No.

IN THE SUPREME COURT OF THE UNITED STATES

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL,
PETITIONERS

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA,
LIMITED, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **PETITION FOR A WRIT OF CERTIORARI,** via e-mail and first-class mail, postage prepaid, this 14th day of November, 2022.

[See Attached Service List]

As required by Supreme Court Rule 33.1(h), I certify that the document contains **7,977** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct. Executed on **November 14, 2022.**

Elizabeth B. Prelogar
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

November 14, 2022

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisory Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL
COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA,

Michael A. Carvin
Direct: 202-879-7643
Email: macarvin@jonesday.com
[COR NTC Retained]
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001

Christian George Vergonis
Direct: 202-879-3914
Email: cvergonis@jonesday.com
[COR LD NTC Retained]
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001

No.

In the Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL., PETITIONERS

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH FROTMAN
General Counsel
STEVEN Y. BRESSLER
Acting Deputy General Counsel
KRISTIN BATEMAN
Acting Assistant General Counsel
CHRISTOPHER DEAL
KEVIN E. FRIEDL
JUSTIN M. SANDBERG
Senior Counsel
Consumer Financial Protection Bureau
Washington, D.C. 20552

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN H. FLETCHER
Deputy Solicitor General
EPHRAIM A. MCDOWELL
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.

PARTIES TO THE PROCEEDING

Petitioners the Consumer Financial Protection Bureau and Rohit Chopra, in his official capacity as Director of the Consumer Financial Protection Bureau, were defendants in the district court and appellees in the court of appeals.

Respondents Consumer Financial Services Association of America, Limited and Consumer Service Alliance of Texas were plaintiffs in the district court and appellants in the court of appeals.

RELATED PROCEEDINGS

United States District Court (W.D. Tex):

Consumer Financial Services Association of America, Limited v. *Consumer Financial Protection Bureau*, No. 18-cv-295 (Aug. 31, 2021)

United States Court of Appeals (5th Cir.):

Consumer Financial Services Association of America, Limited v. *Consumer Financial Protection Bureau*, No. 21-50826 (Oct. 19, 2022)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL., PETITIONERS

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Consumer Financial Protection Bureau and its Director, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 51 F.4th 616. The order of the district court (App., *infra*, 47a-76a) is reported at 558 F. Supp. 3d 350.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 77a-86a.

STATEMENT

Congress has provided by law that the Consumer Financial Protection Bureau (CFPB) shall receive up to a capped amount of funding each year from the earnings of the Federal Reserve System, and that the CFPB may use that funding to fulfill its statutory responsibility to administer and enforce consumer financial protection laws. Disagreeing with other courts to have considered the issue, the court of appeals held that this statutory funding mechanism violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and vacated a CFPB regulation because it was promulgated at a time when the CFPB was receiving funding through that mechanism. No other court has ever held that Congress violated the Appropriations Clause by passing a statute authorizing spending.

A. Legal Background

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank or Act). The Act provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010). It established the CFPB as an "independent bureau" within the Federal Reserve System, 12 U.S.C. 5491(a), and transferred certain consumer financial protection authorities of several existing agencies to the CFPB, see 12 U.S.C. 5581. The Act directs

the CFPB "to implement and, where applicable, enforce Federal consumer financial law" to ensure, among other things, that "consumers are protected from unfair, deceptive, or abusive acts and practices." 12 U.S.C. 5511(a) and (b)(2). And the Act empowers the CFPB to carry out that mandate by, among other things, promulgating rules "identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service." 12 U.S.C. 5531(b); see 12 U.S.C. 5512(b)(1).

Congress specified that the CFPB would receive up to a capped amount of funding each year from the earnings of the Federal Reserve System. 12 U.S.C. 5497(a).[1] Each year, the Federal Reserve Board transfers to the Bureau "the amount determined by the [CFPB] 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." 12 U.S.C. 5497(a)(1). Congress specified that the amount transferred to the CFPB "shall not exceed" 12% "of the total operating expenses of the Federal Reserve System" as reported in 2009, an amount equal to $597.6 million. 12 U.S.C. 5497(a)(2)(A)(iii); see Board of Governors of the Federal Reserve System, *96th Annual Report 2009*, at 491 (May 2010). That statutory cap is then adjusted based on a measure of inflation. 12 U.S.C. 5497(a)(2)(B). In fiscal year 2022, the inflation-adjusted amount that the CFPB

---

[1] The Federal Reserve System earns money from various sources, including interest on securities acquired through open-market operations, fees received for services provided to depository institutions, and interest on loans to depository institutions. See generally 12 U.S.C. 342-361.

could receive through this mechanism was approximately $734 million. App., *infra*, 34a n.12. The CFPB has requested and received approximately $641.5 million this fiscal year. See CFPB, *CFO Update Through the Third Quarter of Fiscal Year* 2022 (Aug. 23, 2022); CFPB, *Funds Transfer Request, FY 2022 Quarter 4* (June 24, 2022).[2]

The money transferred to the CFPB is deposited into a "Bureau Fund" at a Federal Reserve bank. 12 U.S.C. 5497(b)(1)-(2). Congress provided that the money in the Bureau Fund "shall be immediately available to the Bureau" and "shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities." 12 U.S.C. 5497(c)(1).

Congress specified that the funds provided by the Federal Reserve Board to the CFPB "shall not be subject to review by" the House and Senate Appropriations Committees. 12 U.S.C. 5497(a)(2)(C). But Congress established several other mechanisms for monitoring the CFPB's use of funds. For example, the CFPB Director must regularly submit reports to and appear before other congressional committees, including to "justif[y]" the CFPB's "budget request of the previous year." 12 U.S.C. 5496(c)(2); see 12 U.S.C. 5496. And the Comptroller General must conduct annual financial audits of the CFPB and submit to Congress "a report of each annual audit," including statements of assets, liabilities,

---

[2] The CFPB also collects civil penalties from enforcement actions, but it must deposit those sums into the "Consumer Financial Civil Penalty Fund," which may be used only to pay victims harmed by violations of consumer financial laws or for consumer education and financial literacy programs. 12 U.S.C. 5497(d)(1); see 12 U.S.C. 5497(d)(2).

income, and expenses. 12 U.S.C. 5497(a)(5)(B); see 12 U.S.C. 5497(a)(5)(A).

2. In 2017, the CFPB issued a final rule entitled Payday, Vehicle Title, and Certain High-Cost Installment Loans (the Payday Lending Rule). 82 Fed. Reg. 54,472 (Nov. 17, 2017). That rule was signed by then-Director Richard Cordray and had two major components, both of which invoked the CFPB's authority to declare certain practices "unfair" and "abusive." *Ibid.*; see 12 U.S.C. 5531(b). First, the rule's underwriting provisions prohibited covered lenders from making certain loans, including payday and vehicle title loans, "without reasonably determining that the borrowers will have the ability to repay the loans according to their terms." 82 Fed. Reg. at 54,588; see *id.* at 54,874.

Second, the rule's payment provisions prohibited covered lenders from attempting to withdraw payments from consumers' bank accounts after two consecutive attempts had failed due to a lack of funds, unless the consumer provided a new authorization. 82 Fed. Reg. at 54,472; see 12 C.F.R. 1041.7, 1041.8. The rule explained that when two consecutive attempts to withdraw payments have failed, "further attempts * * * are very unlikely to succeed, yet they clearly result in further harms to consumers," such as additional overdraft fees. 82 Fed. Reg. at 54,472; see *id.* at 54,720-54,726.

B. Procedural History

1. Respondents are two associations of companies regulated by the Payday Lending Rule. In April 2018, they filed this suit challenging the rule on various statutory and constitutional grounds. App., *infra*, 6a. Around the time of respondents' suit, the CFPB, then led by Acting Director Mick Mulvaney, decided to engage in rulemaking to reconsider the Payday Lending

Rule. *Ibid.* In light of that rulemaking, the district court stayed proceedings in this case. *Ibid.*

During the rulemaking, Kathleen Kraninger was nominated and confirmed as CFPB Director. App., *infra*, 7a. In June 2020, after this Court invalidated the Director's for-cause removal protection in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), the CFPB issued a new Payday Lending Rule, see 85 Fed. Reg. 44,382 (July 22, 2020). The new rule rescinded the original rule's underwriting provisions but left its payment provisions intact. *Ibid.* Director Kraninger also separately ratified the payment provisions to eliminate any question about whether they had been affected by the invalid removal protection. 85 Fed. Reg. 41,905 (July 13, 2020).

2. Respondents filed an amended complaint challenging the new rule on various grounds. D. Ct. Doc. 76 (Aug. 28, 2020). Respondents devoted most of their complaint to other statutory and constitutional arguments, but they briefly asserted that the CFPB's funding mechanism violates the Appropriations Clause and the separation of powers because the CFPB is "improper[ly] insulat[ed] from congressional supervision." *Id.* at 30.

The district court granted summary judgment to the CFPB on each of respondents' claims. App., *infra*, 47a-76a. On the Appropriations Clause claim, the district court explained that "[t]he Appropriations Clause 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Id.* at 72a (quoting *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990)). And the court concluded that "[w]here, as here, a statute authorizes an agency to receive funds up to a certain cap, there is no Appropriations Clause issue." *Ibid.*

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-46a.

a. The court of appeals began by rejecting respondents' principal challenges. App., *infra*, 9a-27a. Among other things, the court held that the Payday Lending Rule's payment provisions fall within the CFPB's statutory authority to deem certain practices "unfair," and that those provisions were not arbitrary or capricious. *Id.* at 9a-18a. The court thus concluded that the "the Bureau acted within its statutory authority" in issuing the rule. *Id.* at 14a.

b. Respondents had devoted just two pages of their opening brief to their Appropriations Clause claim. Pet. C.A. Br. 28-30. The court of appeals nonetheless embraced that novel argument, holding that "the Bureau's funding structure violates the Appropriations Clause of the Constitution and the separation of powers principles enshrined in it." App., *infra*, 27a. The court acknowledged this Court's statement that "the Appropriations Clause expressly 'was intended as a restriction upon the disbursing authority of the Executive department.'" *Id.* at 33a (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)). But the court maintained that "[o]f equal importance is what the clause 'takes away from Congress: the option *not* to require legislative appropriations prior to expenditure.'" *Id.* at 31a (quoting Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988)). According to the court, "an *appropriation* is required" to authorize spending; "[a] law" providing an agency with a funding source and spending authority "does not suffice." *Id.* at 38a.

The court of appeals did not specify what more it thought was required for such a law to qualify as an "appropriation." Instead, the court listed certain features of the Bureau's statutory funding mechanism that, in its view, collectively rendered that mechanism unconstitutional. App., *infra*, 33a-37a. The court noted that the CFPB does not "rely on annual appropriations" but rather receives up to a capped amount of funding each year through transfers from the Federal Reserve Board. *Id.* at 33a; see *id.* at 33a-34a. And because the court deemed the Federal Reserve Board to itself be funded "'outside the appropriations process through bank assessments,'" the court perceived "a double insulation from Congress's purse strings." *Id.* at 34-35a (citation omitted).

The court further emphasized that the funds that the CFPB receives are "permanently available" until expended. App., *infra*, 35a. It cited a provision stating that "'[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.'" *Id.* at 36a (quoting 12 U.S.C. 5497(c)(2)) (brackets in original). And it maintained that "Congress expressly renounced its check" on the CFPB "by legislating that 'funds derived from the Federal Reserve System . . . shall not be subject to review by'" the House and Senate Appropriations Committees. *Ibid.* (quoting 12 U.S.C. 5497(a)(2)(C)).

The court of appeals stated that "[t]he constitutional problem" it perceived in the CFPB's funding mechanism "is more acute because of the Bureau's capacious portfolio of authority," App., *infra*, 37a, which the court believed was not "remotely comparable" to the portfolios of other agencies with similar funding mechanisms, *id.* at 40a (citation omitted). And the court added that this Court's decision in *Seila Law* "exacerbates the constitutional problem[] arising from the [Bureau's] budgetary independence" by invalidating the CFPB Director's for-cause removal protections, resulting in "unification of the purse and the sword in the executive." *Id.* at 37a (citation omitted; brackets in original).

The court of appeals recognized that "every court to consider [the CFPB's] funding structure," including the D.C. Circuit and at least six district courts, "has deemed it constitutionally sound." App., *infra*, 39a. But the court "respectfully disagree[d] with" those decisions. *Ibid.* The court also acknowledged that Congress has established several other agencies that, like the CFPB, are funded through sources other than time-limited spending bills. *Id.* at 40a. But in the court's view, the various features it had identified meant that CFPB's "funding structure goes a significant step further than that enjoyed by the other agencies." *Ibid.*

c. Turning to "the question of remedy," the court of appeals did not ask whether the constitutional violation it perceived could be cured by severing any of the portions of Section 5497 that the court deemed objectionable. App., *infra*, 42a. Nor did the court consider the remedial questions raised by its novel holding that Congress had violated the Appropriations Clause by failing to maintain adequate supervision over an agency's funding. Instead, the court borrowed the remedial framework from *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), even though it acknowledged that *Collins* "is not precisely on point" because it involved an invalid removal protection rather than an Appropriations Clause violation. App., *infra*, 42a.

The court of appeals interpreted *Collins* to require it to ask whether "there is a linear nexus" between "the agency's unconstitutional funding scheme" and its "promulgation of the rule." App., *infra*, 44a. The court found such a nexus because "the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency's unconstitutional funding scheme." *Ibid.* Accordingly, the court "vacate[d] the Payday Lending Rule." *Id.* at 45a.[3]

REASONS FOR GRANTING THE PETITION

The court of appeals relied on an unprecedented and erroneous understanding of the Appropriations Clause to hold the CFPB's statutory funding mechanism unconstitutional. Congress enacted a statute explicitly authorizing the CFPB to use a specified amount of funds from a specified source for specified purposes. The Appropriations Clause requires nothing more. The court of appeals' novel and ill-defined limits on Congress's spending authority contradict the Constitution's text, historical practice, and this Court's precedent. And the court of appeals compounded its error by adopting a sweeping remedial approach that calls into question virtually every action the CFPB has taken in the 12 years since it was created.

This Court's review is warranted because the court of appeals' decision declared an Act of Congress unconstitutional, because it squarely conflicts with a decision of the D.C. Circuit, and because it threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector. Given the gravity of those consequences and the uncertainty that the court of appeals' decision has already created, the United States is filing this petition less than one month

---

[3] The court of appeals' vacatur did not change the rules governing regulated entities because the lower courts had stayed the Payday Lending Rule's compliance date during the pendency of this litigation. App., *infra*, 75a; C.A. Order (Oct. 14, 2021).

after the decision below and respectfully submits that the Court should hear and decide the case this Term.

A. The Decision Below Is Incorrect

In construing the Constitution, this Court looks to "the constitutional text," "historical practice," and "th[e] Court's precedents." *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1542 (2022); see, *e.g.*, *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2197 (2020). Here, those indicia all point in the same direction: The CFPB's statutory funding mechanism is constitutional. The court of appeals' contrary holding lacks merit, and the court's truncated remedial analysis magnified the consequences of its errors.

1. Text, history, and precedent establish the constitutionality of the CFPB's statutory funding mechanism

a. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. Const. Art. I, § 9, Cl. 7. As this Court has long emphasized, the "command of the Appropriations Clause" is "straightforward and explicit": "'It 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 Co.* v. *United States*, 301 U.S. 308, 321 (1937)).

That requirement serves as an important check on the Executive Branch: Even if Congress has authorized a particular activity, and even if money is available in the Treasury to fund it, that money may be spent only if Congress has authorized the expenditure. See, *e.g.*, *Richmond*, 496 U.S. at 424; *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851). The Appropriations Clause thus functions as a "restriction upon the disbursing authority of the Executive Department." *Cincinnati Soap*, 301 U.S. at 321. The Clause does not, however, limit the manner in which Congress itself may exercise its authority to make "Appropriations" "by law." U.S. Const. Art. I, § 9, Cl. 7.

The Founders knew how to impose such a limit when they wished to do so. In empowering Congress "[t]o raise and support Armies," the Constitution specifies that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. Const. Art. I, § 8, Cl. 12. That specific limitation reflects the Founders' recognition that the Constitution would otherwise allow Congress to "authorize standing appropriations that would keep funds flowing until a later Congress repealed the initial appropriation law." Akhil Reed Amar, *America's Constitution: A Biography* 116 (2005). As a check on a "standing army," the Founders chose to depart from "ordinary appropriation rules" for "army—and only army—appropriations." *Ibid.* James Madison contrasted that special constraint with "the British Constitution," which "fixe[d] no limit whatever to the discretion of the legislature" regarding the duration of appropriations for the army. *The Federalist No. 41*, at 273 (James Madison) (Jacob E. Cooke ed., 1961).

b. "'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) (citation omitted). Here, practice dating to the Founding confirms that the Appropriations Clause does not limit Congress's authority to determine the duration, form, source, and specificity of appropriations.

Since the Founding, congressional appropriations statutes have often given the Executive Branch broad discretion in how to spend appropriated funds up to a specified amount. "From 1789-1791, the First Congress made lump-sum appropriations for the entire Government —'sum[s] not exceeding' specified amounts for broad purposes." *Clinton* v. *City of New York*, 524 U.S. 417, 466 (1998) (Scalia, J., concurring in part and dissenting in part) (citation omitted; brackets in original). Congress provided, for example, "[a] sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." Act of Sept. 29, 1789, ch. 23, 1 Stat. 95; see, *e.g.*, Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190. Similarly, "[e]xamples of appropriations committed to the discretion of the President abound in our history." *Clinton*, 524 U.S. at 467. And "[a]ppropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies." *Cincinnati Soap*, 301 U.S. at 322; see *Lincoln* v. *Vigil*, 508 U.S. 182, 192-193 (1993). "The constitutionality of such appropriations has never seriously been questioned." *Clinton*, 524 U.S. at 467.

Congress has also often provided federal entities and activities with funding for multiple years—sometimes indefinitely (that is, unless and until Congress acts again). Those standing (sometimes called "permanent") appropriations remain "always available for specified purposes and do[] not require repeated action by Congress to authorize [their] use." Government Accountability Office (GAO), *Principles of Federal Appropriations Law*, 2-10 (4th ed. Rev. 2016) (*GAO Redbook*). In some cases, Congress has made standing appropriations that are uncapped in amount and provide such "sum[s] sufficient to carry out" a program. 42 U.S.C. 301. That is true, for instance, of appropriations for Social Security payments, 42 U.S.C. 301, 401(b); payments of final judgments against the government, 31 U.S.C. 1304(a); and payments for scholarships for veterans' dependents, 20 U.S.C. 1070h. Thus, for many years, a large portion of the federal budget has consisted of mandatory spending that "does not require annual appropriations." Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 62 (2017). In fiscal year 2021, Congress authorized approximately $4.8 trillion in such mandatory spending (out of approximately $7 trillion in total spending). See Congressional Budget Office, *The Accuracy of CBO's Budget Projections for Fiscal Year 2021*, at 6 (Jan. 2022).

Congress has also frequently provided for the funding of federal entities partially or exclusively through sources other than allocations in annual appropriations bills—for example, through "fees, assessments, or investments." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc), abrogated on other grounds by *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020). That trend began in the Founding era. In 1792, Congress established a national Post Office, to be funded through its collection of postage rates. See Act of Feb. 20, 1792, ch. 7, §§ 2-3, 1 Stat. 233-234. The same year, it created a national mint, to be funded in part through its collection of fees. See Act of Apr. 2, 1792, ch. 16, §§ 1, 14, 1 Stat. 246, 249.

The practice continued over the centuries that followed. In 1836, Congress established the Patent Office, to be funded through its collection of fees paid by patent applicants. See Act of July 4, 1836, ch. 357, §§ 1, 9, 5 Stat. 117, 121. In 1875, Congress provided for the funding of the Office of the Comptroller of the Currency (OCC) through assessments levied on banks. See Act of Feb. 19, 1875, ch. 89, 18 Stat. 329; 12 U.S.C. 16, 481-482. In 1913, Congress established the Federal Reserve Board, to be funded through assessments on Federal Reserve banks. See Federal Reserve Act, ch. 6, § 10, 38 Stat. 261; 12 U.S.C. 243-244. And since then, Congress has chosen similar funding approaches for, among other agencies, the Federal Deposit Insurance Corporation (FDIC), 12 U.S.C. 1815(d), 1820(e); the National Credit Union Administration (NCUA), 12 U.S.C. 1755(a)-(b); the Farm Credit Administration, 12 U.S.C. 2250; U.S. Citizenship and Immigration Services, 8 U.S.C. 1356(m)-(n); and the Federal Housing Finance Agency, 12 U.S.C. 4516.

c. This Court's precedent confirms that the Appropriations Clause leaves it to Congress to determine the duration, form, source, and specificity of appropriations. In *Cincinnati Soap*, the Court considered a law imposing a tax on the processing of coconut oil and providing that the proceeds "shall be held as a separate fund and paid to the Treasury of the Philippine Islands," which at the time remained a federal territory. 301 U.S. at 310. Plaintiffs challenging the law contended "that there ha[d] been no constitutional appropriation, or that any attempted appropriation is bad, because the particular uses to which the appropriated money is to be put have not been specified." *Id.* at 321. The Court deemed the plaintiffs' statutory challenge to the appropriation "premature" because "none of the proceeds of the tax in question ha[d] been transmitted to the Philippine Treasury" when the Court decided the case. *Ibid.* But the Court emphasized that the plaintiffs' constitutional challenge under the Appropriations Clause was "without merit" because that Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Ibid.*

Lower courts have likewise recognized that "Congress has plenary power" to decide how to exercise its constitutional authority over appropriations. *Harrington* v. *Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977); see *United States Dep't of the Navy* v. *Federal Labor Relations Auth.*, 665 F.3d 1139, 1347 (D.C. Cir. 2012) (Kavanaugh J.). Courts have thus rejected attempts "to distinguish those acts of Congress which created valid appropriations from those which did not." *United Biscuit Co. of Am.* v. *Wirtz*, 359 F.2d 206, 213 n.14 (D.C. Cir. 1965), cert denied, 384 U.S. 971 (1966). Indeed, neither the court of appeals nor respondents have cited any decision, by any court, holding that an Act of Congress violated the Appropriations Clause.

d. The CFPB's funding mechanism is entirely consistent with the text of the Appropriations Clause, with longstanding practice, and with this Court's precedent. Congress provided that the CFPB shall be funded "from the combined earnings of the Federal Reserve System." 12 U.S.C. 5497(a)(1). Congress capped the amount that the Bureau may request and receive each year at a fixed number, adjusted only for inflation. 12 U.S.C. 5497(a)(2)(A)-(B). And Congress specified when and how those funds may be used, making them "immediately available" to "pay the expenses of the Bureau in carrying out its duties and responsibilities" and specifying that those funds "shall remain available until expended." 12 U.S.C. 5497(c)(1).

By prescribing the source, amount, duration, and purpose of the CFPB's funding, Section 5497 more than satisfies the classic elements of an appropriation: As the GAO has long recognized, "any time the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation." *GAO Redbook* 2-22 (citation omitted).

The CFPB's funding mechanism also falls well within the bounds of historical practice. As noted above, since the Founding, Congress has frequently provided agencies with standing authority to spend funds derived from sources such as fees, assessments, and investments. In fact, unlike the CFPB, some agencies have no absolute cap on the amount of funding they can receive and spend from those sources. See, *e.g.*, 12 U.S.C. 16 (authorizing OCC to collect assessments "as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office" and noting factors that the OCC may "take into account" when doing so); 12 U.S.C. 482 (similar OCC assessment provision); 12 U.S.C. 243 (authorizing Federal Reserve Board to collect assessments "sufficient to pay its estimated expenses and the salaries of its members and employees").

By providing a fixed amount of funding each year for the CFPB, Congress effectively enacted a standing, capped lump-sum appropriation—a commonplace way of appropriating funds. See pp. 13-14, *supra*. And that is precisely how the Office of Management and Budget (OMB) treats the CFPB's appropriation for purposes of the federal budget. See OMB, *Appendix, Budget of the*

U.S. Government, Fiscal Year 2023, at 1219, https://www.whitehouse.gov/wp-content/uploads/2022/03/appendix_fy2023.pdf.

2. The court of appeals erred in declaring the CFPB's funding mechanism unconstitutional

The court of appeals nonetheless held that the CFPB's funding mechanism violates "the separation of powers embodied in the Appropriations Clause." App., *infra*, 37a. In so doing, the court failed to seriously grapple with the Clause's text, Congress's longstanding practice, or this Court's precedents. Instead of reasoning from text, history, and precedent, the court listed multiple features of the CFPB's funding mechanism that, in its view, added up to an Appropriations Clause violation. The court gave little insight into which features were necessary to its judgment, or how the different features it identified related to one another. And none of the features cited by the court—whether viewed alone or in combination with others—creates a constitutional problem.

a. The court of appeals began with the premise that "[a] law alone does not suffice" to satisfy the Appropriations Clause, and instead "an *appropriation* is required." App., *infra*, 38a. But the court did not attempt to define "appropriation." And as explained above, the CFPB's funding statute indisputably establishes an appropriation under the long-accepted understanding of that term: It is a law that "specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation and expenditure." *GAO Redbook* 2-22 (citation omitted). To the extent the court was suggesting that Congress may make appropriations only through "annual or other time limited" spending statutes, App., *infra*, 35a, that suggestion is belied by constitutional text and congressional practice, see pp. 12-15, *supra*. Indeed, a bar on standing appropriations would invalidate the spending statutes that account for most of the federal budget. See p. 14, *supra*. Perhaps recognizing the untenable implications of such a rule, the court declined to decide whether "perpetuity of funding alone would be enough to render the Bureau's funding mechanism unconstitutional." App., *infra*, 36a n.14.

Instead, the court of appeals sought support for its view that Section 5497 does not establish a valid "appropriation" in other features of the statute. The court emphasized, for example, the provision specifying that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." 12 U.S.C. 5497(c)(2); see App., *infra*, 38a. The court treated that provision as a self-defeating declaration that Section 5497 violates the Appropriations Clause. See App., *infra*, 38a ("We take Congress at its word."). But it is nothing of the kind. Section 5497(c) does not purport to describe the status of the CFPB's funds under the Constitution; instead, it merely exempts those funds from *statutes* that impose limitations on "the use of all appropriated amounts." *GAO Redbook* 2-22; cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (statutory labels are dispositive of "matters * * * within Congress's control," but not matters governed by "the Constitution"). Congress has included similar provisions in the funding statutes for the Federal Reserve Board, 12 U.S.C. 244, OCC, 12 U.S.C. 16, 481, and Farm Credit Administration, 12 U.S.C. 2250(b)(2), among other agencies.

The court of appeals maintained that the CFPB's funding mechanism is unique because the CFPB receives money through transfers from the Federal Reserve Board, and the court believed that the Board "is itself outside the appropriations process" because it is funded "through bank assessments." App., *infra*, 34a (citation omitted); see 12 U.S.C. 243. Attempting to draw an analogy to *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), the court described the CFPB's arrangement as "a double insulation from Congress's purse strings." App., *infra*, 35a. But the court's double-insulation theory is incorrect because the Federal Reserve Board—the supposed intermediary between Congress and the CFPB—exercises no power over how much money the CFPB receives. Rather, it simply transfers the requested amount up to the cap defined by Congress. 12 U.S.C. 5497(a). That ministerial role in no way insulates the CFPB from congressional control. Congress is free to modify the Bureau's funding at any time by simply passing a statute, just as it would be if Section 5497(a) instead directed the Secretary of the Treasury to transfer the same capped amount from the government's general funds.

The court of appeals additionally emphasized that the CFPB's funds remain "permanently available" until expended. App., *infra*, 35a. But the court's apparent skepticism of appropriations without time limits runs counter to the Constitution's text (which shows that the Founders knew how to require time-limited appropriations when they wanted to) and to congressional practice (which shows that appropriations without time limits are routine).

The court of appeals also relied on the provision stating that "funds derived from the Federal Reserve System . . . shall not be subject to review by the

Committees on Appropriations of the House of Representatives and the Senate." App., *infra*, 36a (quoting 12 U.S.C. 5497(a)(2)(C)). In the court's view, that provision "relinquishe[s] [Congress's] jurisdiction to review agency funding." *Ibid.* In fact, it simply allocates authority among different congressional bodies. And the statute establishes numerous other means for congressional review of the CFPB's finances, including requiring reports to and hearings before other congressional committees. 12 U.S.C. 5496(a), (b), and (c)(2); see 12 U.S.C. 5497(a)(5) (Comptroller General audit and report). The Appropriations Clause is not concerned with such matters of internal congressional housekeeping. Indeed, the House and Senate did not even establish Appropriations Committees until the 1860s. See S. Doc. No. 14, 110th Cong., 2d Sess. 5 (2008).

b. After discussing the CFPB's funding mechanism, the court of appeals added that "[t]he constitutional problem is more acute because of the Bureau's capacious portfolio of authority," and because this Court's decision in *Seila Law* makes the Bureau's Director removable by the President at will. App., *infra*, 37a. But those features of the CFPB's structure are unrelated to any purported Appropriations Clause issue. The Appropriations Clause applies equally to all agencies; nothing in its text or history supports distinctions based on an agency's portfolio, scope of authority, or protection from presidential removal.

The court of appeals' attempt to inject those considerations into the Appropriations Clause is also inconsistent with this Court's decision in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021). There, the Court made clear that "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies." *Id.* at 1785. Because no "clear standard" exists to "distinguish agencies" based on the amount of power they wield, courts should avoid such comparisons when assessing separation-of-powers questions. *Id.* at 1784. The court here, however, relied on precisely that sort of comparison. See App., *infra*, 37a, 40a.

The court of appeals' analysis was also mistaken even on its own terms. The court believed that other agencies with similar funding mechanisms do not possess authority "remotely comparable" to the CFPB's. App., *infra*, 40a. But the Federal Reserve Board's decisions have "global consequence." *Seila Law*, 140 S. Ct. at 2239 (Kagan, J., concurring in the judgment in part and dissenting in part). Several other agencies with similar funding mechanisms exercise significant rulemaking and enforcement authority over the financial sector. See, *e.g.*, 12 U.S.C. 1818, 1828 (granting such authority to the Board, the OCC, and the FDIC). And most of the CFPB's authorities were themselves inherited from such agencies. See 12 U.S.C. 5581 (describing functions transferred from the Federal Reserve Board, the OCC, the FDIC, and the NCUA).

Finally, to the extent the court of appeals' reasoning was driven by general "separation of powers" concerns, App., *infra*, 37a, 42a, those concerns were misplaced. The Appropriations Clause is "a bulwark of the Constitution's separation of powers" because it "restrain[s]" "Executive Branch officers" from infringing on Congress's "'absolute'" "control over federal expenditures." *Dep't of the Navy*, 665 F.3d at 1347-1348 (citation omitted). But where, as here, Congress has enacted a law that expressly authorizes the Executive Branch expenditures at issue, "the straightforward and explicit command of the Appropriations Clause" is satisfied. *Richmond*, 496 U.S. at 424. And courts have no license to depart from the text and history of the constitutional provisions adopted by the Founders in pursuit of their own views about the proper structure and funding of administrative agencies.

3. The court of appeals' remedial holding was erroneous

Even assuming that the court of appeals correctly found an Appropriations Clause violation, its remedial analysis was badly flawed. "Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Seila Law*, 140 S. Ct. at 2209 (citation omitted). In conducting a severability analysis, the Court "identifie[s]" the relevant "constitutional defect[s]" in the statute and then asks whether those defective provisions "can be severed from the other [related] statutory provisions." *Ibid.*; see, *e.g.*, *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1986-1987 (2021) (plurality opinion). After doing so, the court applies the relevant remedial principles to determine whether the plaintiff is entitled to his requested relief. See *Collins*, 141 S. Ct. at 1789 & n.26. Here, the court of appeals erred in failing to conduct a severability analysis and then vacating the Payday Lending Rule.

a. To conduct a severability analysis, a court must first identify the defective statutory provisions. But the court of appeals failed to take that step. Rather, the remedial portion of the court's decision references only "the agency's unconstitutional funding scheme" as a whole and fails to pinpoint any specific defective provisions within Section 5497. App., *infra*, 44a. The court's merits discussion likewise fails to explain which features of Section 5497 were necessary or sufficient to render it unconstitutional, observing only that "[w]herever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it." *Id.* at 36a. In essence, then, the court invalidated Section 5497 entirely, without considering whether specific provisions within Section 5497 could be severed. That approach contradicts this Court's strong presumption favoring severability—which has added force here given that "the Dodd-Frank Act contains an express severability clause." *Seila Law*, 140 S. Ct. at 2209; see 12 U.S.C. 5302.

Had the court of appeals conducted a severability analysis, it would not have necessarily invalidated all of Section 5497. For instance, the court appeared to take particular issue with: Section 5497(c)(2)'s statement that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies," 12 U.S.C. 5497(c)(2); Section 5497(c)(1)'s statement that the CFPB's funds "shall remain available until expended," 12 U.S.C. 5497(c)(1); and Section 5497(a)(2)(C)'s preclusion of "review" by the House and Senate Appropriations Committees, 12 U.S.C. 5497(a)(2)(C). See App., *infra*, 35a-36a. Severing any or all of those provisions thus could have remedied the constitutional problem even under the court's own reasoning. At the same time, without those provisions, the remainder of Section 5497 could still "function[] independently," *Seila Law*, 140 S. Ct. at 2209 (citation omitted), because it would provide the CFPB with funding to fulfill its statutory responsibilities, see 12 U.S.C. 5497(a) and (c)(1).

b. After improperly bypassing the severability analysis mandated by this Court's precedents, the court of appeals improperly held that the remedy for the novel constitutional defect it perceived was to invalidate the Payday Lending Rule.

In general, the Constitution does not itself require any particular remedy for a violation of its provisions. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-327 (2015). It instead operates against the backdrop of statutes, common-law doctrines, and equitable principles that define and limit the availability of relief. See *id.* at 326-328. The Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, expressly incorporates those traditional limits by preserving a court's power to "deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702.

Because the question has never arisen, no court has ever considered how to apply traditional remedial principles when Congress funds an agency's activities through a statute later found to violate the Appropriations Clause. Such a violation does not involve any exercise of power that the agency "did not lawfully possess." *Collins*, 141 S. Ct. at 1788. Here, for example, "Congress plainly (and properly) authorized the Bureau to promulgate the Payday Lending Rule." App., *infra*, 43a. Congress likewise authorized the countless other regulatory, enforcement, and administrative actions the CFPB has taken during its 12-year existence. In carrying out its day-to-day operations, the CFPB has been expending funds in the manner provided for in Section 5497. If this Court were to hold that the entirety of Section 5497 is unconstitutional, that would mean that the CFPB expended those funds without a valid appropriation—and the CFPB would be obliged to halt further spending of funds transferred under Section 5497 (absent other judicial relief). But such a holding would not compel courts to unwind already completed and concededly authorized agency actions like the Payday Lending Rule.

Such a remedy would not actually cure any violation of the Appropriations Clause—it would not, for example, undo the CFPB's expenditures on the salaries and other expenses associated with the rule, or restore any funds to the federal fisc. And unwinding the CFPB's past actions would be both profoundly disruptive and inconsistent with traditional remedial principles, which take significant account of matters such as "the public interest" and "the balance of the equities." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976) (per curiam) (affording "*de facto* validity" to acts of unconstitutionally appointed officers and noting that the Court had done the same for "acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan").

Unwinding the CFPB's past acts would also be inconsistent with Congress's own approach to unauthorized expenditures. Congress has comprehensively regulated to protect its power of the purse, including by establishing remedies for unauthorized spending. The Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*, for example, provides administrative discipline and criminal penalties for federal officials who spend public funds without congressional authorization. 31 U.S.C. 1349(a), 1350. But neither the Anti-Deficiency Act nor any other statute authorizes the unwinding of an otherwise-valid government action simply because the expenses associated with that action were paid using funds later determined to be unauthorized.

Rather than considering those issues, the court of appeals followed what it called the "framework" articulated in *Collins*. App., *infra*, 42a. But *Collins* did not hold, as the court of appeals assumed, that any plaintiff who can show that an unconstitutional statute caused an agency action that imposes some cognizable "harm" is entitled to have that action undone. *Id.* at 43a-44a (citation omitted). To the contrary, the Court made clear that a showing of harm is a necessary, not a sufficient, condition for relief, and it remanded for consideration of other limits on relief, including those drawn from traditional equitable principles. See *Collins*, 141 S. Ct. at 1789 & n.26.

In addition, the court of appeals erred in framing the *Collins* inquiry. The court asked whether there was "a linear nexus" between "the agency's unconstitutional funding scheme" and its "promulgation of the rule." App., *infra*, 44a. But in *Collins*, the Court asked whether the unconstitutional removal provision "inflict[ed] compensable harm" and remanded for consideration of the plaintiffs' arguments that "[w]ere it not for th[e] [unconstitutional removal] provision," the "President might have replaced one of the" relevant officials who caused the plaintiffs' harm, or a removable official "might have altered his behavior in a way that would have benefited the" plaintiffs. 141 S. Ct. at 1789. If the court of appeals were correct that a similar inquiry governed here, it should have asked whether the CFPB would not have promulgated the Payday Lending Rule if it had been funded by "valid" appropriations.[4]

---

[4] In addition, the APA does not authorize lower courts to vacate a regulation on a nationwide basis, as the court of appeals purported to do here. See, *e.g.*, Gov't Br. at 40-44, *United States* v. *Texas*, No.

B. The Decision Below Warrants Review, And The Court Should Hear The Case This Term

This Court should grant the petition for a writ of certiorari and set the case for argument this Term. The court of appeals' decision has enormous legal and practical consequences, and there are compelling reasons for the Court to review it promptly.

1. The Court's intervention is necessary because the court of appeals has held that an Act of Congress violates the Constitution. The Court has recognized that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" of the Federal Judiciary. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The Court has therefore applied "a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay); see, *e.g.*, *Vaello Madero*, 142 S. Ct. at 1542; *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020); *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019).

This Court's review is also necessary because the decision below conflicts with the D.C. Circuit's decision in *PHH Corporation*. Indeed, the court of appeals expressly acknowledged the conflict, "respectfully disagree[ing]" with the D.C. Circuit. App., *infra*, 39a. In *PHH Corporation*, the D.C. Circuit considered a challenge to "Congress's choice to allow the CFPB to claim funds from

---

22-58 (oral argument scheduled for Nov. 29, 2022). The Court need not consider those arguments in this case: The severability and other principles discussed here apply regardless of whether the remedy is nationwide vacatur of the CFPB's past actions or more traditional party-specific equitable relief.

the Federal Reserve rather than through the congressional appropriations process." 881 F.3d at 95. The D.C. Circuit recognized that "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *Ibid.* It observed that Congress has "consistently" chosen such funding mechanisms for "financial regulators." *Ibid.* And the D.C. Circuit upheld the CFPB's funding mechanism because it "fits within the tradition of independent financial regulators." *Ibid.*

2. This Court's review is also warranted because of the immense legal and practical significance of the decision below. In the weeks following that decision, defendants in several CFPB enforcement cases have already sought dismissal or similar relief based on the decision. See, *e.g.*, *CFPB* v. *CashCall, Inc.*, 15-cv-7522, Doc. 363 (C.D. Cal. Nov. 7, 2022); *CFPB* v. *MoneyGram Int'l, Inc.*, 22-cv-3256, Doc. 44 (S.D.N.Y. Oct. 26, 2022); *CFPB* v. *FirstCash, Inc.*, 21-cv-1251, Doc. 64 (N.D. Tex. Oct. 24, 2022); *CFPB* v. *Progrexion Marketing, Inc.*, 19-cv-298, Doc. 484 (D. Utah Oct. 21, 2022); *CFPB* v. *TransUnion*, 22-cv-1880, Doc. 45 (N.D. Ill. Oct. 20, 2022). New challenges to the Bureau's rules and other actions can be expected to multiply in the weeks and months to come, and will presumably be filed in the Fifth Circuit whenever possible.

Those legal consequences have major practical effects. The CFPB's critical work administering and enforcing consumer financial protection laws will be frustrated. And because the decision below vacates a past agency action based on the purported Appropriations Clause violation, the decision threatens the validity of all past CFPB actions as well.

That threat raises grave concerns not just for the CFPB and consumers, but for the entire financial industry. For example, the CFPB has issued regulations making adjustments and exceptions to certain mortgage-related disclosure requirements under the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* See 15 U.S.C. 1638; 12 C.F.R. 1026.19, 1026.37, 1026.38. If those regulations were vacated, mortgage lenders would have to immediately modify the disclosures they give millions of consumers each year, and borrowers could seek to rescind certain mortgage transactions that had relied on regulatory disclosure exceptions, see 15 U.S.C. 1635. Recognizing the destabilizing consequences of vacating past CFPB actions, the Mortgage Bankers Association, National Association of Home Builders, and National Association of Realtors filed a brief in *Seila Law* warning that if the Court issued a decision "calling into question the ongoing legitimacy of the CFPB's past actions," "the results could be catastrophic for the real estate finance industry." Mortgage Bankers Association et al. Amici Br., at 10, *Seila Law*, *supra* (No. 19-7). Such a decision "would create disruptive uncertainty around millions of past home mortgage transactions," and "the mortgage markets would very likely all but grind to a halt." *Ibid.* If allowed to stand, the decision below will threaten the same disruption.

3. Finally, the government respectfully submits that the Court should set this case for argument this Term. The court of appeals' extraordinary decision will remain governing Fifth Circuit precedent until this Court intervenes. As just explained, the court of appeals' unprecedented understanding of the Appropriations Clause threatens the ability of the CFPB to function and risks severe market disruption. Delaying review

until next Term would likely postpone resolution of the critical issues at stake until sometime in 2024.

To facilitate consideration of this case this Term, the government is filing this petition less than one month after the decision below and plans to waive the 14-day waiting period after the brief in opposition is filed, which will enable the Court to consider the petition at its January 6, 2023 conference and hear the case during its April 2023 sitting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN H. FLETCHER
Deputy Solicitor General
EPHRAIM A. MCDOWELL
Assistant to the Solicitor General

SETH FROTMAN
General Counsel
STEVEN Y. BRESSLER
Acting Deputy General Counsel
KRISTIN BATEMAN
Acting Assistant General Counsel
CHRISTOPHER DEAL
KEVIN E. FRIEDL
JUSTIN M. SANDBERG
Senior Counsel

NOVEMBER 2022

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-50826

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

[Filed: Oct. 19, 2022]

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-295

Before: WILLETT, ENGELHARDT, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

"An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced . . . , as that no one could transcend their legal limits, without being effectually checked and restrained by the others." The

Federalist No. 48 (J. Madison) (quoting Thomas Jefferson's *Notes on the State of Virginia* (1781)). In particular, as George Mason put it in Philadelphia in 1787, "[t]he purse & the sword ought never to get into the same hands." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139-40 (M. Farrand ed. 1937). These foundational precepts of the American system of government animate the Plaintiffs' claims in this action. They also compel our decision today.

Community Financial Services Association of America and Consumer Service Alliance of Texas (the "Plaintiffs") challenge the validity of the Consumer Financial Protection Bureau's 2017 Payday Lending Rule. The Plaintiffs contend that in promulgating that rule, the Bureau acted arbitrarily and capriciously and exceeded its statutory authority. They also contend that the Bureau is unconstitutionally structured, challenging the Bureau Director's insulation from removal, Congress's broad delegation of authority to the Bureau, and the Bureau's unique, double-insulated funding mechanism. The district court rejected these arguments.

We agree that, for the most part, the Plaintiffs' claims miss their mark. But one arrow has found its target: Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers. We thus reverse the judgment of the district court, render judgment in favor of the Plaintiffs, and vacate the Bureau's 2017 Payday Lending Rule.

I.

A.

In response to the 2008 financial crisis, Congress enacted the Consumer Financial Protection Act, 12 U.S.C. §§ 5481-5603. The Act created the Bureau as an independent regulatory agency housed within the Federal Reserve System. *See id.* § 5491(a). The Bureau is charged with "implement[ing]" and "enforce[ing]" consumer protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services" that "are fair, transparent, and competitive." *Id.* § 5511(a).

Congress transferred to the Bureau administrative and enforcement authority over 18 federal statutes which prior to the Act were overseen by seven different agencies. *See id*. §§ 5512(a), 5481(12), (14). Those statutes "cover everything from credit cards and car payments to mortgages and student loans." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020). In addition, Congress enacted a sweeping new proscription on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance industry. 12 U.S.C. § 5536(a)(1)(B). "Congress authorized the [Bureau] to implement that broad standard (and the 18 preexisting statutes placed under the agency's purview) through binding regulations." *Seila Law*, 140 S. Ct. at 2193 (citing 12 U.S.C. §§ 5531(a)-(b), 5581(a)(1)(A), (b)).

Congress placed the Bureau's leadership under a single Director to be appointed by the President with the advice and consent of the Senate. 12 U.S.C. § 5491(b)(1)-(2). The Director serves a term of five years, with the potential of a holdover period pending confirmation of a successor. *Id.* § 5491(c)(1)-(2). The Act originally limited the President's ability to remove the Director, *id.* § 5491(c)(3), but the Supreme Court invalidated that provision while this litigation was pending, *see Seila Law*, 140 S. Ct. at 2197.

The Director is vested with authority to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1). This includes rules "identifying as unlawful unfair, deceptive, or abusive acts or practices" committed by certain participants in the consumer-finance industry. *Id.* § 5531(b).

The Bureau's funding scheme is unique across the myriad independent executive agencies across the federal government. It is not funded with periodic congressional appropriations. "Instead, the [Bureau] receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments." *Seila Law*, 140 S. Ct. at 2194. Each year, the Bureau simply requests an amount "determined by the Director to be reasonably necessary to carry out the" agency's functions. *Id.* § 5497(a)(1). The Federal Reserve must then transfer that amount so long as it does not exceed 12% of the Federal Reserve's "total operating expenses." *Id.* § 5497(a)(1)-(2). For the first five years of its existence (i.e., 2010-2014), the Bureau was permitted to exceed the 12% cap by $200 million annually so long as it reported the anticipated excess to the President and congressional appropriations committees. *Id.* § 5497(e)(1)-(2).

B.

In 2016, Director Richard Cordray, who was appointed by President Barack Obama, proposed a rule to regulate payday, vehicle title, and certain high-cost installment loans (the "Payday Lending Rule"). After a public notice-and-comment period, Director Corday finalized the Payday Lending Rule in November 2017, during the first year of the Trump administration. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017). The rule became effective on January 16, 2018, and had a compliance date of August 19, 2019. *Id.*

The Rule had two major components, each limiting a practice the Bureau deemed "unfair" and "abusive." *See id*. First, the "Underwriting Provisions" prohibited lenders from making covered loans "without reasonably determining that consumers have the ability to repay the loans according to their terms." 12 C.F.R. § 1041.4 (2018); 82 Fed. Reg. at 54472.

The Underwriting Provisions have since been repealed and are not at issue in this appeal. *See* 85 Fed. Reg. 44382 (July 22, 2019).

Second, and relevant here, the "Payment Provisions" limit a lender's ability to obtain loan repayments via preauthorized account access. *See* 12 C.F.R. § 1041.8. The Bureau determined that absent a new and specific authorization, it is "unfair and abusive" for lenders to attempt to withdraw payments for covered loans from consumers' accounts after two consecutive withdrawal attempts have failed due to a lack of sufficient funds. *Id.* § 1041.7; 82 Fed. Reg. at 54472. The Payment Provisions accordingly prohibit lenders from initiating additional payment transfers from consumers' accounts after two consecutive attempts have failed for insufficient funds unless "the additional payment transfers are authorized by the consumer." 12 C.F.R. § 1041.8(b)(1), (c)(1).

The Payment Provisions cast a wide net. So long as the purpose of the attempted transfer is to collect payment due on a covered loan, the two-attempt limit applies to "any lender-initiated debt or withdrawal of funds from a consumer's account." *Id.* § 1041.8(a)(1). This includes checks, debit and prepaid card transfers, preauthorized electronic fund transfers, and remotely created payment orders. *See id.*; 82 Fed. Reg. at 54910.

In April 2018, the Plaintiffs sued the Bureau on behalf of payday lenders and credit access businesses, seeking an "order and judgment holding unlawful, enjoining, and setting aside" the Payday Lending Rule. The Plaintiffs alleged that the rule exceeded the Bureau's statutory authority and otherwise violated the Administrative Procedure Act (APA). They further alleged that the rule was invalid because the Act's for-cause removal provision, self-funding mechanism, and delegation of rulemaking authority each violated the Constitution's separation of powers.

Around this time, the Bureau, now led by Acting Director Mick Mulvaney, announced that it intended to engage in notice-and-comment rulemaking to reconsider the Payday Lending Rule. Due to that ongoing effort, the parties filed a joint request to stay both the litigation and the rule's effective date. The district court entered a stay pending further order of the court. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 2018 WL 6252409, at *2 (W.D. Tex. Nov. 6, 2018).

While the Bureau engaged in rulemaking, President Trump nominated and the Senate confirmed Kathleen Kraninger as Director, replacing Acting Director Mulvaney. In early 2019, the Bureau issued a proposed rule rescinding the Underwriting Provisions but leaving the Payment Provisions intact. 84 Fed. Reg. 4252. In July 2020, following the Supreme Court's decision in *Seila Law*, the Bureau finalized its revised rule. 85 Fed. Reg. 44382. The Bureau simultaneously issued a separate "Ratification," in which it "affirm[ed] and ratifie[d] the [P]ayment [P]rovisions of the 2017 [Payday Lending] Rule." 85 Fed. Reg. 41905-02.

In August 2020, the district court lifted the stay, and the Plaintiffs amended their complaint to challenge, among other things, the Bureau's ratification of the Payment Provisions. Thereafter, the parties filed cross-motions for summary judgment. The district court granted summary judgment for the Bureau on each of the Plaintiffs' claims. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 558 F. Supp. 3d 350 (W.D. Tex. 2021). The court concluded, *inter alia*, that: (1) the promulgating Director's insulation from removal did not render the Payment Provisions void ab initio, *id.* at 358; (2) the Bureau's "ratification of the Payment Provisions was a solution tailored to the constitutional injury sustained by the [Plaintiffs]," *id.* at 365; (3) the "Payment Provisions [were] consistent with the Bureau's statutory authority and not arbitrary and capricious," *id.*; (4) the Bureau's self-funding mechanism did not violate the Appropriations Clause because it was expressly authorized by statute, *id.* at 367; and (5) there was no nondelegation issue because the Bureau was vested with an "intelligible principle" to guide its discretion, *id.*

The Plaintiffs now appeal. We allowed the Third-Party Payment Processors Association, a national non-profit association of payment processors and their banks, to appear as amicus curiae in support of the Plaintiffs' arbitrary-and-capricious challenge.

II.

We "review a district court's judgment on cross motions for summary judgment de novo, addressing each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 745 (5th Cir. 2009). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Constitutional issues are also reviewed de novo. *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 434 (5th Cir. 2021).

The Plaintiffs raise four overarching issues on appeal. They contend that the Payment Provisions of the Payday Lending Rule are invalid because: (1) the rule's promulgation violated the APA; (2) the rule was promulgated by a Director unconstitutionally insulated from presidential removal; (3) the Bureau's rulemaking authority violates the nondelegation doctrine; and (4) the Bureau's funding mechanism violates the Appropriations Clause of the Constitution. We address each argument in turn.

A.

The APA instructs courts to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). The Plaintiffs lodge two arguments under the APA. First, they contend that the Bureau exceeded its statutory authority by declaring more than two successive preauthorized withdrawals to be "unfair" and "abusive." Second, they assert that the Payment Provisions are arbitrary and capricious in their entirety or, alternatively, as applied to two specific contexts—installment loans and debit and prepaid card payments.

1.

The Act grants the Bureau broad authority to prescribe rules prohibiting "unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531(b). This authority is not without limitation, however. Congress included specific definitions that govern when an act or practice may be deemed "unfair," *id.* § 5531(c)(1), or "abusive," *id.* § 5531(d). And unless those definitions are met, the Bureau "shall have no authority" to regulate conduct on either ground. *See id.* § 5531(c)-(d).

In devising the Payment Provisions, the Bureau assessed the statutory definitions and determined that it was both "unfair" and "abusive" for lenders to attempt additional withdrawals from consumers' accounts after two consecutive attempts failed due to insufficient funds unless the lender acquired "new and specific authorization." 12 C.F.R. § 1041.7; *see also* 82 Fed. Reg. at 54472. The Plaintiffs assert that the Bureau lacked authority to regulate the number of unsuccessful withdrawal attempts because this practice falls outside the Act's definitions of "unfair" and "abusive."

Our review begins (and ends) with unfairness.[1] Under the Act, an act or practice is "unfair" if "the Bureau 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 the countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c)(1). The Bureau evaluated each element in its 2017 rulemaking record and concluded that the proscribed practice satisfied all three. The Plaintiffs challenge only the first two elements on appeal.

As to the first, the Bureau determined that lenders' excessive withdrawal attempts cause or are likely to cause consumers substantial injury in the form of repeated fees, including insufficient fund fees, overdraft fees, and lender-imposed return fees. 82 Fed. Reg. at 54732-34. It also found that "consumers who experience two or more consecutive failed lender payment attempts appear to be at greater risk of having their accounts closed by their account-holding institution." *Id.* at 54734. The Plaintiffs do not dispute the occurrence

---

[1] Because we ultimately conclude that the Bureau acted within its statutory authority in deeming the proscribed practice unfair, we do not address the alternative ground of abusiveness. *See* 12 U.S.C. § 5531(b) (authorizing the Bureau to prescribe rules regulating practices that are "unfair," "abusive," or both).

or substantiality of these injuries. Rather, they challenge the Bureau's finding that the proscribed practice either causes or is likely to cause them. The Plaintiffs assert that "[c]onsumers' banks—not lenders—cause failed-payment fees or bank-account closures" because they are the ones who "impose, collect, or otherwise control [them]."

We are unpersuaded. The presence of an "independent causal agent[]" does not "erase the role" lenders play in bringing about the contemplated harm. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010). Though not the "most proximate cause," a lender's repeated initiation of unsuccessful payment transfers is both a but-for and a proximate cause of any resulting fees or closures. *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015) ("[The fact] that a company's conduct was not *the most* proximate cause of an injury generally does not immunize liability from foreseeable harms.").

The Plaintiffs also challenge the Bureau's finding that these injuries are not reasonably avoidable by consumers. Few courts have meaningfully addressed this second element of "unfairness" under the Act. *E.g.*, *CFPB v. Navient Corp.*, No. 3:17-CV-101, 2017 WL 3380530, at *20-21 (M.D. Pa. Aug. 4, 2017); *CFPB v. D & D Mktg.*, No. CV 15-9692, 2016 WL 8849698, at *10 (C.D. Cal. Nov. 17, 2016); *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 916-17 (S.D. Ind. 2015). In doing so, these courts relied on our sister circuits' interpretations of "reasonably avoidable" from the analogous standard in the Federal Trade Commission Act (FTCA). *See* 15 U.S.C. § 45(n).[2] We do the same.[3]

To determine whether an injury was "reasonably avoidable" under the FTCA, courts generally "look to whether the consumers had a free and informed choice." *Neovi*, 604 F.3d at 1158; *accord Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985). "An injury is reasonably avoidable if consumers 'have reason to anticipate the impending harm and the means to avoid it,' or if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168-69 (9th Cir. 2012) (quoting *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365-66 (11th Cir. 1988)). The Plaintiffs contend that consumers can reasonably avoid injury associated with successive withdrawal attempts by (1) "not authorizing automatic withdrawals," (2) "sufficiently funding [their] account[s]," (3) "negotiating revised payment options," (4) "invoking [their] rights under federal law to issue stop-payment

---

[2] Section 45(n) provides that the Federal Trade Commission "shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."

[3] Looking to the FTCA for guidance, we remain mindful of one important distinction: The Act requires only that the Bureau have "a *reasonable basis* to conclude that" the proscribed practice "is not reasonably avoidable by consumers," 12 U.S.C. § 5531(c)(1) (emphasis added), while the FTCA includes no such qualifier, *see* 15 U.S.C. § 45(n). In other words, while we find the standards to be analogous, the Bureau is perhaps afforded more deference in its determination than would be afforded under the FTCA.

orders or rescind account access," or (5) "declining to take out the loan" and "pursuing alternative[] sources of credit."

Each of these concerns was raised during the public comment period of the Bureau's rulemaking process. *See, e.g.*, 82 Fed. Reg. at 54736-37. The Bureau found none of them sufficient to constitute a reasonable means of avoiding injury. *Id.* at 54737. The rulemaking record prefaces that many borrowers resort to payday loans because they are in financial distress and lack other viable options for financing. *Id.* at 54571, 54735. Addressing the Plaintiffs' first point, the Bureau explained that since "leveraged payment mechanisms" are "a central feature of these loans," borrowers typically do not have the ability to shop for loans without them. *Id.* at 54737. The Bureau also found that simply funding their accounts is not a reasonable means for borrowers to avoid injury because "[m]any borrowers [do] not have the funds" after two unsuccessful withdrawal attempts, and "subsequent [withdrawals] can occur very quickly, often on the same day, making it difficult to ensure funds are in the right account before the [next withdrawal] hits." *Id.* For the same reason, the Bureau found negotiating repayment options to be too slow a solution to mitigate against fees incurred on additional withdrawal attempts. *See id.* at 54736-37.

Regarding the Plaintiffs' fourth point, the Bureau explained that costs, "[c]omplexities in payment processing systems[,] and the internal procedures of consumers' account-holding institutions, combined with lender practices, often make it difficult for consumers to stop payment or revoke authorization effectively." *Id.* Finally, the Bureau concluded that "the suggestion that a consumer can simply decide not to participate in the market is not . . . a valid means of reasonably avoiding the injury." *Id.* at 54737. By that logic, the Bureau reasoned, "no market practice could ever be determined to be unfair." *Id.*

The Bureau's explanations are fully fleshed out in the Payday Lending Rule's 519-page rulemaking record, where they are supported by a variety of data and industry-related studies. Reviewing that record as it undergirds the Payment Provisions, we find the Bureau had "a reasonable basis to conclude" that the harms associated with three or more unsuccessful withdrawal attempts are "not reasonably avoidable by consumers." 12 U.S.C. § 5531(c)(1). Because the proscribed practice thus satisfies the elements of an "unfair" practice under the Act, we conclude that the Bureau acted within its statutory authority in promulgating the Payment Provisions.

2.

Next, the Plaintiffs contend that the Payment Provisions are arbitrary and capricious, either as a whole or as applied. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Still, we must ensure that an agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted). A rule is arbitrary and capricious if the agency relied on "impermissible factors, failed to consider important aspects of the problem, offered an explanation for its decision that is contrary to the record evidence, or is so irrational that it could not be attributed to a difference in opinion or the result of agency expertise." *BCCA Appeal Grp. v. U.S. EPA*, 355 F.3d 817, 824 (5th Cir. 2003).

Here, the Plaintiffs first contend that the Payment Provisions are arbitrary and capricious in their entirety because they rest on stale data from four-to-five years prior to their promulgation, and the Bureau failed to consider the provisions' important countervailing effects. As to the first point, the Plaintiffs forfeited their stale data argument by failing to raise it in the district court. *See Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 398 (5th Cir. 2021). And forfeiture aside, the Bureau offered a reasoned explanation in its 2017 rulemaking record for relying on data collected from 2011-2012. *See* 82 Fed. Reg. at 54722, 54729.

As to the second point, the only countervailing effect the Plaintiffs allege the Bureau failed to consider is "the increased likelihood that a loan will enter into collections sooner than it would have (if it would have at all)." But the Bureau persuasively responds that "[i]f 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 failed withdrawal attempts—and, in the process, pile additional fees onto the borrower—before the loan enters collections." Even if the Payment Provisions' limit on repeated withdrawal attempts might send some loans to collections sooner, that possibility is not so "important" that the Bureau had to consider it specifically. *See Motor Vehicle Mfrs.*, 463 U.S. at 43 (explaining "an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem").

Turning to their as-applied challenge, the Plaintiffs assert that the Payment Provisions are arbitrary and capricious as applied to debit and prepaid card payments and as to separate installments of multi-payment installment loans. Amicus joins them with respect to debit and prepaid cards. Together, they contend that the Payment Provisions "arbitrarily treat[] debit and prepaid card payments the same as check and [account clearinghouse] payments, even though the former do not give rise to the fees that, in the Bureau's assessment, justify the Rule."

The Bureau acknowledged in the rulemaking record that debit and prepaid card transactions "present somewhat less risk of harm to consumers," but it declined to exclude them for several reasons. 82 Fed. Reg. at 54750. For one, the Bureau found that though failed debit and prepaid card transactions may not trigger insufficient fund fees, "some of them do trigger overdraft fees, even after two failed attempts." *Id.* And as with other payment-transfer methods, consumers would still be subject to "return payment fees and late fees charged by lenders." *Id.* at 54723, 54734. The Bureau also explained that a carve out for these transactions "would be impracticable to comply with and enforce." *Id.* at 54750. These considerations suffice to establish a "rational connection between the facts found and choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (quotation omitted). Therefore, the Payment Provisions are not arbitrary and capricious as applied to debit and prepaid card transfers.[4]

Similarly, we cannot say that the Bureau acted arbitrarily and capriciously by extending the Payment Provisions' two-attempt limit across all scheduled installment payments on the same loan. The Plaintiffs contend that the Bureau failed to support its decision with "reasoned analysis or record evidence." But again, the rulemaking record proves otherwise. Citing its own study, the Bureau explained that a third withdrawal attempt, even as applied to a different scheduled payment, would still likely fail "even if two weeks or a month has passed." 82 Fed. Reg. at 54753. The Bureau also found that "the tailoring of individualized requirements for each discrete payment practice would add considerable complexity to the rule." *Id.* Further, the Bureau determined that distinguishing between re-presentments of the same payment and new presentments for new installments would invite evasion by lenders. The Bureau referenced a rule imposed by the National Automated Clearinghouse Association (NACHA), a self-

---

[4] The Plaintiffs also contend that "the denial of [Advance Financial's] rulemaking petition seeking amendment of the [Payday Lending] Rule to exclude debit and prepaid card payments was arbitrary and capricious." But just as it was not arbitrary and capricious for the Bureau initially to include these payment types within the rule, it was not arbitrary and capricious for the Bureau to deny a rulemaking petition asking for their exemption. This is especially true considering the "extremely limited and highly deferential" standard under which we review an agency's "[r]efusal[] to promulgate rules." *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (internal quotation marks omitted) (quoting *Nat'l Customs Brokers & Forwarders Ass'n. of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

governing private organization, that is similar to the Payment Provisions (except that it only applies after three attempts). *See id.* at 54728-29. The Bureau noted that the NACHA rule's distinction between attempts to collect a new payment and re-initiation of a prior one had led companies to manipulate data fields so that it would appear as if a withdrawal attempt was for a new installment. *See id.* at 54728 n.985 & 54729.

In sum, we conclude that the Payment Provisions are not arbitrary and capricious, either in their entirety or in their two contested applications. As Plaintiffs fail to show that the Payday Lending Rule's promulgation violated the APA, summary judgment in favor of the Bureau on this claim was warranted.

B.

The Plaintiffs next contend that the Payment Provisions must be invalidated because the Payday Lending Rule was initially promulgated by a director who was unconstitutionally shielded from removal.

1.

The Act states that the Bureau's Director may be removed only "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). In *Seila Law*, the Court held that this limitation on the President's removal power violated the Constitution's separation of powers. 140 S. Ct. at 2197. But the Court declined to find that the Director's unconstitutional insulation from removal rendered the remainder of the Act invalid. *Id.* at 2208-11. Instead, the Court concluded that the infirm removal provision was severable and remanded the case for a determination of the appropriate relief. *Id.* at 2211.

Like *Seila Law*, *Collins v. Yellen*, 141 S. Ct. 1761 (2021), involved a challenge to actions taken by an independent agency, the Federal Housing Finance Agency (FHFA), that was headed by a single officer removable only for cause. *See* 141 S. Ct. at 1784. The *Collins* petitioners asserted that the FHFA Director's for-cause removal protection violated the separation of powers, and therefore the agency actions at issue "must be completely undone." *Id.* at 1787. The Court agreed that the for-cause removal provision was unconstitutional, finding *Seila Law* "all but dispositive." *Id.* at 1783. But it refused to hold that an officer's insulation from removal, by itself, rendered all agency action taken under that officer void. *Id.* at 1787-88. Unlike cases "involv[ing] a Government actor's exercise of power that the actor did not lawfully possess," the Court explained, a properly appointed officer's insulation from removal "does not strip the [officer] of the power to undertake the other responsibilities of his office." *Id.* at 1788 & n.23. Thus, to obtain a remedy, the challenging party must demonstrate not only that the removal restriction violates the Constitution but also that "the unconstitutional removal provision inflicted harm." *Id.* at 1788-89.

While the Plaintiffs acknowledge *Collins*, they argue the case is distinguishable on several grounds. None are persuasive.

First, they assert that *Collins* applies only to retrospective relief. But *Collins* did not rest on a distinction between prospective and retrospective relief. As the Sixth Circuit recently explained, *Collins*'s remedial inquiry "focuse[d] on whether a 'harm' occurred that would create an entitlement to a remedy, rather than the nature of the remedy, and our determination as to whether an unconstitutional removal protection 'inflicted harm' remains the same whether the petitioner seeks retrospective or prospective relief." *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022).[5]

The Plaintiffs also contend that *Collins* "does not apply to rulemaking challenges." This distinction is similarly without a difference. To the contrary, in *Collins*, the Court explicitly stated that "the unlawfulness of the removal provision does not strip the Director of the power to undertake the other responsibilities of his office." 141 S. Ct. at 1788 n.23. Because the Bureau's Director's "other responsibilities" include rulemaking, *see* 12 U.S.C. §§ 5511(a), 5512(b), *Collins* is directly on point, and the Plaintiffs must demonstrate that the unconstitutional removal provision caused them harm.

2.

Joining the issue, the Plaintiffs assert that "even if *Collins* does inform the analysis here, its framework plainly requires setting aside the [Payment Provisions]" because the Plaintiffs have made a sufficient showing of harm. As noted above, after *Collins*, a party challenging agency action must show not only that the removal restriction transgresses the Constitution's separation of powers but also that the unconstitutional provision caused (or would cause) them harm. 141 S. Ct. at 1789. The Court chose to remand *Collins*'s remedy question

---

[5] *Collins* originally involved claims for both prospective and retrospective relief. 141 S. Ct. at 1780. By the time the case reached the Supreme Court, the challengers' claims for prospective relief were moot. *Id.* Therefore, the Court articulated its remedial analysis in terms of retrospective relief. *See id.* at 1788-89.

and stopped short of articulating a precise statement as to how a party may prove harm. *See id.* at 1788-89. Instead, the *Collins* majority concluded with several hypotheticals:

> Although an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment), it is still possible for an unconstitutional provision to inflict compensable harm. And the possibility that the unconstitutional restriction on the President's power to remove a Director . . . could have such an effect cannot be ruled out. Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that 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. In those situations, the statutory provision would clearly cause harm.

Id.

We distill from these hypotheticals three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor. This is borne out by the concurring Justices' opinions as well. *See id.* at 1792-93 (Thomas, J., concurring); *id.* at 1801 (Kagan, J., concurring in part); *id.* at 1803 n.1 (Sotomayor, J., concurring in part and dissenting in part). As Justice Kagan emphasized, "plaintiffs alleging a 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*." *Id.* at 1801 (Kagan, J., concurring in part) (emphasis added).

It is thus not enough, as the Plaintiffs would have us hold, for a challenger to obtain relief merely by establishing that the unconstitutional removal provision prevented the President from removing a Director he wished to replace. As we read *Collins*, to demonstrate harm, the Plaintiffs must show *a connection* between the President's frustrated desire to remove the actor and the agency action complained of. *See id.* at 1789. Without this showing, the Plaintiffs could put themselves in a better place than otherwise warranted, by challenging decisions either with which the President agreed, or of which he had no awareness at all. *Id.* at 1802 (Kagan, J., concurring in part).

Applying *Collins*'s framework, we conclude the Plaintiffs fail to show that the Act's removal provision inflicted a constitutional harm. Though they state "[i]t is uncontested that, but for the later-invalidated removal restriction, President Trump would have replaced [Director] Cordray before he finalized the [Payday Lending Rule]," their only support for this assertion consists of a few carefully selected statements from Director Cordray's book, *see, e.g.*, RICHARD CORDRAY, WATCHDOG: HOW PROTECTING CONSUMERS CAN SAVE OUR FAMILIES, OUR ECONOMY, AND OUR DEMOCRACY 185 (2020) ("[T]he threat that I would be fired as soon as President Trump took office loomed over everything."), and an online article, *see* Kate Berry, *In Tell-All, Ex-*

CFPB Chief Cordray Claims Trump Nearly Fired Him, American Banker (Feb. 27, 2020) https://www.american-banker.com/news/in-tell-all-ex-cfpb-chief-cordrayclaims-trump-nearly-fired-him (stating "President Trump was advised to hold off on firing Corday because the Supreme Court had not yet weighed in on [the] 'for cause' provision").

These secondhand accounts of President Trump's supposed intentions are insufficient to establish harm. The Director's subjective belief that his firing might be imminent does not in itself substantiate that the President would have removed the Director but for the unconstitutional removal provision. Regardless, the record before us plainly fails to demonstrate any nexus between the President's purported desire to remove Cordray and the promulgation of the Payday Lending Rule or, specifically, the Payment Provisions. In short, nothing the Plaintiffs proffer indicates that, but for the removal restriction, President Trump would have removed Cordray *and* that the Bureau would have acted differently as to the rule.

Because the Plaintiffs have failed to demonstrate harm, we need not address the Bureau's alternative argument that any alleged harm was cured by Director Kraninger's ratification of the Payment Provisions. *See CFPB v. CashCall, Inc.*, 35 F.4th 734, 743 (9th Cir. 2022) (finding "it unnecessary to consider ratification" where the challenger could not establish harm). Summary judgment in favor of the Bureau on this claim was proper.

C.

We next consider the Plaintiffs' argument that the Bureau's rulemaking authority violates the Constitution's separation of powers by running afoul of the nondelegation doctrine.[6] The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Inherent in "that assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion). "Under the nondelegation doctrine, Congress may not constitutionally delegate its legislative power to another branch of government." *United States v. Jones*, 132 F.3d 232, 239 (5th Cir. 1998) (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

But the Supreme Court has long delimited this general principle: "So long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Touby v. United States*, 500 U.S. 160, 165 (1991) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). It is "constitutionally sufficient if Congress clearly delineates the general pol-

---

[6] For the first time on appeal, the Plaintiffs also argue that Congress violated the nondelegation doctrine by delegating its appropriations power to the Bureau. This argument is distinct from the Plaintiffs' Appropriations Clause challenge, which was raised in the district court and which we address *infra* in II.D. Because the Plaintiffs did not raise their appropriations-based nondelegation argument in the district court, it is forfeited on appeal. *See Rollins*, 8 F.4th at 398.

icy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *see also Gundy*, 139 S. Ct. at 2129 (explaining that "[t]hose standards . . . are not demanding").

Through the Act, Congress gave the Bureau authority "to prescribe rules . . . identifying as unlawful unfair, deceptive, or abusive acts or practices." 12 U.S.C. § 5531(b). This constituted a delegation of legislative power because "the lawmaking function belongs to Congress." *Loving v. United States*, 517 U.S. 748, 758 (1996). The question is whether Congress also "supplied an intelligible principle to guide the [Bureau's] discretion." *Gundy*, 139 S. Ct. at 2123.

The Plaintiffs assert that "[t]here is no intelligible principle" behind the Bureau's "vague and sweeping" rulemaking authority. We disagree. In the Act, Congress articulated its general policy preferences, established the Bureau as the agency to apply them, and set boundaries—albeit broad ones—on the Bureau's rulemaking authority. *Am. Power & Light Co.*, 329 U.S. at 105. Given that the Supreme Court "has over and over upheld even very broad delegations," *Gundy*, 139 S. Ct. at 2129, the Act's delegation of rulemaking authority to the Bureau passes muster.

Congress's general policy is distilled in the Bureau's purpose and objectives. 12 U.S.C. § 5511(a)-(b). The Bureau's "purpose" is "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." *Id.* § 5511(a). That purpose is accompanied by five "objectives" toward which "[t]he Bureau is authorized to exercise its authorit[y.]" *Id.* § 5511(b). One of those is to "ensur[e] that . . . consumers are protected from unfair, deceptive, or abusive acts and practices." *Id.* § 5511(b)(2). In line with that objective, Congress empowered the Bureau to "prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *Id.* § 5531(b). Congress then circumscribed that authority by including specific criteria that must be met before the Bureau can label a practice "unfair" or "abusive." *See id.* § 5531(c)-(d).[7]

Far from an "open-ended delegation" that offers "no guidance whatsoever," *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022) (emphasis omitted), Congress's grant of rulemaking authority to the Bureau was accompanied by a specific purpose, objectives, and definitions to

[7] We discussed the statutory elements of "unfairness" *supra* in II.A.1. It was unnecessary to address "abusiveness" there. *See supra* n.1. For reference here, an act or practice is "abusive" if it

> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; *or* (2) 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; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

12 U.S.C. § 5531(d).

guide the Bureau's discretion. This was more than sufficient to confer an "intelligible principle." *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474-75 (2001) (compiling the various directives the Supreme Court has deemed sufficient to constitute an "intelligible principle").

D.

Finally, the Plaintiffs contend that the Payday Lending Rule is invalid because the Bureau's funding structure violates the Appropriations Clause of the Constitution and the separation of powers principles enshrined in it. Though the constitutionality of the Bureau has been heavily litigated, this issue has yet to be definitively resolved. In *Seila Law*, the Supreme Court determined that the Act's presidential removal restriction violated the Constitution's separation of powers, but the Court did not confront whether the Bureau's unique funding scheme does. 140 S. Ct. at 2197. And a majority of this court recently concluded that the issue was not properly before us in another case challenging the Bureau's structure and authority. *See CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 220 & n.2 (5th Cir. 2022) (en banc). However, Judge Jones, in a magisterial separate opinion joined by several of our colleagues, disagreed and addressed the parties' Appropriations Clause challenge. *See id.* at 221 (Jones, J., concurring). Methodically analyzing the question, she concluded that the Bureau's funding mechanism contravenes the Constitution's separation of powers. *Id.* at 242.

The issue is squarely raised here. We reach the same conclusion.

1.

Our "system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). "If there is one aspect of the doctrine of Separation of Powers that the Founding Fathers agreed upon, it is the principle, as Montesquieu stated it: 'To prevent the abuse of power, it is necessary that by the very disposition of things, power should be a check to power.'" *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (quoting Baron de Montesquieu, The Spirit of the Laws bk. XI, ch. IV (1772)). On that foundation, the Framers erected the three branches of government—legislative, executive, and judicial—and endowed each with "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51 (J. Madison); *see* U.S. Const. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1.

Drawing on the British experience, the Framers "carefully separate[d] the 'purse' from the 'sword' by assigning to Congress and Congress alone the power of the purse." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021).[8] The Framers' rea-

[8] As Alexander Hamilton explained, the powers of "the sword and the purse" should never be placed

> in either the Legislative or Executive, singly; neither one nor the other shall have both; because this would destroy that division of powers on which political liberty is founded, and would furnish one

soning was twofold. First, they viewed Congress's exclusive "power over the purse" as an indispensable check on "the overgrown prerogatives of the other branches of the government." The Federalist No. 58 (J. Madison). Indeed, "the separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." JOSH CHAFETZ, CONGRESS'S CONSTITUTION, LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 57 (2017).

The Framers also believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people. *See* THE FEDERALIST NO. 48 (J. Madison) ("[T]he legislative department alone has access to the pockets of the people.").[9] As James Madison explained, the "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitu-

---

> body with all the means of tyranny. But when the purse is lodged in one branch, and the sword in another, there can be no danger.

2 THE WORKS OF ALEXANDER HAMILTON 61 (Henry Cabot Lodge ed., 1904). George Mason expressed the same sentiment, advising his colleagues at the Philadelphia Convention that "[t]he purse & the sword ought never to get into the same hands." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139-40 (M. Farrand ed. 1937).

[9] *See also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 149-50 (M. Farrand ed. 1937) (statement of James McHenry) ("When the Public Money is lodged in its Treasury there can be no regulation more consist[e]nt with the Spirit of Economy and free Government that it shall only be drawn forth under appropriation by Law and this part of the proposed Constitution could meet with no opposition as the People who give their Money ought to know in what manner it is expended.").

tion can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST NO. 58 (J. Madison).[10]

The text of the Constitution reflects these foundational considerations. First, even before enumerating how legislation becomes law (i.e., passage by both houses of Congress and presentment to the President for signature), the Constitution provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives. . . . " U.S. CONST. art. I, § 7, cl. 1. It then grants the general authority "[t]o lay and collect Taxes" and spend public funds for various ends—the first power positively granted to Congress by the Constitution. *Id.* art. I, § 8, cl. 1. Importantly though, that general grant of spending power is cabined by the Appropriations Clause and its follow-on, the Public Accounts Clause: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made

---

[10] Indeed, popular accountability for the expenditure of public funds was so important that an earlier draft of the Constitution restricted the power to originate appropriations to the House of Representatives: "[A]ll Bills for raising or Appropriating Money, and for fixing the Salaries of the Officers of the Government of the United States shall originate in the first Branch of the Legislature of the United States, and shall not be altered or amended by the second Branch; and that no money shall be drawn from the public Treasury but in Pursuance of Appropriations to be originated by the first Branch." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 129-34 (M. Farrand ed. 1937). Although not carried forward in the Appropriations Clause as ratified, this procedure is well-established in Congressional custom, which requires general appropriations bills to originate in the House of Representatives. CLARENCE CANNON, CANNON'S PROCEDURE IN THE HOUSE OF REPRESENTATIVES 20, § 834 (4th ed. 1944).

by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* art. I, § 9, cl. 7.

The Appropriations Clause's "straightforward and explicit command" ensures Congress's *exclusive* power over the federal purse. *OPM v. Richmond*, 496 U.S. 414, 424 (1990). Critically, it makes clear that "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425. Of equal importance is what the clause "takes away from Congress: the option *not* to require legislative appropriations prior to expenditure." Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1349 (1988). Given that the executive is forbidden from unilaterally spending funds, the actual exercise by Congress of its power of the purse is imperative to a functional government. The Appropriations Clause thus does more than reinforce Congress's power over fiscal matters; it affirmatively obligates Congress to use that authority "to maintain the boundaries between the branches and preserve individual liberty from the encroachments of executive power." *All Am. Check Cashing*, 33 F.4th at 231 (Jones, J., concurring).

The Appropriations Clause thus embodies the Framers' objectives of maintaining "the necessary partition among the several departments," THE FEDERALIST NO. 51 (J. Madison), and ensuring transparency and accountability between the people and their government. The clause's role as "a bulwark of the Constitution's separation of powers" has been repeatedly affirmed. *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.); *see id.* ("The Appropriations Clause prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority.") (citations omitted); *see also, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670, 704 (9th Cir. 2019) ("The Appropriations Clause is a vital instrument of separation of powers. . . . "); *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018) (discussing the power of the purse as an important aspect of the separation of powers created by "[t]he founders of our country"); *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) ("The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them."). As Justice Story said:

> The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. . . . If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation.

2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858). Justice Scalia similarly observed that, while the requirement that funds be disbursed in accord with Congress's dictate and Congress's alone may be inconvenient, "clumsy," or "inefficient," it "reflect[s] 'hard choices . . . consciously made by men who had lived under a

form of government that permitted arbitrary governmental acts to go unchecked.'" *NLRB v. Noel Canning*, 573 U.S. 513, 601-02 (2014) (Scalia, J., concurring) (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)). In short, the Appropriations Clause expressly "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).

2.

All that in mind, we turn to the Bureau's structure. The Bureau "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy." *Seila Law*, 140 S. Ct. at 2191. "The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court." *Id.* at 2193. The Bureau "may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs." *Id.* Unlike nearly every other administrative agency, Congress placed this "staggering amalgam of legislative, judicial, and executive power in the hands of a single Director" rather than a multimember board or commission. *All Am. Check Cashing*, 33 F.4th at 221-22 (Jones, J., concurring); *see* 12 U.S.C. § 5491(b).

Most anomalous is the Bureau's self-actualizing, perpetual funding mechanism. While the great majority of executive agencies rely on annual appropriations for funding, the Bureau does not. *See* 12 U.S.C. § 5497(a). Instead, each year, the Bureau simply requisitions from the Federal Reserve an amount "determined by the Director to be reasonably necessary to carry out" the Bureau's functions.[11] *Id.* The Federal Reserve must grant that request so long as it does not exceed 12% of the Federal Reserve's "total operating expenses." 12 U.S.C. § 5497(a)(1)-(2).[12] The funds siphoned by the Bureau, in effect, reduce amounts that would otherwise flow to the general fund of the Treasury, as the Federal Reserve is required to remit surplus funds in excess of a limit set by Congress. *See* 12 U.S.C. § 289(a)(3)(B).

The Bureau thus "receives funding directly from the Federal Reserve, which is itself outside the appropriations process through bank assessments." *Seila Law*, 140 S. Ct. at 2194; *see* 12 U.S.C. § 5497(a).[13] So Con-

---

[11] As noted, in addition to the funds it draws from the Federal Reserve, the Bureau is empowered to impose significant monetary penalties through administrative adjudications and civil actions. 12 U.S.C. § 5565(a)(2). Those penalties, when levied, are deposited into a "Civil Penalty Fund," expenditures from which are restricted "for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws." *Id.* § 5497(d)(1)-(2). "To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs." *Id.* § 5497(d)(2). As Civil Penalty Fund balances cannot be used to defray the Bureau's general expenses, they do not factor into our analysis here.

[12] This is no insubstantial amount. In fiscal year 2022, for example, the Bureau could demand up to $734 million from the Federal Reserve. Consumer Financial Protection Bureau, *Annual performance plan and report, and budget overview* (Feb. 2022), https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy22.pdf.

[13] The Federal Reserve is funded through interest earned on the securities it owns and assessments the agency levies on banks

gress did not merely cede *direct* control over the Bureau's budget by insulating it from annual or other time limited appropriations. It also ceded *indirect control* by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process—a double insulation from Congress's purse strings that is "unprecedented" across the government. *All Am. Check Cashing*, 33 F.4th at 225 (Jones, J., concurring). And where the Federal Reserve at least remains tethered to the Treasury by the requirement that it remit funds above a statutory limit, Congress cut that tether for the Bureau, such that the Treasury will never regain one red cent of the funds unilaterally drawn by the Bureau.

This novel cession by Congress of its appropriations power—its very obligation "to maintain the boundaries between the branches," *id.* at 231—is in itself enough to give grave pause. But Congress went to even greater lengths to take the Bureau completely off the separation-of-powers books. Indeed, it is literally off the books: Rather than hold funds in a Treasury account, the Bureau maintains "a separate fund, . . . the 'Bureau of Consumer Financial Protection Fund,'" which "shall be maintained and established at a Federal [R]eserve bank." 12 U.S.C. § 5497(b)(1). This fund is "under the control of the Director," and the monies on deposit are permanently available to him without any further act of Congress. *Id.* § 5497(c)(1). Thus, *contra* the Federal Reserve, *id.* § 289(a)(3)(B), the Bureau

---

within the Federal Reserve system. FEDERAL RESERVE, THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES, at 4 (2021), https://www.federalreserve.gov/aboutthefed/files/the-fed-explained.pdf; *see also* 12 U.S.C. § 243.

may "roll over" the self-determined funds it draws *ad infinitum*.

To underscore the point, the Act explicitly states that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." *Id.* § 5497(c)(2). To underscore it again, Congress expressly renounced its check "as a restriction upon the disbursing authority of the Executive department," *Cincinnati Soap*, 301 U.S. at 321, by legislating that "funds derived from the Federal Reserve System . . . shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." *Id.* § 5497(a)(2)(C).

So the Bureau's funding is double-insulated on the front end from Congress's appropriations power. And Congress relinquished its jurisdiction to review agency funding on the back end. In between, Congress gave the Director its purse containing an off-books charge card that rings up "[un]appropriated monies." Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it.[14] The Bureau's perpetual insulation from Congress's appropriations power, including the express exemption from congressional review of its

---

[14] JUDGE JONES emphasized the perpetual nature of the funding mechanism and opined that an appropriation must be time-limited. *See All Am. Check Cashing*, 33 F.4th at 238 ("[T]he separation of powers idea underlying the Framers' assignment of fiscal matters to Congress requires a time limitation for appropriations to the executive branch."). We need not decide whether perpetuity of funding alone would be enough to render the Bureau's funding mechanism unconstitutional. Rather, the Bureau's funding scheme—including the perpetual funding feature—is so egregious that it clearly runs afoul of the Appropriations Clause's requirements.

funding, renders the Bureau "no longer dependent and, as a result, no longer accountable" to Congress and, ultimately, to the people. *All Am. Check Cashing*, 33 F.4th at 232 (Jones, J., concurring); *see id.* at 234 (detailing examples showing that the Bureau's "lack of accountability is not just a theoretical worry"). By abandoning its "most complete and effectual" check on "the overgrown prerogatives of the other branches of the government"—indeed, by enabling them in the Bureau's case—Congress ran afoul of the separation of powers embodied in the Appropriations Clause. *See* THE FEDERALIST NO. 58 (J. Madison).

The constitutional problem is more acute because of the Bureau's capacious portfolio of authority. "It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law*, 140 S. Ct. at 2202 n.8. And the "Director's newfound presidential subservience exacerbates the constitutional problem[] arising from the [Bureau's] budgetary independence." *All Am. Check Cashing*, 33 F.4th at 234 (Jones, J., concurring). An expansive executive agency insulated (no, double-insulated) from Congress's purse strings, expressly exempt from budgetary review, and headed by a single Director removable at the President's pleasure is *the epitome* of the unification of the purse and the sword in the executive—an abomination the Framers warned "would destroy that division of powers on which political liberty is founded." 2 THE WORKS OF ALEXANDER HAMILTON 61 (Henry Cabot Lodge ed., 1904).

The Bureau's arguments to the contrary are unconvincing. First, it contends that there is no constitutional infirmity because its funding scheme was enacted by Congress. In essence, the Bureau contends that because Congress spun the agency's funding mechanism into motion when it passed the Act, voila!—the Appropriations Clause is satisfied. The Bureau's argument misreads not only Supreme Court precedent but also the plain text of the Appropriations Clause.

Start with the clause's text: "No money shall be drawn from the Treasury, but *in Consequence of Appropriations* made by law." U.S. CONST. art I, § 9, cl. 7 (emphasis added). A law alone does not suffice—an *appropriation* is required. Otherwise, why not simply travel under the general procedures for enacting legislation provided elsewhere in Article I? The answer is that spending only "in Consequence of Appropriations made by law" is additive to mere enabling legislation; appropriations are required to meet the Framers' salutary aims of separating and checking powers and preserving accountability to the people. The Act itself tacitly admits such a distinction in its decree that "[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be . . . appropriated monies." 12 U.S.C. § 5497(c)(2). We take Congress at its word. But that is the rub.

The Bureau relies on the Supreme Court's statement that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424 (quoting *Cincinnati Soap*, 301 U.S. at 321). But neither *Richmond* nor *Cincinnati Soap* purported definitively to map the contours of the Appropriations

Clause. Regardless, Congress's mere enactment of a law, by itself, does not satisfy the clause's requirements. Otherwise, the Bureau's position means that no federal statute could ever violate the Appropriations Clause because Congress, by definition, enacts them. As discussed *supra*, our Constitution's structural separation of powers teaches us that cannot be so. *Cf. New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.").

The converse argument, that Congress can alter the Bureau's perpetual self-funding scheme anytime it wants, curing any infirmity, is likewise unavailing. "Congress is always capable of fixing statutes that impinge on its own authority, but that possibility does not excuse the underlying constitutional problems. Otherwise, no law could run afoul of Article I." *All Am. Check Cashing*, 33 F.4th at 238 (Jones, J. concurring); *cf. PHH Corp. v. CFPB*, 881 F.3d 75, 158 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) ("[A]n otherwise invalid agency is no less invalid merely because the Congress can fix it at some undetermined point in the future."), *abrogated on other grounds by Seila Law*, 140 S. Ct. 2183.

The Bureau also contends that because every court to consider its funding structure has deemed it constitutionally sound, we should too.[15] But carefully considering those decisions, we must respectfully disagree with

---

[15] *See, e.g.*, *PHH Corp.*, 881 F.3d at 95-96; *CFPB v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 57 (D.R.I. 2020); *CFPB v. Fair*

their conclusion. Those courts found the constitutional scale tipped in the Bureau's favor based largely on one factor: a handful of other agencies are also self-funded. For instance, the D.C. Circuit emphasized that "Congress has consistently exempted financial regulators from appropriations: The Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency all have complete, uncapped budgetary autonomy." *PHH Corp.*, 881 F.3d at 95.

Such a comparison, focused only on whether other agencies possess a degree of budgetary autonomy, mixes apples with oranges. Or, more accurately, with a grapefruit. Even among self-funded agencies, the Bureau is unique. The Bureau's perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies on offer. And none of the agencies cited above "wields enforcement or regulatory authority remotely comparable to the authority the [Bureau] may exercise throughout the economy." *All Am. Check Cashing*, 33 F.4th at 237 (Jones, J., concurring); *see also* William Simpson, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances*, 36 REV. BANKING & FIN. L.

Collections & Outsourcing, Inc., No. 8:19-cv-2817, 2020 WL 7043847, at *7-9 (D. Md. Nov. 30, 2020); *CFPB v. Think Finance LLC*, No. 17-cv-127, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017); *CFPB v. ITT Educ. Services, Inc.*, 219 F. Supp. 3d 878, 896-97 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014).

343, 367-69 (2016).[16] Taken together, the Bureau's express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority combine to render the Bureau "an innovation with no foothold in history or tradition." *Seila Law*, 140 S. Ct. at 2202. It is thus no surprise that the Bureau "brought to the forefront the subject of agency self-funding, a topic previously relegated to passing scholarly references rather than front-page news." Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1735 (2013).

We cannot sum up better than Judge Jones did:

> [T]he [Bureau]'s argument for upholding its funding mechanism admits no limiting principle. Indeed, if the [Bureau]'s funding mechanism is constitutional,

---

[16] Neither is the Bureau's structure comparable to mandatory spending programs such as Social Security. The Bureau self-directs how much money to draw from the Federal Reserve; the Social Security Administration (SSA) exercises no similar discretion. *Compare* 12 U.S.C. § 5497(a)(1) (creating Bureau funding mechanism) *with* 42 U.S.C. § 415 (setting parameters for Social Security benefit levels). Quite to the contrary, SSA pays amounts Congress has determined to beneficiaries whom Congress has identified. *See* 42 U.S.C. § 415 (identifying amounts); 42 U.S.C. § 402 (identifying eligible individuals). The Executive Branch's power over "automatic" Social Security spending is therefore purely ministerial. Furthermore, Congress retains control over the SSA via the *agency's* annual appropriations. *See, e.g.*, SOCIAL SECURITY ADMINISTRATION, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES | FISCAL YEAR 2023 (2022), https://www.ssa.gov/budget/FY23Files/FY23-JEAC.pdf. Other benefits payments, including Medicare and Medicaid, the Supplemental Nutrition Assistance Program, and Temporary Assistance for Needy Families, are administered similarly by agencies subject to annual appropriations set by Congress.

> then what would stop Congress from similarly divorcing other agencies from the hurly burly of the appropriations process? . . . [T]he general threat to the Constitution's separation of powers and the particular threat to Congress's supremacy over fiscal matters are obvious. Congress may no more lawfully chip away at its own obligation to regularly appropriate money than it may abdicate that obligation entirely. If the [Bureau]'s funding mechanism survives this litigation, the camel's nose is in the tent. When conditions are right, the rest will follow.

All Am. Check Cashing, 33 F.4th at 241 (Jones, J., concurring). The Bureau's funding apparatus cannot be reconciled with the Appropriations Clause and the clause's underpinning, the constitutional separation of powers.

3.

That leaves the question of remedy. Though *Collins* is not precisely on point, we follow its framework because, though that case involved an unconstitutional removal provision, we read its analysis as instructive for separation-of-powers cases more generally. *See Collins*, 141 S. Ct. at 1787-88; *cf. All Am. Check Cashing*, 33 F.4th at 241 (Jones, J., concurring) (finding *Collins* "inapt" for determining a remedy for the Bureau's "budgetary independence").

Collins clarified a dichotomy between agency actions that involve "a Government actor's exercise of power that the actor did not lawfully possess" and those that do not. 141 S. Ct. at 1787-88. Examples of the former include actions taken by an unlawfully appointed official, *see Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); a legislative officer's exercise of executive power, *see Bowsher v. Synar*, 478 U.S. 714, 727-36 (1986); and the President's exercise of legislative power, *see Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The remedy in those cases, invalidation of the unlawful actions, flows "directly from the government actor's lack of authority to take the challenged action in the first place." *All Am. Check Cashing*, 33 F.4th at 241 (Jones, J., concurring).

In contrast, the Court found the separation of powers problem posed by an official's unlawful insulation from removal to be different. *Collins*, 141 S. Ct. 1787-88. Unlike the above examples, such a provision "does not strip" a lawfully appointed government actor "of the power to undertake the other responsibilities of his office." *Id.* at 1788. Thus, as discussed *supra* in II.B., to obtain a remedy, a plaintiff must prove more than the existence of an unconstitutional provision; she must prove that the challenged action actually "inflicted harm." *Id.* at 1789.

Into which category does the Bureau's promulgation of the Payday Lending Rule fall, given the agency's unconstitutional self-funding scheme? The answer turns on the distinction between the Bureau's *power* to take the challenged action and the *funding* that would enable the exercise of that power. Put differently, Congress plainly (and properly) authorized the Bureau to promulgate the Payday Lending Rule, *see* 12 U.S.C. §§ 5511(a), 5512(b), as discussed *supra* in II.A-C. But the agency lacked the wherewithal to exercise that power via constitutionally appropriated funds. Framed that way, the Bureau's unconstitutional funding mechanism "[did] not strip the [Director] of the power to undertake the other responsibilities of his office," *Collins*, 141 S. Ct. at 1788 & n.23, but it deprived the Bureau of the lawful money necessary to fulfill those responsibilities. This is a distinction with more than a semantical difference, as it leads us to conclude that, consistent with *Collins*, the Plaintiffs are not entitled to *per se* invalidation of the Payday Lending Rule, but rather must show that "the unconstitutional . . . [funding] provision inflicted harm." *Id.* at 1788-89.

However, making that showing is straightforward in this case. Because the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency's unconstitutional funding scheme,[17] there is a linear nexus between the infirm provision (the Bureau's funding mechanism) and the challenged action (promulgation of the rule). In other words, without its unconstitutional funding, the Bureau lacked any other means to promulgate the rule. Plaintiffs were thus harmed by the Bureau's improper use of unappropriated funds to engage in the rulemaking at issue. Indeed, the Bureau's unconstitutional funding structure not only "affected the complained-of decision," *id.* at 1801 (Kagan, J., concurring in part), it

---

[17] It is fairly apparent that the Bureau financed its rulemaking efforts with funds requisitioned via its unconstitutional funding mechanism. *Cf. supra* n.11. A Bureau report indicates that it spent over $9 million for "Research, Markets & Regulations" during the fiscal quarter in which the rule was issued. *See* CONSUMER PROTECTION FINANCIAL BUREAU, CFO UPDATE FOR THE FIRST QUARTER OF FISCAL YEAR 2018 (2018), https://files.consumerfinance.gov/f/documents/cfpb_cfo-update_fy2018Q1.pdf. More granular information does not appear to be publicly available, perhaps a direct consequence of the Bureau's unprecedented budgetary independence and lack of Congressional oversight.

literally *effected* the promulgation of the rule. Plaintiffs are therefore entitled to "a rewinding of [the Bureau's] action." *Id.*

In considering other violations of the Constitution's separation of powers, the Supreme Court has rewound the unlawful action by granting a new hearing, *see Lucia v.* SEC, 138 S. Ct. 2044, 2055 (2018), or invalidating an order, *see* NLRB *v. Noel Canning*, 573 U.S. 513, 521, 557 (2014); *see also* 5 U.S.C. § 706(2)(A) (providing that, under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law"). In like manner, we conclude that the district court erred in granting summary judgment to the Bureau and in denying the Plaintiffs a summary judgment "holding unlawful, enjoining and setting aside" the challenged rule. Accordingly, we render judgment in favor of the Plaintiffs on this claim and vacate the Payday Lending Rule as the product of the Bureau's unconstitutional funding scheme.

III.

The Bureau did not exceed its authority under either the Act or the APA in promulgating its 2017 Payday Lending Rule. The issuing Director's unconstitutional insulation from removal does not in itself invalidate the rule, and the Plaintiffs fail to demonstrate cognizable harm from that injury. Nor does the Bureau's rulemaking authority transgress the nondelegation doctrine. We therefore AFFIRM the district court's entry of summary judgment in favor of the Bureau in part.

But Congress's cession of its power of the purse to the Bureau violates the Appropriations Clause and the

Constitution's underlying structural separation of powers. The district court accordingly erred in granting summary judgment in favor of the Bureau and denying judgment in favor of the Plaintiffs. We therefore REVERSE the judgment of the district court on that issue, RENDER judgment in favor of the Plaintiffs, and VACATE the Bureau's Payday Lending Rule.

AFFIRMED in part; REVERSED in part; and RENDERED.

APPENDIX B

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

Cause No. 1:18-CV-00295-LY

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., CONSUMER SERVICE ALLIANCE OF TEXAS, PLAINTIFFS

v.

CONSUMER FINANCIAL PROTECTION BUREAU, KATHLEEN KRANINGER, IN HER OFFICIAL CAPACITY AS DIRECTOR, CONSUMER FINANCIAL PROTECTION BUREAU, DEFENDANTS

[Filed: Aug. 31, 2021]

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Before the court is the above-styled and numbered cause that arises in response to the "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Rule ("the 2017 Rule"), issued by the Consumer Financial Protection Bureau ("the Bureau") on November 17, 2017. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472-01 (Nov. 17, 2017). The 2017 Rule limited certain practices by covered lenders deemed "unfair, deceptive, or abusive." *Id.* However, in 2020, the Supreme Court held that at the time of passing the 2017 Rule, the Bureau was unconstitutionally structured. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020). The Court did so because Congress improperly shielded the Director of the Bureau from at-will removal by the president, rendering the agency "accountable to no one," and violating the Separation of Powers Doctrine. *Id.* at 2203. Two weeks later, the Bureau—then led by a Director removable by the president—ratified a portion of the 2017 Rule known as the "Payment Provisions." Payday, Vehicle Title, and Certain High-Cost Installment Loans; Ratification of Payment Provisions, 85 Fed. Reg. 41,905-02 (July 13, 2020) (the "Ratification").

Plaintiffs, two trade associations ("the Associations"), bring this action on behalf of certain payday lenders and credit-access businesses affected by the 2017 Rule and the Ratification. The Associations challenge the validity of the Ratification and ask the court to set aside the Payment Provisions Section of the 2017 Rule.[1] Before the court now are the parties' cross-motions for summary judgment, responses, replies, exhibits, and supplemental authorities.[2] Having considered

---

[1] The Associations' Original Complaint was filed April 9, 2018 (Dkt. No. 1). On June 12, 2018, the Court entered an order staying litigation in this case (Dkt. No. 29). On November 6, 2018, the Court entered an order staying the 2017 Rule's August 2019 compliance date (Dkt. No. 53). On August 20, 2020, the Court lifted the stay on litigation but did not lift the stay on the compliance date (Dkt. No. 74). The Associations filed an amended complaint on August 28, 2020 (Dkt No. 76). The Bureau filed an Answer to the Amended Complaint on September 18, 2020 (Dkt. No. 79).

[2] The Associations' Motion for Summary Judgment was filed September 25, 2020 (Dkt. No. 80); The Bureau's Response and Cross-Motion for Summary Judgment was filed October 23, 2020 (Dkt. No.

all of the parties' filings and the applicable law, the court renders the following order.

I. LEGAL STANDARD

"Summary judgment is required when 'the movant shows that there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014)). A fact is material if "its resolution could affect the outcome of the action." *Aly v. City of Lake Jackson*, 605 Fed. App'x 260, 262 (5th Cir. 2015).

---

82); The Associations' Response to Defendants' Cross-Motion for Summary Judgment was filed November 20, 2020 (Dkt. No. 84); The Bureau's Reply was filed December 18, 2020 (Dkt. No. 85); The Bureau's First Notice of Supplemental Authority was filed December 30, 2020 (Dkt. No. 86); The Associations' Response to the First Notice of Supplemental Authority was filed December 31, 2020 (Dkt. No. 87); The Bureau's Second Notice of Supplemental Authority was filed May 20, 2021 (Dkt. No. 88); The Associations' Response to the Second Notice of Supplemental Authority was filed May 21, 2021 (Dkt. No. 89); The Bureau's Third Notice of Supplemental Authority was filed June 28, 2021 (Dkt. No. 90); The Associations' Response to the Third Notice of Supplemental Authority was filed June 30, 2021 (Dkt. No. 91).

"If the moving party fails to meet [its] burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *Pioneer Expi., LLC v. Steadfast Ins. Co.*, 767 F.3d 503 (5th Cir. 2014).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005). In deciding a summary-judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Darden v. City of Fort Worth*, 866 F.3d 698, 702 (5th Cir. 2017).

On cross motions for summary judgment, the court reviews each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party, determining for each side whether judgment may be rendered in accordance with the Rule 56 standard. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010) (internal citation and quotation omitted); *Shaw Constr. v. ICF Kaiser Eng'rs., Inc.*, 395 F.3d 533 n.8, 9 (5th Cir. 2004).

In the context of a challenge to an agency action under the Administrative Procedure Act ("APA"), "[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review." *American Stewards of Liberty v. United States Dept. of Interior*, 370 F. Supp. 3d 711, 723 (W.D. Tex. 2019) (quoting *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008)). When a party seeks review of an agency action under the APA, the district judge sits as an appellate tribunal. *See e.g., Redeemed Christian Church of God v. United States Citizenship & Immigr. Servs.*, 331 Fed. Supp. 3d 684, 694 (S.D. Tex. 2018). The entire case on review is a question of law. *Id.* Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether as a matter of law the evidence in the administrative record permitted the agency to make the decision it did. *Id.* Summary judgment serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *Id.*

II. BACKGROUND

The Bureau is charged with regulating individuals and entities that offer financial products or services. 12 U.S.C. § 5491. Congress authorized the Bureau to "prescribe rules . . . identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *Id.* at § 553 1(b).

Pursuant to its rulemaking authority, the Bureau passed the 2017 Rule, which consisted of two parts: the

"Underwriting Provisions" and the "Payment Provisions." *See* 12 C.F.R. § 1041.4. The Underwriting Provisions, inter alia, restricted lenders from making covered loans "without reasonably determining that the consumers will have the ability to repay the loans." 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,826. Those provisions have since been revoked.

At issue here are the Payment Provisions. These provisions restrict lenders of certain loans from attempting to withdraw payments from a consumer's account after a second consecutive failed attempt to do so, without obtaining a new authorization for further withdrawals. 12 C.F.R. § § 1041.7-.8. The Payment Provisions also set limitations on such a new authorization, including requiring a new consumer-rights notice, and restricting when the lender may obtain the new authorization electronically or by telephone. *Id.* at § 1041 .8(c)(3), 1041.9(c).

In 2020, the Supreme Court held in *Seila Law* that the Bureau's "leadership by a single [Director] removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 140 S. Ct. 2183, 2197. The Court was then left with the question of whether "the Director's removal protection was severable from the other provisions of the . . . Act that establish[es] the [Bureau]." *Id.* at 2207. "If so," the Court reasoned, "then the [Bureau] may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal." *Id.* at 2207-08. The Court found the provision was severable and remanded the case to the Ninth Circuit Court of Appeals for consideration of whether the Bureau's actions in that case were validly ratified. *Id.* at 2211.

Shortly after *Seila Law*, the Bureau's Director, now removable at will by the President, ratified the Payment Provisions of the 2017 Rule. Ratification, 85 Fed. Reg. at 41905-02.

III. ANALYSIS

a. The Associations' motion for summary judgment

The Associations offer six arguments as to why the Payment Provisions should be set aside as a matter of law.

1. Payment provisions void *ab initio* due to Bureau's unconstitutional structure

The Associations contend that the 2017 Rule is void *ab initio* because the Bureau that promulgated it was unconstitutionally structured. The Associations further contend that the "appropriate remedy for this constitutional defect in the 2017 Rule is to set aside that rule and require the Bureau . . . to conduct a new notice-and-comment rulemaking."

Since the Associations' briefing was submitted, the Supreme Court clarified that the contention is an incorrect application of precedent:

> What we said about standing in *Seila Law* should not be misunderstood as a holding on a party's entitlement to relief based on an unconstitutional removal restriction. We held that a plaintiff that challenges a statutory restriction on the President's power to remove an executive officer can establish standing by showing that it was harmed by an action that was taken by such an officer and that the plaintiff alleges was void. But that holding on standing does not

> mean that actions taken by such an officer are void *ab initio* and must be undone.

Collins v. Yellen, 141 S. Ct. 1761, 1787 n.24 (2021) (internal citations omitted).

The court concludes the 2017 Rule is not void *ab initio*.

2. Bureau's ratification of Payment Provisions was ineffective, unconstitutional, procedurally improper, and arbitrary and capricious

The Associations also contend that the Bureau's ratification of the Payment Provisions is ineffective and improper because: ratification cannot cure the type of constitutional problem present here; a new notice-and-comment process must be undertaken; ratification requires that the agency had the power to do the act ratified at the time it was done; and the ratification was arbitrary and capricious. The argument that ratification cannot cure the type of constitutional problem present here is not persuasive, because the Supreme Court in *Seila Law* remanded to the lower court for consideration of whether ratification was appropriate—a futile step if ratification, like the Associations contend, is never appropriate for this sort of constitutional harm.

Next, the Associations point to the APA' s requirement that legislative rules like the Payment Provisions follow notice-and-comment procedures. *See* 5 U.S.C. § 553(b). When those procedures were undertaken for the 2017 Rule, the agency was unconstitutionally structured. The Associations rely on the Supreme Court's holding in *Lucia v. Securities and Exchange Commission* for the premise that allowing the Bureau to lean on ratification would deny the Associations a meaningful remedy to the constitutional wrong and would fail to "create incentives" for plaintiffs to challenge actions taken by unconstitutionally structured agencies. *See* 138 S. Ct. 2044, 2055 (2018). But the Associations already received a meaningful remedy for the harm they suffered: a validly appointed Director reviewed the record pertaining to the 2017 Rule and chose to ratify a portion thereof. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 120 (D.C. Cir. 2015) ("new hearing" does not need to be "completely new proceeding" but could instead entail "de novo review"). That the remedy the Associations received stops short of their desire is immaterial—the solution is tailored to the harm.

The Associations' next argument is that this specific ratification is improper because ratification requires that the agency had the authority to do the act ratified at the time it was done. The Associations contend: "[R]atification requires two entities—a principal who had authority to act at the time in question, and an agent who did not." Here, though, the Associations contend the Bureau is the only entity involved and it lacked authority from the start. The Bureau responds that "The Bureau is the principal, and the Director is the agent who acts on the Bureau's behalf"

Other courts have considered and rejected this argument. *See Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016); *Federal Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996). The *Gordon* Court explained:

> Both [Defendant and amicus] recognize that for a ratification to be effective, it is essential that the party

> ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. This rule of law is derived from the Second Restatement of Agency. Under the Second Restatement, if the principal (here, [the Bureau]) had authority to bring the action in question, then the subsequent August 2013 ratification of the decision to bring the case against [Defendant] is sufficient. The Third Restatement, which is less "stringent" than the Second, advises that a ratification is valid even if the principal did not have capacity to act at the time, so long as the person ratifying has the capacity to act at the time of ratification. . . . Because the [Bureau] had the authority to bring the action at the time [Defendant] was charged, [the Bureau Director's] August 2013 ratification, done after he was properly appointed as Director, resolves any Appointments Clause deficiencies.

813 F. 3d at 1191-92 (internal citations and quotations omitted); *see also Intercollegiate Broad. Sys.*, 796 F.3d at 121 ("[O]nce a new Board has been properly appointed (or reconstituted), the Appointments Clause does not bar it from reaching the same conclusion as its predecessor."); *Legi-Tech*, 75 F.3d at 707, 709 (newly constituted Federal Election Commission need not "start at the beginning" and "redo the statutorily required procedures in their entirety").

Based on this analysis, it appears that the Ninth Circuit would uphold the ratification in this case under either the Second or Third Restatement of Agency. Gordon identifies the Bureau as the principal—and presumably the Director as its agent. *Gordon*, 813 F.3d at 1191. But *Gordon* also recognized that ratification is valid so long as the person ratifying has capacity to act at the time of ratification. *Id.* at 1192. The court finds this reasoning persuasive.

Finally, the Associations challenge the Ratification as arbitrary and capricious. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its own judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,43 (1983). Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Id.* (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In reviewing that explanation, the court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citing *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)).

The Associations posit that the Bureau engaged in an "unexplained about-face" on the issue of the time needed to implement the Payment Provisions. In 2017, the Bureau gave companies like those the Associations represent 21 months to come into compliance with the provisions of the 2017 Rule. The Bureau reasoned that "the interest of enacting protections for consumers as soon as possible" had to be balanced against "giving [lenders] enough time for an orderly implementation period" and concluded 21 months was the time required for lenders to adjust practices to come into compliance. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54, 814. The Associations now urge that if 21 months was the time required for lenders to come into compliance, the Bureau's offer of a 30-day compliance period is, on its face, arbitrary and capricious. *See National Res. Def Council, Inc. v. EPA*, 683 F.2d 752, 762 (3rd Cir. 1982) (effective date is "an essential part of any rule: without an effective date, the agency statement could have no future effect and could not serve to implement, interpret, or prescribe law or policy").

In promulgating the 2017 Rule, the Bureau reasoned that 21 months was the necessary time for lenders to adjust their practices according to the Rule. Lenders have had considerably *more* than 21 months. The Bureau's offer of a short additional compliance period after the lapse of the original 21-month compliance period cannot accurately be described as an "unexplained about-face."

In arguing that the Ratification is arbitrary and capricious, the Associations next point to the requirement that the Bureau consider "the potential benefits and costs to consumers and [lenders]," which the Associations contend the ratification fails to do properly. *See* Consumer Fin. Prot. Act ("CFPA") § 1022(b)(2), 12 U.S.C. § 5512(b)(2). The cost-benefit analysis conducted by the Bureau considered the Underwriting Provisions of the 2017 Rule in conjunction with the Payment Provisions—in other words, the analysis considered aspects of the 2017 Rule that have since been revoked *alongside* aspects that were ratified. The Associations contend that the Bureau's failure to conduct a new cost-benefit analysis inherently renders the ratification arbitrary and capricious. But the Bureau responds that the consideration of the crossover impact of the Underwriting Provisions on the Payment Provisions was limited to a couple of sentences on which the 2017 Rule's cost-and-benefit analysis did not rely.[3] The court agrees with the Bureau that this discussion is far from the "essential premise" of the cost-benefit analysis the Associations contend it constitutes.

3. Payment Provisions exceed Bureau's statutory authority and are arbitrary and capricious

The Associations' third argument is that the Payment Provisions violated the CFPA and the APA when enacted by declaring a practice unfair and abusive in a manner that exceeded the Bureau's authority and was arbitrary and capricious.

"Unfair." First, the Associations challenge the Bureau's finding that a third withdrawal attempt after two failed withdrawals is unfair. To declare a practice "unfair," the Bureau must find that the practice "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 all three of these elements were met by new withdrawal attempts from consumer's bank accounts after two attempts have failed unless the consumer gives renewed approval.

---

[3] The language in question is: "[T]he Bureau expects that unsuccessful payment withdrawal attempts will be less frequent under the rule. This is because . . . the [Underwriting] provisions . . . will reduce the frequency with which borrowers receive loans that they do not have the ability to repay. This should in turn lessen the impacts of instances where a lender is required to notify consumers that the lender is no longer permitted to attempt to withdraw payments from a borrower's account." 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,846.

2017 Rule Official Interpretations, 82 Fed. Reg. at 54720.

The Associations first challenge is that, in determining the withdrawal attempts were unfair, the Bureau did not carefully weigh the costs and benefits to consumers and to competition. The Associations then suggest that the benefits of payday and other covered loans to consumers are substantial and are discounted only because of the Bureau's paternalism. But this argument fails for two reasons: first, the court is not seeking in this review to determine if the court *agrees* with the Bureau or would have made the same decision, so reweighing the costs and benefits is inappropriate. Second, the practice in question is not offering loans, but making successive withdrawal attempts, and the Associations have presented no evidence why those attempts help consumers.

The Associations also challenge the Bureau's finding that consumers can reasonably avoid the injury in question. For instance, the Associations allege consumers could (a) refuse to authorize automatic withdrawals; (b) put sufficient funds in their bank accounts; (c) renew loans or negotiate repayment options; or (d) avoid taking out a loan in the first place. Again, these arguments are unpersuasive. The Bureau, in drafting the 2017 Rule, considered whether consumers could take out loans without authorizing automatic withdrawals but found that such loans are generally unavailable. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54737. The Bureau also considered whether consumers could reasonably avoid successive withdrawal attempts by contacting the lender but found that withdrawals often happen multiple times in a day—too fast for such a solution. *Id.* Similarly, the argument that overdraft fees are "reasonably avoidable" because consumers could simply put sufficient funds in their accounts or avoid taking out loans at all is unpersuasive. By that logic, no practice by a lender could ever be "unfair," because the consumer could have simply paid the loan back on time or avoided it altogether.

The Associations' final challenge against the Bureau's conclusion that the successive withdrawals are unfair is that the Bureau charges lenders with being the cause of the injury even though the customers' banks cause the failed-payment fees. But, as the Bureau contends, the fact that "a company's conduct was not *the most* proximate cause of an injury generally does not immunize liability from foreseeable harms." *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015); *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).

"Abusive." The Associations challenge the Bureau's finding that the successive withdrawals are "abusive." The CFPA deems a practice abusive after a finding that 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, when promulgating the 2017 Rule, that successive withdrawal attempts are abusive because they take advantage of consumers' lack of understanding of the risk that a lender would attempt to charge the consumer's account again and again if withdrawal attempts failed. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,741.

The Associations complain that the Bureau has since rejected the interpretations of "lack of understanding" that led it to designate the withdrawal attempts in question as abusive. More specifically, the Associations claim it is the Bureau's belief that a consumer having a general understanding of the risk of the fees associated with failed withdrawal attempts is enough to preclude a finding that a practice takes advantage of a consumer's lack of understanding. *See* 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,740. The Associations contend that because the Bureau has rejected the approach it used to find the withdrawal attempts abusive, that finding is arbitrary and capricious.

The Associations' arguments fail once again. The Bureau responds, and the court agrees, that no substantive consideration about this process has changed. Regarding the Associations' lack-of-understanding argument, the only relevant change to the Bureau's standard concerns the now-revoked Underwriting Provisions. *See* 2017 Rule Official Interpretations, 82 Fed. Reg. at 54597-98.

Failure to differentiate financial products. The Associations contend that the Bureau failed to establish a "rational connection between the facts found and the choice made" when crafting the 2017 Rule because the

Bureau failed to heed important differences in the varieties of financial products covered. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. For instance, the Associations contend the Bureau failed to consider the difference between withdrawal attempts from debit or prepaid cards and those from automated clearing houses and checking accounts.

But the Bureau considered these differences. The 2017 Rule found that the harm it sought to prevent would only be prevented if the lenders "do not charge NSF, overdraft, return payment fees, or similar fees, and do not close accounts because of failed payment attempts." 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,746. Finding that "all payment methods" could expose consumers to some of these fees, the 2017 Rule declined to exempt any payment types from the Payment Provisions. *Id.* That is sufficient to establish the "rational connection between the facts found and the choice made" necessary to avoid the determination the Rule was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Final "Arbitrary and Capricious" Arguments. Lastly, the Associations contend the 2017 Rule is arbitrary and capricious because the Bureau unfairly targeted high-interest loans in violation of Congress's prohibition on establishing a usury limit and that the 2017 Rule is primarily based on public policy considerations. These arguments fail as well. Specifying which loans qualify for restrictions does not establish a limit on annual percentage rate, and the 2017 Rule is supported by reasoning beyond public policy, much of which has been discussed herein.

4. Payment Provisions rest on defective cost-benefit analysis

The Associations' fourth argument is that the Payment Provisions rest on a flawed cost-benefit analysis. The CFPA requires the Bureau to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products." 12 U.S.C. § 5512(b)(2). The Associations contend the 2017 Rule's cost-benefit analysis has two "serious flaw[s]" that "render the rule unreasonable." *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). The Associations point to two factors they believe the Bureau did not consider in its cost-benefit analysis: (1) the increased likelihood a loan would enter into collections sooner than it otherwise would have; and (2) the additional accrued interest customers will incur as a result of the notice requirements in the Payment Provisions.

The Bureau responds that it is only required to consider "important aspect[s] of the problem" before it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. It is "not required to consider every single possible cost." *STG LLC v. United States*, 147 Fed. Cl. 790, 809 (2020). The court agrees. The rational-basis test of APA review asks "whether the [] agency provided a coherent and reasonable explanation of its exercise of discretion." *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 992 (Fed. Cir. 2018) (quoting *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004)). That a review of the agency's cost-benefit analysis with the benefit of hindsight can produce costs not considered or not thoroughly considered by the agency does not automatically render a rule unreasonable.

5. Bureau's denial of Association member's rulemaking petition was arbitrary and capricious

A member of Plaintiff Community Financial Services Association, Advance Financial, submitted a rulemaking petition asking the Bureau to "amend" the 2017 Rule "to exclude debit card payments" from the reach of the Payment Provisions. The Associations contend the Bureau's decision to decline this request amounted to a clear error in judgment and the 2017 Rule should therefore be set aside as arbitrary and capricious. *See Safe Extensions, Inc. v. Federal Aviation Admin.*, 509 F.3d 593, 604 (D.C. Cir. 2007). The reason, similar to arguments made by the Associations above, is that debit card transactions are not usually subject to the same insufficient-funds fees. Again, the Bureau considered those transactions and chose not to make an exception for them. That the Associations disagree is insufficient to establish the "rational connection between the facts found and the choice made" necessary to avoid the determination the Rule was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

6. Bureau's structure continues to violate Separation-of-Powers principles

Finally, the Associations assert the Bureau's structure continues to violate Separation of Powers principles that the Supreme Court had no opportunity to consider in *Seila Law*. The Associations contend the Bureau's Director can establish its budget, up to a set percentage of the Federal Reserve's operating expenses, and that this budget is exempt from review by the congressional Appropriations Committees. According to the Associations, this violates the constitutional proscription against taking money from the Treasury except "in Consequences of Appropriations made by Law." U.S. Const., art. I § 9, cl. 7.

The Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (citing *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Therefore, if a statute authorizes an agency to receive funds up to a certain cap, as the CFPA authorizes the Bureau to do, there is no Appropriations Clause issue. *See* 12 U.S.C. § 5497(a).

The Associations also contend that the Bureau violates the Constitution because Congress merely "announce[d] vague aspirations and then assign[ed] others the responsibility of adopting legislation to reach its goals." *See Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Here, the Associations assert Congress has done just that by assigning the Bureau the responsibility to prevent unfair and abusive practices in this industry. The court disagrees and does not find a remaining constitutional issue. *See Gundy*, 139 S. Ct. at 2123 (holding Congress may delegate power to agencies as long as it provides an "intelligible principle" for those agencies to follow).

7. Summary

Because the Associations have not shown they are entitled to judgment as a matter of law, the court will deny their Motion for Summary Judgment.

b. The Bureau's motion for summary judgment

The Bureau offers six reasons it is entitled to summary judgment on each of the Associations' causes of action. The court considers each of these arguments in turn.

1. The Associations' constitutional challenge provides no basis to set aside the Payment Provisions because a validly appointed director ratified them.

The Bureau first argues it is entitled to summary judgment on the issue of whether the Payment Provisions are void *ab initio*. The Supreme Court's holding in *Collins* suggests the Bureau is correct. *See Collins*, 2021 WL 2557067, at *19 n.24 (*Seila Law*'s "holding on standing does not mean that actions taken by [an improperly appointed] officer are void *ab initio* and must be undone."). The court therefore concludes that the Payment Provisions are not void *ab initio*.

Therefore, the court considers whether the Bureau's ratification of the Payment Provisions was proper. Federal courts have held consistently that ratification by a properly appointed official remedies the constitutional problem with actions initially approved by an improperly appointed official. *See, e.g., Gordon*, 819 F.3d at 1190-91 (9th Cir. 2016) (properly appointed official's ratification cured constitutional problem caused by actions initially overseen by official appointed in violation of Article II); *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017) (same); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (same). The court therefore concludes that ratification can be a proper mechanism of addressing the sort of constitutional problem at issue here.

Additionally, the court finds that the Bureau's ratification of the Payment Provisions was a solution tailored to the constitutional injury sustained by the Associations. *See United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting "general rule that remedies should be tailored to the injury suffered from the constitutional violation"). A few weeks after the Supreme Court's holding in *Seila Law*, the Bureau's constitutionally appointed director ratified the Payment Provisions. *See* Ratification, 85 Fed. Reg. 41905-02. In doing so, the Director noted she "is familiar with the payment provisions and has also conducted a further evaluation of them for purposes of th[e] ratification. Based on the Director's evaluation of the payment provisions, it is the Director's considered judgment that they should be ratified." *Id.* This assurance is sufficient to establish "*de novo* review." *See Intercollegiate Broad. Sys.*, 796 F.3d at 120 ("new hearing" does not need to be "completely new proceeding" but could instead entail "*de novo* review"). Finally, as previously discussed, the Associations' arguments against the propriety, legality, and sufficiency of the Ratification all fail. The court concludes that the Ratification was valid and cured the constitutional injury caused by the 2017 Rule's approval by an improperly appointed official.

2. Payment Provisions are consistent with the Bureau's statutory authority and not arbitrary and capricious

The Bureau argues that, as a matter of law, the Payment Provisions do not exceed the Bureau's statutory authority and are not arbitrary and capricious.

The Bureau argues that it reasonably determined that the practice addressed by the Payment Provisions —repeated attempts to withdraw money from consumers' accounts after such attempts have failed twice—is "unfair." The Bureau arrived at this conclusion because it determined that such a practice caused substantial injury to consumers by subjecting them to substantial and repeated fees, was not reasonably avoidable by those consumers, and did not include some countervailing benefit to outweigh that substantial injury. The Associations' challenges to the Bureau's determination that the Payment Provisions were "unfair" fail.

The Bureau next asserts that it reasonably determined that the proscribed withdrawals were "abusive" because they 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 and (b) the inability of the consumer to protect the interests of the consumer in selecting or using" the product or service. The Associations' challenges to the Bureau's determination that the Payment Provisions were "abusive" fail.

The Bureau contends that it reasonably declined to exempt certain payment methods from the Payment Provisions and that this denial was not arbitrary and capricious. More specifically, the Bureau contends it set forth a "rational connection between the facts found and the choice made" when it chose to not exempt debit-card and prepaid-card payments from the restrictions of the Payment Provisions, even though these do not usually result in insufficient-funds fees. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (discussing "rational connection" standard to overcome arbitrary and capricious claims). The Bureau established the rational connection between the facts found and the choice made when it chose to include debit- and prepaid-card payments in the Payment Provisions.

Lastly, the Bureau contends it did not establish a usury limit or improperly rely on public policy. The Bureau is limited from "establish[ingj a usury limit applicable to an extension of credit offered or made . . . to a consumer" and from allowing public policy to "serve as a primary basis" for the determination that an act or practice is unfair. 12 U.S.C. § 5517(o), 5531(c)(2). As discussed above, the Associations fail in their attempt to show that the Payment Provisions run afoul of either of these statutory restrictions.

The court therefore concludes as a matter of law that the Payment Provisions are consistent with the Bureau's statutory authority and are not arbitrary and capricious.

3. Bureau reasonably considered Payment Provisions' costs and benefits

The Bureau contends it is entitled to summary judgment on the issue of whether it thoroughly considered the costs and benefits of the Payment Provisions in accordance with the CFPA. *See* 12 U.S.C. § 5512(b)(2)(A). The Associations claim that the Bureau fell short of this requirement in two ways: first by failing to consider that the Underwriting Provisions' absence would affect and enhance certain aspects of the Payment Provisions and, second, by failing to consider certain costs the Payment Provisions would impose on customers.

Both arguments fail. The Bureau noted the Underwriting Provisions could lessen certain impacts of the

Payment Provisions, but also discussed and considered the impact the Payment Provisions would have independent of the Underwriting Provisions. Further, The Bureau is only required to consider "important aspect[s] of the problem" before it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. It is "not required to consider every single possible cost." *STG LLC*, 147 Fed. Cl. at 809. The Associations have failed to show that either of the issues the Bureau supposedly overlooked—the likelihood a loan would enter collections sooner or that customers might incur additional accrued interest because of the Payment Provisions—are so important as to render the entire cost-benefit analysis defective. The Bureau is entitled to summary judgment on this issue.

4. Bureau appropriately denied Advance Financial's rulemaking petition

The Bureau contends that, as a matter of law, it was not unreasonable to deny a Petition for Rulemaking submitted by Advance Financial. The petition asked the Bureau to create a new rule to exempt debit- and prepaid-card payments from the restrictions of the Payment Provisions.

Just as it was not arbitrary and capricious for the Bureau to initially refuse to exempt those payment methods from the Payment Provisions, it was not arbitrary and capricious to decline to do so via a new rule. Further, the Supreme Court has held that an agency's refusal to promulgate a rule is subject only to "extremely limited and highly deferential" review. *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007). On this issue, too, the Bureau is entitled to summary judgment.

5. No remaining constitutional problem with the Bureau's structure

The Bureau contends it is entitled to summary judgment on the issue of whether its current structure and function violates the Constitution's Separation of Powers Doctrine and Appropriations Clause. The Associations contend that two constitutional problems remain. First, the Associations contend the Bureau violates the Appropriations clause's mandate 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. The Bureau's structure allows its director to set a budget for the Bureau up to a certain cap. *See* 12 U.S.C. § 5497(a)(1)(2). The Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424. Where, as here, a statute authorizes an agency to receive funds up to a certain cap, there is no Appropriations Clause issue.

Second, the Associations contend the Bureau violates the Separation of Powers Doctrine because Congress improperly vests its powers to develop regulations in the Bureau without "an intelligible principle to guide [the Bureau's] use of discretion." *See Gundy*, 139 5. Ct. at 2133 (Gorsuch, J., dissenting). Instead, the Associations argue that by assigning the Bureau the responsibility to prevent unfair and abusive practices in an industry, Congress has merely "announce[d] vague aspirations and then assign[ed] others the responsibility of adopting legislation to reach its goals." *See id.* The court disagrees and concludes that the Bureau is vested with an "intelligible principle," so no Separation of Powers problem remains.

6. Bureau observed all required procedures in promulgating Payment Provisions

Finally, the Bureau contends it is entitled to summary judgment on Count Eight of the Associations' amended complaint, which alleges that the Bureau "violated . . . procedural requirements" in promulgating the Payment Provisions.

Count Eight includes four barebones arguments: while under its previous Director, the Bureau (a) made repeated false statements, (b) allowed groups opposed to payday lending to drive the rulemaking leading to the 2017 Rule, (c) failed to comply with unnamed provisions of the Regulatory Flexibility Act, and (d) failed to give interested parties an opportunity to participate in rulemaking by creating the 2017 Rule against the wishes of many of these parties. These allegations are baseless. For instance, the Associations charge the Bureau with failing to publish a regulatory flexibility analysis. The Bureau did publish such an analysis. *See* 82 Fed. Reg. at 548 53-70 (final regulatory flexibility analysis); 81 Fed. Reg. at 48150-66 (initial regulatory flexibility analysis). Similarly, the Associations claim the Bureau approached the rulemaking process with the preconceived intention to create the 2017 Rule and did not approach it with an open mind. But besides the Associations' failure to provide any details, the Supreme Court has rejected the "open-mindedness" requirement for the APA. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020).

The Bureau is also entitled to summary judgment on Count Eight of the Associations' Amended Complaint.

7. Summary

The court concludes that the Bureau is entitled to summary judgment on each of the Associations' claims.

c. Compliance Date

The Associations ask that, in the event the court upholds the Payment Provisions, the court restart (or, in the alternative, resume) the compliance period, so it may have sufficient time to prepare its operations for compliance with the Payment Provisions. Because the original compliance date of August 19, 2019, has passed, the Associations ask the court to stay the compliance date because it would be unfair to penalize parties that reasonably relied on the court's stay. As the Associations put it, "[b]ecause the stay was requested with 445 days left until the implementation deadline, and it was entered with 286 days remaining, any decision upholding the Payment Provisions should leave 445 days—or alternatively, 286 days—for companies to comply with those provisions." According to the Associations, the court should establish a compliance date of at least 286 days, so they receive the full intended benefit of the court's stay—the "preserv[ation] of the status quo." *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 19 (D.D.C. 2012). Further, the Associations believe the Bureau's request of a 30-day compliance period would be arbitrary and capricious in that it would suddenly reduce what was once a 21-month compliance period to one month. Finally, the Associations posit that a longer compliance period gives them time to appeal the court's decision.

In response to the Associations' arguments, the Bureau notes that the decision to stay the compliance period is discretionary and equitable. *See Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982) (discussing stays pending appeal); *Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016) (applying standards for stay pending appeal to request for stay of agency action under § 705 of the APA); *accord, e.g., Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) (explaining that "the authority granted" under § 705 to stay rules "is equitable" (alteration omitted)). The Bureau suggests that the Associations are not entitled to an additional delay, especially because the APA requires only 30 days' notice before a rule may take effect. *See* 5 U.S.C. § 553(d). Further, the Bureau contends it warned the Associations that it would seek to promptly lift the stay, so the Associations' decision to forego preparations to bring operations into compliance with the rule was a gamble. Lastly, the Bureau responds that the 2017 Rule's original 21-month compliance period contemplated the now-revoked Underwriting Provisions, without which the compliance date would have been much shorter. The Bureau asks that the court lift the stay on the compliance date within 30 days after the court enters judgment.

The court is persuaded by the Associations' arguments that they should receive the full benefit of the temporary stay and that a more substantial compliance date allows time for appeal. The court will extend the compliance-date stay for 286 days after final judgment.

IV. CONCLUSION

Having determined the foregoing, the court renders the following orders:

IT IS ORDERED that the Associations' Motion for Summary Judgment (Dkt. No. 80) is **DENIED**.

IT IS FURTHER ORDERED that the Bureau's Cross-Motion for Summary Judgment (Dkt. No. 82) is **GRANTED**, and the Associations shall **TAKE NOTHING** by their claims against the Bureau.

IT IS FINALLY ORDERED that the August 19, 2019 compliance date of the 2017 Rule is **STAYED** until 286 days after the date of this order, at which time the stay will expire.

SIGNED this [31st] day of Aug., 2021.

/s/ LEE YEAKEL
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

1. U.S. Const. Art. I, § 9, Cl. 7 provides:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2. 12 U.S.C. 5497 provides:

Funding; penalties and fines

(a) Transfer of funds from Board Of Governors

(1) In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount 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).

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to—

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount

The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) Reviewability

Notwithstanding any other provision in this title,[1] the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

(3) Transition period

Beginning on July 21, 2010, and until the designated transfer date, the Board of Governors shall transfer to the Bureau the amount estimated by the

---

[1] See References in Text note below.

Secretary needed to carry out the authorities granted to the Bureau under Federal consumer financial law, from July 21, 2010 until the designated transfer date.

(4) Budget and financial management

(A) Financial operating plans and forecasts

The Director shall provide to the Director of the Office of Management and Budget copies of the financial operating plans and forecasts of the Director, as prepared by the Director in the ordinary course of the operations of the Bureau, and copies of the quarterly reports of the financial condition and results of operations of the Bureau, as prepared by the Director in the ordinary course of the operations of the Bureau.

(B) Financial statements

The Bureau shall prepare annually a statement of—

(i) assets and liabilities and surplus or deficit;

(ii) income and expenses; and

(iii) sources and application of funds.

(C) Financial management systems

The Bureau shall implement and maintain financial management systems that comply substantially with Federal financial management systems requirements and applicable Federal accounting standards.

(D) Assertion of internal controls

The Director shall provide to the Comptroller General of the United States an assertion as to the effectiveness of the internal controls that apply to financial reporting by the Bureau, using the standards established in section 3512(c) of title 31.

(E) Rule of construction

This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

(F) Financial statements

The financial statements of the Bureau shall not be consolidated with the financial statements of either the Board of Governors or the Federal Reserve System.

(5) Audit of the Bureau

(A) In general

The Comptroller General shall annually audit the financial transactions of the Bureau in accordance with the United States generally accepted government auditing standards, as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where accounts of the Bureau are normally kept. The representatives of the Government Accountability Office shall have access to the personnel and to all books, accounts, documents, papers, records (including electronic records), reports, files, and all other papers, automated data, things, or property belonging to or under the control of or used or employed by the Bureau pertaining to its financial transactions and necessary to facilitate the audit, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, documents, records, reports, files, papers, and property of the Bureau shall remain in possession and custody of the Bureau. The Comptroller General may obtain and duplicate any such books, accounts, documents, records, working papers, automated data and files, or other information relevant to such audit without cost to the Comptroller General, and the right of access of the Comptroller General to such information shall be enforceable pursuant to section 716(c) of title 31.

(B) Report

The Comptroller General shall submit to the Congress a report of each annual audit conducted under this subsection. The report to the Congress shall set forth the scope of the audit and shall include the statement of assets and liabilities and surplus or deficit, the statement of income and expenses, the statement of sources and application of funds, and such comments and information as may be deemed necessary to inform Congress of the financial operations and condition of the Bureau, together with such recommendations with respect thereto as the Comptroller General may deem advisable. A copy of each report shall be furnished to the President and to the Bureau at the time submitted to the Congress.

(C) Assistance and costs

For the purpose of conducting an audit under this subsection, the Comptroller General may, in the discretion of the Comptroller General, employ by contract, without regard to section 6101 of title 41, professional services of firms and organizations of certified public accountants for temporary periods or for special purposes. Upon the request of the Comptroller General, the Director of the Bureau shall transfer to the Government Accountability Office from funds available, the amount requested by the Comptroller General to cover the full costs of any audit and report conducted by the Comptroller General. The Comptroller General shall credit funds transferred to the account established for salaries and expenses of the Government Accountability Office, and such amount shall be available upon receipt and without fiscal year limitation to cover the full costs of the audit and report.

(b) Consumer Financial Protection Fund

(1) Separate fund in Federal Reserve established

There is established in the Federal Reserve a separate fund, to be known as the "Bureau of Consumer Financial Protection Fund" (referred to in this section as the "Bureau Fund"). The Bureau Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose.

(2) Fund receipts

All amounts transferred to the Bureau under subsection (a) shall be deposited into the Bureau Fund.

(3) Investment authority

(A) Amounts in Bureau Fund may be invested

The Bureau may request the Board of Governors to direct the investment of the portion of the Bureau Fund that is not, in the judgment of the Bureau, required to meet the current needs of the Bureau.

(B) Eligible investments

Investments authorized by this paragraph shall be made in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Bureau Fund, as determined by the Bureau.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Bureau Fund shall be credited to the Bureau Fund.

(c) Use of funds

(1) In general

Funds obtained by, transferred to, or credited to the Bureau Fund shall be immediately available to the Bureau and under the control of the Director, and shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities. The compensation of the Director and other employees of the Bureau and all other expenses thereof may be paid from, obtained by, transferred to, or credited to the Bureau Fund under this section.

(2) Funds that are not Government funds

Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.

(3) Amounts not subject to apportionment

Notwithstanding any other provision of law, amounts in the Bureau Fund and in the Civil Penalty Fund established under subsection (d) shall not be subject to apportionment for purposes of chapter 15 of title 31 or under any other authority.

(d) Penalties and fines

(1) Establishment of victims relief fund

There is established in the Federal Reserve a separate fund, to be known as the "Consumer Financial Civil Penalty Fund" (referred to in this section as the "Civil Penalty Fund"). The Civil Penalty Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose. If the Bureau obtains a civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau shall deposit into the Civil Penalty Fund, the amount of the penalty collected.

(2) Payment to victims

Amounts in the Civil Penalty Fund shall be available to the Bureau, without fiscal year limitation, for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws. To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs.

(e) Authorization of appropriations; annual report

(1) Determination regarding need for appropriated funds

(A) In general

The Director is authorized to determine that sums available to the Bureau under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year.

(B) Report required

When making a determination under subparagraph (A), the Director shall prepare a report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the level of the amount set forth in subsection (a)(2). The Director shall submit the report to the President and to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives.

(2) Authorization of appropriations

If the Director makes the determination and submits the report pursuant to paragraph (1), there are hereby authorized to be appropriated to the Bureau, for the purposes of carrying out the authorities granted in Federal consumer financial law, $200,000,000 for each of fiscal years 2010, 2011, 2012, 2013, and 2014.

(3) Apportionment

Notwithstanding any other provision of law, the amounts in paragraph (2) shall be subject to apportionment under section 1517 of title 31 and restrictions that generally apply to the use of appropriated funds in title 31 and other laws.

(4) Annual report

The Director shall prepare and submit a report, on an annual basis, to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives regarding the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the sources and application of funds of the Bureau, including any funds appropriated in accordance with this subsection.