No. 22-663

In the Supreme Court of the United States

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

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET. AL.

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

BRIEF OF *AMICUS CURIAE* THIRD PARTY PAYMENT PROCESSORS ASSOCIATION SUPPORTING CROSS-PETITIONERS

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QUESTIONS PRESENTED

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.

3. Whether the Payday Lending Rule should be vacated because it violates the Administrative Procedure Act's prohibition against arbitrary and capricious rulemaking. 5 U.S.C. § 706(2).

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the Third Party Payment Processors Association ("TPPPA") is a national, not-for-profit association of payment processors and their banks. The TPPPA helps its members operate efficiently and comply with applicable regulations by developing best practices for payment processing.

The TPPPA was formed in 2013, in large part to facilitate dialogue between the TPPPA's members and regulatory agencies like the Consumer Financial Protection Bureau ("CFPB"). The TPPPA has successfully worked with the CFPB and other federal agencies to develop the TPPPA Compliance Management System ("CMS"), a best-practices control framework for payment processors and their banks. The CMS aids TPPPA members with regulatory compliance for all payment methods by providing risk-based, documented compliance management system controls that are tailored to the members' distinct payment-processing programs and the related requirements and responsibilities. The TPPPA regularly engages in the rule-making process

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[1] Pursuant to this Court's Rule 37.2, *Amicus* provided timely notice to all parties of its intent to file this amicus brief. Further, per this Court's Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this amicus brief.

by responding to Requests for Comments on matters that impact its members. The TPPPA also regularly files amicus briefs in cases of importance to its members, including this one. *See, e.g.*, Pet.App.[2] 1a–46a; *Hunstein v. Preferred Collection and Mgmt. Servs., Inc.*, 17 F.4th 1016 (11th Cir.), *reh'g en banc granted, opinion vacated*, 17 F.4th 1103 (11th Cir. 2021), *and on reh'g en banc*, 48 F.4th 1236 (11th Cir. 2022); *Consumer Fin. Prot. Bureau v. Intercept Corp.*, No. 3:16-cv-144, 2017 WL 3774379 (D.N.D. Mar. 17, 2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

Before holding that the CFPB's funding structure violates the Appropriations Clause and thus that any actions that the CFPB has taken with unconstitutional funding were void, the Fifth Circuit brushed past the legality of the Payday Lending Rule. The Rule runs roughshod over the basic functions of our Nation's critical electronic payment processing systems, requiring payment processors to adopt an entirely different system for collecting certain types of debts—primarily payday loans and other short-term, small-dollar consumer loans that are offered by non-bank lenders—by limiting the number of withdrawal attempts on a consumer's account to repay those

[2] "Pet.App." refers to the CFPB's petition for a writ of certiorari, No. 22-448 and the accompanying appendix. *See* Sup. Ct. R. 12.5.

debts. The Rule upends the existing regulatory framework that has governed electronic payment processing for over 50 years through effective, consistent rules that protect payment processors, banks, and consumers alike. Worse still, the Rule imposes this new regime on withdrawal attempts from consumer accounts via debit and pre-paid cards, payment methods which are protected by other regulations such that they do not pose the same risks to consumers as other payment methods—namely, insufficient funds fees—that CFPB relied upon to justify the Rule's strictures.

If this Rule takes effect, payment processors must either increase their service fees for payday lenders and other institutions who issue covered loans, due to payment processors' own increased operating risk under the Rule, or just cease processing payments for such lenders altogether, or, more likely, some combination of both. Those exceedingly likely responses to the Rule will work to consumers' harm—and, particularly, to the detriment of low-income consumers who especially rely on the loans covered by the Rule—by making such loans more costly and more difficult to obtain.

Given the destructive impacts that the Rule would have on the Nation's payment processing systems and low-income consumers, if this Court chooses to grant the CFPB's Petition, it should also review the Rule's legality on both of the Cross-Petition's questions presented, as well the additional

Question Presented of the Rule's compliance with the Administrative Procedure Act's ("APA") prohibition against arbitrary and capricious rulemaking. While the Cross-Petition ably covers its two proposed Questions Presented—whether the Rule should be vacated either because it was promulgated by a director who was unconstitutionally shielded from removal or because the conduct that the Rule prohibits is outside the scope of the governing statute—*Amicus* respectfully suggests that the arbitrary-and-capricious question is also worthy of this Court's review.

As *Amicus* has explained during the rulemaking process and in support of Cross-Petitioners' arguments below, the Rule is arbitrary and capricious because it includes debit and pre-paid cards in the scope of its novel multiple-withdrawal provisions. The Rule sets out a payment processing regime that is entirely different from existing regulations, requiring financial institutions to obtain a consumer's new and specific authorization for any electronic fund withdrawal attempts made after two consecutive failed attempts, rather than the consumer informing their financial institution that the authorization was revoked, and being refunded for any fees for insufficient or uncollected funds resulting from the payment. The Rule then irrationally imposes that regime on withdrawal attempts from consumers' accounts made with debit and pre-paid cards, even though those payment methods do not generally charge the insufficient withdrawal fees that were the

CFPB's justification for the Rule's multiple-withdrawal provisions. The CFPB offered no "reasoned explanation" for its inclusion of debit and pre-paid cards in the Rule's scope, *Judulang v. Holder*, 565 U.S. 42, 45 (2011), relying instead largely on data from other, inapposite forms of electronic payment that more frequently involve insufficient fund fees. The payments provisions of the Rule are arbitrary and capricious, in violation of the APA. The Fifth Circuit, with all respect, did not meaningfully analyze this issue, merely quoting verbatim the CFPB's inapposite rationalizations for its actions.

If this Court grants the Petition, it should grant the Cross-Petition, while further granting review on the question of whether the Payday Lending Rule is arbitrary and capricious, in violation of the APA.

ARGUMENT

I. The Legality Of The Payday Lending Rule Is An Issue Of Nationwide Importance

Whether the Payday Lending Rule, 12 C.F.R. §§ 1041.1 *et seq.*; 82 Fed. Reg. 54,472 (Nov. 17, 2017) (codified at 12 C.F.R. pt. 1041), ever should be permitted to take effect is an issue of nationwide importance, which is worthy of this Court's review if it grants the CFPB's Petition, Sup. Ct. Rule 10(c). That is because the Rule undermines the Nation's payment processing system, to the great determinant of both that system and consumers.

The landmark Regulation E, 12 C.F.R. §§ 1005.1 *et seq.*, which implements the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693, *et seq.*, governs consumer electronic fund transfers. Regulation E allows a consumer to pre-authorize electronic fund transfers from that consumer's accounts as recurring payments. 12 C.F.R. § 1005.2(k). Once a consumer has set up such recurring payments, that consumer is responsible for revoking permission for the withdrawals by notifying their financial institution. *Id*. §§ 1005.2(m); 1005.10(c)(1). Regulation E also prevents financial institutions from charging a consumer overdraft fees unless the consumer has been notified of, and has affirmatively opted into, the institution's overdraft service. 12 C.F.R. § 1005.17(b). Regulation E does not limit the number of electronic fund transfers that a payment processor may attempt to initiate on any consumer's account to collect payment on a debt after that consumer has provided the required authorization for such transfers. *See* Marsha Jones, TPPPA, Comment Letter on Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule, at 4 (May 15, 2019) (hereinafter "TPPPA Comment").[3]

The TPPPA and organizations like the National Automated Clearinghouse Association ("NACHA") have expended considerable resources to craft voluntary, rigorous, and effective compliance systems

[3] Available at https://bit.ly/3ZAReLN (all websites last visited Jan. 24, 2023).

that protect consumers, going even above and beyond Regulation E's base protections. TPPPA Comment at 1, 3, 6; William D. Sullivan, NACHA, Comment Letter on Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans, at 2–3 (Sept. 13, 2016).[4] For example, these compliance systems provide consumers with a longer period of time in which to bring breach-of-warranty claims for an unauthorized electronic funds transfer than required by Regulation E. TPPPA Comment at 3–4.

The Payday Lending Rule's two-attempt withdrawal limit directly conflicts with Regulation E's electronic-payment-withdrawal rules, which ultimately means that the Rule would undermine the payment processing industry, to the detriment of consumers. The Rule prohibits a payment processor from initiating an electronic fund withdrawal from a consumer's account to collect a covered loan payment after two consecutive withdrawal attempts by the payment processor have failed due to insufficient funds—unless the consumer provides "new and specific authorization to make further withdrawals." 82 Fed Reg. at 54,473; 12 C.F.R. §§ 1041.7–.8. That is, despite the consumers having specifically authorized electronic fund transfers from their accounts as recurring payments by payment processers under Regulation E, 12 C.F.R. § 1005.2(k); despite Regulation E empowering consumers to

[4] Available at https://bit.ly/3GB508A.

revoke permission for such withdrawals simply by notifying their financial institutions, *id.* §§ 1005.2(m); 1005.10(c)(1); and despite Regulation E not capping the number of electronic withdrawal attempts that a payment processor may initiate on a consumer's account, *supra* p.6, the Rule imposes a two-attempt withdrawal limit on payment processors for covered loans unless they take the costly and burdensome step of obtaining *yet another, duplicative* specific authorization from the consumer, 82 Fed Reg. at 54,473; 12 C.F.R. §§ 1041.7–.8.

Because the Rule requires payment processors to stop attempting withdrawals to repay covered loans after two failed attempts, if the Rule ever takes effect, this will force payment processers to develop different operating protocols, at great expense. Current operating protocols, such as the NACHA Rules and the TPPPA's own rules, are premised on compliance with Regulation E—which, as noted above, requires consumers to revoke authorization of withdrawals and does not require payment processors to seek new and specific authorization for any additional withdrawal after two consecutive failed attempts for insufficient or uncollected funds. *See supra* pp.6. While the NACHA rules and other voluntary operating protocols do impose a two-attempt limit for failed payments due to insufficient funds, the two-attempt threshold would reset for each monthly payment in an installment plan. In contrast, the Rule would apply the two-attempt limit across monthly payments. So, if a consumer's June monthly bill for a

covered loan failed once due to insufficient funds, and then her July bill failed once for the same reason, at that point the payment processor would have to seek new, specific authorization before attempting the payment again. As a result, banks, which can be penalized for high return rates in short periods of time, will now have their liability periods extended indefinitely. Developing new compliance procedures will be costly and time-consuming because payment processors will have to reconstruct their compliance systems from the ground up to account for fundamentally different operating protocols for a small subset of consumer payments. TPPPA Comment at 1–2. In sum, the CFPB has adopted an inconsistent and unworkable system that will create challenges and risks for payment processors in an effort to target a disfavored industry.

The Rule also exposes payment processors and their banks to a new form of risk, further undermining the payment processing system. While the Rule specifically prohibits more than two attempted withdrawals for payments on covered loans—primarily payday loans and other short-term, small-dollar consumer loans offered by non-bank lenders, *see* 12 C.F.R. § 1041.3—*payment processors do not know when they initiate any electronic withdrawal whether they are processing a payment for a covered loan or some other non-covered consumer bill*. TPPPA Comment at 5. Instead, payment processors are only aware of the payment method and the amount to be withdrawn. More troubling, "[t]here

is currently *no means*" for a payment processor to "identify[ ] payments related specifically to covered loans" under the Rule. *Id.* at 5 (emphasis added). Thus, payment processors will not know, and cannot know, whether any given withdrawal initiation is a payday loan installment covered by the Rule or, for example, a one-time medical bill beyond the Rule's scope. That uncertainty will expose payment processors to significant liability under the Rule, without any acceptable available solution. *Id*. at 5. So, as a result of the drastically increased operating, compliance, and legal risks, payment processors seeking to comply with the Rule may simply decide that the risks of incurring violations are too great to continue processing payments for payday lenders or other institutions that issue covered loans. *Id*. at 2. Or these payment processors may drastically increase their fees for providing services to these payday lenders and other institutions to account for these significant compliance costs. *Id.*

If the Rule goes into effect, its burdens on payment processors and banks will ultimately be borne by consumers, particularly the low-income consumers who—lacking access to other forms of credit—disproportionately rely upon the loans covered by the Rule, including payday loans. If payment processors or their banks respond to the Rule by increasing the fees for payday lenders and other institutions issuing covered loans to use their services, those lenders will inevitably seek to recoup these increased operational costs in the form of higher

interest rates on their consumer loans. *See* TPPPA Comment at 2; *see also* Todd J. Zywicki, *The Case Against New Restrictions on Payday Lending*, 4–5 (George Mason Univ. Mercatus Ctr., Working Paper No. 09-28) (explaining that loan re-pricing is a frequent side effect of increased regulation of payday lending).[5] If payment processors respond to the Rule by refusing to process payments for any payday lender or other institution issuing covered loans, this would make it more difficult for consumers to repay these loans, triggering more loan defaults and/or reducing the pool of consumers who will, given these practicalities, take out such loans. *See* TPPPA Comment at 2; Donald P. Morgan & Michael R. Strain, *Payday Holiday: How Households Fare After Payday Credit Bans*, Fed. Reserve Bank of N. Y. Staff Reports, No. 309 at 26 (Feb. 2008) (explaining that after states banned payday loans, consumers in those states experience increased bank account overdrafts and bankruptcy filings).[6]

Either of these effects would be disastrous for consumers, particularly low-income consumers who rely on payday loans or other loans covered by the Rule. Payday lending can provide an option for consumers with poor credit to cover rent, utilities, groceries, or gas bills when the timing of their income is out of sync with the due-dates for those necessary

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[5] Available at https://bit.ly/3XETqAf.

[6] Available at https://nyfed.org/3CZsTFV.

bills. Zywicki, *supra* at 9–10. So, without affordable and responsible payday lenders—lenders whom the Rule pushes out of the market—consumers in need of such loans may resort to riskier, unregulated forms of lending for emergency cash, such as overseas lenders or loan sharks. State Attorneys General, Comment Letter Re Docket No. CFPB-2016-0025 at 2, 26–27, 29 (Oct. 7, 2016);[7] Neil Bhutta, Jacob Goldin, & Tatiana Homonoff, *Consumer Borrowing After Payday Loan Bans*, 59 J. of L. & Econ. 225, 227 (2016) (decrease in payday loan usage is offset by increase in borrowing from pawn shops and involuntary closures of consumers' checking accounts).[8]

In sum, whether the Rule should ever be permitted to operate nationwide is an important question for this Court to address, Sup. Ct. Rule 10(c), as the Rule will cause an entire industry to be suddenly out of compliance with federal law, at great costs to the system and to low-income consumers. Payment processors will face impossible risks on an hourly basis, and many may choose to stop processing payments for any merchant offering payday loans rather than face those risks. As a result, low-income consumers will predominantly bear the unfortunate consequences of these decisions through increased costs and decreased access to much-needed cash.

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[7] Available at https://bit.ly/3QGfvfr.

[8] Available at https://bit.ly/3QOvFn7.

II. This Court Should Review Both Of Cross-Petitioners' Questions Presented, As Well As The Question Of Whether The Rule Violates The APA's Prohibition Against Arbitrary And Capricious Rulemaking

The Rule should never be permitted to take effect for three independent reasons, even apart from the Fifth Circuit's holding that the CFPB's funding structure violates the Appropriations Clause. Accordingly, if this Court grants the CFPB's Petition, it should also grant review on both of the Cross-Petition's Questions Presented, as well as the additional Question Presented of whether the Rule violates the APA's prohibition against arbitrary and capricious rulemaking. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 & n.6 (1971) (this Court's rules "do not limit [the Court's] power to decide important questions not raised by the parties."); *see also Am. Hosp. Ass'n v. Becerra*, 141 S. Ct. 2883 (2021) (adding question presented).

A. The Payday Lending Rule Is Unlawful For The Two Reasons That The Cross-Petition Raises

Cross-Petitioners ask this Court to review whether the Rule should be vacated for two reasons, assuming this Court grants the Petition. First, the CFPB promulgated the Rule under a director who was unconstitutionally shielded from removal. Cross-Pet. at i, 13–22. Second, the conduct that the Rule

prohibits falls outside the statutory definition of unfair or abusive conduct. *Id*. at i, 22–28. This Court should grant review on these Questions Presented both because of the nationwide importance of the Rule itself, as explained immediately above, *see supra* Part I, and because the Fifth Circuit erroneously decided both those Questions Presented, as the Cross-Petition well articulates, *see* Cross-Pet. at i, 13–22.

B. The Payday Lending Rule Is Unlawful Because It Is Arbitrary And Capricious

1. During the public comment period for the Rule's re-issuance,[9] the TPPPA explained that its proposed payment provisions contained critical flaws that the CFPB should correct. TPPPA Comment at 4. Under Regulation E, payment processors can attempt to withdraw authorized payments from consumers' accounts until the payments are successfully withdrawn, but the Rule would require payment processors to stop after two attempts fail due to insufficient funds and seek authorization from the

[9] The Rule originally contained underwriting provisions that 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. The CFPB repealed the underwriting provisions and reissued the Rule with just its second component, the payment provisions at issue here. Payday, Vehicle, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44,382 (July 22, 2020) (codified at 12 C.F.R. pt. 1041).

consumer before attempting another withdrawal. *Id.* at 2–3; *see supra* pp.8–9. Further, under current industry systems and processes, payment processors do not know—and cannot know—whether any given payment is for a covered loan or a non-covered consumer expense, making their compliance with the Rule nearly impossible. TPPPA Comment at 5; *see supra* pp.9–10.

Further and relatedly, the TPPPA explained that imposing this novel regime on withdrawals made via debit and prepaid cards, in particular, would be irrational because the CFPB's proposed justification for the Rule's new regime—concerns about insufficient fund fees—does not apply to those payment methods. TPPPA Comment at 4. The proposed Rule concluded that repeated attempts to withdraw funds by means of debit and pre-paid cards was "unfair and abusive" if two consecutive withdrawal attempts failed due to insufficient funds in the account. 82 Fed. Reg. at 54,877–78; *id.* at 54,910. At that point, the lender requesting the payment and the payment processor must halt the transaction and seek "new and specific" authorization from the consumer before attempting to withdraw again. *Id.* at 54,877–78. The purpose of this treatment was to prevent consumers from "incur[ring] repeated fees" for insufficient funds in their accounts. *Id.* at 54,732–33. But, as the TPPPA explained, debit and prepaid cards do not incur insufficient funds fees in the same way as other methods of payment, such as ACH or checks (which

are already limited to two attempted collections on a single payment returned for insufficient funds), because debit and prepaid cards are protected by Regulation E. TPPPA Comment at 4. Card payments are authorized if there is money in the account or the consumer has overdraft protection that covers the payment. *Id.* Otherwise, the payment is declined. In short, including debit and prepaid cards within the Rule would not further the CFPB's goal of reducing insufficient funds fees for consumers.

The final Rule adopted the payments provisions, including their application to debit and prepaid cards, without change, while failing to explain rationally why imposing the drastic new regime on withdrawal attempts made by debit and prepaid cards made sense. The CFPB admitted, as it had to, that "debit card transactions present somewhat less of a risk of harm to consumers," 82 Fed. Reg. at 54,750, but concluded that while they "may not trigger [insufficient fund fees], some of them do trigger overdraft fees." *Id.* at 54,747. As for the difficulty for payment processors and banks to comply with this regime that was now irrationally imposed on withdrawals made with debit and prepaid cards, the CFPB only noted, in cursory fashion, that current rules "generally provide additional consumer protections . . . beyond those applicable to checks," but concluded that the Rule's new system was justified. 82 Fed. Reg. at 54,501.

2. Both the Cross-Petitioners and undersigned *Amicus* raised the Rule's irrational inclusion of debit and prepaid card payments within its novel regime throughout the litigation below. *See CFSA, et al., v. Consumer Fin. Prot. Bureau, et al.,* No. 1:18-cv-295, Doc. No. 80 at 23–29 (W.D. Tex. Sept. 25, 2020) (CFSA motion for summary judgment); *CFSA, et al. v. Consumer Fin. Prot. Bureau et al.*, No. 21-50826, Appellants' Br. at 43–49 (5th Cir. Nov. 15, 2021); Amicus Br. of TPPPA (Nov. 24, 2022).

3. If this Court grants the Petition, it should also grant review on the Question Presented of whether the Rule violates the APA's prohibition against arbitrary and capricious rulemaking. Review on this additional Question Presented would be necessary if this Court grants the Petition both because of the nationwide importance of whether the Rule should ever be permitted to go into effect, as explained above in Part I, and because the Fifth Circuit's decision upholding the Rule is wrong, as explained below.

Under the APA, an agency must provide a "reasoned explanation" for a rule in the administrative record, *Judulang*, 565 U.S. at 45, including by "examin[ing] the relevant data and articulat[ing] 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) (citation omitted). In reviewing an agency's explanation, courts must determine whether

the agency's "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citation omitted). A rule is arbitrary and capricious when the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *Id.*

The Rule is arbitrary and capricious under the APA because it includes debit and prepaid card payments in its two-attempt withdrawal limit, where the CFPB's justification for the rule—the avoidance of insufficient-fund fees—does not apply to such payment methods. The CFPB justified the Rule's limitations on multiple withdrawal attempts based on the need to avoid insufficient funds fees for consumers, reasoning that repeated withdrawal attempts could cause "harms" to the consumers in the form of multiple insufficient fund fees. 82. Fed. Reg. 54,732–33. But this rationale does not even arguably justify including debit and pre-paid card payments within the Rule, because these types of payments do not incur insufficient fund fees or overdraft fees unless the consumer specifically opts into certain overdraft services. 12 C.F.R. § 1005.17(b). The CFPB committed a "clear error of judgment," *State Farm*, 463 U.S. at 43 (citation omitted), by overlooking a key aspect of existing consumer-protection law: banks and credit unions "cannot charge [the consumer] fees for overdrafts on ATM and most debit card transactions unless [that consumer has] agreed ('opted in') to those fees." Gary Stein, *Understanding the Overdraft "Opt-in" Choice,* Consumer Fin. Prot. Bureau (Jan. 19,

2017);[10] 12 C.F.R. § 1005.17(b). The CFPB failed to offer a "satisfactory explanation" for its decision to include debit and pre-paid card payments within the Rule. *State Farm*, 463 U.S. at 43.

The CFPB's treatment of the debit and pre-paid card issue raised by the TPPPA during rulemaking was cursory, insufficient, and devoid of a defensible explanation. The CFPB acknowledged that "debit card transactions present somewhat less risk of harm to consumers," 82 Fed. Reg. at 54,750, but concluded that, while they "may not trigger [insufficient fund fees], some of them do trigger overdraft fees." *Id*. at 54,747. This conclusion lacks any "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43 (citation omitted), and is thus arbitrary and capricious. The only time that a debit or prepaid card will cause overdraft fees is after a consumer has received clear notice of her bank's overdraft fees policy and has expressly opted into the program, voluntarily choosing to overdraw her account and be charged a fee instead of having her card decline. 12 C.F.R. §§ 1005.2(k) (consumers can preauthorize electronic payments); 1005.2(m) (consumer must revoke authority); 1005.17(b) (opt-in to overdraft fees after notice). Further, these voluntarily chosen overdraft fees, which average around $30, standing alone, would never have justified the adoption of the Rule, given the Rule's substantial burdens—and CFPB does not claim

[10] Available at https://bit.ly/3EZ1531.

otherwise—so it is not rational to apply the two-attempt withdrawal limit to debit and prepaid card payments, where these are the only type of fee incurred for overdrawing an account. FDIC, *Your Guide to Managing and Preventing Overdraft Fees* at 1 (2011).[11]

The Fifth Circuit, for its part, blessed CFPB's cursory treatment of this critically important issue. As relevant here, the Fifth Circuit held that the Rule's CFPB's inclusion of debit and prepaid card payments was rational since failed "debit and prepaid card transactions" may trigger other fees, such as "overdraft fees," "return payment fees," and "late fees," and because excluding debit and prepaid cards would be "impracticable." Pet.App. at 16a (citations omitted). The Fifth Circuit's analysis was wholly insufficient, as it simply cited and quoted the Rule's bottom-line conclusions. *Id*. (citations omitted). But the CFPB has not provided a valid justification for treating debit and pre-paid cards the same as ACH and other payment methods. *Contra State Farm*, 463 at 43. As explained above, supra pp.18–19, debit and prepaid cards payments do not pose the same risk of insufficient funds fees for consumers, and they are protected from overdraft fees unless the consumer knowingly opts into overdraft services. And such treatment will create massive compliance issues without achieving the CFPB's aim of protecting consumers from overdraft fees. In all, the Fifth

[11] Available at https://bit.ly/3WmNFWS.

Circuit's exceedingly limited, perfunctory engagement with the Cross-Petitioners' powerful arbitrary-and-capricious arguments was, with respect, entirely insufficient and thus unlawful.

CONCLUSION

If this Court grants the Petition, it should also grant the Cross-Petition's two Questions Presented, while also granting review on the Question Presented of whether the Payday Lending Rule is arbitrary and capricious, in violation of the APA.

Respectfully submitted,

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