH network (but not other types of payment methods) are also subject to private contractual rules set by the National Automated Clearinghouse Association (NACHA). *Id.* at 54501.

Bureau found that the proscribed payment practice continues to cause substantial injury to consumers. *Id.* at 54722, 54728-30.

Plaintiffs concede that these injuries occur. Plaintiffs dispute (at 46) only whether their practice of repeat withdrawal attempts "causes or is likely to cause" that injury, 12 U.S.C. § 5531(c)(1)(A). But while it is true that some (but not all) of the relevant fees are charged by the consumer's bank, not the lender, the Bureau found that lenders' practice of repeat withdrawal attempts is a central cause of the harm to borrowers that the rule addresses—without the withdrawal attempts, the harms would not occur—and that lenders can foresee the harmful consequences of their withdrawal practice. 82 Fed. Reg. 54735. It was thus eminently reasonable to find that the practice "causes or is likely to cause" consumer harm. Even where a practice "was not *the most* proximate cause of an injury," that "generally does not immunize liability from foreseeable harms." *FTC v. Wyndham Worldwide Corp*., 799 F.3d 236, 246 (3d Cir. 2015); *see also FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (in context of unfairness, "the contribution[s] of independent causal agents … do not magically erase the role" of others in causing harm).

Reasonably Avoidable. The Bureau determined that consumers are not reasonably able to avoid the injuries resulting from the proscribed practice. "Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it." *Orkin Exterminating Co.*

v. FTC, 849 F.2d 1354, 1365 (11th Cir. 1988); *see also Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). A theoretical way of avoiding injury is not enough; rather, the means must "be practicable for individual consumers to pursue." FTC, Policy Statement on Unfairness at n.19 (1980), https://go.usa.gov/xGSbW.

Applying this standard, the Bureau determined that consumers cannot reasonably avoid the fees and other harms that result from repeat failed withdrawal attempts. Covered lenders frequently initiate withdrawal attempts in unexpected ways, making it difficult for consumers to anticipate the fees and other harms they will face. A variety of hurdles also prevent consumers from avoiding those harms by revoking lenders' account access or otherwise stopping further withdrawal attempts. 82 Fed. Reg. 54737; *see also id.* at 54726-28; *supra* at 7-8.

Plaintiffs argue (at 45) that consumers can reasonably avoid injury (1) by "not authorizing automatic withdrawals," (2) by "sufficiently funding [the] account, negotiating revised payment options, (3) by invoking [] rights under federal law to issue stop-payment orders or rescind account access," or (4) by "declining to take out the loan [and] pursuing alternatives sources of credit." But the rulemaking record specifically refutes each of Plaintiffs' suggestions.

First, the Bureau explained that borrowers cannot avoid injury by declining to authorize automatic withdrawals because borrowers "do not have the ability to

shop, at the time of origination, for covered loans" that do not require such authorization, "as that is a central feature of these loans." 82 Fed. Reg. at 54737; *see also id.* at 54499-500, 54721 n.920. More fundamentally, these authorizations do not put consumers on notice about the ways that covered lenders—in contrast to payees and lenders in other markets—actually use that authorization by repeatedly submitting requests, sometimes many times per day, even after multiple prior attempts have failed. *See id.* at 54723-24. The Bureau further found that covered lenders sometimes initiate withdrawal attempts in ways that depart from or actually contradict the terms of the authorization. *Id*. at 54721. Plaintiffs are simply wrong to suggest (at 1) that the harms to borrowers from the identified practice are something those borrowers "freely and knowingly bargained" for when they authorized automatic withdrawals, given the "aggressive and unpredictable" ways lenders actually use those authorizations. *Id.* at 54501.

Second, consumers cannot practicably avoid injury by simply putting funds in their bank accounts both because (1) they typically do not have the money (indeed, that is generally why the withdrawal attempts have failed) and (2) even if they did, subsequent withdrawal attempts can occur very quickly, sometimes on the same day, making it hard to get funds in the right account before the next withdrawal attempt. *Id.* at 54736-37. For the same reason, negotiating repayment options is generally not a viable way to avoid the injury either. *See id.* at 54737.

Third, revoking payment authorization is likewise not a viable option in many cases. As noted above, *see supra* at 7-8, there are numerous practical obstacles, many imposed by covered lenders themselves, that make it difficult for consumers to revoke authorization in the first place. For example, although EFTA and Regulation E give borrowers a right to stop payment, 82 Fed. Reg. at 54501-02 & n.308, lenders often take steps to frustrate consumers' ability to exercise that right, such as by obtaining authorizations to withdraw from the account using different methods—*e.g.*, ACH withdrawals, RCCs, or debit cards—and simply switching from one payment method to another if a borrower revokes an authorization, *id.* at 54726-28, 54736. Even when borrowers do eventually revoke authorization, they may still accrue significant fees in the time it takes to do so.

Fourth, consumers cannot reasonably avoid the injuries from the unfair practice by not taking out the loan in the first place. *Id.* at 54737. It is well established that an injury is not "reasonably avoidable" if the consumer has no "reason to anticipate the impending harm" and thus does not appreciate the need to take steps to avoid it. *Orkin,* 849 F.2d at 1365-66. Because consumers reasonably do not anticipate the "aggressive and unpredictable" way that many covered lenders attempt to withdraw payment, they would have no reason to decline the loan in order to avoid the harms that result from that practice. *See* 82 Fed. Reg. at

54501, 54737. By the time the problem is apparent, declining the loan is no longer an option.

For this reason, Plaintiffs' reliance (at 44-45) on *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152 (9th Cir. 2012), is misplaced. That case involved an annual fee that was disclosed, and emphasized, from the outset—and that the consumer therefore had reason to anticipate—and that also was completely refundable. *Id.* at 1163-64, 1169. That is utterly unlike the consumer harm at issue here.

Countervailing Benefits**.** The Bureau also reasonably determined that the substantial injury was not "outweighed by countervailing benefits to consumers or to competition," including because a third withdrawal attempt is very unlikely to result in payment. 82 Fed. Reg. at 54737-39. Plaintiffs do not challenge this conclusion, and the district court correctly found they had "presented no evidence why [repeat failed withdrawal attempts] help consumers." ROA.1768.

In short, the Bureau reasonably determined that the proscribed payment practice is unfair.

2. The Bureau reasonably determined that the proscribed payment practice is abusive.

The Bureau also reasonably determined that the proscribed payment practice is "abusive"—a finding that independently supports the Payment Provisions. Under the CFPA, the Bureau may declare a practice abusive where it "takes unreasonable advantage of (A) a lack of understanding on the part of the consumer

of the material risks, costs, or conditions of the product or service; [or] (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." 12 U.S.C. § 5531(d)(2)(A)-(B). The Bureau found that the payment practice it identified was abusive for both of these two independent reasons. 82 Fed. Reg. at 54739-44. Plaintiffs object (at 47), claiming (1) consumers have a general understanding of the risk of fees when they have insufficient funds in their accounts, which precludes a finding that the proscribed practice takes advantage of consumers' lack of understanding; and (2) consumers have "access to alternative sources of credit," which precludes a finding that they are unable to protect their own interests. But the record refutes both of Plaintiffs' arguments.

Lack of Understanding. In issuing the Payment Provisions, the Bureau found that the proscribed payment practice takes unreasonable advantage of consumers' "lack of understanding" of the risk that a lender would attempt to debit the consumer's account again and again after initial withdrawal attempts failed. *Id.* at 54740-42. In particular, the Bureau found that the "lack of understanding" element was met because even if borrowers understand that any one failed withdrawal attempt may result in a fee, most consumers do not appreciate the risks and costs associated with the particular practice in this market of making repeated, often unpredictable withdrawal attempts after initial attempts fail. *Id.* at 54741.

Plaintiffs do not dispute the factual accuracy of that finding. And their observation (at 47) that consumers are aware of the existence of nonsufficient fund fees—something the Bureau expressly acknowledged, *id.*—does nothing to suggest that the Bureau's finding was unreasonable.

Inability of Consumer to Protect Interests. The Bureau also concluded that the proscribed payment practice takes unreasonable advantage of consumers' inability to protect their interests when using covered loans. *Id.* at 54742-43. For the reasons discussed above in connection with the "reasonable avoidability" prong of unfairness, *supra* at 18-19, the Bureau determined that consumers had no reason to anticipate that they could face repeat withdrawal attempts resulting in significant fees and, potentially, account closure—and so would have no reason to decline the loan to avoid that (unknown) risk. Contrary to Plaintiffs' argument (at 47), even if consumers had "access to alternative sources of credit," that does not "preclude a finding" that consumers are "unable to protect their own interests"—because consumers have no reason to anticipate the harms that they would be seeking alternative sources of credit to avoid.

In short, the Bureau reasonably concluded on two independent grounds that the proscribed payment practice is abusive.

B. The Payment Provisions are not otherwise arbitrary or capricious.

Plaintiffs' additional attempts to show the Payment Provisions are arbitrary and capricious are unpersuasive.

Plaintiffs first claim (at 48) that the Bureau failed to consider "that a loan will enter into collections sooner than it would have" if lenders are required to obtain new authorization from the borrower before initiating further withdrawal attempts from a particular account. But Plaintiffs provide no reason to think this requirement will cause loans to enter collections any sooner than they otherwise would have. If the borrower is able to obtain the needed funds after two withdrawal attempts have failed, the borrower can authorize a new withdrawal or repay via another method. *See* 12 C.F.R. § 1041.8(c). If the borrower is unable to obtain the funds, it is unclear why the borrower (or the lender) would be better off if the lender could initiate additional failed withdrawal attempts—and, in the process, pile additional fees onto the borrower—before the loan enters collections.

Moreover, an agency need only consider "*important* aspect[s] of the problem" before it, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added), and, in considering a rule's costs, may "reasonably focus[] on the most significant cost[s] suggested by the record," *Huawei*, 2 F.4th at 452-54 (rejecting argument that agency was required to "conduct or commission its own empirical or statistical studies to

confirm or reject the speculative costs identified by" challenger (brackets and quotation marks omitted)). Even if the rule's limit on repeat withdrawal attempts might send some loans into collections sooner, that cost is hardly significant, particularly given that the alternative is repeat withdrawal attempts that cause consumers to incur more fees. Indeed, Plaintiffs cannot credibly claim that the possibility of a loan entering collections sooner is so "important" that the Bureau had to specifically discuss it—Plaintiff CFSA did not even mention this alleged issue in its nearly-100-page comment letter on the proposed rule (and CFSA's co-plaintiff did not comment at all). ROA.1027-122.

Plaintiffs next challenge (at 49) the timeliness of some of the data on which the Bureau relied. But Plaintiffs did not raise this argument to the district court, and this Court does not "ordinarily consider issues that are forfeited because they are raised for the first time on appeal." *Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 398 (5th Cir. 2021). Even if the Court considers this argument, it is unavailing. Plaintiffs offer no support for their claim that some of the data the Bureau relied upon is "stale" and could not be considered simply because it relates to transactions that took place 4-5 years before the Bureau issued the proposed rule. The Bureau specifically considered these arguments and provided a reasoned explanation why the data remained relevant. 82 Fed. Reg. at 54722, 54729. For example, although commenters expressed concern that the impact of certain

NACHA policies for ACH payments might render the data "stale," the Bureau found that the most relevant NACHA policy was already in place during the relevant time period. Despite this, the data still showed a high number of failed payments, and the Bureau continued to receive related consumer complaints. *Id*. Plaintiffs also do not identify any more recent data that they think the Bureau overlooked. *See Huawei*, 2 F.4th at 453 (rejecting similar attack on evidentiary record because "the FCC reasonably relied on the evidence it had" and the challenger "d[id] not point [the Court] to record evidence" that the agency failed to consider (quotation marks omitted)); *see generally FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (rejecting argument that agencies can act only with "perfect empirical or statistical data").

C. The Bureau reasonably applied the Payment Provisions to installment loans and debit and prepaid cards.

Plaintiffs claim (at 50-57) that the Payment Provisions' application to installment loans and debit and prepaid cards is arbitrary and capricious. But here again Plaintiffs ignore the rulemaking record, which establishes that the Bureau more than met its obligation to establish a "rational connection between the facts found and the choice[s] made." *State Farm*, 463 U.S. at 43.

Installments. Plaintiffs dispute (at 50-52) the Bureau's decision, for covered installment loans, to apply the rule's limit on failed withdrawal attempts across scheduled installment payments, rather than restarting the count for each scheduled

payment. They allege (at 52) that the Bureau did not justify its decision with "reasoned analysis or record evidence." Plaintiffs ignore that the rulemaking record amply explains the Bureau's decision: For example, the Bureau pointed out that a third withdrawal attempt, even for a different scheduled payment, would still likely fail "even if two weeks or a month has passed." 82 Fed. Reg. at 54753; *see also id.* at 54728 (describing evidence that rate of failure on repeat withdrawal attempts remains high even when attempts are spaced two weeks apart). Plaintiffs do not provide evidence that consumers in financial distress would be likely to scrape together funds in the time between installments. And, for any consumers who are able to do so, the rule makes clear that they can simply provide a new authorization to resume withdrawals. *See* 12 C.F.R. § 1041.8(c).

The Bureau also explained that creating separate requirements for continued attempts to withdraw the same installment payment versus "new" attempts to withdraw the next payment would add unwarranted complexity to the rule. 82 Fed. Reg. at 54753. It would also invite evasion. As the rulemaking record showed, companies have evaded NACHA's private-network limits on repeat payment requests by manipulating data fields to make it appears that a withdrawal attempt is for a new installment, rather than a repeat attempt to withdraw a prior installment payment. *Id.* at 54728 n.985 (quoting statement by NACHA acknowledging problems with evasion of its rules). As a result, those rules have proved "difficult

to monitor and enforce." *Id.* at 54728-29. It was therefore, at minimum, reasonable for the Bureau to take a different approach that would lessen the risk of evasion and of resulting harm to consumers. *See Huawei*, 2 F.4th at 456 ("[W]e must defer to the agency's reasoned explanation" that the approach it adopted "would be easier for providers to implement and for the [agency] to enforce" (quotation marks omitted)).

Debit and Prepaid Cards. Plaintiffs next claim (at 53) that the Payment Provisions "arbitrarily treat[] 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." But that assertion is based on a mischaracterization of the record. Plaintiffs assert (at 54) that the Bureau "acknowledged [that], unlike check and ACH payments, debit-card payments almost never result in NSF fees or overdraft fees." What the Bureau actually said is that failed attempts to withdraw payments from debit card accounts *can* trigger overdraft fees. *See* 82 Fed. Reg. at 54747. The Bureau also noted that lenders may still charge returned payment fees for each presentment. *Id.* And on top of that, even Plaintiffs acknowledge (at 55 n.5) that some prepaid card providers charge fees for declined payment. Beyond that, failed attempts to withdraw from debit and

prepaid cards can trigger, in addition to overdraft and returned-payment fees,[3] "'extended' overdraft fees" (if the consumer is unable to clear the overdraft within a set period of time), as well as lender-imposed fees, like late fees. *Id.* at 54723, 54747. For these reasons, and because "the tailoring of individualized requirements for each discrete payment practice would add considerable complexity to the rule and yet still could leave consumers vulnerable," *Id.* at 54753, the Bureau reasonably chose not to exclude these payment types.

Just as it was reasonable for the Bureau to decline to exclude these payment types in the first place, it was reasonable to deny a petition for rulemaking asking the Bureau to make that exclusion, *contra* Br. at 57—particularly given that the petition did not cite any relevant new information. An agency's "[r]efusal to promulgate [a] rule[]" is subject only to "extremely limited and highly deferential"

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[3] Plaintiffs claim (at 55) that overdraft fees in connection with debit and prepaid cards are "reasonably avoidable" in this context, as banks cannot charge fees for overdrafts on ATM and most debit-card transactions unless consumers have "opted in" to allow overdrafts on those transactions. Plaintiffs mischaracterize the opt-in framework: Consumer opt-in applies only to ATM and one-time debit card transactions and is not required in order for banks to charge overdraft fees on "recurring" debit transactions such as payments on installment loans covered by the Payment Provisions. *See* 82 Fed. Reg. at 54723 n.942 ("[O]verdraft fees cannot be charged on *one-time* debit card transactions when a borrower does not opt in."); 12 C.F.R. § 1005.17(b). Moreover, even where opt-in is required, banks generally seek opt-in when consumers open their deposit accounts. Plaintiffs do not allege that consumers would have sufficient information at the time they opt in about the payment practice addressed in this rule that they could reasonably avoid the harms from that practice by declining to opt in.

review. *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007). Even if Plaintiffs had shown that the denial was arbitrary—which they have not—the appropriate remedy would be to require the Bureau to reconsider the petition and respond again, not to order the Bureau to commence a rulemaking. *See, e.g.*, *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 747 (D.C. Cir. 2017).

D. The Payment Provisions are wholly consistent with the Bureau's later rule revoking other provisions.

Plaintiffs claim that key parts of the analysis undergirding the Payment Provisions were undermined by the Bureau's 2020 rule ("2020 Rule") rescinding the Underwriting Provisions. But the 2020 Rule left intact the Payment Provisions and is consistent with the Bureau's explanation for those Provisions in the original rule ("2017 Rule"). Contrary to Plaintiffs' allegations (at 34, 39), nothing in the 2020 Rule is "inconsistent with the Bureau's interpretation of its UDAAP authority" that underlies the Payment Provisions or with the Bureau's assessment of the benefits and costs of those Provisions.

1. The standards for abusiveness and unfairness that the Bureau applied in adopting the Payment Provisions are wholly consistent with the 2020 Rule. In the 2017 Rule, the Bureau found that one reason the proscribed payment practice was "abusive" was because it took unreasonable advantage of consumers' "lack of understanding" of the risk a lender would make multiple repeat withdrawal attempts even after initial attempts failed. 82 Fed. Reg. at 54741. Although

consumers realize they will face fees if lenders attempt to withdraw payment from an account with insufficient funds, most do not understand the common practice of covered lenders to continue trying to withdraw payment after initial attempts fail. Consumers thus do not appreciate the costs and risks associated with the particular aggressive and unpredictable way these lenders attempt to withdraw payment. *Id.* Consumers are also unlikely to understand in advance "the array of significant challenges they will encounter if … they take steps to try to stop the lender from … mak[ing] any additional attempts" by revoking payment authorization. *Id.* at 54740.

Through a convoluted and highly selective reading of the record, Plaintiffs claim (at 34) that this view of "consumer understanding" conflicts with the view the Bureau advanced in the preamble to the 2020 Rule. But there is no such conflict and no inconsistency between the Bureau's conclusion in the Payment Provisions that borrowers lack understanding about how lenders will actually attempt to withdraw payment and its conclusion in the 2020 Rule that borrowers do *not* lack understanding when they take out a covered loan about the risks that the loan will prove unaffordable if lenders do not assess their ability to repay.

In the 2017 Rule, the Bureau identified two ways that consumers could "lack understanding" for purposes of the abusiveness standard. First, borrowers might not understand that a risk exists as a general matter. Alternatively, borrowers might

understand that a risk exists as a general matter but still "lack understanding" for purposes of the abusiveness standard if they do not understand their own individualized risk of suffering a particular harm given their personal circumstances. *See, e.g.*, 82 Fed. Reg. at 54597-98. The Underwriting Provisions of the 2017 Rule were grounded on the latter approach: that borrowers lack understanding of the risks of covered loans made without lenders assessing ability to repay because borrowers do not appreciate their own individual risk of being unable to repay and ending up in a costly cycle of debt. In the 2020 Rule, the Bureau discarded that application of the individualized-risk standard. *See* 85 Fed. Reg. at 44390 (determining that, for consumers to have sufficient "understanding," they need not have a "specific understanding of their individualized likelihood and magnitude of harm such that they could accurately predict how long they would be in debt after taking out a covered … loan").

But the Bureau did not base the Payment Provisions on any similar finding that consumers "lack understanding" of the risks and costs of covered loans because they do not know their own *individual* risk of facing repeat withdrawal attempts. Instead, the Bureau's determination that consumers lack understanding of the risks associated with the proscribed payment practice was based on the fact that consumers are not aware that these risks exist even as a general matter. 82 Fed. Reg. at 54741 ("[M]ost consumers do not realize that the identified practice

involving multiple failed re-presentments happens.”). As the district court recognized, the individualized risk standard that was relevant to the Underwriting Provisions simply had no bearing on the Payment Provisions. ROA.1770 (holding that “the only relevant change to the Bureau’s standard concerns the now-revoked Underwriting Provisions”).

In an attempt to create a conflict where none exists, Plaintiffs claim (at 35, 38) that the Bureau found in the 2017 Rule that consumers *do* have a “generalized understanding” of the risks but lack an individualized understanding of the “severity of the risk they are exposing themselves to in the circumstances.” But, contrary to Plaintiffs’ suggestion, the “circumstances” that the Bureau referred to were not consumers’ individual circumstances, but “the circumstances of the identified practice.” 82 Fed. Reg. at 54741. In other words, the Bureau’s finding did not rely on an individualized-risk standard because consumers lack even a general understanding of the risk from the identified practice “that lenders will [make withdrawal attempts] repeatedly when borrowers default” and thus do not understand just how many fees they could face if their accounts lack sufficient funds. *Id.* Likewise, the Bureau explained that “the complexity of payment presentment practices and their effects makes it likely that a significant number of borrowers lack a sufficient understanding of those practices and their effects.” *Id.* Thus, the rulemaking record makes clear that it is the consumers’ lack of

awareness of the *general* risks of repeat withdrawal attempts—not any lack of understanding by consumers of their *individual* risks—that animated the Payment Provisions. That conclusion is wholly consistent with the interpretation of "consumer understanding" the Bureau applied to the Underwriting Provisions in 2020.

Nor is there any conflict between the preamble of the 2020 Rule and the Bureau's conclusion in the 2017 Rule that consumers could not "reasonably avoid" injury (a finding relevant to whether a practice is "unfair") or "protect their interests" (relevant to "abusiveness") by declining to take out a loan in the first place. As explained above, *supra* at 18-19, the Bureau concluded in 2017 that consumers cannot reasonably avoid the injuries from the proscribed payment practice by declining to take out the loan in the first place because they would have no reason to know about the risk of repeat withdrawal attempts and ensuing harms and thus would have no reason to decline the loan to avoid that (unknown) risk.

Plaintiffs claim (at 36, 38-39) that this conclusion is undermined by the 2020 Rule's statement that consumers can avoid injury and protect their interests by not taking out a loan in the first place. But the 2020 Rule makes no such sweeping statement. To be sure, in the 2020 Rule, the Bureau determined that consumers can *sometimes* reasonably avoid injury, or protect their interests, by declining a product. *See* 85 Fed. Reg. at 44397, 44425. But it in no way called into doubt the

conclusion that declining a loan would not be a way for consumers to reasonably avoid the injury *that results from repeated payment withdrawal attempts*.

In particular, in the 2020 Rule, the Bureau determined that consumers have the means to reasonably avoid the injuries that result from the practice addressed by the Underwriting Provisions—lenders making loans without assessing borrowers' ability to repay—by not taking out the loan and instead seeking other forms of credit. *Id*. But in so concluding, the Bureau made clear that it is not always the case that "any harm [would be] reasonably avoidable simply because a consumer can decline a product or service." *Id*. The unfair and abusive payment practice at issue in the Payment Provisions—in contrast to the practice that would have been addressed by the Underwriting Provisions—involves lenders' conduct after the consumer has taken out the loan and two consecutive payment attempts have failed. At that point, consumers cannot reasonably avoid the injury or protect their own interests by declining to take out a loan.

Moreover, when consumers are deciding whether to take out a loan, they have no reason to anticipate they will face repeat withdrawal attempts or the difficulties they may face later in attempting to revoke account access, and thus no reason to decline the loan to avoid those risks. So while the 2020 Rule states that "a finding that consumers lack the means to avoid injury at a later time is not generally sufficient [to render injury 'not reasonably avoidable'] *if* they could do

so at an earlier time," *id.* at 44397 (emphasis added), that does not advance Plaintiffs' argument here because nothing in the 2020 Rule changed the Bureau's 2017 conclusion that consumers could *not*, at an earlier time, avoid the harms identified in the Payment Provisions. Plaintiffs do not point to anything in the 2020 Rule (or elsewhere) that undermines that conclusion.

2. Plaintiffs' claim (at 39-42) that the 2020 Rule undermines the 2017 Rule's analysis of benefits and costs is also mistaken. Plaintiffs allege that the Bureau's assessment of the benefits and costs of the Payment Provisions assumed that the (since-revoked) Underwriting Provisions would be in effect and would "lessen the impacts" of the Payment Provisions by making it less likely that withdrawal attempts would fail. The premise of Plaintiffs' argument is incorrect. The Bureau expressly stated that it was assessing the benefits and costs of the Payment Provisions as compared to the baseline of "the regulatory regime" that existed at the time—that is, one *in which the Underwriting Provisions did not exist*. 82 Fed. Reg. at 54815 ("[T]he Bureau takes the status quo as the baseline."). And its detailed consideration of those costs and benefits did not assume that the Underwriting Provisions would be in place. *See id.* at 54847-50. The fact that the Bureau offered the additional (and correct) observation that the Underwriting Provisions would have lessened certain impacts of the Payment Provisions does not make the Bureau's reasoning arbitrary and capricious. *See id.* at 54846. Indeed,

the Bureau made clear that the Payment Provisions should take effect even without the Underwriting Provisions, explaining that the two parts "are entirely separate, based on separate identified unfair and abusive practices, and thus, if either should fall, the other should remain intact and continue to operate." *Id.* at 54813.

II. Plaintiffs' objections to the removal provision provide no basis for invalidating the Payment Provisions' important protections.

Plaintiffs ask the Court to set aside the Payment Provisions because a provision in the CFPA formerly (and invalidly) purported to limit the grounds on which the President could remove the Bureau's Director. Recent Supreme Court precedent, however, holds that the invalidity of a removal provision does not render agency action void. *Collins*, 141 S. Ct. 1761. And Plaintiffs cannot show under *Collins* that they are otherwise entitled to the relief they seek. The Court should reject Plaintiffs' request to invalidate the rule's important consumer protections based on a removal provision that caused Plaintiffs no harm and that was "never really part of the body of governing law" to begin with. *Id.* at 1788.

A. Under *Collins*, the removal provision did not render the Bureau's rulemaking invalid.

Collins forecloses Plaintiffs' argument (at 13) that "the rule is invalid because it was promulgated by a Director unconstitutionally exercising governmental authority."

Collins involved a challenge to actions by the Federal Housing Finance Agency during a time when the FHFA's statute—just like the CFPA prior to *Seila Law*—purported to shield its single Director from at-will removal. The Supreme Court held that the removal provision was unconstitutional under *Seila Law*. *Collins*, 141 S. Ct. at 1783-84. But it rejected the challengers' claim that the provision rendered invalid any of the FHFA's actions.

Writing for an 8-justice majority on this point, Justice Alito explained that "the [challengers'] argument is neither logical nor supported by precedent." *Id.* at 1787. Because the FHFA Directors were properly appointed, "there [wa]s no reason to regard any of the actions taken by the FHFA … as void." *Id*. The Court distinguished other cases involving "a Government actor's exercise of power that the actor did not lawfully possess," including where the official was improperly appointed. *Id.* at 1788. Unlike in those cases, the Court explained, an invalid removal provision provides "no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Id*.; *see also id.* at 1788 n.23 ("Settled precedent … confirms that the unlawfulness of the removal provision does not strip the Director of the power to undertake the … responsibilities of his office"); *id.* at 1789-95 (Thomas, J., concurring) (writing

separately to emphasize why an invalid removal provision does not render agency action invalid).

Collins makes clear that the invalidity of the CFPA's removal provision "d[id] not strip the [Bureau's] Director of the power to undertake the … responsibilities of his office," did not deprive the Director "of the authority to carry out the functions of the office," and did not render "any of the actions taken by the [Bureau] in relation to the [Payment Provisions] … void." *Id.* at 1787-88 & n.23 (majority); *see also CFPB v. Nat'l Collegiate Master Student Loan Trust*, No. 1:17-cv-1323, slip op. at 5-6 (D. Del. Dec. 13, 2021) (Bibas, J., sitting by designation) (applying *Collins*'s holding that "an unconstitutional *removal* restriction does not invalidate agency action so long as the agency head was properly *appointed*" and concluding that "the CFPB's initial decision to bring this suit was not ultra vires"). Instead, the Bureau, headed by a properly appointed Director, at all times had the authority to address unfair and abusive practices through rulemaking. *See* 12 U.S.C. §§ 5512, 5531. The Bureau validly exercised that authority in promulgating the Payment Provisions.

Plaintiffs' attempts to escape *Collins*'s clear holding are unpersuasive. They claim (at 15-17) that *Collins* applies only to requests for "retrospective" relief, not "prospective" relief. *Collins* makes no such distinction. Although the Court's remedial analysis did not focus on prospective relief, the Court explained that this

was because the request for such relief was moot. 141 S. Ct. at 1780, 1787 ("[B]ecause the shareholders no longer have a live claim for prospective relief … the only remaining remedial question concerns retrospective relief."). Nothing in the Court's analysis turned on the type of relief requested. To the contrary, the Court's broad holdings that, for example, "there is no reason to regard any of the actions taken by the FHFA … as void" apply equally to (1) a claim (like in *Collins*) that retrospective relief is owed because an agency action was void and (2) a claim (like Plaintiffs') that prospective relief is owed because an agency action was void. Indeed, the remedial analysis in *Collins* relied in part on the decision in *Seila Law*, a case involving a request for prospective relief—*i.e.*, that the respondent not have to comply with a civil investigative demand. *See id.* at 1788 & nn.23, 24 (citing *Seila Law*).[4]

Plaintiffs' assertion (at 15) that *Collins* "does not apply to rulemaking challenges" is equally unmoored from the actual reasoning of that decision—and Plaintiffs do not claim to find any support in the decision itself. In fact, *Collins* cuts squarely against their argument. It holds that an invalid removal provision "does not strip the Director of the power to undertake the … responsibilities of his

[4] Plaintiffs rely (at 16, 18) on Justice Gorsuch's partial dissent on remedies, which they claim supports the distinction they would like to draw. *See Collins*, 141 S. Ct. at 1795-99 (Gorsuch, J., concurring in part). Justice Gorsuch acknowledged, however, that he was "part[ing] ways" with the 8-justice majority on this issue. *Id.* at 1795. The majority's analysis controls here.

office," period, whether those responsibilities are entering into contracts, promulgating a rule, or something else. *Id.* at 1788 n.23. That means that the CFPA's removal provision did not deprive the Director of authority to promulgate the Payment Provisions—and there is therefore "no reason to regard *any* of the actions taken by [the Bureau] in relation to [those Provisions] as void." *See id.* at 1787 (emphasis added). Nor is there any logical reason that the holding in *Collins* would apply to the complex, multibillion-dollar transactions in that case but *not* to the narrow rule in this case.

Plaintiffs are also incorrect when they claim (at 18) that their legal theory would "entail no disruption." Their view that an invalid removal provision makes rules void *ab initio* could, if adopted, have a calamitous effect on the broader financial market by calling into question the validity of other Bureau rules that the Director ratified after *Seila Law* and that play a significant role in the national economy. These actions include, for example, regulations governing the multitrillion-dollar mortgage market. *See, e.g.*, Brief for Mortgage Bankers Ass'n, et al. as Amici Curiae at 20, 10, *Seila Law*, 2019 WL 6910300 (U.S.) (warning that "a ruling calling into question the ongoing legitimacy of the CFPB's past actions … could be catastrophic for the real estate finance industry"). A ruling that condemned these past actions could "trigger a major regulatory disruption and

would leave appreciable damage to Congress's work in the consumer-finance arena." *CFPB v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 51 (D.R.I. 2020).

There is no cause to invite such disruption here. Under *Collins*, it is clear that the Bureau's actions in promulgating the Payment Provisions were valid.

B. Plaintiffs are not otherwise entitled to relief under *Collins* because the removal provision caused them no actual harm.

Collins held it was "possible" that challengers could obtain relief based on an invalid removal provision, but only if they could show the removal provision actually caused them "harm." 141 S. Ct. at 1788-89. Plaintiffs cannot make that showing.

Collins explained that the harm necessary to obtain relief must be more concrete than the harm necessary to establish standing to challenge a removal provision. *Id.* at 1788 n.24. A party has standing if it "was harmed by an action that was taken by [an unconstitutionally insulated] officer and that the plaintiff alleges was void." *Id.* But that alone is not enough to require "actions taken by such an officer" to be "undone." *Id.* Rather, for a challenger to obtain relief, the removal provision must have caused it actual "harm"—*i.e.*, had an impact on the challenged action. *See id.* at 1789 (explaining that a removal provision would cause harm where the President "express[ed] displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way"); *see also id.* at 1801 (Kagan, J., concurring regarding remedy) ("agree[ing]"

with majority that relief is available only where the removal provision "affected the complained-of decision"); *Nat'l Collegiate*, slip op. at 5-6 ("[A challenger] must show that the agency action would not have been taken but for the President's inability to remove the agency head.").

Plaintiffs have not shown, and cannot show, that the removal provision caused them any harm—here, in the form of their members' future obligation to comply with the Payment Provisions. Those Provisions have now been overseen by five consecutive Directors appointed by three consecutive Presidents. Four of these officials were indisputably removable at will by the President for all or part of their tenures, and thus were subject to full presidential supervision. One of them, Director Kraninger, expressly ratified the Payment Provisions shortly after the removal provision was held invalid (and long before Plaintiffs' members will have to begin complying). 85 Fed. Reg. 41905 (July 13, 2020). Following that ratification, the Bureau, still headed by Director Kraninger, took action in this litigation to seek to implement the Payment Provisions as soon as practicable. *See, e.g.*, ROA.623 (arguing that "staying the compliance date is no longer warranted"). Another official, Acting Director Mulvaney—who was designated Acting Director by President Trump and was fully removable by him—initiated a rulemaking process to revisit the rule's Underwriting Provisions but *not* its Payment Provisions. And another official, Acting Director Uejio—who was

designated Acting Director by President Biden and was fully removable by him—expressly approved the Payment Provisions and reiterated the Bureau's intention that they take effect as issued. *See* Statement, Acting Director Uejio (Sept. 7, 2021), https://go.usa.gov/xe5w5.

Any one of these officials subject to the President's plenary oversight could have taken steps to rescind the Payment Provisions or to otherwise undermine them, such as by declining to defend them in this case. None did. Nor did any of these officials take any action to alter the Payment Provisions, even as the Bureau undertook a notice-and-comment rulemaking to revoke the Underwriting Provisions of the same rule. Had either President Trump or President Biden disapproved of those officials' actions or of the Payment Provisions, he could easily have made his preferences known and, if necessary, put in place a new Director to carry out those preferences. Neither did. Through two presidential administrations and multiple Directors, the Bureau has sought to implement the Payment Provisions as issued. There is no basis for Plaintiffs to claim that the removal provision caused them harm. *See Nat'l Collegiate*, slip op. at 6 (holding that defendants were not harmed by removal provision where Bureau continued to pursue lawsuit while headed by multiple different at-will-removable Directors).

Plaintiffs make no attempt to show that President Trump or President Biden had any interest in preventing the Payment Provisions from taking effect. Nor does

their brief identify any specific harm they believe the removal provision caused them. Instead, Plaintiffs claim (at 18-20) the Payment Provisions must be invalidated based on a single sentence from *Collins*, which they take out of context.[5] As an example of when a removal provision might inflict "harm," *Collins* cited a scenario in which "the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." 141 S. Ct. at 1789. Plaintiffs allege they are entitled to relief under *Collins* because, they say, President Trump wanted to remove Director Cordray but felt legally constrained by the removal provision.[6]

That is not the relevant issue. As the Court described in *Collins*, Plaintiffs instead must show that the removal provision caused them "harm"—here, from their future (modest) compliance obligations. *See* 141 S. Ct. at 1788-89; *see also id.* at 1801 (Kagan, J., concurring regarding remedy) ("[P]laintiffs alleging a

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[5] Plaintiffs cite language from *Seila Law* that to have standing to challenge a removal provision, parties need not "show that the challenged act would not have been taken" absent the provision. Br. at 19-20 (quoting *Seila Law*, 140 S. Ct. at 2196). But *Collins* explained that this language "should not be misunderstood as a holding on a party's entitlement to relief." 141 S. Ct. at 1788 n.24.

[6] In support of this argument, Plaintiffs offer (at 5-6) only a few carefully selected quotations from a memoir by Director Cordray—not part of the record—along with a news report describing that memoir. But the memoir, even if it were otherwise relevant and admissible, contains nothing more than Director Cordray's speculation about what might have been going on inside the White House.

removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision."). Regardless of whether President Trump wanted to fire Director Cordray, President Trump's own appointee, Director Kraninger, ratified the Payment Provisions as issued, and did so after it was clear she could be removed at will. In doing so, Director Kraninger specifically ratified all of "the procedural steps that were necessary to issue the payment provisions," including the decision to propose them in the first place. 85 Fed. Reg. at 41906 n.10.

That approval by an official serving at President Trump's pleasure conclusively shows that any perceived restriction on his ability to remove Director Cordray had no impact on the Payment Provisions and provides no basis to invalidate them. And, as noted, multiple other heads of the Bureau have expressly approved, and sought to implement, the Provisions as they were issued. These facts conclusively show that the removal provision did not harm Plaintiffs and that their request in the alternative (at 21 n.1) that this case be remanded for unspecified additional discovery—presumably into material that would be privileged in any event—would be pointless.

The sentence from *Collins* on which Plaintiffs focus did not eliminate the requirement that, to obtain relief, a party must show the removal provision actually "inflict[ed] … harm." 141 S. Ct. at 1789. It simply described one scenario in which

that showing might be possible: If the President had "express[ed] displeasure with actions taken by a Director" and said he would fire the Director "if the statute did not stand in the way," then relief would likely be available *with respect to those actions the President had disapproved*. It does not follow that relief would be appropriate for *any* action the agency took—especially those the President approved of. For such actions, the removal provision could not sensibly be said to have caused the challenger harm. Indeed, this Court, sitting en banc, has already explained in similar circumstances that it would not "make sense" to "wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency." *Collins v. Mnuchin*, 938 F.3d 553, 594 (5th Cir. 2019) (en banc), *aff'd in part and rev'd in part on other grounds*, 141 S. Ct. 1761. Doing so "would actually erode executive authority rather than reaffirm it." *Id.*

C. If the Court thought Plaintiffs were entitled to relief, it should hold that ratification provided the appropriate remedy.

In the alternative, if the Court thought that the removal provision somehow harmed Plaintiffs, it should hold that any such harm was remedied by ratification.

Every court of appeals to have considered the issue has concluded that ratification can provide a proper remedy where a separation-of-powers issue called

into question the validity of an agency action.[7] They have done so in cases involving so-called "structural constitutional defect[s]." *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996). They have done so in cases specifically involving the CFPA's removal provision, holding that ratification "cure[d]" any problem with a Bureau action filed while the Director was purportedly removable only for cause. *See CFPB v. Seila Law LLC*, 984 F.3d 715, 718-19 (9th Cir. 2020), *reh'g en banc denied as amended*, 997 F.3d 837 (2021). And they have done so in cases involving rulemakings and other agency actions subject to specific statutorily prescribed procedures, including under the APA. *See Moose Jooce v. FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020) (rule), *cert. denied*, 141 S. Ct. 2854 (2021); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998) (administrative enforcement proceeding).

These decisions were correct. As in those cases, Director Kraninger's ratification provided Plaintiffs with a full and precisely tailored remedy—if any

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[7] *See, e.g.*, *NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 161-63 (2d Cir. 2021); *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 370-72 (D.C. Cir. 2017); *CFPB v. Gordon*, 819 F.3d 1179, 1190-91 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2291 (2017); *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338-39 (6th Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-06 (3d Cir. 2016). In keeping with the language of these decisions, the Bureau has previously described ratification in this case as providing a "remedy" to any problem stemming from the removal provision. The Bureau has never agreed, however, that the removal provision caused Plaintiffs actual harm of the type that *Collins* makes clear is needed to justify relief. *See Collins*, 141 S. Ct. at 1789.

were needed—to any harm they could have suffered from the removal provision. Director Kraninger's decision to ratify the Payment Provisions while unmistakably removable at will confirmed that Plaintiffs have no grounds for concern that their members will be subject to a rule that may contradict the views of the President. Any Bureau action to enforce the rule in the future will of course also be subject to full Presidential oversight through a Director removable at will.

Ratification is also a remedy appropriately tailored to take into account the other interests at stake, including the President's overriding constitutional interest in the execution of the law, the interests of borrowers injured by unfair and abusive practices, and the Bureau's statutory mission to address such practices. *Cf. United States v. Morrison*, 449 U.S. 361, 364 (1981) (describing "general rule" that constitutional remedies "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests"). Those significant interests would be "unnecessarily infringe[d]"—to say the least—by the windfall Plaintiffs seek: complete invalidation of the rule.

Plaintiffs' arguments why ratification would be insufficient fall short. They claim (at 21-22) that ratification is impossible because the removal provision meant neither the Bureau nor its Director was "properly exercising" authority when the Bureau issued the rule. This argument ignores *Collins*'s directly contrary holding. Plaintiffs suggest (at 22-24) that the only "meaningful remedy" in a

separation-of-powers case is total invalidation of the challenged action. *Collins* forecloses this argument too: The Court there "s[aw] no reason to hold that the [challenged agency action] must be completely undone." 141 S. Ct. at 1788. This Court had already reached the same conclusion. *See Collins*, 938 F.3d at 594. So too every court of appeals to consider ratification in similar circumstances. *See supra* note 7. Plaintiffs received a meaningful remedy when a fully accountable official considered and ratified the Payment Provisions, years before Plaintiffs' members will need to begin complying with the rule.[8]

Plaintiffs also assert (at 24-28) that even if other agency actions can be ratified, rulemakings cannot, because rules are subject to "statutorily prescribed notice-and-comment procedures." But the Bureau satisfied these procedures when

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[8] Plaintiffs provide no case that actually supports their position. They cite *Lucia v. SEC*, 138 S. Ct. 2044 (2018), but *Collins* specifically distinguished *Lucia* from cases that involve the removal power. *Collins*, 141 S. Ct. at 1788; *accord id.* at 1793 (Thomas, J., concurring) (explaining why "Appointments Clause cases [such as *Lucia*] do not help the shareholders"). Nor did *Lucia* consider ratification, let alone reject it as a remedy. Similarly, *FEC v. NRA Pol. Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), involved an action that had not been ratified. When the same court considered an action that *had* been ratified, it held that invalidation was "neither necessary nor appropriate, and certainly is not compelled by *NRA*." *Legi-Tech*, 75 F.3d at 708. So too, *Norton v. Shelby County*, 118 U.S. 425 (1886), is no help to Plaintiffs. *Norton* said that the challenged action *was* capable of ratification—it just had not been validly ratified because the entity attempting to do so did not "possess[] the power to perform the act ratified." *Id.* at 451-52. Here, the Bureau at all times possessed "the power to perform the act ratified." Finally, *Ringling v. City of Hempstead* involved an attempt to ratify proceedings that—unlike the issuance of the Payment Provisions—were undertaken by a body having "no authority in law to act at all." 193 F. 596, 601 (5th Cir. 1911).

it issued the rule, and its actions in doing so were valid. *See Collins*, 141 S. Ct. at 1787-88. There was thus no need to undertake notice-and-comment procedures a second time or to otherwise repeat the explanation the Bureau provided in issuing the Payment Provisions. The APA does not require agencies to explain the same action twice. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101-02 (2015) ("Time and again, we have reiterated that the APA sets forth the full extent of judicial authority to review executive agency action for procedural correctness." (quotation marks omitted)).[9]

If Plaintiffs mean to suggest (at 24) that any harm from the removal provision would automatically entitle them to vacatur under the APA's remedial provision, that is contradicted by the provision itself, which directs that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. Any harm to Plaintiffs from the removal provision would have been fully resolved, and rendered harmless, by Director Kraninger's ratification.[10]

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[9] Because the Bureau satisfied all applicable procedural requirements when it issued the Payment Provisions (and because those Provisions are the source of the compliance obligations Plaintiffs seek to challenge here), there is no basis for Plaintiffs to claim that the Court must separately analyze whether the ratification was itself arbitrary and capricious. In any case, as explained, *supra* at 28-35, the two arguments Plaintiffs have offered why the ratification would be arbitrary, because it is supposedly inconsistent with the 2020 Rule, are unpersuasive.

[10] Contrary to Plaintiffs' view (at 32-33), ratification of the Payment Provisions does not make those provisions apply retroactively, *i.e.*, to past conduct—the concern at issue in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Plaintiffs' efforts to distinguish some of the many cases cutting against them fall short. They provide no convincing grounds to discount *Moose Jooce v. FDA,* 981 F.3d 26 (D.C. Cir. 2020), in which the D.C. Circuit affirmed the ratification of a regulation. Contrary to Plaintiffs' claim (at 26 n.2) that the arguments there were "under-developed," the court carefully considered, and rejected, the challengers' arguments that the rule had not been (and could not be) validly ratified. *See id.* at 28-30. And while Plaintiffs acknowledge (at 28) that administrative adjudications, like rulemakings, "require certain procedures before making a decision," they overlook that a number of circuit cases have approved ratifications of adjudications and other actions besides rulemakings that are subject to specific procedural requirements. *See, e.g.*, *Doolin*, 139 F.3d at 213-14 (approving ratification of administrative adjudication proceeding and finding no need to "redo[]" those proceedings); *Advanced Disposal*, 820 F.3d at 604-06 (approving ratification of agency official's actions conducting union election that was governed by provisions of the National Labor Relations Act).

III. Plaintiffs' remaining constitutional claims are without merit.

Plaintiffs argue that other aspects of the CFPA are unconstitutional and require invalidation of the Payment Provisions. These arguments are meritless.

1 . The CFPA established the Bureau within the Federal Reserve System and provided that the Bureau would draw up to a capped amount of funds from the

System's combined earnings. 12 U.S.C. §§ 5491(a), 5497(a). The CFPA further provides that the Bureau can spend that money "to pay the expenses of the Bureau in carrying out its duties and responsibilities." *Id.* § 5497(c). Plaintiffs claim (at 28-30) that these statutory authorizations violate the Appropriation Clause's requirement 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.

But even assuming an Appropriations Clause problem could justify setting aside a rule, there is nothing problematic about the CFPA's funding provisions. The Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). Its "straightforward and explicit command … 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap*, 301 U.S. at 321). "[I]n other words, the payment of money from the Treasury must be authorized by a statute." *Id.* Both the Bureau's receipt of funds and its use of those funds are so authorized. *See* 12 U.S.C. § 5497(a), (c). That fully satisfies the Appropriation Clause's "straightforward and explicit command." *Richmond*, 496 U.S. at 424.

Indeed, every court to consider the Bureau's funding has held that it is constitutional. *See, e.g.*, *PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018)

(en banc), *abrogated on other grounds by Seila Law*, 140 S. Ct. 2183; *Citizens Bank*, 504 F. Supp. 3d at 57; *CFPB v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020 WL 7043847, at *7-9 (D. Md. Nov. 30, 2020). Nor is there anything unusual about Congress's choice to fund the Bureau through its organic statute rather than annual spending bills. Numerous programs and agencies are similarly funded through "fees, assessments, or investments rather than the ordinary appropriations process." *PHH Corp.*, 881 F.3d at 95 (listing examples including the Federal Reserve Board, FDIC, and OCC).

2. Nor did Congress violate the non-delegation doctrine when it authorized the Bureau to spend up to a capped amount of funds and to prevent unfair and abusive practices.[11] *Contra* Br. at 30-31.

The CFPA's funding provision instructs the Bureau to draw an amount, up to a specified limit, that the Director determines is "reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year)." 12 U.S.C. § 5497(a). Even standing alone, this provision provides at least as much guidance as the far broader delegations the Supreme Court has repeatedly upheld. The Court has upheld instructions for agencies to set

[11] Plaintiffs did not argue in the district court that the CFPA's funding provision violates the non-delegation doctrine (as opposed to the Appropriations Clause) and thus waived this argument. *See* ROA.739-40.

air quality standards "requisite to protect the public health," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001); to take action to "avoid an imminent hazard to the public safety," *Touby v. United States*, 500 U.S. 160, 165-67 (1991); and to fix "fair and equitable" commodities prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944). "In short, [the Court] ha[s] almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474-75 (quotation marks omitted).

In any event, the funding provision need not be read alone, because its reference to "the authorities of the Bureau under Federal consumer financial law" necessarily incorporates the whole of the CFPA, which describes, in great detail, the specific authorities and duties of the Bureau. The Director can determine what amount (up to the statutory cap) is "reasonably necessary" to carry out the Bureau's statutory responsibilities only by considering what those statutory responsibilities are. Thus, not just Section 5497(a) but the entire CFPA provides an intelligible principle to guide the Bureau's decisionmaking.

The Court need go no further to reject Plaintiffs' claim. But it is also notable that Congress has frequently—as it did here—made available set amounts of money for certain purposes while authorizing the executive to spend less than the full amount appropriated. "From a very early date Congress … made permissive

individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion." *Clinton v. City of New York*, 524 U.S. 417, 466-67 (1998) (Scalia, J., concurring in part and dissenting in part). "The constitutionality of such appropriations has never seriously been questioned." *Id.*

Plaintiffs' similar attack on the provisions defining unfairness and abusiveness, *see* 12 U.S.C. § 5531(c)-(d), are similarly foreclosed by binding precedent. Those provisions describe with great specificity the findings the Bureau must make before it can determine that a practice is unfair or abusive. Plaintiffs admit as much themselves, acknowledging (at 3) that the CFPA "limits" and "narrowly defin[es] the practices that can be regulated as 'unfair' … or 'abusive.'" The provisions provide a more-than-sufficient intelligible principle.

CONCLUSION

For these reasons, the Court should affirm the district court's judgment.

Dated: December 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 15, 2021, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Counsel for all participants are registered CM/ECF users, and service on them will be accomplished by the CM/ECF system.

/s/ Kevin E. Friedl
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32. It contains 12,993 words, excluding the portions exempted by Rule 32(f), and was prepared using Microsoft Office 365 Pro Plus.

/s/ Kevin E. Friedl
Kevin E. Friedl

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CONSUMER FINANCIAL
PROTECTION BUREAU,

Plaintiff,

v.

No. 1:17-cv-1323-SB

NATIONAL COLLEGIATE MASTER
STUDENT LOAN TRUST et al.

Defendants.

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MEMORANDUM OPINION

December 13, 2021

BIBAS, *Circuit Judge*, sitting by designation.

Sometimes litigation is a moving target. Legal rules can change while the parties are battling it out. Earlier this year, the National Collegiate Student Loan Trusts successfully argued that the Consumer Financial Protection Bureau's suit against them was untimely. This Court dismissed the case without prejudice, relying on then-prevailing precedent. But then the Supreme Court announced a new rule. And the CFPB renewed its suit. Applying the new rule, at least on the complaint before me, this case is timely.

Plus, the Trusts say the CFPB lacks authority to sue them because they are not "covered persons" under the Consumer Financial Protection Act. But they "engaged in" servicing loans and collecting debt through their contractors, so they fall within the statute. I must thus let the CFPB's case proceed.

I. BACKGROUND

In 2017, the CFPB sued the Trusts for engaging in forbidden debt-collection and litigation practices. First Am. Compl., D.I. 362 ¶¶ 1–2. Now the Trusts move to dismiss. Understanding that motion requires us to take a whistle-stop tour through both this protracted enforcement action and the structure of the CFPB.

A. The Trusts and the CFPB's enforcement

The Trusts were set up to securitize student loans. They bought a pool of 800,000 private loans, then sold notes secured by that pool to investors. *Id.* ¶¶ 27, 34. As students repaid their loans, the investors would take a cut. D.I. 54, at 4. Just like any other securitization, the value of the notes depended on the riskiness of the

underlying asset: the more students default on their loan payments, the less valuable the notes.

Thus, the Trusts have a powerful incentive to ensure that students do not miss loan payments. Since the Trusts have no employees, they collect debt and service the loans through third parties. First Am. Compl. ¶ 29.

To that end, in 2009 the Trusts contracted with a special servicer to collect "past-due and defaulted student loans" and to do "collections litigation." D.I. 54, at 5. The special servicer, in turn, entered into agreements with "subservicers," who would "conduct[] collections" and "oversee[] various law firms that [would] file collection lawsuits against borrowers in the name of the Trusts." *Id.*; *see* First Am. Compl. ¶¶ 38–44.

But the subservicers soon attracted the attention of the CFPB. After a lengthy investigation, it found that the subservicers had "executed and notarized deceptive affidavits" and "filed … collections lawsuits lacking" key evidence. First Am. Compl. ¶¶ 49–50. The CFPB concluded that they engaged in unfair and deceptive debt-collection practices. D.I. 54, at 1–2.

So in 2014, the CFPB started administrative proceedings against the Trusts. Though the parties reached a settlement and asked the Court to enter a consent decree, the Court declined. D.I. 272. That forced the CFPB to sue.

B. The structure of the CFPB and the Trusts' first motion to dismiss

But midway through this litigation, the Supreme Court injected a new issue. Since its creation in 2008, the CFPB had been headed by a single director, insulated from removal by the President. Yet the Court said that structure "violate[d] the separation

of powers." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197, 2209 (2020). So it severed the removal restriction, leaving the rest of the statute intact.

That ruling implicated this enforcement action, which the CFPB filed in 2017 while headed by an improperly insulated director. Aware that such a director may have lacked the power to bring an enforcement action, a new director (now removable at will by the President) ratified the suit to cure any defect. D.I. 308-1.

But earlier this year, Judge Noreika ruled that the ratification came too late to save this suit. D.I. 359, at 8–14. All CFPB enforcement actions must be brought within three years of the date on which it discovers the violation. 12 U.S.C. § 5564(g)(1). Yet here, the CFPB admitted that "ratification … came more than three years after the date of discovery." D.I. 356, at 40:20–21. Plus, it could not show that the statute-of-limitations clock was extended by equitable tolling. So Judge Noreika dismissed the suit without prejudice, giving the CFPB another chance to explain why its suit was timely. D.I. 360.

After that ruling, the CFPB amended its complaint. And the Trusts brought this motion to dismiss, arguing that the new complaint suffered from the same timeliness defect as the first one. D.I. 367, at 7–11. They also contend that the Trusts do not count as "covered person[s]" under the Act and so cannot be targets of CFPB enforcement. *Id.* at 11; 12 U.S.C. § 5481(6).

To survive a motion to dismiss, a complaint must contain enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). I must accept all

allegations in the complaint as true and draw all inferences in favor of the nonmoving party. *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014).

II. This Suit Is Not Yet Time Barred

The Trusts say the CFPB failed to ratify this suit before the statute-of-limitations clock ran out. But this assumes that unconstitutional removal protections automatically void agency action. And earlier this year, the Supreme Court rejected that premise. Thus, the CFPB stopped the clock when it sued. So on the compliant now before me, the suit is timely filed.

A. There was no need for the CFPB to ratify this suit

The CFPB brought this suit while it was unconstitutionally structured. Back then, courts saw actions brought by improperly structured agencies as "ultra vires" and so void. *Collins v. Yellen*, 141 S. Ct. 1761, 1795 (2021) (Gorsuch, J., concurring in part). And void actions cannot stop the statute-of-limitations clock. Thus, to save the suit, an agency had to cure the constitutional defect, then ratify the action before the clock ran out. Here, ratification happened too late. So Judge Noreika dismissed this lawsuit.

Yet earlier this year, the Supreme Court undercut that reasoning. *Id.* at 1788 (majority opinion). It held that an unconstitutional *removal* restriction does not invalidate agency action so long as the agency head was properly *appointed*. Such an agency head has "authority to carry out the functions of the office." *Id.* So the agency's actions are not "void" and do not need to be "ratified," unless a plaintiff can show that the removal provision harmed him. *Id.* Put differently, he must show that the agency

action would not have been taken but for the President's inability to remove the agency head. *Id.*

That is not the case here. This suit would have been filed even if the director had been under presidential control. It has been litigated by five directors of the CFPB, four of whom were removable at will by the President. D.I. 377, at 2. And the CFPB did not change its litigation strategy once the removal protection was eliminated. This is strong evidence that this suit would have been brought regardless. Thus, the CFPB's initial decision to bring this suit was not ultra vires.

B. At this stage, I may not decide whether this suit is time barred

Because the decision to bring this suit was a valid agency action, it is not untimely if it was *filed* within three years of the date on which the CFPB discovered the alleged violation. 12 U.S.C. § 5564(g)(1).

The Trusts argue that even under this test, the suit is time barred. The CFPB sued on September 18, 2017. Yet the Trusts say, the CFPB had discovered the alleged misconduct by September 4, 2014, when it issued a civil investigative demand asking the Trusts for information about possible violations. D.I. 367, at 19. If true, this suit is time barred.

But the Trusts' argument is premature. On this motion to dismiss, I may consider a statute-of-limitations defense only if "the face of the complaint demonstrates that the plaintiff's claims are untimely." *Stephens v. Clash*, 796 F.3d 281, 288 (3d Cir. 2015) (internal quotation marks omitted). Otherwise, the defendant would be forced to state facts necessary to anticipate and overcome an affirmative defense. *Id.*

Yet the Trusts fall afoul of this rule by relying on a civil-investigative-demand letter outside the complaint. *See* D.I. 302-3. Because I may not consider that letter, the Trusts' argument fails. Even if I *could* look at the letter, it does not unambiguously show that the CFPB knew about the alleged violations by September 4, 2014. The letter states that its purpose is to "determine whether [the Trusts] … engaged [in] … unlawful acts." *Id.* at 4. Such an investigation would have been pointless if the agency already knew about the Trusts' alleged misconduct.

The Trusts may still try to make out a statute-of-limitations defense, but that will have to wait until summary judgment.

III. THE TRUSTS ARE "COVERED PERSONS" UNDER THE CONSUMER FINANCIAL PROTECTION ACT

The Trusts argue that the CFPB cannot bring an enforcement action against them because they are not "covered persons" as required under the Act. But this theory is undercut by the statute's text: the Trusts "engage in" servicing and collecting debt.

Start with the text. The CFPB may bring enforcement actions to "prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice." 12 U.S.C. § 5531(a). Thus, it may sue only a "covered person" or a "service provider." The CFPB does not argue that the Trusts are "service provider[s]." *See* First Am. Compl. ¶ 8. So this suit may only proceed if they are "covered person[s]": "person[s] that engage[] in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6).

The CFPB argues that the Trusts qualify because they "engage[] in" providing some of the "financial product[s] or service[s]" listed in the Act: "servicing loans,

including acquiring, purchasing, selling, brokering, or other extensions of credit" and "collecting debt." *Id.* § 5481(6), (15)(A)(i), (x); First Am. Compl. ¶ 8. More precisely, it claims that the Trusts "engage in regular servicing of … loans" and "debt-collection activities through … [its] subservicers." *Id.* ¶¶ 35–36.

The Trusts do not deny that their subservicers collected debt or serviced loans. Instead, they contend that the CFPB cannot hold them liable for those actions. D.I. 367, at 13. The Trusts characterize themselves as "passive securitization vehicles … [that] take no action related to the servicing of student loans or collecting debt." *Id.* at 12.

So this dispute boils down to the breadth of the word "engage." Does a person "engage" in an activity if he contracts with a third party to do that activity on his behalf? Yes.

"Engage" means to "to embark in any business" or to "enter upon or employ oneself in an action." *Engage* (def. 16), Oxford English Dictionary (2d ed. 2000); *see also Engage*, Black's Law Dictionary (11th ed. 2019) ("To employ or involve oneself; to take part in; to embark on.").

That definition is broad enough to encompass actions taken on a person's behalf by another, at least where that action is central to his enterprise. Thus, if a dairy farmer contracts with a farmhand to milk his cows and never does that job himself, he is still employed in or in the business of milking cows.

So too here. The Trusts "embark[ed] in [the] business" of collecting debt and servicing loans when they contracted with the servicers and subservicers to collect their

debt and service their loans. Indeed, the CFPB alleges that the unfair and deceptive debt-collection practices happened in lawsuits brought on behalf of the Trusts, with the "relevant Trust … named [as the] plaintiff in the action." First Am. Compl. ¶ 37. Those suits could have proceeded only with the Trusts' involvement: with narrow exceptions, "a party … must assert his own legal rights and interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (internal quotation marks omitted). The subservicers could not have collected any debt without the Trusts' say-so.

True, the subservicers were independent contractors and not Trust employees. D.I. 302-1 § 17. But that is not dispositive. Debt collection and loan servicing are core aspects of the Trusts' business model. If they did not enforce debtors' obligations, their pool of loans would be less valuable, as would the notes they sell to investors. The Trusts cannot claim that they were not "engaged in" a key part of their business just because they contracted it out. *Cf. Barbato v. Greystone All., LLC*, 916 F.3d 260, 266–68 (3d Cir. 2019) (finding that a "passive debt owner" counted as a "debt collector" under the Fair Debt Collection Practices Act when it contracted with a third party to collect debt on its behalf).

Plus, if Congress wanted to allow enforcement against only those who *directly* engage in offering or providing consumer financial services, it could have said so. *See, e.g.*, 12 U.S.C. § 5481(15)(A)(vii)(I) (exempting some merchants from "covered person" status where they deal in "nonfinancial good[s] or service[s] sold *directly* … to the consumer").

Pushing back, the Trusts note that the Act expressly enumerates when a "related person" may be sued based on his relationship to a covered person. D.I. 367, at 14 (citing 12 U.S.C. § 5481(25)). That provision, they reason, displaces common-law vicarious liability. Maybe so. But because the Trusts *themselves* count as covered persons, I need not decide whether a non-covered-person principal can ever be held vicariously liable for the acts of his covered-person agent.

* * * * *

The Trusts argue that the CFPB was powerless to file this suit and that it filed too late. But both arguments fail. On the complaint now before me, this suit was timely filed. And the CFPB may sue the Trusts because they are "covered persons" under the Consumer Financial Protection Act. Thus, this enforcement action may proceed.