No. 22-663

IN THE
# Supreme Court of the United States

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

*Cross-Petitioners*,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,

*Cross-Respondents*.

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

## REPLY TO BRIEF IN OPPOSITION

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## INTRODUCTION

The Lenders' cross-petition identified two alternative non-constitutional grounds for affirming the Fifth Circuit's vacatur of the Rule. The Lenders urged this Court to either deny the Bureau's petition contesting the Appropriations Clause holding or grant review of all three claims against the Rule. The Bureau responds that, unless the additional questions independently warrant certiorari, the Court should disregard them and plow ahead to adjudicate the novel and consequential constitutional question. That position flouts established principles of judicial restraint.

This Court generally will not "decide questions of a constitutional nature unless absolutely necessary." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). That venerable maxim does not depend on whether there is a circuit split on the non-constitutional issue. Of course, the Court need not waste time on alternative arguments with no realistic chance of success, like "an issue that is committed to the trial court's discretion[] [i]n the absence of a strong suggestion of an abuse of that discretion." *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975). But that is not remotely the situation presented by the significant legal questions in the cross-petition.

On the remedy for the unconstitutional removal restriction, the Bureau misreads *Collins v. Yellen*, 141 S. Ct. 1761 (2021). It asserts that, under *Collins*, Director Cordray was lawfully exercising the powers of his office when he issued the Rule in late 2017. In fact, Cordray was unlawfully clinging to office under

the statutory provision that unconstitutionally insulated him from removal, as it is beyond genuine dispute that President Trump would have fired him long before then but for litigation over the provision's validity. Consequently, Cordray unlawfully occupied his office when he issued the Rule, rendering it an "exercise of power" he "did not lawfully possess." *Id.* at 1788.

On the statutory authority for the Rule, the Bureau engages in bait-and-switch. The CFPB's authority to prohibit an "act or practice" as "unfair" or "abusive" requires that consumers cannot reasonably avoid any substantial injury or protect their own interests. 12 U.S.C. § 5531(b)-(d). But the Bureau does not meaningfully attempt that showing for the conduct outlawed by the Rule—*i.e.*, continuing to make preauthorized attempts to withdraw loan repayments after two consecutive denials for insufficient funds. Rather, the Bureau points to asserted harms that some consumers face from *other* alleged conduct, such as inadequate disclosure policies or interference with available banking remedies. Regardless of whether the Bureau could have promulgated a valid regulation banning that conduct, it is not what *this Rule* does.

Accordingly, the Court should either deny the Bureau's petition or grant review of these alternative questions too.

## ARGUMENT

### I. THE BUREAU ERRS IN DISMISSING THE STRENGTH OF THE ALTERNATIVE GROUNDS FOR VACATING THE RULE

#### A. The Bureau Mischaracterizes The Remedial Inquiry Triggered By An Unconstitutional Removal Restriction

Under *Collins*, an unconstitutional removal restriction inflicts redressable harm on a party injured by an officer's action if the provision *in fact prevented* the President from removing the officer. Cross-Pet. 13-19. The Bureau's response misses that key point, and its ratification fallback fares no better.

**1.** To begin, the Bureau straw-mans the Lenders' position. Although it emphasizes that "[t]he mere latent existence of an unconstitutional (and thus unenforceable) removal provision" does not alone establish harm supporting vacatur, Cross-BIO 13, the cross-petition never claimed otherwise. Rather, the Lenders made clear that relief is warranted when the restriction "actually thwart[ed] the President's removal of the officer," Cross-Pet. 13, and thus had a prejudicial "effect" on the officer's actions, *Collins*, 141 S. Ct. at 1789. This can occur when "a lower court decision" blocks an officer's removal (the first *Collins* hypothetical) or when the President, unhappy with the officer's actions, "assert[s] that he would remove" him but for the restriction (the second). *Id.* The common denominator is that the President "would remove the [officer] if the [unconstitutional] statute did not stand in the way," thereby making the officer as much a usurper "not lawfully possess[ing]"

the powers of office as one unconstitutionally appointed. *Id.* at 1788-89; *see* Cross-Pet. 16-18.

The Bureau tries to transform those hypotheticals into a rigid two-prong test, objecting that the Lenders "cannot make either of th[e] showings" given some factual distinctions. Cross-BIO 12. But the *Collins* hypotheticals were just "clear[]" "example[s]" of redressable harm, which is why the Court *remanded* for a harm determination even though "the situation" there was "less clear-cut." 141 S. Ct. at 1789. And the situation here shares the same critical feature as the examples, because President Trump would have fired Cordray but for the removal restriction, as the Bureau does not genuinely contest. Cross-Pet. 14-15; *see infra* at 11.

Tellingly, the Bureau offers no principled difference between this case and the first example. It concedes that if the President had been "prevented from removing Director Cordray by a lower court decision" enforcing the removal restriction, Cordray would not have been "lawfully occupying his office" when he issued the Rule. Cross-BIO 12 (cleaned up). While "no judicial order" existed here, the Bureau never explains *why it matters* whether the President's removal plans are unconstitutionally thwarted by an erroneous court order applying the removal restriction or by the erroneous imprimatur of the restriction itself. Cross-BIO 13. President Trump left Cordray in office because of that unlawful legislative direction, which thus caused the same "effect" and inflicted the same "harm" as an unlawful judicial direction. *Collins*, 141 S. Ct. at 1789.

Indeed, this situation satisfies the Bureau's own articulation of the *Collins* inquiry—that a party "must show that the challenged action would not have been taken but for the unconstitutional removal restriction." Cross-BIO 14. Where, as here, the President otherwise would have fired the officer, "the challenged action" by definition "would not have been taken" *by that officer*. *Id.* It is irrelevant whether a *replacement officer* would have taken the same action, as the Bureau concedes for an improperly appointed officer or an officer improperly shielded from removal by court order. Cross-BIO 11-13. In all three cases, the officer does "not lawfully possess" the powers of office because an unconstitutional statute is the but-for cause for his being in office. *Collins*, 141 S. Ct. at 1788.

Finally, other than the flawed premise that the Lenders have not shown "concrete harm," the Bureau has no response to the "difficult[y]" that private parties could virtually never make the showing it demands. Cross-BIO 14. The Bureau does not identify any path by which a private litigant could even identify the hypothetical replacement officer, much less divine his views on the agency action at issue, let alone do so without unprecedented discovery that the government would vigorously oppose. The Bureau simply has no defense to the charge that its remedies approach would render futile judicial review of separation-of-powers claims brought by private parties, contrary to both precedent and principle. Cross-Pet. 18-19.

**2.** The Bureau therefore retreats to the defense that Director Kraninger later ratified the Rule. Cross-BIO 14-17. But it never meaningfully grapples

with the reason why ratification is inappropriate for notice-and-comment rulemaking.

The Bureau concedes that a "ratifying official" must have "authority to take the action at the time of the ratification." Cross-BIO 15 (citing *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994)). Yet notice-and-comment rulemaking is a multi-step process, so Kraninger lacked authority to take *all* the steps at the *same* time; and she did not actually take *any* of the steps save the last, which she rubber-stamped. Cross-Pet. 20. Although the Bureau cites three lower-court cases accepting ratification of notice-and-comment rules, two of them did not consider this authority issue at all, and the third failed to consider the multi-step timing aspect. *See* Cross-BIO 16. Likewise, the Bureau cites two lower-court cases allowing ratification of agency *enforcement orders* without repeating the "entire administrative process," *see id.*, but that hardly supports ratifying a *legislative rule* while dispensing with notice and comment, which are the critical "price" that must be paid to promulgate rules with "the force and effect of law," *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015).

The Bureau tries to elide the problem by suggesting that the 2016 notice-and-comment process was not unlawful because President Obama did not want to fire Cordray. Cross-BIO 16-17. But the agency provides no support for this mix-and-match theory of ratification. Cordray's 2017 analysis of comments and adoption of text was unlawful because President Trump wanted to fire him. Kraninger thus did not have authority to take those final steps herself in 2020 (much less in the boilerplate manner

she did) based on Cordray's outdated preceding steps four years earlier. Cross-Pet. 20-21. The Bureau's argument only confirms that, due to the multi-step nature, notice-and-comment rulemaking is not an "act" an official is later "able … to do" through ratification. *NRA Pol. Victory Fund*, 513 U.S. at 98.

### B. The Bureau Misconstrues Its Statutory Authority

As relevant here, Congress barred the CFPB from outlawing an "act or practice" as "unfair" or "abusive" unless consumers cannot reasonably avoid substantial injury or protect their own interests, given their understanding of the risks. 12 U.S.C. § 5531(c)(1)(A), (d)(2)(A)-(B). The Rule does not satisfy that precondition. Consumers have readily available means to avoid the costs that may follow from preauthorizing repeated unsuccessful attempts to withdraw repayment of covered loans. Cross-Pet. 22-24. The Bureau reached a contrary conclusion only by gutting the statutory preservation of consumer choice. Cross-Pet. 24-27. And the agency now tries to solve the problem by defending a different regulation than the one it adopted.

**1.** The Bureau has no coherent response to consumers' ability to simply refrain from taking out covered loans if they do not wish to assume the ordinary financial risks of having insufficient funds when *preauthorized* withdrawal attempts later occur. The agency now concedes that the viability of such anticipatory avoidance forecloses a regulatory ban when consumers understand the risks at issue, but it contends that consumers here do not. Cross-BIO 20-22. That rejoinder is doubly flawed.

*First*, the Bureau's reasoning departs from the rationale it gave in the Rule. When adopting the Rule's payment provisions, the Bureau took the categorical position that forgoing payday loans is "not … a valid means of reasonably avoiding the injury." 82 Fed. Reg. 54,472, 54,737 (Nov. 17, 2017). But as the Bureau later acknowledged when rescinding the Rule's underwriting provisions, "anticipatory avoidance" *can* include pursuing "viable alternatives" to payday loans. 85 Fed. Reg. 44,382, 44,397 (July 22, 2020). That is why the Bureau now switches to its consumer-ignorance defense. Cross-BIO 21. This new justification, however, is a flagrant *Chenery* violation. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907-09 (2020).

*Second*, the Bureau's new rationale fails on its own terms. Even if some consumers do not sufficiently understand how repeated withdrawal attempts work, *but see* Cross-Pet. 27, that at most bears on the lawfulness of lenders' *disclosure policies*, not their making repeated withdrawal attempts. The Act does not permit outlawing an "act[] or practice[]" that is neither unfair nor abusive when properly disclosed. *See* 12 U.S.C. § 5531(b); *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

**2.** The same defects plague the Bureau's response to avoidance and mitigation measures available to consumers who have taken out covered loans.

For example, the Bureau continues to fixate on the options available "*after* two consecutive attempts have failed." Cross-BIO 22 (emphasis added). But consumers' options must be assessed *ex ante* rather than *ex post*, because otherwise late fees and all other

sorts of conventional charges would be unlawful, as they too typically cannot be avoided *after* they have been incurred. Cross-Pet. 26. The Bureau ignores this point, other than reiterating that the practice here is inadequately disclosed. Cross-BIO 24.

Likewise, the Bureau asserts that "consumers often face lender-created barriers that prevent them" from trying to "issu[e] stop-payment orders or rescind[] access to their accounts." Cross-BIO 23. If so, that perhaps could have justified the Bureau's banning *those* obstructive "acts or practices," 12 U.S.C. § 5531(b), but it cannot justify the Rule's categorical ban on third-or-more withdrawal attempts. A "narrower approach" (Cross-BIO 22) is what the Act mandates by depriving the Bureau of "authority … to declare an act or practice … unlawful" unless the banned conduct *itself* meets the statutory criteria. 12 U.S.C. § 5531(c)-(d). Given this mismatch, the Rule exceeds the Bureau's authority.

## II. THE BUREAU CANNOT JUSTIFY DISREGARDING THE ALTERNATIVE GROUNDS

Given the strength of the alternative grounds for affirmance, the Bureau is seriously misguided in urging this Court to zip past these non-constitutional offramps for resolving the Rule's invalidity. The Bureau is also plainly wrong that adopting these alternative grounds would not actually avoid the Appropriations Clause question.

**A.** The Bureau insists that this Court can end-run constitutional-avoidance principles by simply "declin[ing] to entertain" discretionary review of any antecedent non-constitutional questions that are not themselves "of sufficient general importance to justify

the grant of certiorari." Cross-BIO 25. Although this Court *could* exercise its discretion in that injudicious fashion, it *should* not do so. Rather, it "ought not to pass on questions of constitutionality … unless such adjudication is unavoidable," for the familiar reasons that this "doctrine [is] more deeply rooted than any other in the process of constitutional adjudication." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999).

Indeed, the Bureau's sole case supports the *Lenders*' position. In *Nobles*, the alternative grounds bypassed were issues "committed to the trial court's discretion," not pure questions of law decided *de novo* by this Court. 422 U.S. at 241 n.16. Moreover, the Court highlighted "the absence of a strong suggestion of an abuse of that discretion *or* an indication that the issues are of sufficient general importance to justify the grant of certiorari." *Id.* (emphasis added). The plain implication is that the Court *would have* considered even a non-certworthy discretionary issue if doing so created a substantial opportunity to affirm without deciding the constitutional question. Here, the remedial and statutory questions are, at minimum, sufficiently weighty that, under the constitutional-avoidance doctrine, they warrant either denying certiorari altogether or reviewing all the questions together—especially since the Bureau never disputes that the Lenders' remedies question is closely related to the remedies question in its own petition, Cross-Pet. 21.

**B.** The Bureau pivots to an alternative argument of its own, contending that neither of the additional questions "would allow this Court to avoid" the

Appropriations Clause question. Cross-BIO 26. This argument, however, is insubstantial.

On the removal remedy, the Bureau asserts that the Lenders "introduced no evidence … at summary judgment" that President Trump would have fired Cordray in January 2017 were it not for the then-pending litigation over the removal restriction's validity. *Id.* But the Lenders *did* introduce such evidence, the Bureau introduced *no* contrary evidence, and there is no *genuine* dispute of material fact. Although *Collins* had not yet adopted its "novel" remedial inquiry for invalid removal restrictions when summary-judgment motions were first filed, 141 S. Ct. at 1797 (Gorsuch, J., concurring in part), the Lenders supplemented their motion post-*Collins* with Cordray's published account of the Trump Administration's plans, Dist. Ct. Dkt. No. 91, at 4-6, which is cognizable at summary judgment, *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003). Moreover, the key evidence is subject to judicial notice and beyond reasonable debate. *See* Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding."). Neither below nor here has the Bureau ever seriously contended—much less identified any evidence that would permit the district court to (im)plausibly find—that President Trump *willingly* retained a controversial holdover from the prior administration in this powerful role, especially when his later replacement for Cordray opposed the CFPB's very *existence*. Cross-Pet. 14-15. This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

On statutory authority, the Bureau notes that the Fifth Circuit upheld the Rule's "unfairness" finding without also considering its "abusiveness" finding. Cross-BIO 27-28. But the two findings rise or fall together. The cross-petition expressly addressed and refuted both findings for the same underlying reasons: Just as the proscribed conduct is not "unfair" because any injury is "reasonably avoidable by consumers," it also is not "abusive" because consumers can "protect [their] interests" and "understand[] … the material risks." 12 U.S.C. § 5531(c)(1)(A), (d)(2)(A)-(B); *see* Cross-Pet. 22-24; *supra* at Part I.B. The Bureau identifies no theory how the Lenders could prevail on "unfairness" yet somehow lose on "abusiveness." Cross-BIO 28.

Moreover, even if the Bureau were correct that the additional questions supported remand rather than affirmance, the Court still should consider them. If the Fifth Circuit on remand ended up vacating the Rule on alternative grounds, this Court still could avoid the need to resolve the Appropriations Clause question in this case. *See Hernandez v. Mesa*, 140 S. Ct. 735, 740-41 (2020) (describing how the Court had used remand on a *Bivens* issue to avoid deciding the underlying constitutional claim). And even if this Court were to resolve and reverse on the Appropriations Clause question, correcting the Fifth Circuit's erroneous reasons for rejecting the Lenders' alternative claims against the Rule would still "dispose of the case" both "more fully" and "more fairly." *United States v. Tinklenberg*, 563 U.S. 647, 661 (2011). Either way, the alternative grounds should not be excised from the case at this stage.

In sum, there is at least a significant prospect that the alternative grounds for vacating the Rule would moot the need to decide the Appropriations Clause question. While that vehicle problem counsels against taking this case at all, it at minimum warrants teeing up these other questions. Especially in a case of such complexity and significance, this Court should have the full menu of options before it.

## CONCLUSION

The Court should deny the Bureau's certiorari petition or else grant this cross-petition or add these questions to the Bureau's petition.

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Respectfully submitted,

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