No. 22-___

IN THE

Supreme Court of the United States

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

Cross-Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a challenge to the validity of a single regulation promulgated by the Consumer Financial Protection Bureau (CFPB or Bureau). As relevant here, the Rule prohibits a covered lender from continuing to make preauthorized attempts to withdraw loan repayments from a consumer's bank account after two consecutive attempts are denied for insufficient funds. 82 Fed. Reg. 54,472, 54,877-79 (Nov. 17, 2017). Cross-Petitioners (the Lenders) claimed that the Rule is unlawful on several grounds, and the court of appeals vacated the Rule on one ground after rejecting the others.

In No. 22-448, the Bureau has filed a certiorari petition seeking review of the holding below that the Rule should be vacated because the statute authorizing the agency's funding violates the Appropriations Clause. This Court should deny that petition for the reasons explained in the Lenders' opposition brief.

If the Court grants the Bureau's petition, however, it should either grant this cross-petition or add to the Board's petition two antecedent questions that also are presented by the judgment under review:

1. Whether the Rule should be vacated because it was promulgated by Director Cordray while shielded from removal by President Trump under a statutory provision this Court later held is unconstitutional.

2. Whether the Rule should be vacated because the prohibited conduct falls outside the statutory definition of unfair or abusive conduct.

PARTIES TO THE PROCEEDING

Cross-Petitioners—Community 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.

Cross-Respondents—the Consumer Financial Protection Bureau and the Director of the Bureau in his official capacity (currently, Rohit Chopra)—were Defendants in the district court and Appellees in the court of appeals.

RULE 29.6 STATEMENT

Community Financial Services Association of America, Limited has no parent corporation, and no publicly held corporation holds a ten percent or more ownership stake. Consumer Service Alliance of Texas has no parent corporation, and no publicly held corporation holds a ten percent or more ownership stake.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Western District of Texas:

Community Fin. Servs. Ass'n of Am., Ltd. v. CFPB, No. 1:18-cv-295 (order denying plaintiffs' motion for summary judgment and granting defendants' cross-motion for summary judgment, Aug. 31, 2021; order entering judgment, Aug. 31, 2021).

United States Court of Appeals for the Fifth Circuit:

Community Fin. Servs. Ass'n of Am., Ltd. v. CFPB, No. 21-50826 (affirming in part, reversing in part, and rendering judgment for plaintiffs, Oct. 19, 2022).

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The opinion of the U.S. Court of Appeals for the Fifth Circuit (Pet.App. 1a-46a) is reported at 51 F.4th 616. The opinion of the U.S. District Court for the Western District of Texas (Pet.App. 47a-76a) is reported at 558 F. Supp. 3d 350.[1]

JURISDICTION

The Fifth Circuit issued its judgment on October 19, 2022. 28 U.S.C. § 1254(1) confers jurisdiction.

PROVISIONS INVOLVED

The appendix reproduces the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7; the Bureau's purported statutory authority to promulgate the Rule, 12 U.S.C. §§ 5497, 5531; and the Rule's primary operative text, 12 C.F.R. §§ 1041.7-1041.8, *see id.* §§ 1041.2-1041.3.

INTRODUCTION

In the judgment below, the court of appeals vacated a CFPB regulation. It held that, because the Bureau's unprecedented funding mechanism violates the Appropriations Clause, the agency had no lawful means to promulgate the Rule. The Bureau has filed a petition for certiorari asking this Court to review that holding and reverse that judgment, and the Lenders now file this cross-petition raising additional questions that warrant the Court's consideration if it grants the Bureau's petition.

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[1] The terms "Pet." and "Pet.App." in this cross-petition refer to the Bureau's petition for a writ of certiorari in No. 22-448 and the accompanying appendix. *See* S. Ct. R. 12.5. The term "BIO" refers to the Lenders' brief in opposition in No. 22-448.

To be clear, the Court should deny the Bureau's petition, which would moot this cross-petition. As the Lenders have explained in their opposition brief, the Appropriations Clause holding is correct, and further percolation is warranted on that novel and important question. More importantly for present purposes, the case is a bad vehicle to resolve the Appropriations Clause question because the Fifth Circuit incorrectly rejected two antecedent grounds for vacating the Rule that the Lenders now raise in this cross-petition. Under constitutional-avoidance principles, this Court would need to consider those questions *before* reaching the Appropriations Clause question, which means the Court may well be unable to resolve the latter question in this case at all.

For similar reasons, even if this Court decides to grant the Board's petition, it should review the Lenders' additional questions and make clear that it intends to do so. Beyond triggering constitutional-avoidance principles, each alternative ground for vacating the Rule is compelling in its own right.

First, the Rule should be vacated to remedy an *acknowledged* constitutional violation. In 2010, Congress purported to insulate the CFPB Director from removal by the President, but this Court held in 2020 that the statutory removal restriction violates Article II. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020). And back in 2017, that unconstitutional provision is what allowed Director Cordray to remain in office against President Trump's wishes and promulgate the Rule. The Rule is thus directly attributable to, and tainted by, the unconstitutional statute, which enabled Cordray to exercise the powers of the Director's office that he no longer

lawfully possessed. Vacatur is the standard and proper remedy in such circumstances. *Collins v. Yellen*, 141 S. Ct. 1761, 1788-89 (2021). Yet the Fifth Circuit refused to provide any remedy, demanding that the Lenders offer evidence that the President's *hypothetical replacement* for Cordray in 2017 would have acted differently with respect to the Rule. *See* Pet.App. 21a-23a. That counterfactual remedial standard is at odds with this Court's precedents and also would make it virtually impossible for private parties to seek judicial enforcement of structural constitutional principles.

Notably, this remedies question substantially overlaps with the Bureau's remedy argument on the Appropriations Clause claim. The Bureau contends that the Fifth Circuit erred by not inquiring whether the Rule would have been promulgated had the agency been properly funded. *See* Pet. 24-27. If this Court reviews *that* question, it should review too the *related* question whether, instead, the Fifth Circuit erred by requiring the analogous inquiry whether the Rule would have been promulgated had the President been able to replace Cordray in 2017.

Second, the Rule also should be vacated because the Bureau *exceeded its statutory authority*. Congress permitted the CFPB to issue regulations prohibiting "unfair" or "abusive" conduct, but it imposed a precondition that expressly bars the CFPB from outlawing conduct where consumers are capable on their own of reasonably avoiding substantial injury and protecting their interests. 12 U.S.C. § 5531(b)-(d). Yet the Rule bans covered lenders from continuing to attempt *preauthorized* withdrawals for repayment from consumers' bank accounts after two

attempts are denied for insufficient funds, merely to protect consumers from incurring additional fees or other harms. 12 C.F.R. §§ 1041.7-1041.8. Of course, consumers can reasonably avoid any such harm in myriad ways, including by declining loans that preauthorize successive withdrawal attempts; funding their accounts before the repayment date; or revoking access to their accounts if they lack the necessary funds. The Bureau deemed all that irrelevant based on a paternalistic misinterpretation of the statute that allows the agency to prevent informed consumers from voluntarily accepting reasonable financial risks. *See* Pet.App. 9a-14a. In rubberstamping that position, the Fifth Circuit allowed the Bureau to effectively write the precondition out of the statute.

Although this Court can consider the two alternative grounds for affirmance under the Bureau's petition itself, the Lenders have filed this cross-petition in an abundance of caution. It eliminates any possible jurisdictional doubts and ensures that the Court has the proper range of options before it to resolve the actual controversy between the parties. And by granting this cross-petition or expressly adding the questions presented herein to the Bureau's petition, the Court can provide the parties with clarity about which questions it intends to consider. Again, though, the Court should consider *no* questions in this case, because it should deny the Bureau's petition outright.

STATEMENT OF THE CASE

A. Legal Background

1. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the Act), the 2010 Congress created the CFPB to serve "as an independent financial regulator" responsible for "implementing and enforcing a large body of financial consumer protection laws." *Seila Law*, 140 S. Ct. at 2193 (cleaned up). In addition to placing 18 existing statutes under the CFPB's domain, Congress tasked the agency with enforcing a new proscription on "any unfair, deceptive, or abusive act or practice" by certain members of the consumer-finance sector. *Id.* (quoting 12 U.S.C. § 5536(a)(1)(B)). With the "sole responsibility to administer 19 separate consumer-protection statutes," the CFPB's reach extends to "everything from credit cards and car payments to mortgages and student loans." *Id.* at 2200.

Congress also armed the CFPB with "potent enforcement powers." *Id.* at 2193. The agency can "issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court." *Id.* It can "seek restitution, disgorgement, and injunctive relief, as well as civil penalties." *Id.* And it can bring that "coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties." *Id.* at 2200-01.

Despite vesting the CFPB with this significant authority, the 2010 Congress took unprecedented steps to insulate the agency from oversight by the politically accountable branches. It limited the

President's ability to remove the CFPB Director to cases of "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)(1), (c)(3). Such removal restrictions had rarely before been extended beyond multi-member expert agencies exercising only quasi-legislative and quasi-judicial powers. *Seila Law*, 140 S. Ct. at 2198-99, 2201-02. In *Seila Law*, this Court held that the CFPB's removal protection was unconstitutional. *Id.* at 2192.

The 2010 Congress likewise tried to shield the CFPB from oversight *by itself and future Congresses*. According to the CFPB's architects, it was "absolutely essential" that the new regulator receive funding through a mechanism "independent of the Congressional appropriations process." S. Rep. No. 111-176, at 163 (2010). They wanted the Bureau to avoid "the difficulties faced by the Office of Federal Housing Enterprise Oversight (OFHEO)," which faced "repeated Congressional pressure because it was forced to go through the annual appropriations process." *Id.* In their view, OFHEO's lack of "a steady stream of independent funding outside the appropriations process led to repeated interference" with its activities. 156 Cong. Rec. 13,195 (2010) (Sen. Dodd); *accord id.* (even the mere "threat of congressional interference could very well have served to circumscribe the actions OFHEO was willing to take"). The CFPB's creators "did not want to repeat that mistake." *Id.*

The 2010 Congress thus provided that the CFPB would not have to "rely on the annual appropriations process" and would "receive[] funding directly from the Federal Reserve." *Seila Law*, 140 S. Ct. at 2193-94. The CFPB can simply ask the Federal Reserve

each year, in perpetuity, for an "amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau." 12 U.S.C. § 5497(a)(1). The Federal Reserve must grant the request so long as it does not exceed $597.6 million, adjusted for inflation. *See id.* § 5497(a)(2)(A)-(B); Pet. 3-4. In fiscal year 2022, the Bureau took $641.5 million of the $734 million available. CFPB, *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2022*, at 44-45 (Nov. 15, 2022), https://bit.ly/3WCVoke (*2022 Report*).

Any unused funds "shall remain available" to the CFPB "until expended" in future years. 12 U.S.C. § 5497(c)(1). And the agency may use the Federal Reserve to "invest[]" the portion "that is not, in the judgment of the Bureau, required to meet [its] current needs." *Id.* § 5497(b)(3). As of September 30, 2022, the CFPB's investments were worth nearly $340 million. *2022 Report*, at 86.

2. In 2016, Director Cordray, President Obama's Senate-confirmed CFPB head, invoked the Act's new prohibition on "unfair" or "abusive" conduct to propose a regulation focusing generally on payday loans and other short-term, small-dollar consumer loans offered by non-bank lenders. 81 Fed. Reg. 47,864 (July 22, 2016). In 2017, following the change in administrations, but before *Seila Law* held that the CFPB's removal protection is unconstitutional, Cordray issued the final regulation. 82 Fed. Reg. 54,472 (Nov. 17, 2017).

The Rule imposed two primary prohibitions on covered lenders. The Rule's underwriting provisions banned making certain loans without reasonably

determining that consumers have the ability to satisfy the repayment terms. 82 Fed. Reg. at 54,874-77. And the Rule's payment provisions banned continuing to make preauthorized attempts to withdraw loan repayments from a consumer's bank account after two consecutive attempts failed due to insufficient funds (absent renewed consumer authorization). 12 C.F.R. §§ 1041.7-1041.8. During this litigation, the CFPB reconsidered the Rule and rescinded the underwriting provisions. Pet.App. 5a. Due to that reconsideration and the litigation, the payment provisions have been stayed and never gone into effect. Pet. 10 n.3.

B. Procedural History

1. The Lenders, two associations of regulated entities, filed suit in April 2018 seeking vacatur of the Rule on statutory and constitutional grounds. Pet.App. 6a. The Lenders contended that the Rule exceeds the CFPB's statutory authority to forbid "unfair" or "abusive" conduct; was issued by Director Cordray while he was unconstitutionally insulated from removal by President Trump; and was promulgated using funds spent in violation of the Appropriations Clause. *Id.*

Around that time, the CFPB, then run by Acting Director Mulvaney following Cordray's resignation, announced that it intended to reconsider the Rule. *Id.* In July 2020, the CFPB, by that point headed by Senate-confirmed Director Kraninger, rescinded the Rule's underwriting provisions, 85 Fed. Reg. 44,382 (July 22, 2020), but purported to ratify the Rule's payment provisions in response to *Seila Law*, 85 Fed. Reg. 41,905 (July 13, 2020).

The district court granted summary judgment to the Bureau. Pet.App. 47a-76a. The court concluded that the Rule's payment provisions fall within the agency's statutory authority to proscribe "unfair" or "abusive" conduct. Pet.App. 59a-62a. The court acknowledged that the Rule was issued by Director Cordray while he was unconstitutionally shielded from removal, but concluded that the Rule was not void given the remedies holding in *Collins v. Yellen*, *supra*. Pet.App. 52a-54a. And the court held that there was "no Appropriations Clause issue" because "a statute authorizes" the CFPB "to receive funds up to a certain cap." Pet.App. 66a.

2. The Fifth Circuit affirmed some of those holdings but ultimately reversed the judgment and vacated the Rule. Pet.App. 1a-46a.

First, the court held that the Rule's payment provisions fall within the CFPB's statutory authority to proscribe "unfair" conduct. Pet.App. 9a-14a. It rejected the Lenders' argument that any financial harms caused by successive withdrawal attempts are "reasonably avoidable by consumers," and that the Lenders' withdrawal attempts thus fall within a statutory limitation on the "[u]nfairness" definition in 12 U.S.C. § 5531(c)(1). Pet.App. 12a-14a.

Second, although the court agreed that the Rule had been "promulgated by a director who was unconstitutionally shielded from removal" under *Seila Law*, the court held that the Lenders could not "obtain a remedy" for that violation under *Collins*. Pet.App. 18a-19a; *see* Pet.App. 19a-23a. The court read *Collins* to require the Lenders to "demonstrate" not just that "President Trump would have removed

Cordray" absent the removal restriction, but also that "the Bureau would have acted differently as to the rule" under Cordray's hypothetical replacement. Pet.App. 23a. Finding that the Lenders could not make this showing, the court declined to consider the validity of Kraninger's purported ratification of the Rule's payment provisions. *Id.*

Finally, the court nevertheless vacated the Rule because it was "the product of the Bureau's unconstitutional funding scheme." Pet.App. 45a; *see* Pet.App. 27a-46a. Following a path previously proposed by Judge Edith Jones, the court held that "the Bureau's funding structure violates the Appropriations Clause." Pet.App. 27a; *see CFPB v. All American Check Cashing, Inc.*, 33 F.4th 218, 220-42 (5th Cir. 2022) (en banc) (Jones, J., concurring). The court reasoned that Congress had "abdicate[d] its appropriations power" by granting the CFPB a "self-actualizing, perpetual funding mechanism" to bankroll sweeping "executive power." Pet.App. 2a, 33a. "By abandoning its most complete and effectual check" on the Executive Branch and thereby unifying "the purse and the sword," "Congress ran afoul of the separation of powers embodied in the Appropriations Clause." Pet.App. 37a (cleaned up). And because the Bureau had no "means to promulgate the rule" "without its unconstitutional funding," the proper remedy under *Collins* was to vacate the Rule. Pet.App. 44a-45a.

REASONS FOR GRANTING THE CROSS-PETITION

Wholly apart from the Appropriations Clause defect, the Rule should be vacated on two alternative grounds: (1) the Rule's promulgation was tainted by the removal restriction that this Court has already held is unconstitutional, because Director Cordray remained in office only because President Trump was improperly prevented from firing him; and (2) the Rule exceeds the CFPB's authority because the prohibited conduct falls outside the statutory definition of unfair or abusive conduct. As the Lenders have explained, if the Bureau's petition were granted, constitutional-avoidance principles would require this Court to consider these grounds for vacating the Rule *before* reaching the novel constitutional question about the CFPB's funding scheme. BIO 31-32.

To be sure, even "[w]ithout cross-petitioning for certiorari," the Lenders can "defend [their] judgment" on these alternative grounds, which were "properly raised below" but "rejected … [by] the Court of Appeals." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). That is because neither ground seeks "to enlarg[e] [the Lenders'] rights" under the judgment or to "lessen[] the rights" of the Bureau. *Jennings v. Stephens*, 574 U.S. 271, 281 (2015). Both grounds seek "the same relief" that was granted for the Appropriations Clause violation, *id.* at 282—*i.e.*, nothing more than vacatur of the Rule, Pet.App. 46a.

The Court, though, has sometimes stated, less precisely, that a cross-petition is needed when an alternative ground would "*alter* the judgment below,"

Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 364 (1994) (emphasis added), by "expand[ing] [or] contract[ing] the rights of *either* party," *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (emphasis added). Such modification could occur here if, rather than affirming outright, the Court were to vacate the Fifth Circuit's judgment and remand for further consideration of the alternative grounds for vacating the Rule. Although such a lessening of the Lenders' own rights under the Fifth Circuit's judgment *should not* require a cross-petition under *Jennings*, the Lenders have filed one in an abundance of caution.

Regardless of the procedural vehicle, the critical point is this: If the Court grants the Bureau's petition in order to review the Appropriations Clause question, it also should review the Lenders' alternative questions and make clear that it intends to do so. Given constitutional-avoidance principles and the strength of the alternative grounds on their own terms, the Court should have before it the proper range of options to resolve the actual controversy between the parties over the Rule's validity; and the parties should have clarity about which issues the Court intends to consider. Accordingly, although the Court should simply deny the Bureau's petition, if it grants that petition, it should either grant this cross-petition or expressly add the questions presented herein to the Bureau's petition.

I. THE RULE SHOULD BE VACATED BECAUSE IT WAS PROMULGATED BY A DIRECTOR WHO REMAINED IN OFFICE DUE TO AN UNCONSTITUTIONAL REMOVAL RESTRICTION

The Rule is actually tainted by *two* constitutional violations, one of which is not disputed because this Court already addressed it in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). That latter defect—the invalid restriction on the President's power to remove the CFPB's head—is what allowed Director Cordray to stay in office and promulgate the Rule ten months after President Trump's inauguration. The Fifth Circuit nevertheless refused to vacate the Rule absent proof that a different policy would have been pursued by the hypothetical replacement that President Trump would have selected if he could have fired Cordray. That novel and untenable burden on separation-of-powers claimants cannot be reconciled with this Court's remedies jurisprudence.

A. In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Court addressed the circumstances that entitle a party to a remedy for agency action taken by an executive officer unconstitutionally insulated from removal by the President. The controlling inquiry, the Court stated, is whether the removal restriction "inflict[ed] compensable harm," by actually thwarting the President's removal of the officer. *Id.* at 1788-89. If the President would have removed the officer, then the officer's later action is attributable to the removal restriction, and it should be vacated. *See id.*; *see also id.* at 1789 (acknowledging, but not resolving, the argument that harm also would exist if the insulated officer would have acted differently absent the removal restriction).

Here, it is undisputed that Director Cordray issued the Rule while unconstitutionally insulated from removal by President Trump. As the Bureau and Fifth Circuit recognize, the removal restriction was not declared unenforceable until this Court decided *Seila Law* in 2020, and so the Rule's promulgation in 2017 occurred under the ostensible shield of removal protection. Pet. 5-6; Pet.App. 5a-7a, 18a.

The Rule's promulgation also occurred *because of* that protection. The Bureau does not and cannot dispute that President Trump would have fired Cordray—before the Rule's promulgation—absent the statutory impediment. Cordray himself provided a first-hand account of relevant events: how "the threat that [he] would be fired as soon as President Trump took office loomed over everything"; how Cordray "prepare[d] a lawsuit to contest a firing"; and how Cordray's conversations with Gary Cohn, the senior White House official "task[ed]" by the President with "deciding what to do" about removal, resulted in the Trump Administration and Cordray "negotiat[ing] a temporary truce to await" the D.C. Circuit litigation addressing the removal restriction's constitutionality. Richard Cordray, *Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy* 184-87 (2020). To be sure, the Fifth Circuit suggested that Cordray's description of these events, in which he actively participated, was not sufficient evidence of what the President would have done. Pet.App. 22a-23a. But the President made his own views crystal clear when, after Cordray's resignation, he appointed Acting Director Mulvaney, who had co-sponsored a bill to *abolish the CFPB*, H.R. 3118, 114th Cong. § 1 (2015),

and who proceeded to "dramatically reduce[] the intensity of [its] enforcement actions," Christina Skinner, *Presidential Pendulums in Finance*, 2020 COLUM. BUS. L. REV. 532, 552 (2020). Indeed, the Bureau below never even made, let alone identified a scintilla of evidence to support, the implausible claim that President Trump *voluntarily* retained a controversial holdover from the Obama Administration to keep serving as the second "most powerful official in the entire U.S. Government." *PHH Corp. v. CFPB*, 881 F.3d 75, 172 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

Given the absence of any genuine dispute over whether President Trump would have removed Cordray but for the unconstitutional removal restriction, the Lenders were entitled to summary judgment and vacatur under *Collins*. At the very least, the Lenders were entitled to an opportunity for discovery. *See* Fed. R. Civ. P. 56(d); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (permitting discovery in APA case where necessary for "effective judicial review"); Dist. Ct. Dkt. No. 91, at 7 (requesting discovery if needed). The Fifth Circuit thus could not properly have affirmed the district court's grant of summary judgment *to the Bureau* based on any such dispute, and it did not purport to do so. *See* Pet.App. 23a.

B. The Fifth Circuit instead ruled for the Bureau by erroneously engrafting an additional requirement onto the *Collins* inquiry. The court reasoned that, absent evidence that the hypothetical officer who would have replaced Cordray in 2017 "would have acted differently as to the rule," vacatur is not warranted because there is no "nexus between the

President's purported desire to remove Cordray and the promulgation" of the Rule's payment provisions. *Id.* Although the court construed *Collins* to require such an inquiry, Pet.App. 21a-23a, this "nexus" holding fundamentally misunderstands *Collins* as well as the Court's broader jurisprudence on constitutional remedies.

First, *Collins* itself is unambiguous that a removal restriction "clearly" inflicts remediable harm if the President otherwise would have removed the officer who took the challenged agency action. 141 S. Ct. at 1788-89. For example, such harm would be "clear-cut," the Court said, if "the President had attempted to remove [the officer] but was prevented from doing so by a lower court decision." *Id.* at 1789. That example alone reveals that an impeded removal effort is sufficient to support a remedy; the Court did not say that the challenger additionally had to establish that the unidentified, hypothetical replacement officer would have acted differently. *See id.*

The Fifth Circuit, however, overread *Collins*'s next example—that harm also would be "clear-cut" if the President had "express[ed] displeasure" with an officer's actions *and* "asserted that he would remove" the officer but for the statutory restriction. *Id.* The court read the conjunction in that example to mean that there must be "a nexus between the desire to remove and the challenged actions taken by the insulated actor." Pet.App. 21a. But the point of the second example was merely that the President's substantive disagreement with an insulated officer's actions can be *sufficient* evidence that the removal restriction caused harm, even absent a futile attempt to actually remove the officer. The Court obviously

was not saying that such evidence is *necessary* even where it is already clear that the President would have removed the officer. That would contradict the first example, which, to repeat, did not require any such evidence. In short, *Collins* is plainly satisfied where, as here, the party challenging the officer's action demonstrates (in any appropriate way) that the President would have removed the officer absent the invalid removal restriction. 141 S. Ct. at 1789; *accord id.* at 1797 (Gorsuch, J., concurring in part) (describing the majority as authorizing vacatur if "the President would have removed … the unconstitutionally insulated official had he known he had the authority to do so," and criticizing even that standard as imposing too high a burden).

Second, when an officer is improperly shielded from removal that otherwise would have occurred, his actions are analogous to those of an improperly appointed officer. Both involve the "exercise of power that the actor did not lawfully possess," and thus vacatur is the ordinary and proper remedy. *Id.* at 1788 (majority op.) (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018)). It is immaterial that the insulated officer *previously* lawfully possessed the powers of his office, because he *no longer does* once the President is unconstitutionally thwarted from actually removing him. At that point, he becomes just as much a usurper in office as one who was unconstitutionally appointed in the first place.

The actions of usurpers are routinely set aside, without requiring any additional showing of whether a *different action* would have been taken if the proper appointment process had been followed—even though that process often would have led to the *same person*

holding the office. *See, e.g.*, *Lucia*, 138 S. Ct. at 2055. Once it is shown that the President otherwise would have removed an improperly insulated officer, there is no "difference" from an improperly appointed officer, because "[e]ither way, governmental action is taken by someone erroneously claiming the mantle of executive power—and thus taken with no authority at all." *Collins*, 141 S. Ct. at 1795 (Gorsuch, J., concurring in part).

Third, requiring a counterfactual inquiry into the actions of a hypothetical replacement officer would be untenable. There is no practical way for any private litigant to divine and prove both who the hypothetical replacement would have been and how he would have acted on the matter—let alone without seeking intrusive discovery from the President and other high-ranking Executive officials, *cf. Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 385 (2004) ("special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated").

This Court should ensure that it remains realistically possible for litigants to challenge agency action on separation-of-powers grounds. That is especially so given the crucial role that those structural principles play in securing individual liberty. *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010). Indeed, this Court has affirmatively favored remedies that "provide[] a suitable incentive to make such challenges." *Ryder v. United States*, 515 U.S. 177, 186 (1995); *accord Lucia*, 138 S. Ct. at 2055 n.5.

Finally, applying the standard vacatur remedy is particularly appropriate in a conventional APA case like this, involving a regulation that governs the challengers' primary conduct. *Collins*, in contrast, was a highly unusual case where private plaintiffs sought to collaterally attack an *intergovernmental agreement* implicating hundreds of billions of dollars that had already been distributed; and they did so even though the agreement itself had been adopted by *properly removable* agency officials and at worst was "implemented" in some unspecified ways by an improperly insulated official. *See* 141 S. Ct. at 1772-75, 1787. That convoluted posture raised tricky remedial issues that this Court remanded for further consideration. *See id.* at 1787-89.

Here, no such circumstances warrant depriving the Lenders of the ordinary vacatur remedy. To the contrary, such a result would make a mockery of "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). Judge-made remedial doctrines (*see* Pet. 25) should not be distorted to deprive the Lenders of *any* judicial relief despite their concededly being injured by the actions of an executive officer who remained in office solely due to a removal restriction that this Court has *already held* is unconstitutional.

C. The Bureau below alternatively argued that, even if Director Cordray unlawfully promulgated the Rule in 2017, Director Kraninger lawfully ratified the payment provisions in 2020, after *Seila Law* made clear that she was removable at will. That alternative argument, which the Fifth Circuit did not reach, Pet.App. 23a, is clearly wrong.

Unlike some agency actions, notice-and-comment rulemaking cannot be ratified by a later official, because rulemaking is a multi-step process that requires providing notice to the public, considering their comments, and exercising reasoned discretion in response. 5 U.S.C. § 553; *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Kraninger did not, and could not, perform *each* of these steps in 2020—in fact, she did not meaningfully perform *any* of them, as she rubberstamped the Rule's payment provisions in three boilerplate sentences. *See* 85 Fed. Reg. 41,905, 41,905-06 (July 13, 2020). This confirms that notice-and-comment rulemaking is inherently not an "act" that a later official is "able" to do "*at the time the [purported] ratification was made*." *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994).

That is especially true here, where Kraninger's attempt to piggyback on Cordray's assessment of the rulemaking record makes no sense given intervening circumstances. Among other problems: the Rule's 2017 cost-benefit analysis was premised on the underwriting provisions' "lessen[ing] the impacts" of the payment provisions, but the Bureau rescinded the underwriting provisions when it ratified the payment provisions, *see* 82 Fed. Reg. 54,472, 54,846 (Nov. 17, 2017); 85 Fed. Reg. 44,382 (July 22, 2020); the agency's 2020 explanation for rescinding the underwriting provisions construed the key statutory standard differently than did the 2017 explanation for adopting the payment provisions, *see infra* at 24-25; and the public's comments were several years old. Kraninger violated the APA by failing to consider any of this. *See* 85 Fed. Reg. at 41,905-06; *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020)

(ignoring effects from changed circumstances is arbitrary and capricious); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (same).

Accordingly, once the Fifth Circuit's misapplication of *Collins* is corrected, it is clear that the Rule should be vacated to remedy the *Seila Law* violation and that this Court could affirm the Fifth Circuit's judgment on that alternative ground. At minimum, if this Court were uncertain about the purported ratification, it could remand for the Fifth Circuit to consider in the first instance. *See Seila Law*, 140 S. Ct. at 2211. Regardless, the key point for now is that the Court may not need to reach the Appropriations Clause question to resolve the parties' controversy over the Rule's validity.

D. Finally, there is an important overlap between the remedy question presented here and the remedy question presented in the Bureau's petition. There, the Bureau alternatively argues that, even if the Bureau's funding statute is unconstitutional, vacatur of the Rule is not a proper remedy under *Collins* absent proof that a properly funded agency would not have promulgated the Rule. *See* Pet. 24-27. That, of course, is the same (erroneous) remedial approach that the Fifth Circuit *adopted* for the removal violation, by requiring proof that a properly removable replacement Director would not have promulgated the Rule. *See supra* at 15-19; *see also* BIO 27-28 (demonstrating why that approach is likewise erroneous in the appropriations context). If this Court were to grant the Bureau's petition, it thus would be particularly appropriate to review both of the Fifth Circuit's remedy holdings together and clarify the proper application of *Collins*.

II. THE RULE SHOULD BE VACATED BECAUSE IT FALLS OUTSIDE THE BUREAU'S STATUTORY AUTHORITY

The Rule also should be vacated because it is contrary to statute. Although Congress authorized the Bureau to prohibit as "unfair" or "abusive" lending practices that exploit consumer coercion or ignorance, the Act contains a limitation that expressly bars the CFPB from outlawing practices where consumers are capable on their own of reasonably avoiding substantial injury and protecting their interests. Nevertheless, the Rule prohibits a covered lender from making *preauthorized* attempts to withdraw a loan repayment from a customer's bank account after two consecutive attempts have failed due to insufficient funds, merely because continued unsuccessful attempts could cause the consumer to incur additional fees or other harms. A consumer, though, obviously has myriad reasonable ways to avoid that natural "injury" from loan non-repayment, both before and after taking out the loan. The Bureau's paternalistic effort to reconcile the Rule with the statutory limitation would eviscerate the latter; the Fifth Circuit thus erred in rubberstamping the agency's untenable statutory interpretation.

A. The Act authorizes the CFPB to identify and proscribe "unfair, deceptive, or abusive acts or practices" in connection with certain consumer transactions. 12 U.S.C. § 5531(b). Critically, though, the Act expressly cabins the scope of this authority. It imposes a precondition barring the CFPB from declaring conduct "unfair" or "abusive" absent a "reasonable basis" for concluding that the conduct satisfies specific statutory criteria. *Id.* § 5531(c)-(d).

Under this precondition, the CFPB may not deem conduct to be "unfair" unless it is likely to cause substantial injury that "is not reasonably avoidable by consumers." *Id.* § 5531(c)(1)(A). Likewise, the CFPB may not deem conduct to be "abusive" unless, as relevant here, it "takes unreasonable advantage" of consumers' "inability … to protect [their] interests" or their "lack of understanding … of the material risks, costs, or conditions of the product or service." *Id.* § 5531(d)(2)(A)-(B) (emphasis added).[2]

B. Here, the Bureau flouted the Act's regulatory precondition for outlawing conduct as "unfair" or "abusive." The Rule prohibits a covered lender from continuing to make preauthorized attempts to withdraw a loan repayment from a customer's bank account after two consecutive attempts have failed due to insufficient funds (absent renewed consumer authorization). 12 C.F.R. §§ 1041.7-1041.8; *see id.* § 1041.3 (covered-loan definition, which generally focuses on payday loans and other short-term, small-dollar consumer loans offered by non-bank lenders). The Bureau's rationale was that continued failed withdrawal attempts may cause consumers to incur additional fees or other harms (such as insufficient-funds fees). 82 Fed. Reg. at 54,734-35, 54,744.

The rationale's legal flaw is that consumers unquestionably have myriad reasonable options to avoid this natural "injury" from loan non-repayment and protect their own interests. On the front end, of

[2] The CFPB also may deem conduct abusive in two other circumstances, but the Bureau did not rely on them to justify the Rule. *See* 12 U.S.C. § 5531(d)(1), (d)(2)(C); 82 Fed. Reg. at 54,739-44.

course, consumers are not required to take out covered loans at all, let alone ones that preauthorize successive withdrawal attempts. *Id.* at 54,596. Moreover, even once they take out such a loan, they can ensure that their accounts are sufficiently funded when the loan repayments are due, *id.* at 54,472, 54,496, or authorize repayments from accounts that do not charge fees for failed payments (like most debit cards), *id.* at 54,750. Indeed, even after two failed withdrawal attempts have occurred, they can issue stop-payment orders or rescind access to their accounts, which will enable them at least to mitigate, if not eliminate, additional fees. *Id.* at 54,501-02, 54,557. To be sure, these options may not always be "convenient or costless," *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012), but they establish that ordinary consumers can readily avoid the fees and protect their own interests. And that means continued withdrawal attempts clearly fall outside the Act's definition of "unfair" or "abusive" conduct. *See id.*

C. The Bureau tried to reconcile the Rule with the Act in several ways, and the Fifth Circuit parroted those points. But each of the Bureau's paternalistic arguments is a manifestly unreasonable reading that would gut the Act's regulatory precondition.

First, the Bureau asserted that consumers "typically do not have the ability to shop for [covered] loans" that do not require preauthorization of successive withdrawal attempts. Pet.App. 13a. And based on that premise, it jumped to the conclusion that "decid[ing] not to participate in the market [at all] is not … *a valid means* of reasonably avoiding the injury," because otherwise "no market practice could

ever be determined to be unfair." Pet.App. 14a (emphasis added). Even assuming the (dubious) factual premise, however, the legal conclusion is a non sequitur. The statutory question is whether it is "reasonabl[e]" to expect the consumer to refrain from market participation to "avoid[]" the "injury" at issue. 12 U.S.C. § 5531(c)(1)(A); *accord id.* § 5531(d)(2)(B) ("tak[ing] unreasonable advantage" of the consumer's "inability … to protect [his] interests"). While that may be unreasonable *sometimes* (*e.g.*, where market participation is necessary or the contractual condition is inherently wrongful), it certainly is not *always* unreasonable. For ordinary financial harms flowing from a party's own contractual non-compliance, "[a]n injury is reasonably avoidable if consumers 'have reason to anticipate the impending harm and the means to avoid it.'" *Davis*, 691 F.3d at 1168-69 (quoting *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365-66 (11th Cir. 1988)).

As the Bureau itself admitted when rescinding the Rule's underwriting provisions, it is "well-established that consumers can reasonably avoid injury through … 'anticipatory avoidance,'" *including* by pursuing "viable alternatives to … covered loans." 85 Fed. Reg. at 44,397 (quoting *Orkin*, 849 F.2d at 1365). Accordingly, the Bureau's position in the 2017 Rule—*i.e.*, that exiting the covered-loan market is not "a valid means" of avoiding any injury from the conduct at issue, Pet.App. 14a—is contrary both to the statute and to its own position in the 2020 rulemaking that partially abrogated the Rule. (This also underscores why the Bureau's purported 2020 "ratification" of the Rule's payment provisions is incoherent. *See supra* at 20-21.)

Second, the Bureau asserted that, "*after* two unsuccessful withdrawal attempts," consumers may not have the ability or time to fund their accounts or otherwise avoid a third (or more) unsuccessful withdrawal attempt. Pet.App. 13a (emphasis added). Again, this blinkered inquiry disregards "anticipatory avoidance." *Orkin*, 849 F.2d at 1365. Indeed, on the Bureau's bizarre logic, late fees could be outlawed as "unfair" or "abusive" because consumers could never reasonably avoid or protect against them *after* they had been incurred. *Contra, e.g.*, *Davis*, 691 F.3d at 1169 (holding that consumer could have reasonably avoided annual fee because, among other things, it was "completely refundable if [he had] closed his account within 90 days without using the card," and he simply "refused to do so, citing the negative impact it would have on his credit score").

Moreover, even focused solely on "mitigating the injury after the fact," *id.* at 1168-69, the Act does not permit the Bureau *to ban* third attempts, rather than at most *restrict* third attempts made *before* consumers have sufficient time to address the problem. Whether or not that narrower "act or practice" is "likely to cause" unavoidable injury or "takes unreasonable advantage" of consumers' inability to protect themselves, 12 U.S.C. § 5531(c)(1)(A), (d)(2)(B), the broader category plainly does not meet these standards. In fact, the Rule's sweeping ban perversely forces lenders to pursue more burdensome methods of debt collection even if consumers have replenished their accounts after the second failed attempt. *See* 82 Fed. Reg. at 54,483.

Third, the Bureau tried to circumvent the foregoing flaws by speculating that consumers may

not be aware of either the possibility of multiple unsuccessful withdrawal attempts, or the resulting consequences and how to avoid them. *See id.* at 54,741-43. But consumers have preauthorized the use of successive withdrawal attempts, *id.* at 54,720; "understand as a general matter that they may incur" fees when attempted withdrawals are denied for insufficient funds, *id.* at 54,740; and can readily learn how to take actions like issuing stop-payment orders, *see id.* at 54,727 & nn.977-78. No more should be required for consumers to understand the risk, protect their own interests, and reasonably avoid any injuries. *See, e.g.*, *Davis*, 691 F.3d at 1169 (requirement to "check the box indicating … assent" to credit-card terms "provided 'the means to avoid'" alleged injury from annual fee). At the very least, the Bureau could not permissibly go beyond requiring any increased disclosure the agency shows is necessary to address successive withdrawal attempts. The Rule's categorical ban thus cannot be reconciled with the Act's regulatory precondition.

In sum, while Congress gave the Bureau a blank check to fund itself, Congress was more careful in defining the scope of the agency's power to regulate unfair or abusive conduct. Although the Bureau can protect consumers from things like coercion and ignorance, it cannot second-guess their willingness to voluntarily undertake the informed risk of potential financial injuries that they can reasonably avoid. The Bureau wants a blank check here too, however, and wrote one for itself by misconstruing the precondition out of the Act. This statutory violation is another alternative ground for vacating the Rule.

CONCLUSION

Although the Bureau's petition for a writ of certiorari should be denied, if it is granted, then the Court also should either grant this cross-petition or add the questions presented herein to the Bureau's petition.

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Respectfully submitted,

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