No. 21-50826

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CONSUMER FINANCIAL PROTECTION BUREAU; DAVID UEJIO, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR, CONSUMER FINANCIAL PROTECTION BUREAU,

Defendants-Appellees.

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

APPELLANTS' OPPOSED MOTION FOR A STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

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

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

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

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

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

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

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

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

7. The following law firms and counsel have participated in the case:

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REQUEST FOR EXPEDITED CONSIDERATION

Plaintiffs-Appellants respectfully request that this Court extend the district court's stay of the compliance date until 286 days after resolution of this appeal, rather than requiring compliance with the challenged agency action 286 days after the district court's orders entered on August 31, 2021, A01–A25. *See* 5 U.S.C. § 705; Fed. R. App. P. 8. Because Plaintiffs will need to begin preparing for compliance much earlier than **June 13, 2022**, Plaintiffs seek a stay by **October 25, 2021**.[1]

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over these federal claims pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's orders represent its final judgment.

INTRODUCTION

Plaintiffs-Appellants are associations of companies that offer small-dollar consumer-credit products including payday and installment loans. They challenged a final rule promulgated by the Consumer Financial Protection Bureau entitled "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule ("2017 Rule" or "Rule"), 82 Fed. Reg. 54,472 (Nov. 17, 2017), codified at 12 C.F.R. pt. 1041 (A158–88 (Excerpts)). Plaintiffs sought to set aside the Rule on the grounds that, *inter alia*, the director who promulgated it had been unconstitutionally insulated

[1] Plaintiffs' counsel gave notice to Defendants' counsel on September 30. Defendants' counsel indicated that they oppose relief.

from presidential removal and control. *Seila Law LLC v. CFPB* subsequently vindicated this view. 140 S. Ct. 2183, 2207 (2020). The district court, however, held that it could offer no remedy for this constitutional violation. This Court, en banc, is poised to address similar questions of remedy and ratification in *CFPB v. All American Check Cashing*, No. 18-60302 and *Collins v. Yellen*, No. 17-20364.

The 2017 Rule provided a twenty-one-month implementation period for "lenders [to] be able to reasonably adjust their practices to come into compliance with the rule." 82 Fed. Reg. at 54,814 (A184). In response to this litigation, the district court stayed the compliance date with 286 days left for implementation. Recognizing that Plaintiffs "should receive the full benefit of [its] temporary stay," the district court's summary judgment order restored the pre-stay status quo by staying compliance until 286 days from the date of final judgment (*i.e.*, until June 13, 2022). A24.

The Rule's substantive provisions have never gone into effect. The district court's prior stay orders correctly recognized that the equities support maintenance of the status quo until 286 days after final judgment, so that lenders can fully resolve their claims before undertaking the irreparable, costly, and time-consuming steps needed for compliance. Now that Plaintiffs have appealed, that logic supports extending the stay to 286 days after resolution of this appeal in order to maintain the status quo. Indeed, the district court's order summarily denying that extension offers no rationale for treating the situations differently.

To facilitate orderly proceedings in this Court, Plaintiffs respectfully request a decision on this motion by October 25, 2021.

STATEMENT OF THE CASE

A. The Consumer Financial Protection Act

The 2010 Consumer Financial Protection Act ("CFPA") established the Bureau as an "independent" regulatory agency. 12 U.S.C. § 5491. A single director heads the Bureau for a five-year term. *Id*. § 5491(b)–(c). The Act originally provided that the president could remove the Bureau's director only "for cause," *id.* § 5491(c), but *Seila Law* invalidated this provision.

Under the Director's supervision, the Bureau may "prescribe rules … identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with" certain consumer transactions. *Id*. § 5531(b) ("UDAAP authority"). Congress, however, limited the Bureau's power so that consumers could "make" their own "responsible decisions about financial transactions." *Id*. § 5511(a)–(b); *see also id.* § 5512(b)(2)(A). These limits include narrowly defining practices that could be regulated as "unfair," *id.* § 5531(c)(1), or "abusive," *id.* § 5531(d).

B. Payday and Installment Loans

The loans at issue here are short- and medium-term, small-dollar, consumer-finance products provided by non-bank lenders to consumers lacking access to more traditional forms of credit. *See* A298. Preauthorized repayment, through regularly scheduled bank withdrawals, is a common feature of many of these loans. As in other contexts (*e.g.*, automatic bill payment), the use of preauthorized payments provides numerous benefits to consumers, including greater access to credit, convenience, fewer missed payments, and lower costs. *See, e.g.*, A293.

C. 2017 Rule and Ensuing Litigation

In 2016, the Bureau invoked its UDAAP authority to propose a rule that would fundamentally alter the industry. The rulemaking straddled the administrations of Presidents Obama and Trump. President Obama's appointee, Director Richard Cordray, completed the rulemaking process during the first year of President Trump's administration. As demonstrated below without dispute from the Bureau, but for the later-invalidated removal restriction, President Trump would have fired Director Cordray before he finalized the Rule. A146–49; A155. Director Cordray himself explained that "the threat that I would be fired as soon as President Trump took office loomed over everything." Richard Cordray, *Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy* 185 (2020); *see also* Kate Berry, *In tell-all, ex-CFPB chief Cordray claims Trump nearly fired him*, American Banker (Feb. 27, 2020), https://www.americanbanker.com/news/in-tell-all-ex-cfpb-chief-cordray-claims-trump-nearly-fired-him. This threat loomed largest over what Cordray described as his—“last big fight,” “the payday lending rule.” Cordray, *Watchdog*, *supra* at 198.

But “President Trump was advised to hold off on firing Cordray because the Supreme Court had not yet weighed in on [the] ‘for cause’ provision,” Berry, *In tell-all*, *supra*, while the D.C. Circuit, less than one month into the new president’s term, had vacated and agreed to reconsider en banc a decision invalidating the removal protection. Feb. 16, 2017 Order (per curiam), *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177). Before the courts could rule, however, Director Cordray promulgated the Rule and subsequently resigned.

The Rule originally imposed two major limits. *First*, its “underwriting provisions” prohibited covered lenders from making payday loans unless the borrower could satisfy a government-mandated “ability to repay” test. 12 C.F.R. § 1041.4. *Second*, the Rule’s “payment provisions” forbade a covered lender to make or attempt an authorized withdrawal from a bank account after the lender’s second consecutive attempt failed due to a lack of sufficient funds, unless the lender obtains the consumer’s new and specific authorization for further withdrawals. *Id.* § 1041.7. The Bureau designated departures from either rule as “unfair” and “abusive” practices.

The Rule was published on November 17, 2017, but became effective on January 16, 2018, with an original compliance date of August 19, 2019 for the Rule’s substantive requirements. 82 Fed. Reg. at 54,472 (A158). This twenty-one month implementation period—six months more than originally proposed—reflected the Bureau's judgment that twenty-one months were necessary for "an orderly implementation period" and for "lenders [to] be able to reasonably adjust their practices to come into compliance." *Id.* at 54,814 (A184).

Plaintiffs sued to enjoin the Rule on April 9, 2018, arguing that an unconstitutionally structured Bureau promulgated the Rule, that it exceeded the Bureau's statutory authority, and that it was arbitrary and capricious under the APA. But long before the original compliance date, and less than one year after the Rule's issuance, the Bureau announced that it would reconsider the Rule.

The district court stayed the litigation. A127–28. The parties jointly moved to stay the compliance date, agreeing that any stay should "preserve the amount of time for bringing … operations into compliance that Plaintiffs' members currently have from the date of this motion to the Payday Rule's current compliance date." A124. The court stayed compliance with 286 days left on the implementation clock. *See* A129–32.

In early 2019, the Bureau initiated rulemaking proceedings to revoke the Rule's underwriting provisions (but not its payment provisions). *See* 84 Fed. Reg. 4,252 (Feb. 14, 2019). It acknowledged certain key flaws in the Rule, including that the evidence supporting it was insufficiently robust and reliable, and that the prior Director had misinterpreted the scope of the Bureau's UDAAP authority. *Id.*

On June 29, 2020—while the revocation rulemaking was pending—the Supreme Court held that the Bureau was unconstitutionally structured and invalidated the CFPA's removal restriction. *Seila Law*, 140 S. Ct. at 2207, 2209–11.

Eight days later, the Bureau announced a final rule revoking the underwriting provisions. *See* 85 Fed. Reg. 44,382 (July 22, 2020) ("2020 Rule") (A191–204 (Excerpts)). The Bureau simultaneously released a notice purporting to "affirm[] and ratif[y] the payment[s] provisions of the 2017 Final Rule." 85 Fed. Reg. 41,905-02 (July 13, 2020) (A189–90). This purported ratification occurred outside notice-and-comment rulemaking and failed to address how the Bureau could ratify components of a rule that had relied on (in the Bureau's own assessment) an incorrect interpretation of UDAAP authority.

The district court lifted the litigation stay, A133–34, and Plaintiffs amended their complaint to add, *inter alia*, claims challenging the Bureau's ratification, A78–119. The parties cross-moved for summary judgment. On August 31, 2021, the district court granted judgment for Defendants, but restored the parties to the original compliance period remaining when the court granted its stay (286 days). It reasoned that Plaintiffs "should receive the full benefit of the temporary stay," which would also allow "time for appeal." A24.

On the remedial merits, the court concluded that the Bureau's unconstitutional structure did not render the Rule void *ab initio*. Its entire analysis rested on one block-quoted passage from *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which explained only that agency actions taken by unconstitutionally insulated Directors are not always automatically void. *See* A06. It then concluded that Plaintiffs received a "meaningful remedy" when the subsequent Director ratified a portion of the 2017 Rule without actually undertaking a valid notice-and-comment rulemaking. A07. The court also rejected Plaintiffs' APA arguments, primarily reasoning that the Bureau's initial rulemaking combined with the unilateral ratification satisfied the agency's APA duties. *See* A07–15.

On September 9, 2021, Plaintiffs filed their notice of appeal and a motion for stay pending appeal. On September 30, 2021, the district court summarily denied Plaintiffs' motion. A26–28.

STANDARD OF REVIEW

A stay pending appeal "maintain[s] the status quo pending a final determination on the merits." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981). A party seeking a stay "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting a stay." *Campaign for S. Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014). This Court has consistently counseled against "apply[ing] these factors in a rigid, mechanical fashion." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). A stay is proper "where relative harm and the uncertainty of final disposition justify it." *Ruiz*, 650 F.2d at 565.

ARGUMENT

This case presents "a serious legal question" not only affecting the public's access to credit in a global pandemic, but also engendering overarching implications for litigants' remedial relief from rulemakings conducted by unlawfully structured agencies. *See Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23–24 (5th Cir. 1992) (per curiam) (serious legal question if case involves "far-reaching effects or public concerns"). Plaintiffs' members will suffer irreparable harm absent an extension of the district court's stay, *see infra* Part I.A, and the balance of equities heavily favors a stay given the district court's own (correct) determination that Plaintiffs are entitled to a compliance period consistent with the pre-stay status quo, *see infra* Part I.B. Plaintiffs have also presented a substantial case on the merits because the en banc Court is poised to address, in *Collins* and *All American*, related questions of remedy and ratification following invalidation of agency structures (including the Bureau's) on constitutional grounds. *See infra* Part III.A. In any event, Plaintiffs are likely to succeed on the merits of their claims. *See infra* Part III.B.

I. PLAINTIFFS' MEMBERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

"Federal courts," including this one, "have long recognized that, when the threatened harm is more than de minimis, it is not so much the magnitude but the *irreparability* that counts for purposes of" temporary relief. *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (cleaned up) (emphasis in original). As the Supreme Court recently reaffirmed, monetary injury is irreparable when there is "no guarantee of eventual recovery." *Ala. Ass'n of Realtors v. HHS*, No. 21A23, 2021 WL 3783142, at *4 (U.S. Aug. 26, 2021) (per curiam). And here, absent an extension of the district court's stay, Plaintiffs' members have guaranteed irreparable injuries. Given the government's immunity from suit, none will be compensable by money damages should the Rule be invalidated or repealed. *See Texas v. EPA*, 829 F.3d 405, 433–34 (5th Cir. 2016) ("complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs").

As this Court has previously explained, expenditures needed for compliance constitute irreparable harm even where they occur in advance of a rule's compliance date. In *Texas v. EPA*, for example, the court found irreparable injury, and granted a stay pending review, where power companies were spending money in 2016 to comply with EPA installation deadlines of 2019 and 2021. *See* 829 F.3d at 416. The Court recognized that, despite the deadlines being many years away, the required emissions controls "take several years to install" and "the regulated companies will have to begin installation almost immediately." *Id*. at 433.

The district court here correctly recognized the irreparable harm caused by potentially unnecessary compliance costs, both when it entered the initial stay and in its decision to grant Plaintiffs the full benefit of the pre-stay, 286-day compliance period.

Preparation for compliance is a costly, months-long process. It involves a complete overhaul of Plaintiffs' members' internal compliance systems and external client communications. *See, e.g.*, A136, ¶¶ 6–7. These changes will necessitate extensive testing, new recordkeeping, re-training of employees, restructuring of outside vendor relationships, and similar burdens. A136–37, ¶¶ 5–8. Implementing these changes requires substantial resources and time: six to twelve months, "[a]ssuming the business impacts from COVID-19 normalize in 2021." A137, ¶ 9.[2]

Though the Rule's compliance deadline is still approximately eight months away, this evidence demonstrates that Plaintiffs will need to undertake expensive and disruptive business changes while this appeal is pending. Indeed, because the median decision time is approximately 320 days, *see* Fifth Circuit Practitioner's

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[2] Unfortunately, business impacts have not normalized. And the cost and time required to implement necessary changes grew exponentially due to the pandemic. A137–38, ¶¶ 8–11. This only further counsels in favor of relief given that the pandemic was completely unanticipated at the Rule's promulgation and when the original stay took effect.

Guide 4 (Sept. 2021), absent a stay Plaintiffs' members will likely need to begin *complying* with the payment provisions (not just preparing to comply with them) before the appeal is resolved.

II. THE BALANCE OF EQUITIES HEAVILY FAVORS A STAY.

Balancing the irreparable harm facing Plaintiffs' members against the public interest and the lack of harm to the government weighs heavily in favor of a stay. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that harm to the opposing party and the public interest "merge when the Government is the opposing party"). This Court routinely recognizes that the equities favor temporary relief where judicial review can resolve serious questions before implementation of a government program irreversibly alters the status quo. *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015); *see also Ruiz*, 650 F.2d at 569.

Preserving the status quo costs the Bureau nothing. The Rule has never gone into effect, and the Bureau previously joined in delaying compliance. Leaving the stay in place pending appeal briefly maintains the status quo that has been in place for decades.

In contrast, requiring implementation of the payment provisions will impose unprecedented changes to the lending industry and fundamentally alter the public's access to affordable credit during a public-health crisis. *See infra* Part III.B.3; *see also Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585

(5th Cir. 2013). Plaintiffs' members will have to budget for increased compliance costs. Accordingly, their services will be more costly, they will offer fewer services to fewer people, and they will have less ability to renegotiate payment terms for borrowers behind on payments. Focusing resources on compliance costs also takes limited resources away from more "immediate and urgent priorities associated with COVID-19, such as addressing consumer needs for convenient remote servicing options and increasing payment accommodation capabilities during these unprecedented times." A137, ¶ 8. At a minimum, the public would not be served by subjecting borrowers to contradictory ping-ponging loan terms if, for example, the payment provisions take effect before the appeal concludes, but this Court ultimately invalidates those provisions. In short, Plaintiffs' members' "normal procedures … should not be interrupted so significantly until an appeal has been decided." *Baylor Univ. Med. Ctr.*, 711 F.2d at 40.

III. THE MERITS JUSTIFY A STAY PENDING APPEAL.

A. Plaintiffs Have a Substantial Case on the Merits.

It is unnecessary for this Court to "express any opinion on the resolution" of the legal issues in order to conclude that a substantial case on the merits exists. *Baylor Univ. Med. Ctr.*, 711 F.2d at 40. Rather, "[t]he Fifth Circuit recognizes that a party presents a substantial case on the merits when there is a lack of precedent to clarify the issues at bar." *Cruson v. Jackson Nat'l Life Ins. Co.*, No. 16-cv-00912, 2018 WL 2937471, at *4 (E.D. Tex. June 12, 2018).

That is certainly the case here, where the en banc Court, in *All American* and *Collins*, is poised to address the questions of remedy and ratification following the invalidation of agency structures, including the Bureau's, on constitutional grounds. That review alone demonstrates that Plaintiffs have a "substantial case on the merits," at least on the remedial questions related to the Bureau's unlawful structure. *See* Fed. R. App. P. 35(a) (explaining that "en banc hearing or rehearing is not favored and ordinarily will not be ordered unless," *inter alia*, "the proceedings involves a question of exceptional importance"); 5th Cir. R. 35.1 (cautioning counsel that en banc review "is a serious call on limited judicial resources").

Regardless, because Plaintiffs are likely to succeed on the merits, *see infra* Part III.B, they certainly meet the "substantial case" standard.

B. In Any Event, Plaintiffs Are Likely to Succeed on the Merits.

Although Plaintiffs only need to demonstrate "a substantial case on the merits," *Bryant*, 773 F.3d at 57, they are *likely* to succeed on the merits for several reasons.

First, the payment provisions must be invalidated because an unconstitutionally structured Bureau issued them after President Trump was prevented from removing Director Cordray. Ratification cannot cure this constitutional defect because a valid legislative rule requires a valid rulemaking.

Second, even if ratification could sometimes cure rulemaking defects, the ratification here violates the CFPA and APA.

Third, ratification aside, the payment provisions themselves are arbitrary and capricious and inconsistent with several statutory limits on the Bureau's authority.

1. The payment provisions are constitutionally defective.

The Bureau lacked authority to promulgate the Rule because its director at the time was unconstitutionally insulated from removal, *see Seila Law*, 140 S. Ct. 2183, thus entitling Plaintiffs to prospective relief. To the extent *Collins* governs the remedial analysis, it confirms Plaintiffs' entitlement to a remedy because the removal restriction in fact prevented President Trump from removing the unconstitutionally insulated director. The Bureau's attempted "ratification" changes neither conclusion.

a. An agency whose very "composition violates the Constitution's separation of powers" simply "lacks authority to" act. *FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). Where a party timely challenges agency action by an unconstitutionally structured agency, the default remedy to "cure the constitutional error" is to require the agency to conduct the tainted agency proceeding anew. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

At the time it promulgated the 2017 Rule, the Bureau was led by an unconstitutionally insulated director. Because the unlawfully composed Bureau lacked valid rulemaking power, the Rule must be set aside.

b. Below, the Bureau argued, and the district court thought, that *Collins* limited this rationale to Appointments Clause violations. That is incorrect. *Collins* concerned a request for far-reaching "retrospective relief," and noted only (under those circumstances) that an unconstitutional removal provision does not automatically require that *all* agency actions "be undone." 141 S. Ct. at 1787–88 & n.24. *Collins* did not dictate limits on *prospective relief* (like the injunction sought here) that would follow from an unlawful removal provision.

This prospective/retrospective distinction is no mere formalism. The *Collins* plaintiffs wielded the constitutional structural flaw as a sword to unwind financial transactions involving hundreds of millions from the Treasury; Plaintiffs here invoke the Constitution as a shield against the Bureau's unlawful exercise of authority. *See NRA Pol. Victory Fund*, 6 F.3d at 828 (granting relief from agency action to parties that "raise [a] constitutional challenge as a defense"). The factbound need to avoid far-reaching financial disruption in *Collins* is inapplicable to the prospective relief sought here. *See* 141 S. Ct. at 1789 (focusing on "compensable" harm); *id.* at 1793 n.5 (Thomas, J., concurring) (relying on *Seila Law* to explain that the "combination" of an unlawful removal provision and statutory enforcement provisions "can produce a separation-of-powers violation that renders Government action unlawful"); *id.* at 1799 (Gorsuch, J., concurring in part) ("nothing [in *Collins*] undoes [the Court's] prior guidance authorizing more meaningful relief in other situations" outside of *Collins*' "unique context").

In any event, the *Collins* framework also would require setting aside the Rule. *Collins* held that plaintiffs are "entitle[d]" even to retrospective relief if a removal provision "inflict[ed] compensable harm" by, for example, actually "prevent[ing]" the President from removing a director he wished to replace. *Id.* at 1788–89 (majority op.). The district court skipped over this step of the required analysis.

No one seriously contends that, absent the removal restriction, Director Cordray would have been the lone Obama holdover to continue to serve. To the contrary, as detailed above, *see supra* pp. 4–6, the evidence shows that before Director Cordray promulgated the Rule, "President [Trump] … would [have] remove[d] [him] if the [unconstitutional] statute did not stand in the way." 141 S. Ct. at 1789. The Bureau did not contest this point below, thereby implicitly conceding it. Plaintiffs therefore satisfy any *Collins* standard for "entitlement to … relief."

Below, the Bureau cited the "ratification" of the payment provisions in 2020 as evidence that a Trump-appointed director would have promulgated the payment provisions. That is as irrelevant as it is unknowable. *Collins* affords relief once a plaintiff establishes (as here) that the unconstitutional removal provision stood in the way of presidential removal. Neither *Collins* nor any other precedent calls for further analysis of a "counterfactual world" to determine whether a different director would have promulgated a different rule containing the challenged provisions. *Seila Law*, 140 S. Ct. at 2196; *see also NRA Pol. Victory Fund*, 6 F.3d at 824–25 (challengers "need not show that the [agency] would have acted differently if it were constitutionally composed"). The Court need only ask whether the President would have removed the Director before promulgation. If so, the removal provision resulted in harm: an illegal rule promulgated by an unconstitutional exercise of executive power. Thus, the only remedy here is a completely new rulemaking.

2. The Bureau's attempted "ratification" cannot save the Rule.

A notice of "ratification" cannot supplant valid notice-and-comment rulemaking. Moreover, even if ratifications of invalid rules were theoretically possible, *this* ratification was arbitrary and capricious.

a. The Bureau cannot "ratify" provisions it lacked authority to initially adopt. "[I]t is essential that the party ratifying should be able … to do the act ratified at the time the act was done," and not only "at the time the ratification was made." *NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994).

A legislative rule like the 2017 Rule must undergo valid notice-and-comment procedures supervised by a lawfully constituted agency. *See* 5 U.S.C. § 553.

Because the unlawfully constituted Bureau lacked the power to conduct the 2017 rulemaking, it cannot later "ratify" that process or its result. *See* Restatement (Third) of Agency § 4.04 cmt. c (2006) ("[A] person not in existence at the time of an act or transaction may not subsequently ratify it."). Congress did not create the elaborate notice-and-comment procedure as an empty song and dance, and a legislative rule requires more than the Director's signature. It requires a panoply of procedures, including a regulatory flexibility analysis that gives voice to small businesses, *see* 5 U.S.C. §§ 603–04, 609, and extensive engagement with comments (here over a million comments). A valid rulemaking ensures "fairness and mature consideration of rules having a substantial impact on those regulated." *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011). Thus, a new process, led by a lawfully reconstituted Bureau, is indispensable.

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

b. Even if ratifications of rules were theoretically possible, the ratification here violates the CFPA and is arbitrary and capricious. The payment provisions rested on at least two premises the Bureau rejected in the course of revoking the underwriting provisions.

First, as part of its statutorily required cost-benefits analysis, 12 U.S.C. § 5512(b)(2), the Bureau in the 2017 Rule expressly concluded that the operation of the underwriting provisions would "lessen the impacts of" the payment provisions. *See* 82 Fed. Reg. at 54,846 (A187). But when it ratified the payment provisions while revoking the underwriting provisions, the Bureau failed to undertake a new cost-benefit analysis assessing the payment provisions' costs without the underwriting provisions' ameliorative effect. This violates the CFPA and renders the ratification arbitrary and capricious. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (defects or "serious flaw[s]" in an agency's cost-benefit analysis "can render the [resulting] rule unreasonable"); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153–54 (D.C. Cir. 2011) (similar).

Second, ratification of the payment provisions rested on interpretations of UDAAP authority that the Bureau rejected in revoking the underwriting provisions. The 2017 Rule found the practices at issue "abusive" partly on the ground that the practices took "unreasonable advantage" of consumers' "lack of understanding" of associated "risks." 82 Fed. Reg. at 54,744 (A172); 12 U.S.C. § 5531(d)(2). And it found the practices "unfair" on the ground that they were likely to cause injuries "not reasonably avoidable by" consumers (which in turn also depended on whether consumers "lack[ed]" "understanding"). 82 Fed. Reg. at 54,740–41 (A168–69); 12 U.S.C. § 5531(c)(1)(A)–(B). The problem is that on both of these related concepts—lack of understanding and reasonable avoidability—the Bureau relied on one set of interpretations in its 2017 Rule, and a diametrically opposed set in revoking the underwriting provisions. *See, e.g.*, 85 Fed. Reg. at 44390–91, 44394–95, 44,397, 44,422 (A193–94, A197–98, A200, A203) (2020 revocation rejecting 2017 interpretation of necessary understanding and reasonable avoidability). This likewise dooms the Bureau's attempted ratification.

3. The payment provisions are themselves unlawful and arbitrary and capricious.

Plaintiffs demonstrated below that, when originally enacted, the payment provisions also themselves violated the CFPA and the APA. *See* 5 U.S.C. § 706(2)(C). Like the ratification, the 2017 Rule rested on an erroneous interpretation of the Bureau's UDAAP authority and was arbitrary and capricious (*e.g.*, by treating lenders as the "cause" of fees charged exclusively by banks). But at the very least, the Rule's failure to differentiate between financial products requires a tailored injunction.

In restricting payment-transfer attempts, for example, the Bureau ignored crucial differences among the varieties of covered loans. According to the Bureau's own 2017 rationale, "the harms underpinning the unfair and abusive practice" "would not occur," absent fees or closing of accounts, "and thus the Bureau conclude[d] that the rule does not need to cover those instances." 82 Fed. Reg. at 54,746 (A174). But the payment provisions treat debit/prepaid-card payments the same as check/ACH payments when debit/prepaid-card payments *almost never* result in nonsufficient-funds fees or overdraft fees. *See id.* at 54,747 (A175). As the Bureau itself admitted, debit-card transactions will not cause such fees unless consumers have "opted in" to these fees with the banks; ACH transactions, in contrast, are not subject to an opt-in requirement. *Id.* at 54,723 n.942, 54,735 (A160, A163). An "injury" that consumers must opt into is surely "reasonably avoidable," so it falls outside the scope of UDAAP and beyond any possible justification for the payment provisions. The Bureau acted arbitrarily by riding roughshod over this difference. *See id.* at 54,741 (A169).

Likewise, the Rule limited payment-transfer attempts across multiple installments of a multi-payment loan, even though those installments are typically spaced two weeks or a month apart. Here, the Bureau failed to account for an "important aspect of the problem"—longer periods between installments leave consumers more opportunity to avoid nonsufficient-funds fees by replenishing funds or renegotiating the loans' terms. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Bureau's two-attempt limit should at least differentiate between each installment. And below, the Bureau only expressed the unsubstantiated belief "that obtaining a new authorization would be appropriate" even after two weeks or a month had passed despite the fact that the Bureau's own cited study "did not distinguish between re-presentments of the same payment and new presentments for new installments." 82 Fed. Reg. at 54,753 (A181). Rank speculation—unsupported by any evidence and contradicted by the record—is quintessential capriciousness.

These arbitrary and capricious inclusions at least require vacating the Rule's application to debit/prepaid-card payments and multi-payment installment loans (and extending the compliance stay as to these applications).

CONCLUSION

Plaintiffs respectfully ask this Court to stay the implementation period and compliance date of the payment provisions until 286 days after their appeal is fully and finally resolved. Plaintiffs further respectfully request determination on this Motion on or before October 25, 2021.

October 1, 2021

Respectfully submitted,

/s/ Christian G. Vergonis

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CERTIFICATE OF SERVICE

I certify that on October 1, 2021, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: October 1, 2021

/s/ Christian G. Vergonis
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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27(d)(2)(A). Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the motion contains 5,165 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: October 1, 2021

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