APPENDIX

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United States Court of Appeals
Fifth Circuit

FILED
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Lyle W. Cayce
Clerk

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 21-50826

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

Plaintiffs—Appellants,

versus

CONSUMER FINANCIAL PROTECTION BUREAU; ROHIT CHOPRA, *in his official capacity as Director, Consumer Financial Protection Bureau*,

Defendants—Appellees.

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

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

This case is before us on remand from the Supreme Court. On initial review, we reversed the judgment of the district court and vacated the Consumer Financial Protection Bureau's 2017 Payday Lending Rule based on our conclusion that the Bureau's funding structure violated the Appropriations Clause. 51 F.4th 616, 635–44 (5th Cir. 2022). The Supreme Court reversed our judgment and held that the Bureau's funding structure is constitutional. *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 441 (2024). Though it reversed our judgment in its entirety, the Court did not address the other issues we decided in the case. *See* 51 F.4th at 626–35.

Accordingly, we REINSTATE our judgment affirming the district court's ruling in favor of Defendants based on Plaintiffs' alternative arguments, and we RENDER judgment in favor of Defendants declaring that the Bureau's funding structure, and thereby the Payday Lending Rule, is constitutional.

Plaintiffs shall have fourteen days after entry of this opinion to file a petition for panel rehearing. *See* Fed. R. App. P. 40(a)(1). Plaintiffs' letter filed May 16, 2024, *see* Fed. R. App. P. 28(j), is STRICKEN for noncompliance with the rule.

United States Court of Appeals
Fifth Circuit
FILED
November 12, 2024
Lyle W. Cayce
Clerk

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 21-50826

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

Plaintiffs—Appellants,

versus

CONSUMER FINANCIAL PROTECTION BUREAU; ROHIT CHOPRA, *in his official capacity as Director, Consumer Financial Protection Bureau*,

Defendants—Appellees.

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

ON PETITION FOR REHEARING EN BANC

BEFORE WILLETT, ENGELHARDT, AND WILSON, *Circuit Judges*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

*Judge James C. Ho, did not participate in the consideration of the rehearing en banc.

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2022
Lyle W. Cayce
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APPENDIX C

United States Court of Appeals for the Fifth Circuit

No. 21-50826

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

Plaintiffs—Appellants,

versus

CONSUMER FINANCIAL PROTECTION BUREAU; ROHIT CHOPRA, *in his official capacity as Director, Consumer Financial Protection Bureau*,

Defendants—Appellees.

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

Before WILLETT, ENGELHARDT, AND WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

"An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced ..., as that no one could transcend their legal limits, without being effectually checked and restrained by the others." THE FEDERALIST NO. 48 (J. Madison) (quoting Thomas

Jefferson's *Notes on the State of Virginia* (1781)). In particular, as George Mason put it in Philadelphia in 1787, "[t]he purse & the sword ought never to get into the same hands." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139–40 (M. Farrand ed. 1937). These foundational precepts of the American system of government animate the Plaintiffs' claims in this action. They also compel our decision today.

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

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

I.

A.

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

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

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

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

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

B.

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

The Rule had two major components, each limiting a practice the Bureau deemed "unfair" and "abusive." *See id.* First, the "Underwriting Provisions" prohibited lenders from making covered loans "without reasonably determining that consumers have the ability to repay the loans according to their terms." 12 C.F.R. § 1041.4 (2018); 82 Fed. Reg. at 54472. The Underwriting Provisions have since been repealed and are not at issue in this appeal. *See* 85 Fed. Reg. 44382 (July 22, 2019).

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

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

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

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

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

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

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

II.

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

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

A.

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

1.

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

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

Our review begins (and ends) with unfairness.[1] Under the Act, an act or practice is "unfair" if "the Bureau has a reasonable basis to conclude that [1] the act or practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers; and [3] such substantial injury is not outweighed by the countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c)(1). The Bureau evaluated each element in its 2017 rulemaking record and concluded that the proscribed practice satisfied all three. The Plaintiffs challenge only the first two elements on appeal.

As to the first, the Bureau determined that lenders' excessive withdrawal attempts cause or are likely to cause consumers substantial injury in the form of repeated fees, including insufficient fund fees, overdraft fees, and lender-imposed return fees. 82 Fed. Reg. at 54732–34. It also found that "consumers who experience two or more consecutive failed lender payment attempts appear to be at greater risk of

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

having their accounts closed by their account-holding institution." *Id.* at 54734. The Plaintiffs do not dispute the occurrence or substantiality of these injuries. Rather, they challenge the Bureau's finding that the proscribed practice either causes or is likely to cause them. The Plaintiffs assert that "[c]onsumers' banks—not lenders—cause failed-payment fees or bank-account closures" because they are the ones who "impose, collect, or otherwise control [them]."

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

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

Commission Act (FTCA). *See* 15 U.S.C. § 45(n).[22] We do the same.[3]

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

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

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

(4) "invoking [their] rights under federal law to issue stop-payment orders or rescind account access," or (5) "declining to take out the loan" and "pursuing alternative[ ] sources of credit."

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

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

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

2.

Next, the Plaintiffs contend that the Payment Provisions are arbitrary and capricious, either as a whole or as applied. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Still, we must ensure that an agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quotation omitted). A rule is arbitrary and capricious if the agency relied on "impermissible factors, failed to consider important aspects of the problem, offered an explanation for its decision that is contrary to the record evidence, or is so irrational that it could not be attributed to a difference in opinion or the result of agency expertise." *BCCA Appeal Grp. v. U.S. EPA*, 355 F.3d 817, 824 (5th Cir. 2003).

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

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

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

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

Provisions are not arbitrary and capricious as applied to debit and prepaid card transfers.[4]

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

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

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

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

B.

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

1.

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

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

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

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

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

2.

Joining the issue, the Plaintiffs assert that "even if *Collins* does inform the analysis here, its framework plainly requires setting aside the [Payment Provisions]" because the Plaintiffs have made a sufficient showing of harm. As noted above, after *Collins*, a party challenging agency action must show not only that the removal restriction transgresses the Constitution's separation of powers but also that the

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

unconstitutional provision caused (or would cause) them harm. 141 S. Ct. at 1789. The Court chose to remand *Collins*'s remedy question and stopped short of articulating a precise statement as to how a party may prove harm. *See id.* at 1788–89. Instead, the *Collins* majority concluded with several hypotheticals:

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

Id.

We distill from these hypotheticals three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor. This is borne out by the concurring Justices' opinions as well. *See id.* at 1792–93 (Thomas, J., concurring); *id.* at 1801 (Kagan, J., concurring in part); *id.* at 1803 n.1 (Sotomayor, J., concurring in part and dissenting in part). As Justice Kagan emphasized, "plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head *affected the complained-of decision*." *Id.* at 1801 (Kagan, J., concurring in part) (emphasis added).

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

Applying *Collins*'s framework, we conclude the Plaintiffs fail to show that the Act's removal provision inflicted a constitutional harm. Though they state "[i]t is uncontested that, but for the later-invalidated removal restriction, President Trump would have replaced [Director] Cordray before he finalized the [Payday Lending Rule]," their only support for this assertion consists of a few carefully selected statements from Director Cordray's book, *see, e.g.*, Richard Cordray, Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy 185 (2020) ("[T]he threat that I would be fired as soon as President Trump took office loomed over everything."), and an online article, *see* Kate Berry, *In Tell-All, Ex-CFPB Chief Cordray Claims Trump Nearly Fired Him*, American Banker (Feb. 27, 2020) https://www.americanbank er.com/news/in-tell-all-ex-cfpb-chief-cordrayclaims-tr ump-nearly-fired-him (stating "President Trump was advised to hold off on firing Corday because the Supreme Court had not yet weighed in on [the] 'for cause' provision").

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

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

C.

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

But the Supreme Court has long delimited this general principle: "So long as Congress' lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Touby v. United States*, 500 U.S. 160, 165 (1991) (quoting *J.W.*

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

Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *see also Gundy*, 139 S. Ct. at 2129 (explaining that "[t]hose standards ... are not demanding").

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

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

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

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

> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; *or* (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

12 U.S.C. § 5531(d).

Far from an "open-ended delegation" that offers "no guidance whatsoever," *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022) (emphasis omitted), Congress's grant of rulemaking authority to the Bureau was accompanied by a specific purpose, objectives, and definitions to guide the Bureau's discretion. This was more than sufficient to confer an "intelligible principle." *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474–75 (2001) (compiling the various directives the Supreme Court has deemed sufficient to constitute an "intelligible principle").

D.

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

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

1.

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

Drawing on the British experience, the Framers "carefully separate[d] the 'purse' from the 'sword' by assigning to Congress and Congress alone the power of the purse." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021).[8] The Framers' reasoning was twofold. First, they viewed Congress's exclusive "power over the purse" as an indispensable check on "the overgrown prerogatives of the other branches of the government." THE FEDERALIST NO. 58 (J. Madison). Indeed, "the separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." JOSH CHAFETZ, CONGRESS'S CONSTITUTION, LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 57 (2017).

The Framers also believed that vesting Congress with control over fiscal matters was the best means of ensuring transparency and accountability to the people. *See* THE FEDERALIST NO. 48 (J. Madison) ("[T]he legislative department alone has access to the pockets of the people.").[99] As James Madison explained,

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

> in either the Legislative or Executive, singly; neither one nor the other shall have both; because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny. But when the purse is lodged in one branch, and the sword in another, there can be no danger.

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

[9] *See also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 149–50 (M. Farrand ed. 1937) (statement of James McHenry) ("When the Public Money is lodged in its Treasury there can be no regulation more consist[e]nt with the Spirit of Economy and free Government that it shall only be drawn forth under

the "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST NO. 58 (J. Madison).[10]

The text of the Constitution reflects these foundational considerations. First, even before enumerating how legislation becomes law (i.e., passage by both houses of Congress and presentment to the President for signature), the Constitution provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives ...." U.S.

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appropriation by Law and this part of the proposed Constitution could meet with no opposition as the People who give their Money ought to know in what manner it is expended.").

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

Const. art. I, § 7, cl. 1. It then grants the general authority "[t]o lay and collect Taxes" and spend public funds for various ends—the first power positively granted to Congress by the Constitution. *Id.* art. I, § 8, cl. 1. Importantly though, that general grant of spending power is cabined by the Appropriations Clause and its follow-on, the Public Accounts Clause: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* art. I, § 9, cl. 7.

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

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

> The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money .... If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations,

> constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation.

2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858). Justice Scalia similarly observed that, while the requirement that funds be disbursed in accord with Congress's dictate and Congress's alone may be inconvenient, "clumsy," or "inefficient," it "reflect[s] 'hard choices ... consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. '" *NLRB v. Noel Canning*, 573 U.S. 513, 601–02 (Scalia, J., concurring) (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)). In short, the Appropriations Clause expressly "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

2.

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

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

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

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

reduce amounts that would otherwise flow to the general fund of the Treasury, as the Federal Reserve is required to remit surplus funds in excess of a limit set by Congress. *See* 12 U.S.C. § 289(a)(3)(B).

The Bureau thus "receives funding directly from the Federal Reserve, which is itself outside the appropriations process through bank assessments." *Seila Law*, 140 S. Ct. at 2194; *see* 12 U.S.C. § 5497(a).[13] So Congress did not merely cede *direct* control over the Bureau's budget by insulating it from annual or other time limited appropriations. It also ceded *indirect control* by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process—a double insulation from Congress's purse strings that is "unprecedented" across the government. *All Am. Check Cashing*, 33 F.4th at 225 (Jones, J., concurring). And where the Federal Reserve at least remains tethered to the Treasury by the requirement that it remit funds above a statutory limit, Congress cut that tether for the Bureau, such that the Treasury will never regain one red cent of the funds unilaterally drawn by the Bureau.

This novel cession by Congress of its appropriations power—its very obligation "to maintain the boundaries between the branches," *id.* at 231—is in itself enough to give grave pause. But Congress went

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[13] The Federal Reserve is funded through interest earned on the securities it owns and assessments the agency levies on banks within the Federal Reserve system. FEDERAL RESERVE, THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES, at 4 (2021), https://www.federalreserve.gov/aboutthefed/files/the-fed-explained.pdf; *see also* 12 U.S.C. § 243.

to even greater lengths to take the Bureau completely off the separation-of-powers books. Indeed, it is literally off the books: Rather than hold funds in a Treasury account, the Bureau maintains "a separate fund, ... the 'Bureau of Consumer Financial Protection Fund,' " which "shall be maintained and established at a Federal [R]eserve bank." 12 U.S.C. § 5497(b)(1). This fund is "under the control of the Director," and the monies on deposit are permanently available to him without any further act of Congress. *Id.* § 5497(c)(1). Thus, *contra* the Federal Reserve, *id.* § 289(a)(3)(B), the Bureau may "roll over" the self-determined funds it draws *ad infinitum*.

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

So the Bureau's funding is double-insulated on the front end from Congress's appropriations power. And Congress relinquished its jurisdiction to review agency funding on the back end. In between, Congress gave the Director its purse containing an off-books charge card that rings up "[un]appropriated monies." Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it.[14] The Bureau's perpetual insulation from Congress's appropriations power, including the express exemption from congressional review of its funding, renders the Bureau "no longer dependent and, as a result, no longer accountable" to Congress and, ultimately, to the people. *All Am. Check Cashing*, 33 F.4th at 232 (Jones, J., concurring); *see id.* at 234 (detailing examples showing that the Bureau's "lack of accountability is not just a theoretical worry"). By abandoning its "most complete and effectual" check on "the overgrown prerogatives of the other branches of the government"—indeed, by enabling them in the Bureau's case—Congress ran afoul of the separation of powers embodied in the Appropriations Clause. *See* THE FEDERALIST NO. 58 (J. Madison).

The constitutional problem is more acute because of the Bureau's capacious portfolio of authority. "It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Seila Law*, 140 S. Ct. at 2202 n.8. And the

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

"Director's newfound presidential subservience exacerbates the constitutional problem[ ] arising from the [Bureau's] budgetary independence." *All Am. Check Cashing*, 33 F.4th at 234 (Jones, J., concurring). An expansive executive agency insulated (no, double-insulated) from Congress's purse strings, expressly exempt from budgetary review, and headed by a single Director removable at the President's pleasure is *the epitome* of the unification of the purse and the sword in the executive—an abomination the Framers warned "would destroy that division of powers on which political liberty is founded." 2 THE WORKS OF ALEXANDER HAMILTON 61 (Henry Cabot Lodge ed., 1904).

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

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

The Bureau relies on the Supreme Court's statement that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424 (quoting *Cincinnati Soap*, 301 U.S. at 321). But neither *Richmond* nor *Cincinnati Soap* purported definitively to map the contours of the Appropriations Clause. Regardless, Congress's mere enactment of a law, by itself, does not satisfy the clause's requirements. Otherwise, the Bureau's position means that no federal statute could ever violate the Appropriations Clause because Congress, by definition, enacts them. As discussed *supra*, our Constitution's structural separation of powers teaches us that cannot be so. *Cf. New York v. United States*, 505 U.S. 144, 182, (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.").

The converse argument, that Congress can alter the Bureau's perpetual self-funding scheme anytime it wants, curing any infirmity, is likewise unavailing. "Congress is always capable of fixing statutes that impinge on its own authority, but that possibility does not excuse the underlying constitutional problems. Otherwise, no law could run afoul of Article I." *All Am.*

Check Cashing, 33 F.4th at 238 (Jones, J. concurring); *cf. PHH Corp. v. CFPB*, 881 F.3d 75, 158 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) ("[A]n otherwise invalid agency is no less invalid merely because the Congress can fix it at some undetermined point in the future."), *abrogated on other grounds by Seila Law*, 140 S. Ct. 2183.

The Bureau also contends that because every court to consider its funding structure has deemed it constitutionally sound, we should too.[15] But carefully considering those decisions, we must respectfully disagree with their conclusion. Those courts found the constitutional scale tipped in the Bureau's favor based largely on one factor: a handful of other agencies are also self-funded. For instance, the D.C. Circuit emphasized that "Congress has consistently exempted financial regulators from appropriations: The Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency all have complete, uncapped budgetary autonomy." *PHH Corp.*, 881 F.3d at 95.

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[15] *See, e.g.*, *PHH Corp.*, 881 F.3d at 95–96; *CFPB v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 57 (D.R.I. 2020); *CFPB v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-2817, 2020 WL 7043847, at *7-9 (D. Md. Nov. 30, 2020); *CFPB v. Think Finance LLC*, No. 17-cv-127, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017); *CFPB v. ITT Educ. Services, Inc.*, 219 F. Supp. 3d 878, 896-97 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014).

Such a comparison, focused only on whether other agencies possess a degree of budgetary autonomy, mixes apples with oranges. Or, more accurately, with a grapefruit. Even among self-funded agencies, the Bureau is unique. The Bureau's perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies on offer. And none of the agencies cited above "wields enforcement or regulatory authority remotely comparable to the authority the [Bureau] may exercise throughout the economy." *All Am. Check Cashing*, 33 F.4th at 237 (Jones, J., concurring); *see also* William Simpson, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances*, 36 REV. BANKING & FIN. L. 343, 367–69 (2016).[16] Taken together, the Bureau's express

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

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

We cannot sum up better than Judge Jones did:

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

Assistance for Needy Families, are administered similarly by agencies subject to annual appropriations set by Congress.

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

3.

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

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

In contrast, the Court found the separation of powers problem posed by an official's unlawful insulation from removal to be different. *Collins*, 141 S.

Ct. at 1787–88. Unlike the above examples, such a provision "does not strip" a lawfully appointed government actor "of the power to undertake the other responsibilities of his office." *Id.* at 1788. Thus, as discussed *supra* in II.B., to obtain a remedy, a plaintiff must prove more than the existence of an unconstitutional provision; she must prove that the challenged action actually "inflicted harm." *Id.* at 1789.

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

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

In considering other violations of the Constitution's separation of powers, the Supreme Court has rewound the unlawful action by granting a new hearing, *see Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), or invalidating an order, *see NLRB v. Noel Canning*, 573 U.S. 513, 521, 557 (2014); *see also* 5 U.S.C. § 706(2)(A) (providing that, under the APA, a "reviewing court shall ... hold unlawful and set aside agency action ... found to be ... not in accordance with law"). In like

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

manner, we conclude that the district court erred in granting summary judgment to the Bureau and in denying the Plaintiffs a summary judgment "holding unlawful, enjoining and setting aside" the challenged rule. Accordingly, we render judgment in favor of the Plaintiffs on this claim and vacate the Payday Lending Rule as the product of the Bureau's unconstitutional funding scheme.

III.

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

But Congress's cession of its power of the purse to the Bureau violates the Appropriations Clause and the Constitution's underlying structural separation of powers. The district court accordingly erred in granting summary judgment in favor of the Bureau and denying judgment in favor of the Plaintiffs. We therefore REVERSE the judgment of the district court on that issue, RENDER judgment in favor of the Plaintiffs, and VACATE the Bureau's Payday Lending Rule.

AFFIRMED in part; REVERSED in part; and RENDERED.

APPENDIX D

IN THE WESTERN DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL	**§**	
SERVICES ASSOCIATION	**§**	
OF AMERICA, LTD.,	**§**	
CONSUMER SERVICE	**§**	
ALLIANCE OF TEXAS,	**§**	
PLAINTIFFS	**§**	
V.	**§**	**CAUSE NO.**
CONSUMER FINANCIAL	**§**	**1:18-CV-00295-**
PROTECTION BUREAU,	**§**	**LY**
KATHLEEN KRANINGER,	**§**	
IN HER OFFICIAL	**§**	
CAPACITY AS DIRECTOR,	**§**	
CONSUMER FINANCIAL	**§**	
BUREAU;	**§**	
DEFENDANTS.	**§**	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court is the above-styled and numbered cause that arises in response to the "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Rule ("the 2017 Rule"), issued by the Consumer Financial Protection Bureau ("the Bureau") on November 17,

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

Plaintiffs, two trade associations ("the Associations"), bring this action on behalf of certain payday lenders and credit-access businesses affected by the 2017 Rule and the Ratification. The Associations challenge the validity of the Ratification and ask the court to set aside the Payment Provisions Section of the 2017 Rule.[1] Before the court now are the

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

parties' cross-motions for summary judgment, responses, replies, exhibits, and supplemental authorities [2] Having considered all of the parties' filings and the applicable law, the court renders the following order.

I. LEGAL STANDARD

"Summary judgment is required when 'the movant shows that there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015) (quoting

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Answer to the Amended Complaint on September 18, 2020 (Dkt. No. 79).

[2] The Associations' Motion for Summary Judgment was filed September 25, 2020 (Dkt. No. 80); The Bureau's Response and Cross-Motion for Summary Judgment was filed October 23, 2020 (Dkt. No. 82); The Associations' Response to Defendants' Cross-Motion for Summary Judgment was filed November 20, 2020 (Dkt. No. 84); The Bureau's Reply was filed December 18, 2020 (Dkt. No. 85); The Bureau's First Notice of Supplemental Authority was filed December 30, 2020 (Dkt. No. 86); The Associations' Response to the First Notice of Supplemental Authority was filed December 31, 2020 (Dkt. No. 87); The Bureau's Second Notice of Supplemental Authority was filed May 20, 2021 (Dkt. No. 88); The Associations' Response to the Second Notice of Supplemental Authority was filed May 21, 2021 (Dkt. No. 89); The Bureau's Third Notice of Supplemental Authority was filed June 28, 2021 (Dkt. No. 90); The Associations' Response to the Third Notice of Supplemental Authority was filed June 30, 2021 (Dkt. No. 91).

Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.' " *Id.* (quoting *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014)). A fact is material if "its resolution could affect the outcome of the action." *Aly v. City of Lake Jackson*, 605 Fed. App'x 260, 262 (5th Cir. 2015). "If the moving party fails to meet [its] burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *Pioneer Expl., LLC v. Steadfast Ins. Co.*, 767 F.3d 503 (5th Cir. 2014).

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

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

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

II. BACKGROUND

The Bureau is charged with regulating individuals and entities that offer financial products or services. 12 U.S.C. § 5491. Congress authorized the Bureau to "prescribe rules ... identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *Id.* at § 5531(b).

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

At issue here are the Payment Provisions. These provisions restrict lenders of certain loans from attempting to withdraw payments from a consumer's account after a second consecutive failed attempt to do so, without obtaining a new authorization for further withdrawals. 12 C.F.R. §§ 1041.7–8. The Payment Provisions also set limitations on such a new authorization, including requiring a new consumer-rights notice, and restricting when the lender may obtain the new authorization electronically or by telephone. *Id.* at §§ 1041.8(c)(3), 1041.9(c).

In 2020, the Supreme Court held in *Seila Law* that the Bureau's "leadership by a single [Director] removable only for inefficiency, neglect, or malfeasance violates the separation of powers."

S.Ct. 2183, 2197. The Court was then left with the question of whether "the Director's removal protection was severable from the other provisions of the ... Act that establish[es] the [Bureau]." *Id.* at 2207. "If so," the Court reasoned, "then the [Bureau] may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal." *Id.* at 2207-08. The Court found the provision was severable and remanded the case to the Ninth Circuit Court of Appeals for consideration of whether the Bureau's actions in that case were validly ratified. *Id.* at 2211.

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

III. ANALYSIS

a. The Associations' motion for summary judgment

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

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

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

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

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

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

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

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

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

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

The Associations' next argument is that this specific ratification is improper because ratification requires that the agency had the authority to do the act ratified at the time it was done. The Associations contend:

"[R]atification requires two entities—a principal who had authority to act at the time in question, and an agent who did not." Here, though, the Associations contend the Bureau is the only entity involved and it lacked authority from the start. The Bureau responds that "The Bureau is the principal, and the Director is the agent who acts on the Bureau's behalf."

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

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

> after he was properly appointed as Director, resolves any Appointments Clause deficiencies.

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

Based on this analysis, it appears that the Ninth Circuit would uphold the ratification in this case under either the Second or Third Restatement of Agency. *Gordon* identifies the Bureau as the principal—and presumably the Director as its agent. *Gordon*, 819 F.3d at 1191. But *Gordon* also recognized that ratification is valid so long as the person ratifying has capacity to act at the time of ratification. *Id.* at 1192. The court finds this reasoning persuasive.

Finally, the Associations challenge the Ratification as arbitrary and capricious. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its own judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Id.* (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). In reviewing that explanation, the court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citing *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

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

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

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

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

far from the "essential premise" of the cost-benefit analysis the Associations contend it constitutes.

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

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

"***Unfair.***" First, the Associations challenge the Bureau's finding that a third withdrawal attempt after two failed withdrawals is unfair. To declare a practice "unfair," the Bureau must find that the practice "has a reasonable basis to conclude that [1] the act or practice causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers; and [3] such substantial injury is not outweighed by countervailing benefits to consumers or to competition." 12 U.S.C. § 5531(c). The Bureau found that all three of these elements were met by new withdrawal attempts from consumer's bank accounts after two attempts have failed unless the consumer gives renewed approval. 2017 Rule Official Interpretations, 82 Fed. Reg. at 54720.

The Associations first challenge is that, in determining the withdrawal attempts were unfair, the Bureau did not carefully weigh the costs and benefits to consumers and to competition. The Associations then suggest that the benefits of payday and other covered loans to consumers are substantial and are discounted only because of the Bureau's paternalism.

But this argument fails for two reasons: first, the court is not seeking in this review to determine if the court *agrees* with the Bureau or would have made the same decision, so reweighing the costs and benefits is inappropriate. Second, the practice in question is not offering loans, but making successive withdrawal attempts, and the Associations have presented no evidence why those attempts help consumers.

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

The Associations' final challenge against the Bureau's conclusion that the successive withdrawals are unfair is that the Bureau charges lenders with being the cause of the injury even though the customers' banks cause the failed-payment fees. But, as the Bureau contends, the fact that "a company's conduct was not *the most* proximate cause of an injury generally does not immunize liability from foreseeable harms." *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (in context of unfairness, "the contribution[s] of independent causal agents ... do not magically erase the role" of others in causing harm).

"***Abusive.***" The Associations challenge the Bureau's finding that the successive withdrawals are "abusive." The CFPA deems a practice abusive after a finding that it:

> takes unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; [or] (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service.

12 U.S.C. § 5531(d)(2)(A)–(B).

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

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

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

Failure to differentiate financial products. The Associations contend that the Bureau failed to establish a "rational connection between the facts found and the choice made" when crafting the 2017 Rule because the Bureau failed to heed important differences in the varieties of financial products covered. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856. For instance, the Associations contend the Bureau failed to consider the difference between withdrawal attempts from debit or prepaid cards and those from automated clearing houses and checking accounts.

But the Bureau considered these differences. The 2017 Rule found that the harm it sought to prevent would only be prevented if the lenders "do not charge NSF, overdraft, return payment fees, or similar ***363** fees, and do not close accounts because of failed payment attempts." 2017 Rule Official Interpretations, 82 Fed. Reg. at 54,746. Finding that "all payment methods" could expose consumers to some of these fees, the 2017 Rule declined to exempt any payment types from the Payment Provisions. *Id.* That is sufficient to establish the "rational connection between the facts found and the choice made" necessary to avoid the determination the Rule was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856.

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

4. Payment Provisions rest on defective cost-benefit analysis

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

The Bureau responds that it is only required to consider "important aspect[s] of the problem" before it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856. It is "not required to consider every single possible cost." *STG LLC v. United States*, 147 Fed. Cl. 790, 809 (2020). The court agrees. The rational-basis test of APA review asks "whether the [ ] agency provided a coherent and reasonable explanation of its exercise of discretion." *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 992 (Fed. Cir. 2018) (quoting *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004)). That a review of the agency's cost-benefit analysis with the benefit of hindsight can produce costs not considered or not thoroughly considered by the agency does not automatically render a rule unreasonable.

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

A member of Plaintiff Community Financial Services Association, Advance Financial, submitted a rulemaking petition asking the Bureau to "amend" the 2017 Rule "to exclude debit card payments" from the reach of the Payment Provisions. The Associations contend the Bureau's decision to decline this request amounted to a clear error in judgment and the 2017 Rule should therefore be set aside as arbitrary and capricious. *See Safe Extensions, Inc. v. Federal Aviation Admin.*, 509 F.3d 593, 604 (D.C. Cir. 2007). The reason, similar to arguments made by the Associations above, is that debit card transactions are ***364** not usually subject to the same insufficient funds fees. Again, the Bureau considered those transactions and chose not to make an exception for them. That the Associations disagree is insufficient to establish the "rational connection between the facts found and the choice made" necessary to avoid the determination the Rule was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856.

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

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

The Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) (citing *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321, 57 S.Ct. 764, 81 L.Ed. 1122 (1937)). Therefore, if a statute authorizes an agency to receive funds up to a certain cap, as the CFPA authorizes the Bureau to do, there is no Appropriations Clause issue. *See* 12 U.S.C. § 5497(a).

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

7. Summary

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

b. The Bureau's motion for summary judgment

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

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

The Bureau first argues it is entitled to summary judgment on the issue of whether the Payment Provisions are void *ab initio*. The Supreme Court's holding in *Collins* suggests the Bureau is correct. *See Collins*, 141 S.Ct. at 1778 (*Seila Law's* "holding on standing does not mean that actions taken by [an improperly appointed] officer are void *ab initio* and must be undone."). The court therefore concludes ***365** that the Payment Provisions are not void *ab initio*.

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

Additionally, the court finds that the Bureau's ratification of the Payment Provisions was a solution tailored to the constitutional injury sustained by the Associations. *See United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) (noting "general rule that remedies should be tailored to the injury suffered from the constitutional violation"). A few weeks after the Supreme Court's holding in *Seila Law*, the Bureau's constitutionally appointed director ratified the Payment Provisions. *See* Ratification, 85 Fed. Reg. 41905-02. In doing so, the Director noted she "is familiar with the payment provisions and has also conducted a further evaluation of them for purposes of th[e] ratification. Based on the Director's evaluation of the payment provisions, it is the Director's considered judgment that they should be ratified." *Id.* This assurance is sufficient to establish "*de novo* review." *See Intercollegiate Broad. Sys.*, 796 F.3d at 120 ("new hearing" does not need to be "completely new proceeding" but could instead entail "*de novo* review"). Finally, as previously discussed, the Associations' arguments against the propriety, legality, and sufficiency of the Ratification all fail. The court concludes that the Ratification was valid and cured the constitutional injury caused by the 2017 Rule's approval by an improperly appointed official.

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

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

The Bureau argues that it reasonably determined that the practice addressed by the Payment

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

The Bureau next asserts that it reasonably determined that the proscribed withdrawals were "abusive" because they take unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service and (b) the inability of the consumer to protect the interests of the consumer in selecting or using" the product or service. The Associations' challenges to the Bureau's determination that the Payment Provisions were "abusive" fail.

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

Bureau established the rational connection between the facts found and the choice made when it chose to include debit- and prepaid-card payments in the Payment Provisions.

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

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

3. Bureau reasonably considered Payment Provisions' costs and benefits

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

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

4. Bureau appropriately denied Advance Financial's rulemaking petition

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

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

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

The Bureau contends it is entitled to summary judgment on the issue of whether its current structure and function violates the Constitution's Separation of Powers Doctrine and Appropriations Clause. The Associations contend that two constitutional problems remain. First, the Associations contend the Bureau violates the Appropriations clause's mandate that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. The Bureau's structure allows its director to set a budget for the Bureau up to a certain cap. *See* 12 U.S.C. § 5497(a)(1)–(2). The Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424, 110 S.Ct. 2465. Where, as here, a statute authorizes an agency to receive funds up to a certain cap, there is no Appropriations Clause issue.

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

6. Bureau observed all required procedures in promulgating Payment Provisions

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

Count Eight includes four barebones arguments: while under its previous Director, the Bureau (a) made repeated false statements, (b) allowed groups opposed to payday lending to drive the rulemaking leading to the 2017 Rule, (c) failed to comply with unnamed provisions of the Regulatory Flexibility Act, and (d) failed to give interested parties an opportunity to participate in rulemaking by creating the 2017 Rule against the wishes of many of these parties. These allegations are baseless. For instance, the Associations charge the Bureau with failing to publish a regulatory flexibility analysis. The Bureau *did* publish such an analysis. *See* 82 Fed. Reg. at 54853–70 (final regulatory flexibility analysis); 81 Fed. Reg. at 48150-66 (initial regulatory flexibility analysis). Similarly, the Associations claim the Bureau approached the rulemaking process with the preconceived intention to create the 2017 Rule and did not approach it with an open mind. But besides the Associations' failure to provide any details, the Supreme Court has rejected the "open-mindedness" requirement for the APA. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020).

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

7. Summary

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

c. Compliance Date

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

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

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

IV. CONCLUSION

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

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

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

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

APPENDIX E

United States Constitution

Article II

Section 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:– I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

APPENDIX F

12 U.S.C. § 5531

§ 5531. Prohibiting unfair, deceptive, or abusive acts or practices

(a) In general

The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking

The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

(c) Unfairness

(1) In general

The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that--

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) Consideration of public policies

In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(d) Abusive

The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice--

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of--

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

(e) Consultation

In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

(f) Consideration of seasonal income

The rules of the Bureau under this section shall provide, with respect to an extension of credit secured by residential real estate or a dwelling, if documented income of the borrower, including income from a small business, is a repayment source for an extension of credit secured by residential real estate or a dwelling, the creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.

APPENDIX G

12 C.F.R. § 1041.2

§ 1041.2 Definitions.

(a) Definitions. For the purposes of this part, the following definitions apply:

(1) Account has the same meaning as in Regulation E, 12 CFR 1005.2(b).

(2) Affiliate has the same meaning as in 12 U.S.C. 5481(1).

(3) Closed-end credit means an extension of credit to a consumer that is not open-end credit under paragraph (a)(16) of this section.

(4) Consumer has the same meaning as in 12 U.S.C. 5481(4).

(5) Consummation means the time that a consumer becomes contractually obligated on a new loan or a modification that increases the amount of an existing loan.

(6) Cost of credit means the cost of consumer credit as expressed as a per annum rate and is determined as follows:

(i) Charges included in the cost of credit. The cost of credit includes all finance charges as set forth by Regulation Z, 12 CFR 1026.4, but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11).

(ii) Calculation of the cost of credit—

(A) Closed-end credit. For closed-end credit, the cost of credit must be calculated according to the requirements of Regulation Z, 12 CFR 1026.22.

(B) Open-end credit. For open-end credit, the cost of credit must be calculated according to the rules for calculating the effective annual percentage rate for a billing cycle as set forth in Regulation Z, 12 CFR 1026.14(c) and (d).

(7) Covered longer-term balloon-payment loan means a loan described in § 1041.3(b)(2).

(8) Covered longer-term loan means a loan described in § 1041.3(b)(3).

(9) [Reserved by 84 FR 27929]

(10) Covered short-term loan means a loan described in § 1041.3(b)(1).

(11) Credit has the same meaning as in Regulation Z, 12 CFR 1026.2(a)(14).

(12) Electronic fund transfer has the same meaning as in Regulation E, 12 CFR 1005.3(b).

(13) Lender means a person who regularly extends credit to a consumer primarily for personal, family, or household purposes.

(14) [Reserved by 85 FR 44444]

(15) Motor vehicle means any self-propelled vehicle primarily used for on-road transportation. The term does not include motor homes, recreational vehicles, golf carts, and motor scooters.

(16) Open-end credit means an extension of credit to a consumer that is an open-end credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(20), but

without regard to whether the credit is consumer credit, as defined in 12 CFR 1026.2(a)(12), is extended by a creditor, as defined in 12 CFR 1026.2(a)(17), is extended to a consumer, as defined in 12 CFR 1026.2(a)(11), or permits a finance charge to be imposed from time to time on an outstanding balance as defined in 12 CFR 1026.4.

(17) Outstanding loan means a loan that the consumer is legally obligated to repay, regardless of whether the loan is delinquent or is subject to a repayment plan or other workout arrangement, except that a loan ceases to be an outstanding loan if the consumer has not made at least one payment on the loan within the previous 180 days.

(18) Service provider has the same meaning as in the Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(26).

(19) [Reserved by 85 FR 44444]

(b) Rule of construction. For purposes of this part, where definitions are incorporated from other statutes or regulations, the terms have the meaning and incorporate the embedded definitions, appendices, and commentary from those other laws except to the extent that this part provides a different definition for a parallel term.

APPENDIX H

12 C.F.R. § 1041.3

§ 1041.3 Scope of coverage; exclusions; exemptions.

(a) General. This part applies to a lender that extends credit by making covered loans.

(b) Covered loan. Covered loan means closed-end or open-end credit that is extended to a consumer primarily for personal, family, or household purposes that is not excluded under paragraph (d) of this section or conditionally exempted under paragraph (e) or (f) of this section; and:

(1) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire amount of the loan within 45 days of consummation, or for all other loans, the consumer is required to repay substantially the entire amount of any advance within 45 days of the advance;

(2) For loans not otherwise covered by paragraph (b)(1) of this section:

(i) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire balance of the loan in a single payment more than 45 days after consummation or to repay such loan through at least one payment that is more than twice as large as any other payment(s).

(ii) For all other loans, either:

(A) The consumer is required to repay substantially the entire amount of an advance in a single payment more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment(s); or

(B) A loan with multiple advances is structured such that paying the required minimum payments may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan; or

(3) For loans not otherwise covered by paragraph (b)(1) or (2) of this section, if both of the following conditions are satisfied:

(i) The cost of credit for the loan exceeds 36 percent per annum, as measured:

(A) At the time of consummation for closed-end credit; or

(B) At the time of consummation and, if the cost of credit at consummation is not more than 36 percent per annum, again at the end of each billing cycle for open-end credit, except that:

(1) Open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B) in any billing cycle in which a lender imposes a finance charge, and the principal balance is $0; and

(2) Once open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B), it meets

the condition set forth in paragraph (b)(3)(i)(B) for the duration of the plan.

(ii) The lender or service provider obtains a leveraged payment mechanism as defined in paragraph (c) of this section.

(c) Leveraged payment mechanism. For purposes of paragraph (b) of this section, a lender or service provider obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer's account to satisfy an obligation on a loan, except that the lender or service provider does not obtain a leveraged payment mechanism by initiating a single immediate payment transfer at the consumer's request.

(d) Exclusions for certain types of credit. This part does not apply to the following:

(1) Certain purchase money security interest loans. Credit extended for the sole and express purpose of financing a consumer's initial purchase of a good when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded.

(2) Real estate secured credit. Credit that is secured by any real property, or by personal property used or expected to be used as a dwelling, and the lender records or otherwise perfects the security interest within the term of the loan.

(3) Credit cards. Any credit card account under an open-end (not home-secured) consumer credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(15)(ii).

(4) Student loans. Credit made, insured, or guaranteed pursuant to a program authorized by

subchapter IV of the Higher Education Act of 1965, 20 U.S.C. 1070 through 1099d, or a private education loan as defined in Regulation Z, 12 CFR 1026.46(b)(5).

(5) Non-recourse pawn loans. Credit in which the lender has sole physical possession and use of the property securing the credit for the entire term of the loan and for which the lender's sole recourse if the consumer does not elect to redeem the pawned item and repay the loan is the retention of the property securing the credit.

(6) Overdraft services and lines of credit. Overdraft services as defined in 12 CFR 1005.17(a), and overdraft lines of credit otherwise excluded from the definition of overdraft services under 12 CFR 1005.17(a)(1).

(7) Wage advance programs. Advances of wages that constitute credit if made by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner, to the employer's employees, provided that:

(i) The advance is made only against the accrued cash value of any wages the employee has earned up to the date of the advance; and

(ii) Before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties on behalf of itself and any business partners, that it or they, as applicable:

(A) Will not require the consumer to pay any charges or fees in connection with the advance, other than a charge for participating in the wage advance program;

(B) Has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(C) With respect to the amount advanced to the consumer, will not engage in any debt collection activities if the advance is not deducted directly from wages or otherwise repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

(8) No-cost advances. Advances of funds that constitute credit if the consumer is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance, provided that before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties:

(i) That it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(ii) That, with respect to the amount advanced to the consumer, such entity will not engage in any debt collection activities if the advance is not repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

(e) Alternative loan. Alternative loans are conditionally exempt from the requirements of this part. Alternative loan means a covered loan that satisfies the following conditions and requirements:

(1) Loan term conditions. An alternative loan must satisfy the following conditions:

(i) The loan is not structured as open-end credit, as defined in § 1041.2(a)(16);

(ii) The loan has a term of not less than one month and not more than six months;

(iii) The principal of the loan is not less than $200 and not more than $1,000;

(iv) The loan is repayable in two or more payments, all of which payments are substantially equal in amount and fall due in substantially equal intervals, and the loan amortizes completely during the term of the loan; and

(v) The lender does not impose any charges other than the rate and application fees permissible for Federal credit unions under regulations issued by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii).

(2) Borrowing history condition. Prior to making an alternative loan under this paragraph (e), the lender must determine from its records that the loan would not result in the consumer being indebted on more than three outstanding loans made under this paragraph (e) from the lender within a period of 180 days. The lender must also make no more than one alternative loan under this paragraph (e) at a time to a consumer.

(3) Income documentation condition. In making an alternative loan under this paragraph (e), the lender must maintain and comply with policies and

procedures for documenting proof of recurring income.

(4) Safe harbor. Loans made by Federal credit unions in compliance with the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan are deemed to be in compliance with the requirements and conditions of paragraphs (e)(1), (2), and (3) of this section.

(f) Accommodation loans. Accommodation loans are conditionally exempt from the requirements of this part. Accommodation loan means a covered loan if at the time that the loan is consummated:

(1) The lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year, and made 2,500 or fewer such covered loans in the preceding calendar year; and

(2)(i) During the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered loans; or

(ii) If the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will derive no more than 10 percent of their receipts from covered loans during the current tax year.

(3) Provided, however, that covered longer-term loans for which all transfers meet the conditions in § 1041.8(a)(1)(ii), and receipts from such loans, are not included for the purpose of determining whether

the conditions of paragraphs (f)(1) and (2) of this section have been satisfied.

(g) Receipts. For purposes of paragraph (f) of this section, receipts means "total income" (or in the case of a sole proprietorship "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts.

(h) Tax year. For purposes of paragraph (f) of this section, "tax year" has the meaning attributed to it by the IRS as set forth in IRS Publication 538, which provides that a "tax year" is an annual accounting period for keeping records and reporting income and expenses.

APPENDIX I

12 C.F.R. § 1041.7

§ 1041.7 Identification of unfair and abusive practice.

It is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts.

APPENDIX J

12 C.F.R. § 1041.8

§ 1041.8 Prohibited payment transfer attempts.

(a) Definitions. For purposes of this section and § 1041.9:

(1) Payment transfer means any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan.

(i) Means of transfer. A debit or withdrawal meeting the description in paragraph (a)(1) of this section is a payment transfer regardless of the means through which the lender initiates it, including but not limited to a debit or withdrawal initiated through any of the following means:

(A) Electronic fund transfer, including a preauthorized electronic fund transfer as defined in Regulation E, 12 CFR 1005.2(k).

(B) Signature check, regardless of whether the transaction is processed through the check network or another network, such as the automated clearing house (ACH) network.

(C) Remotely created check as defined in Regulation CC, 12 CFR 229.2(fff).

(D) Remotely created payment order as defined in 16 CFR 310.2(cc).

(E) When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution, other than such a transfer meeting the description in paragraph (a)(1)(ii) of this section.

(ii) Conditional exclusion for certain transfers by account-holding institutions. When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution is not a payment transfer if all of the conditions in this paragraph (a)(1)(ii) are met, notwithstanding that the transfer otherwise meets the description in paragraph (a)(1) of this section.

(A) The lender, pursuant to the terms of the loan agreement or account agreement, does not charge the consumer any fee, other than a late fee under the loan agreement, in the event that the lender initiates a transfer of funds from the consumer's account in connection with the covered loan for an amount that the account lacks sufficient funds to cover.

(B) The lender, pursuant to the terms of the loan agreement or account agreement, does not close the consumer's account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan.

(2) Single immediate payment transfer at the consumer's request means:

(i) A payment transfer initiated by a one-time electronic fund transfer within one business day after the lender obtains the consumer's authorization for the one-time electronic fund transfer.

(ii) A payment transfer initiated by means of processing the consumer's signature check through the check system or through the ACH system within one business day after the consumer provides the check to the lender.

(b) Prohibition on initiating payment transfers from a consumer's account after two consecutive failed payment transfers—

(1) General. A lender must not initiate a payment transfer from a consumer's account in connection with any covered loan that the consumer has with the lender after the lender has attempted to initiate two consecutive failed payment transfers from that account in connection with any covered loan that the consumer has with the lender. For purposes of this paragraph (b), a payment transfer is deemed to have failed when it results in a return indicating that the consumer's account lacks sufficient funds or, if the lender is the consumer's account-holding institution, it is for an amount that the account lacks sufficient funds to cover.

(2) Consecutive failed payment transfers. For purposes of the prohibition in this paragraph (b):

(i) First failed payment transfer. A failed payment transfer is the first failed payment transfer from the consumer's account if it meets any of the following conditions:

(A) The lender has initiated no other payment transfer from the account in connection with the covered loan or any other covered loan that the consumer has with the lender.

(B) The immediately preceding payment transfer was successful, regardless of whether the lender has previously initiated a first failed payment transfer.

(C) The payment transfer is the first payment transfer to fail after the lender obtains the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section.

(ii) Second consecutive failed payment transfer. A failed payment transfer is the second consecutive failed payment transfer from the consumer's account if the immediately preceding payment transfer was a first failed payment transfer. For purposes of this paragraph (b)(2)(ii), a previous payment transfer includes a payment transfer initiated at the same time or on the same day as the failed payment transfer.

(iii) Different payment channel. A failed payment transfer meeting the conditions in paragraph (b)(2)(ii) of this section is the second consecutive failed payment transfer regardless of whether the first failed payment transfer was initiated through a different payment channel.

(c) Exception for additional payment transfers authorized by the consumer—

(1) General. Notwithstanding the prohibition in paragraph (b) of this section, a lender may initiate additional payment transfers from a consumer's account after two consecutive failed payment transfers if the additional payment transfers are authorized by the consumer in accordance with the requirements and conditions in this paragraph (c) or if the lender executes a single immediate payment

transfer at the consumer's request in accordance with paragraph (d) of this section.

(2) General authorization requirements and conditions—

(i) Required payment transfer terms. For purposes of this paragraph (c), the specific date, amount, and payment channel of each additional payment transfer must be authorized by the consumer, except as provided in paragraph (c)(2)(ii) or (iii) of this section.

(ii) Application of specific date requirement to re-initiating a returned payment transfer. If a payment transfer authorized by the consumer pursuant to this paragraph (c) is returned for nonsufficient funds, the lender may re-initiate the payment transfer, such as by re-presenting it once through the ACH system, on or after the date authorized by the consumer, provided that the returned payment transfer has not triggered the prohibition in paragraph (b) of this section.

(iii) Special authorization requirements and conditions for payment transfers to collect a late fee or returned item fee. A lender may initiate a payment transfer pursuant to this paragraph (c) solely to collect a late fee or returned item fee without obtaining the consumer's authorization for the specific date and amount of the payment transfer only if the consumer has authorized the lender to initiate such payment transfers in advance of the withdrawal attempt. For purposes of this paragraph (c)(2)(iii), the consumer authorizes such payment transfers only if the consumer's authorization obtained under paragraph (c)(3)(iii) of this section includes a statement, in terms that are clear and readily understandable to the consumer, that payment transfers may be initiated solely to collect a late fee or returned item fee and that specifies the highest amount for such fees that may be charged and the payment channel to be used.

(3) Requirements and conditions for obtaining the consumer's authorization—

(i) General. For purposes of this paragraph (c), the lender must request and obtain the consumer's authorization for additional payment transfers in accordance with the requirements and conditions in this paragraph (c)(3).

(ii) Provision of payment transfer terms to the consumer. The lender may request the consumer's authorization for additional payment transfers no earlier than the date on which the lender provides to the consumer the consumer rights notice required by § 1041.9(c). The request must include the payment transfer terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The lender may provide the terms and statement to the consumer by any one of the following means:

(A) In writing, by mail or in person, or in a retainable form by email if the consumer has consented to receive electronic disclosures in this manner under § 1041.9(a)(4) or agrees to receive the terms and statement by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by § 1041.9(c).

(B) By oral telephone communication, if the consumer affirmatively contacts the lender in that manner in response to the consumer rights notice required by § 1041.9(c) and agrees to receive the terms and statement in that manner in the course of, and as part of, the same communication.

(iii) Signed authorization required—

(A) General. For an authorization to be valid under this paragraph (c), it must be signed or otherwise agreed to by the consumer in writing or electronically and in a retainable format that memorializes the payment transfer terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The signed authorization must be obtained from the consumer no earlier than when the consumer receives the consumer rights notice required by § 1041.9(c) in person or electronically, or the date on which the consumer receives the notice by mail. For purposes of this paragraph (c)(3)(iii)(A), the consumer is considered to have received the notice at the time it is provided to the consumer in person or electronically, or, if the notice is provided by mail, the earlier of the third business day after mailing or the date on which the consumer affirmatively responds to the mailed notice.

(B) Special requirements for authorization obtained by oral telephone communication. If the authorization is granted in the course of an oral telephone communication, the lender must record the call and retain the recording.

(C) Memorialization required. If the authorization is granted in the course of a recorded telephonic conversation or is otherwise not immediately retainable by the consumer at the time of signature, the lender must provide a memorialization in a retainable form to the consumer by no later than the date on which the first payment transfer authorized by the consumer is initiated. A memorialization may be provided to the consumer by email in accordance with the requirements and conditions in paragraph (c)(3)(ii)(A) of this section.

(4) Expiration of authorization. An authorization obtained from a consumer pursuant to this paragraph (c) becomes null and void for purposes of the exception in this paragraph (c) if:

(i) The lender subsequently obtains a new authorization from the consumer pursuant to this paragraph (c); or

(ii) Two consecutive payment transfers initiated pursuant to the consumer's authorization fail, as specified in paragraph (b) of this section.

(d) Exception for initiating a single immediate payment transfer at the consumer's request. After a lender's second consecutive payment transfer has failed as specified in paragraph (b) of this section, the lender may initiate a payment transfer from the consumer's account without obtaining the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section if:

(1) The payment transfer is a single immediate payment transfer at the consumer's request as defined in paragraph (a)(2) of this section; and

(2) The consumer authorizes the underlying one-time electronic fund transfer or provides the underlying signature check to the lender, as applicable, no earlier than the date on which the lender provides to the consumer the consumer rights notice required by § 1041.9(c) or on the date that the consumer affirmatively contacts the lender to discuss repayment options, whichever date is earlier.

(e) Prohibition against evasion. A lender must not take any action with the intent of evading the requirements of this section.