



1700 G Street NW, Washington, D.C. 20552

August 5, 2024

Lyle W. Cayce, Clerk of Court
Office of the Clerk
United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Community Financial Services Ass’n of Am., Ltd.*, v. CFPB, No. 21-50826
– Response to Petitioners’ Rule 28(j) Letter of July 31, 2024

Dear Mr. Cayce:

Apparently recognizing the weakness of their rehearing petition, Petitioners try to raise, via 28(j) letter, a new claim not mentioned in the petition. But “[t]his court will not consider a new claim raised for the first time in ... a Rule 28(j) letter.” *United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5th Cir. 2005).

Anyway, Petitioners’ new argument does not support rehearing. *Consumers’ Research* found a nondelegation problem with a statute the Court said “suppl[ie]d no [intelligible] principle at all.” Op. 24. The Bureau’s statute does. In contrast to *Consumers’ Research*, it details at length the specific findings the Bureau had to make before identifying as “unfair” and “abusive” the payment practice proscribed by the rule and before issuing that rule. *CFSA*, 51 F.4th at 634 (citing, among other provisions, 12 U.S.C. § 5531(c)-(d)). “This was more than sufficient to confer an ‘intelligible principle.’” *Id.* at 635.

Petitioners suggest that the panel was insufficiently aware of the Bureau’s funding. That is an odd claim given the panel’s detailed explication—since reversed—why that funding “cannot be reconciled with the Appropriations Clause and the ... separation of powers.” *Id.* at 635-42. Nor did *Consumers’ Research* hold that a statute—such as the Bureau’s—that provides an intelligible principle may nonetheless violate the nondelegation doctrine because of Congress’s choice how to appropriate money to administer the statute. The Court’s “point [wa]s only

that, to the extent Congress’s ability to control agencies through regular appropriations supplies some justification for broad delegations ... that justification is absent here.” Op. 29 n.10. Here, the panel did not need to hunt for special justifications where the relevant provisions themselves provided the needed intelligible principle.

If Petitioners mean to mount a nondelegation attack on the Bureau’s funding itself, that claim is doubly forfeited: They did not raise it in their petition and also failed to properly raise it before the panel. *CFSA*, 51 F.4th at 633 n.6 (finding that claim “forfeited on appeal”). The claim is also meritless. *See, e.g., CFSA*, 601 U.S. at 435 (“[T]he Bureau’s funding mechanism fits comfortably with the First Congress’ appropriations practice.”).

Respectfully submitted,

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cc: Counsel of record (via CM /ECF)