No. 22-663

In the Supreme Court of the United States

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

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.

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

BRIEF FOR THE CROSS-RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a rule promulgated by the Consumer Financial Protection Bureau (CFPB) known as the Payday Lending Rule. The CFPB adopted the rule in 2017 under then-Director Richard Cordray. In 2020, after this Court held that the statute purporting to limit the President's authority to remove the CFPB Director is unconstitutional in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), then-Director Kathleen Kraninger rescinded portions of the Payday Lending Rule but expressly ratified the rule's remaining provisions.

The court of appeals rejected most of cross-petitioners' challenges to the remaining provisions of the rule but vacated the rule based on its holding that the statute funding the CFPB violates the Appropriations Clause. The government has filed a petition for a writ of certiorari seeking review of that holding. Cross-petitioners have filed a conditional cross-petition presenting two additional questions on which the CFPB prevailed below:

1. Whether the lower courts should have invalidated the remaining provisions of the Payday Lending Rule because they were adopted before this Court held that the statutory limit on the President's ability to remove the CFPB Director is unconstitutional.

2. Whether the remaining portions of the Payday Lending Rule are a permissible exercise of the CFPB's authority to prohibit certain "unfair" or "abusive" practices. 12 U.S.C. 5531(b); see 12 U.S.C. 5531(c) and (d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 51 F.4th 616. The order of the district court (Pet. App. 47a-76a) is reported at 558 F. Supp. 3d 350.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2022. The petition for a writ of certiorari in No. 22-448 was filed on November 14, 2022. The conditional cross-petition for a writ of certiorari in No. 22-663 was filed on January 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References to "Pet. App." refer to the appendix to the government's petition for a writ of certiorari in No. 22-448.

STATEMENT

The background of this case is described in the government's petition for a writ of certiorari (22-448 Pet. 2-10), which seeks review of the court of appeals' holding that Congress violated the Appropriations Clause by enacting the statute providing funding for the Consumer Financial Protection Bureau (CFPB). This Statement sets forth additional context relevant to the questions presented in the conditional cross-petition.

A. Legal Background

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376. As part of Congress's effort to reform the financial-services industry in the wake of the 2008 financial crisis, the Act established the CFPB, 12 U.S.C. 5491(a), and provided for it to be headed by a Director appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1)-(2). The Act purported to limit the President's ability to remove the Director before the end of the Director's five-year term, providing that the Director may be removed only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

As relevant here, the Act authorizes the CFPB to proscribe "unfair" or "abusive" acts or practices in connection with certain consumer financial transactions. 12 U.S.C. 5531(b). The CFPB may deem an act or practice "unfair" when it 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." 12 U.S.C. 5531(c)(1). And, as relevant here, the CFPB may deem an act or practice "abusive" when it finds that the act or practice "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 [her] interests * * * in selecting or using a consumer financial product or service." 12 U.S.C. 5531(d)(2)(A)-(B).

2. In 2017, the CFPB issued a final rule entitled Payday, Vehicle Title, and Certain High-Cost Installment Loans (the Payday Lending Rule). 82 Fed. Reg. 54,472 (Nov. 17, 2017). That rule was signed by then-Director Richard Cordray and had two discrete components.

First, the rule's underwriting provisions prohibited covered lenders from making certain loans, including payday and vehicle title loans, "without reasonably determining that the borrowers will have the ability to repay the loans according to their terms." 82 Fed. Reg. at 54,588; see *id.* at 54,874.

Second, the rule's payment provisions prohibited covered lenders from attempting to withdraw payments from a consumer's account after two consecutive attempts had failed due to a lack of funds, unless the consumer provided a new authorization. 82 Fed. Reg. at 54,472; see 12 C.F.R. 1041.7, 1041.8. The rule explained that when two consecutive attempts to withdraw payments have failed, "further attempts * * * are very unlikely to succeed, yet they clearly result in further harms to consumers," such as non-sufficient funds and overdraft fees. 82 Fed. Reg. at 54,472; see *id.* at 54,720-54,726. "Despite these potential risks to consumers," the Bureau found that "many lenders vary the timing, frequency, and amount of payment attempts," "make multiple attempts to collect payment on the same day," and "repeat the attempt to collect payment multiple times on subsequent days," triggering hundreds of dollars in fees with little prospect of actually collecting the debt. *Id.* at 54,723-54,724.

The CFPB found that covered lenders' repeat-withdrawal practice is both "unfair" and "abusive." 12 U.S.C. 5531(b); see Pet. App. 9a-10a. The CFPB deemed the practice "unfair" after finding that "the substantial injury" the practice inflicts is "not reasonably avoidable by consumers." 82 Fed. Reg. at 54,737. And the CFPB deemed the practice "abusive" for two independent reasons: The practice takes "unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of" covered loans, *id.* at 54,744; and it takes "unreasonable advantage of" consumers' "inability to protect their interests in selecting or using" covered loans, *ibid.*

3. In 2020, this Court held that the statute purporting to limit the President's authority to remove the CFPB Director "violates the separation of powers" and that the Director "must be removable by the President at will." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2192 (2020). That holding was consistent with the views of the Executive Branch, which had taken the position that the for-cause removal limitation was unconstitutional since March 2017, months before the Payday Lending Rule was finalized. See U.S. Amicus Br. at 5-23, *PHH Corp.* v. *CFPB*, No. 15-1177 (D.C. Cir.) (Mar. 17, 2017) (U.S. *PHH* Br.); see also Gov't Br. at 7-38, *Seila Law*, *supra* (No. 19-7) (Dec. 9, 2019).

B. Procedural History

1. Cross-petitioners are two associations of lenders regulated by the Payday Lending Rule. In April 2018, they filed this suit challenging the rule on various grounds. Pet. App. 6a. Around the same time, the

CFPB, then led by Acting Director Mick Mulvaney, announced that it would engage in rulemaking to reconsider the Payday Lending Rule. *Ibid.* The Bureau later issued a notice proposing to rescind the rule's underwriting provisions, but not its payment provisions. 84 Fed. Reg. 4252 (Feb. 14, 2019). In light of that rulemaking, the district court stayed this case and the rule's compliance date. Pet. App. 6a; see *id.* at 74a-75a.

During the rulemaking, Kathleen Kraninger was nominated by President Trump and confirmed by the Senate as CFPB Director. Pet. App. 7a. In July 2020, after this Court's decision in *Seila Law* holding the Director's for-cause removal protection invalid, Director Kraninger ratified the payment provisions of the Payday Lending Rule to eliminate any question about whether they had been affected by the removal protection. 85 Fed. Reg. 41,905 (July 13, 2020). The CFPB also promulgated a new final rule rescinding the rule's underwriting provisions but leaving its payment provisions intact. 85 Fed. Reg. 44,382 (July 22, 2020).

2. Cross-petitioners filed an amended complaint challenging the Payday Lending Rule's payment provisions on various grounds. D. Ct. Doc. 76 (Aug. 28, 2020). As relevant here, cross-petitioners asserted that the rule was invalid because it was promulgated before this Court had "confirmed" that the for-cause removal provision is unconstitutional. *Id.* at ¶ 94; see *id.* at ¶¶ 90-111. Cross-petitioners also asserted that the payment provisions were inconsistent with the relevant provisions of the Dodd-Frank Act. *Id.* at ¶¶ 120-139.

The district court granted summary judgment to the CFPB. Pet. App. 47a-76a. It first addressed cross-petitioners' claim that the Payday Lending Rule was invalid because it had been adopted before this Court declared the removal limitation unconstitutional. *Id.* at 53a-54a. The district court explained that *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), foreclosed cross-petitioners' assertion that all actions taken by an agency subject to an unconstitutional removal protection are "void." Pet. App. 53a-54a. The court further held that Director Kraninger's ratification of the payment provisions after this Court's decision in *Seila Law* cured any constitutional defect in the original promulgation of the Payday Lending Rule. *Id.* at 54a-59a.

The district court also determined that the CFPB had statutory authority to adopt the payment provisions. Pet. App. 59a-62a. It first held that the CFPB had a reasonable basis to conclude that the repeat-withdrawal practice was "unfair." *Id.* at 59a; see *id.* at 59a-61a. In addition, the court determined that the payment provisions were independently justified because they target "abusive" conduct. *Id.* at 61a. The court upheld the CFPB's finding "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." *Id.* at 62a.

3. The court of appeals affirmed in part, reversed in part, and vacated the remaining provisions of the Payday Lending Rule. Pet. App. 1a-46a.

a. The court of appeals rejected cross-petitioners' argument that the presence of a statutory provision purporting to insulate the Director from at-will removal required invalidation of the Payday Lending Rule. Pet. App. 18a-23a. The court relied on this Court's determination in *Collins* that, "[u]nlike cases 'involving a Government actor's exercise of power that the actor did not lawfully possess,' * * * 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 19a (quoting *Collins*, 141 S. Ct. at 1788 & n.23) (brackets omitted). Instead, "the challenging party must demonstrate," at a minimum, "that 'the unconstitutional removal provision inflicted harm.'" *Ibid.* (quoting *Collins*, 141 S. Ct. at 1788-1789).

The court of appeals explained that to establish the requisite harm, a plaintiff must show: (1) that the President desired "to remove the unconstitutionally insulated actor"; (2) that the President perceived himself as unable "to remove the actor due to the infirm provision"; and (3) a "connection between the President's frustrated desire to remove the actor and the agency action complained of." Pet. App. 21a-22a (emphasis omitted). The court explained that without the final showing, 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 22a.

The court of appeals determined that cross-petitioners could not make the necessary showings. As to the first two showings, the court observed that cross-petitioners relied exclusively on "a few carefully selected statements from Director Cordray's" memoir and an "online article"—neither of which were in the record—to support their assertion that President Trump would have removed Director Cordray but for the statutory limitation on removal. Pet. App. 22a; see *id.* at 22a-23a. The court found "[t]hese secondhand accounts of President Trump's supposed intentions * * * insufficient," because "[t]he 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." *Id.* at 23a. And as to the third showing, the court found that "the record before [it] plainly fails to demonstrate any nexus between [President Trump's] purported desire to remove Cordray" and the promulgation of the rule's payment provisions. *Ibid.* Because cross-petitioners had "failed to demonstrate harm," the court found it unnecessary to "address the [CFPB's] alternative argument that any alleged harm was cured by Director Kraninger's ratification." *Ibid.*

b. The court of appeals also determined that the CFPB acted within its statutory authority in issuing the payment provisions. Pet. App. 10a-14a. The court upheld the CFPB's conclusion that lenders' repeat-withdrawal practice is unfair because the substantial injuries the practice causes "are not reasonably avoidable by consumers." *Id.* at 11a. The court reasoned that "since 'leveraged payment mechanisms' are 'a central feature of [covered payday] loans,' borrowers typically do not have the ability to shop for loans without them." *Id.* at 13a (quoting 82 Fed. Reg. at 54,737). The court emphasized that "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.'" *Ibid.* (quoting 82 Fed. Reg. at 54,737). And it rejected cross-petitioners' suggestion that borrowers can avoid harm by simply revoking lenders' authorization to withdraw payment, explaining that "lender practices" frequently "make it difficult for consumers to" do so. *Ibid.* (quoting 82 Fed. Reg. at 54,737).

In sum, the court of appeals determined that "[t]he 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." Pet. App. 14a. Because "the proscribed practice thus satisfies the elements of an 'unfair' practice under the Act," the court "conclude[d] that the Bureau acted within its statutory authority in promulgating the Payment Provisions." *Ibid.* And because the court upheld the rule as a valid exercise of the CFPB's authority to prohibit "unfair" practices, it had no occasion to "address the alternative ground of abusiveness." *Id.* at 10a n.1.

c. Having rejected cross-petitioners' primary contentions, the court of appeals nonetheless vacated the Payday Lending Rule based on its view that the CFPB's "funding structure violates the Appropriations Clause of the Constitution." Pet. App. 27a; see *id.* at 27a-45a; see also 22-448 Pet. 7-10.

4. Because the court of appeals had held a federal statute unconstitutional and called into question the CFPB's past and ongoing activities, the government filed a petition for a writ of certiorari seeking this Court's review of the Appropriations Clause question. To ensure that the Court could consider the petition at its January 6, 2023 conference and hear the case during its April 2023 sitting, the government filed the petition on November 14, 2022, just 26 days after the court of appeals' decision. See 22-448 Pet. 30-31.

After cross-petitioners indicated their intent to file a conditional cross-petition (which would delay distribution of the government's petition, see Sup. Ct. R. 15.7) and to seek an extension of the time to file their brief in opposition, the parties agreed to a schedule that would allow the Court to consider both petitions at the Court's February 17, 2023 conference. See Letter from Elizabeth

B. Prelogar, Solicitor General, to Scott Harris, Clerk of Court (Nov. 21, 2022). The government explained that such a schedule would permit the case to be argued and decided this Term under a somewhat expedited briefing schedule. *Ibid.* The government respectfully submitted that if the Court had concerns about such expedition, however, the appropriate course would have been to deny cross-petitioners' request for an extension of time. *Ibid.* The Court granted the extension.

ARGUMENT

Cross-petitioners renew their contentions that the Payday Lending Rule's payment provisions are invalid because they were finalized before this Court's decision in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), and that those provisions conflict with the Dodd-Frank Act. The court of appeals correctly rejected those arguments, and its holdings neither conflict with any decision of another court of appeals nor otherwise satisfy this Court's traditional criteria for discretionary review.

Cross-petitioners nevertheless insist (Cross-Pet. 11) that this Court is "require[d]" by principles of constitutional avoidance to take up the questions raised in their cross-petition in an attempt to avoid deciding the important Appropriations Clause question presented in the government's petition. But this Court has no practice of exercising its certiorari jurisdiction to avoid constitutional issues in the manner that cross-petitioners propose. And in any event, neither of the issues in the cross-petition would actually provide a basis for avoiding the Appropriations Clause question. The Court should therefore deny the cross-petition. And for the same reason, it should reject cross-petitioners' alternative request to add the questions presented in the cross-petition if it grants the government's petition.

A. The Court of Appeals Correctly Held That The Unconstitutional Removal Restriction Provides No Basis For Invalidating The Payment Provisions

The court of appeals correctly held that the unconstitutional restriction on the removal of the CFPB Director provides no basis for invalidating the Payday Lending Rule's payment provisions. Cross-petitioners failed to show that the removal restriction affected the adoption of those provisions. And even if they had made such a showing, Director Kraninger's post-*Seila Law* ratification would have cured any constitutional defect.

1. In *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), this Court held that a statute purporting to impose unconstitutional limits on the President's authority to remove an officer "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)." *Id.* at 1788-1789. So long as the officer in question was "properly *appointed*," therefore, "there is no reason to regard" the officer's actions as "void *ab initio*" merely because they are taken before this Court formally declares the removal limitation unconstitutional. *Id.* at 1787; accord *id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment); *id.* at 1792 (Thomas, J., concurring).

A plaintiff seeking relief based on an unconstitutional removal restriction must therefore make an affirmative showing that the restriction "inflict[ed] compensable harm." *Collins*, 141 S. Ct. at 1789. The Court identified two ways in which a plaintiff can do so. First, such harm would exist if "the President had attempted to remove [an officer] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Ibid.* When "the President tries to remove an official but a court blocks this action, then that official is not lawfully occupying his office and would likely be acting without authority." *Id.* at 1793 n.6 (Thomas, J., concurring). Second, a plaintiff could establish harm if "the President had made a public statement expressing displeasure with actions taken by [an officer] and had asserted that he would remove the [officer] if the statute did not stand in the way." *Id.* at 1789 (majority opinion). In that circumstance, there is reason to conclude that an officer removable at will "might have altered his behavior in a way that would have benefited" the plaintiff. *Ibid.*

Cross-petitioners cannot make either of those showings. As to the first, President Trump was not "prevented from [removing Director Cordray] by a lower court decision holding that he did not have 'cause' for removal." *Collins*, 141 S. Ct. at 1789. There is accordingly no basis to conclude that Director Cordray "[wa]s not lawfully occupying his office" at the time that he signed the Payday Lending Rule. *Id.* at 1793 n.6 (Thomas, J., concurring).

As to the second showing, cross-petitioners identify no evidence that President Trump disapproved of the payment provisions of the Payday Lending Rule, such that the CFPB Director "might have altered his behavior in a way that would have benefited" cross-petitioners in the absence of the unconstitutional removal restriction. *Collins*, 141 S. Ct. at 1789. Just the opposite: After Director Cordray left office, President Trump's appointees to replace him—Acting Director Mulvaney and Director Kraninger—oversaw a process by which the CFPB reconsidered the rule and ultimately rescinded its underwriting provisions, but *not* the payment provisions at issue here. See pp. 4-5, *supra*.

Instead, Director Kraninger explicitly ratified those provisions after this Court made clear that she was removable at will. 85 Fed. Reg. at 41,905. Those events foreclose any contention that President Trump disapproved of the payment provisions.

2. Cross-petitioners' contrary arguments lack merit. They primarily contend (Cross-Pet. 16) that they need not establish that a Director removable at will "would have acted differently" with respect to the payment provisions. Because this Court in *Collins* included no analogous requirement in its example of a plaintiff who proves harm by showing that "the President had attempted to remove a Director but was prevented from doing so by a lower court," *Collins*, 141 S. Ct. at 1789, cross-petitioners assert (Cross-Pet. 16-17) that a plaintiff seeking vacatur of agency action *never* needs to show that the agency would have proceeded differently absent the unconstitutional limit on removal.

That argument ignores the actual source of the harm in the proffered example. As Justice Thomas explained, that harm arises from the fact that the "official [wa]s not lawfully occupying his office" and was therefore "likely * * * acting without authority" when he took the challenged actions. *Collins*, 141 S. Ct. at 1793 n.6 (Thomas, J., concurring); see *id.* at 1788 (majority opinion) (distinguishing ordinary removal cases from Appointments Clause cases that involve "a Government actor's exercise of power that the actor did not lawfully possess"). But in circumstances like those here, where no judicial order "unconstitutionally thwarted [the President] from actually removing" an officer, Cross-Pet. 17, a plaintiff cannot establish any such harm: The mere latent existence of an unconstitutional (and thus unenforceable) removal provision "does not strip the [officer] of the power to undertake the * * * responsibilities of his office." *Collins*, 141 S. Ct. at 1788 n.23 (majority opinion). A plaintiff therefore must show that the challenged action would not have been taken but for the unconstitutional removal restriction, for "[o]nly then is relief needed to restore the plaintiff[] to the position [it] 'would have occupied in the absence' of the removal problem." *Id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment) (citation omitted).

Cross-petitioners object that it may be difficult for plaintiffs to establish that a removal restriction caused such real-world harm, and thus urge the Court to do away with that requirement in order to "incentiv[ize]" litigants to bring constitutional challenges. Cross-Pet. 18 (quoting *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018)). In *Lucia*, however, the Court first found harm —adjudication by an officer acting without constitutional authority because of an Appointments Clause violation—and only then asked how to "design[]" relief that provides appropriate incentives. 138 S. Ct. at 2055 n.5. That decision accordingly provides no support for cross-petitioners' contention that plaintiffs who bring removal challenges are entitled to vacatur of governmental action without any need to show concrete harm in the first place. Indeed, vacating government action that did not result from the identified constitutional violation "would, contrary to usual remedial principles, put the plaintiffs 'in a better position' than if no constitutional violation had occurred." *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring in part and concurring in the judgment) (citation omitted). The court of appeals correctly rejected such an approach. Pet. App. 22a.

3. In any event, even if cross-petitioners could show that the removal restriction affected the original

issuance of the payment provisions, Director Kraninger's post-*Seila Law* ratification cured any constitutional defect. The substance of cross-petitioners' removal claim is that promulgation of the Payday Lending Rule was an executive act that could be undertaken only by a Director removable at will by the President. See Cross-Pet. 13. Any force that argument might have had when the rule was originally promulgated was eliminated when Director Kraninger ratified the rule after this Court had made clear that she *was* removable at will.

This Court has recognized that the agency-law "doctrine of ratification" presumptively applies to governmental actions that were not properly authorized when they were taken. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). So long as the ratifying official had authority to take the action at the time of the ratification, see *ibid.*, the ratification operates "retroactively" to "give [the original act] validity," *United States* v. *Heinszen & Co.*, 206 U.S. 370, 382 (1907). Consistent with those principles, the courts of appeals have "repeatedly held" that even when the challenged action was originally taken by an official who was improperly appointed—and thus lacked authority to act at all—"a properly appointed official's ratification * * * 'remed[ies] the defect' (if any)" in the original action. *Guedes* v. *ATF*, 920 F.3d 1, 13 (D.C. Cir. 2019) (per curiam).[2]

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[2] See, *e.g.*, *Moose Jooce* v. *FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020), cert. denied, 141 S. Ct. 2854 (2021); *NLRB* v. *Newark Elec. Corp.*, 14 F.4th 152, 161-163 (2d Cir. 2021); *Wilkes-Barre Hosp. Co., LLC* v. *NLRB*, 857 F.3d 364, 370-372 (D.C. Cir. 2017); *CFPB* v. *Gordon*, 819 F.3d 1179, 1190-1191 (9th Cir. 2016), cert. denied, 137 S. Ct. 2291 (2017); *McKinney* v. *Ozburn-Hessey Logistics, LLC*, 875 F.3d 333,

The same principle applies with even greater force when the constitutional defect was merely an invalid restriction on removal that did not eliminate the original official's power to carry out the "responsibilities of his office." *Collins*, 141 S. Ct. at 1788 n.23. Thus, as the Ninth Circuit held on remand in *Seila Law* itself, Director Kraninger's ratification "remedies any constitutional injury" attributable to Director Cordray's prior actions because it confirms that those actions reflect "adequate presidential oversight and control." *CFPB* v. *Seila Law LLC*, 997 F.3d 837, 846 (2021).

Cross-petitioners assert (Cross-Pet. 20) that "notice-and-comment rulemaking cannot be ratified by a later official" because it "is a multi-step process." But they cite no decision embracing that argument. To the contrary, the courts of appeals have repeatedly applied ratification principles to notice-and-comment rulemaking. See *Kajmowicz* v. *Whitaker*, 42 F.4th 138, 148-152 (3d Cir. 2022); *Moose Jooce* v. *FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020); *Guedes*, 920 F.3d at 13-17. More fundamentally, courts have long recognized that a ratifying official need not "repeat the entire administrative process" for ratification to be effective. *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996); see, *e.g.*, *Doolin Sec. Sav. Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203, 214 (D.C. Cir. 1998).

Cross-petitioners' contrary argument is especially misplaced in the circumstances of this case. They have not argued that Director Cordray was acting unlawfully in July 2016, when the CFPB issued the notice of proposed rulemaking that preceded the Payday Lending

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338-339 (6th Cir. 2017); *Advanced Disposal Servs. E., Inc.* v. *NLRB*, 820 F.3d 592, 602-606 (3d Cir. 2016); *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704, 707-709 (D.C. Cir. 1996).

Rule. See 81 Fed. Reg. 47,864 (July 22, 2016). Instead, their argument relates only to "the Rule's promulgation in 2017," by which point they claim that President Trump would have removed Director Cordray. Cross-Pet. 14. But as to that final decision to promulgate the payment provisions, Director Kraninger arrived at the same conclusion in 2020 based on consideration of the same comments. Cross-petitioners thus offer no sound reason to doubt that Director Kraninger's ratification cured any constitutional defect.[3]

B. The Court Of Appeals Correctly Rejected Cross-Petitioners' Statutory Challenge

Cross-petitioners also renew their contention (Cross-Pet. 22-27) that the Payday Lending Rule's payment provisions exceed the CFPB's statutory authority. The court of appeals correctly rejected that contention, holding that the payment provisions prohibit conduct that qualifies as "an 'unfair' practice under the Act."

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[3] Cross-petitioners briefly assert (Cross-Pet. 20) that Director Kraninger's ratification was inconsistent with the decision to rescind other portions of the Payday Lending Rule. But as we explain below, no such inconsistency exists. See pp. 21-22, *infra*; see also CFPB C.A. Br. 34-35 (explaining that the CFPB's 2017 assessment of the costs and benefits of the payment provisions "did not assume that the Underwriting Provisions would be in place"). Cross-petitioners also assert (Cross-Pet. 20) that the ratification "violated the APA" because it failed to consider other changes in circumstances between 2017 and 2020. That argument misapprehends the nature of a ratification, which is not a new action but instead an adoption of a prior action that " 'relates back' in time to the date" of the original action. *Advanced Disposal Servs.*, 820 F.3d at 602 (citation omitted). As the D.C. Circuit explained in rejecting a similar argument, Director Kraninger thus had no "obligation to consider new evidence" before ratifying the payment provisions. *Moose Jooce*, 981 F.3d at 29.

Pet. App. 14a. And although the court did not address the issue, the payment provisions are independently lawful because they target an "abusive" practice as well. 12 U.S.C. 5531(d).

1. Congress authorized the CFPB to identify and prohibit both "unfair" and "abusive" acts or practices in connection with certain consumer transactions. 12 U.S.C. 5531(b). Distinct statutory standards apply to those two categories of acts or practices. As relevant here, the Bureau may deem an act or practice "unfair" when it has "a reasonable basis to conclude" that, *inter alia*, "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers." 12 U.S.C. 5531(c)(1).

The payment provisions declare that "[i]t is an unfair and abusive practice" for a covered lender to attempt to withdraw payments from a consumer's account after two consecutive attempts have failed due to a lack of funds, unless the consumer provides "new and specific authorization." 12 C.F.R. 1041.7; see 12 C.F.R. 1041.8. In deeming that practice "unfair," the CFPB determined that the substantial injuries caused by the practice are "not reasonably avoidable by consumers." 82 Fed. Reg. at 54,737. Specifically, the CFPB found that covered lenders frequently use "aggressive and unpredictable payment collection practices" that consumers do not anticipate and that sometimes violate the terms of consumers' agreements with lenders. *Id.* at 54,501; see *id.* at 54,723-54,724. For example, covered lenders sometimes attempt to withdraw payment from a borrower's account two, three, or as many as 11 times per day or on different dates from those stated in the borrower's agreement. *Id.* at 54,723-54,724. Moreover, the CFPB found that even when a borrower becomes aware that a lender has attempted multiple withdrawals, many covered lenders "have obfuscated or interfered with consumers' ability to revoke authorization," *id.* at 54,737, by, among other things: "including language in loan agreements purportedly prohibiting the consumer from stopping payment or revoking authorization"; "charg[ing] consumers a substantial fee" for revocation; and "requir[ing] consumers to provide written revocation by mail several days in advance of the next scheduled payment withdrawal attempt." *Ibid.*

The CFPB's findings on unfairness "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." Pet. App. 14a. Accordingly, the court of appeals correctly held that the payment provisions prohibit "an 'unfair' practice under the Act" because "the harms associated with three or more unsuccessful withdrawal attempts are 'not reasonably avoidable by consumers.'" *Ibid.* (quoting 12 U.S.C. 5531(c)(1)).

2. In addition, although the court of appeals did not address the issue, see Pet. App. 10a n.1, the payment provisions are independently justified as an exercise of the CFPB's authority to prohibit "abusive" practices, 12 U.S.C. 5531(b). As relevant here, the CFPB may deem a practice "abusive" when it finds that the practice "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) and (B).

In deeming lenders' repeat-withdrawal practice "abusive," the CFPB permissibly determined that the practice "takes unreasonable advantage of" (A) "consumers' lack of understanding of the material risks, costs, or conditions of" covered loans and (B) "their inability to protect their interests in selecting or using" covered loans. 82 Fed. Reg. at 54,744. Specifically, the CFPB found that borrowers lack understanding of covered lenders' "complex[]" repeat-withdrawal practices, which are distinct from the collection practices that "consumers experience in other markets." *Id.* at 54,741. And the CFPB found that borrowers cannot protect their own interests because they face "considerable" lender-imposed "challenges and barriers when trying to stop payment or authorization." *Id.* at 54,742. Based on those findings, the CFPB reasonably deemed covered lenders' practice of attempting three or more consecutive payment withdrawals "abusive."

3. Cross-petitioners' contrary arguments are misconceived. Cross-petitioners insist (Cross-Pet. 24) that consumers can reasonably avoid the harms flowing from lenders' repeat-withdrawal practice by simply declining "to take out covered loans at all." But that logic would render the prohibition on unfair practices a dead letter: Consumers could in theory avoid virtually *any* covered practice by simply avoiding the relevant financial product altogether. The Act's "reasonably avoidable" standard demands more than that: An injury is not reasonably avoidable where consumers lack "reason to anticipate the impending harm and the means to avoid it." *Orkin Exterminating Co.* v. *FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988), cert. denied, 488 U.S. 1041 (1989).

Here, the CFPB found that before taking out covered loans, borrowers lack understanding of the "aggressive and unpredictable" methods covered lenders use to withdraw payments—methods that are not typical in other markets. 82 Fed. Reg. at 54,501; see *id.* at 54,723-54,724, 54,740-54,741. So although consumers may generally know of "the possibility of multiple unsuccessful withdrawal attempts," Cross-Pet. 27, they do not know of the practices used by the lenders here—*e.g.*, trying to withdraw payments several times per day or "vary[ing] the timing, frequency, and amount of payment attempts over the course of the lending relationship," 82 Fed. Reg. at 54,723; see *id.* at 54,723-54,724, 54,741. Nor do consumers "have the ability to shop, at the time of origination, for covered loans without leveraged payment mechanisms, as that is a central feature of these loans." *Id.* at 54,737; see *id.* at 54,721. Without knowledge of "the impending harm" or "the means to avoid it," *Orkin*, 849 F.2d at 1365, borrowers cannot reasonably avoid the harms of repeated withdrawals by declining to take out covered loans.

Contrary to cross-petitioners' suggestion (Cross-Pet. 25), the CFPB's reasoning on this issue is fully consistent with the 2020 rule rescinding the underwriting provisions. The 2020 rule found insufficient evidence that, before taking out payday loans, ordinary borrowers are unaware that such loans entail risks due to the lender's failure to assess the borrower's ability to repay. See 85 Fed. Reg. at 44,396-44,397. Because ordinary borrowers may possess such *ex ante* knowledge, the 2020 rule determined that they could reasonably avoid the harms targeted by the underwriting provisions by availing themselves of "alternatives to payday loans." *Id.* at 44,397. By contrast, in the payment provisions, the CFPB found that before taking out covered loans, borrowers *do not* understand the risks associated with lenders' repeat-withdrawal practice. See pp. 12, 20-21, *supra*. And nothing in the 2020 rule—which did not address lenders' repeat-withdrawal practice at all—calls that finding into question.

Cross-petitioners also assert (Cross-Pet. 24) that consumers can reasonably avoid the harms from repeat-withdrawal attempts by "ensur[ing] that their accounts are sufficiently funded when the loan repayments are due." But the payment provisions prohibit lenders from seeking to withdraw funds from a borrower's account a *third time* after two consecutive attempts have failed. In that scenario, it is apparent that the borrower—who likely "resort[ed] to payday loans" in the first place only because she was "in financial distress," Pet. App. 13a—lacks sufficient funds. And any funds that the borrower has "likely would be claimed first by the [borrower's] bank to repay the * * * fees charged for the prior two failed attempts." 82 Fed. Reg. at 54,736. Cross-petitioners ignore those findings.

Cross-petitioners posit (Cross-Pet. 26) that instead of prohibiting third withdrawal attempts, the CFPB should have only "*restrict[ed]* third attempts made *before* consumers have sufficient time to address the problem" by revoking payment authorization. But nothing required the CFPB to adopt that narrower approach given its finding that "many lenders have obfuscated or interfered with consumers' ability to revoke authorization." 82 Fed. Reg. at 54,737. Lenders cannot stymie consumers' revocations and then claim that the CFPB should have merely afforded consumers more time to revoke. At minimum, the CFPB had a "reasonable basis to conclude" that a broader solution was warranted, 12 U.S.C. 5531(c)(1), and cross-petitioners offer no sound basis for substituting their own policy preferences for the CFPB's conclusion.[4]

Finally, cross-petitioners contend (Cross-Pet. 24) that following two failed withdrawal attempts, consumers can reasonably avoid harm by "issu[ing] stop-payment orders or rescind[ing] access to their accounts." But as noted, "consumers often face lender-created barriers that prevent them from pursuing this option as an effective means of avoiding injury." 82 Fed. Reg. at 54,737. And even if a borrower eventually overcomes those barriers, she will likely have accumulated significant additional fees in the interim. See *ibid.* The court of appeals thus properly rejected cross-petitioners' reliance on the possibility that borrowers could avoid harm by revoking payment authorization. See Pet. App. 13a.

C. The Questions Presented In The Cross-Petition Do Not Warrant Further Review

Cross-petitioners have not shown that either of the questions presented in the cross-petition warrants this Court's review.

1. Cross-petitioners make no meaningful attempt to show that either question presented satisfies this Court's traditional certiorari standards. See Sup. Ct. R. 10; see also Cross-Pet. 11-12. They do not claim that the decision below conflicts with the decision of any other

[4] Cross-petitioners incorrectly suggest (Cross-Pet. 26) that the payment provisions "force[] lenders to pursue more burdensome methods of debt collection even if consumers have replenished their accounts after the second failed attempt." Where a consumer has replenished her account, she can (and, in light of the possibility of alternative debt-collection methods, presumably will) provide "new and specific authorization to make further withdrawals from [that] account[]." 12 C.F.R. 1041.7.

court of appeals as to the removal issue. See Pet. App. 19a-20a, 23a (agreeing with decisions of the Sixth and Ninth Circuits on relevant points). Nor do cross-petitioners directly contend that the Fifth Circuit's statutory holding conflicts with the decision of any other court of appeals. And to the extent that cross-petitioners seek to imply (Cross-Pet. 25-26) that the statutory analysis below is inconsistent with *Davis* v. *HSBC Bank Nevada, N.A.*, 691 F.3d 1152 (9th Cir. 2012), that suggestion is incorrect. The Ninth Circuit held that the consumer injuries there were reasonably avoidable because consumers had clear notice of the relevant fee, and the "fee was completely refundable if [the consumer] closed his account within 90 days without using the card." *Id.* at 1169. Here, by contrast, the Fifth Circuit upheld the CFPB's determination that consumers lack notice of lenders' "aggressive and unpredictable" withdrawal tactics, 82 Fed. Reg. at 54,501, and that consumers cannot "stop payment or revoke authorization effectively" before additional fees accumulate, *id.* at 54,736; see Pet. App 14a. The decisions thus applied the same legal standard and reached different outcomes because they found different factual predicates.

2. Unable to satisfy the ordinary criteria for discretionary review, cross-petitioners instead declare (Cross-Pet. 11) that constitutional-avoidance principles "require" this Court to grant review of the questions presented in the cross-petition in an attempt to avoid deciding the Appropriations Clause question raised in the government's petition. That is doubly mistaken.

a. Most fundamentally, cross-petitioners are wrong to assert (Cross-Pet. 11; 22-448 Br. in Opp. 31-32) that this Court must grant review of any and all non-constitutional questions raised by a respondent whenever they might allow the Court to avoid a certworthy constitutional question. To the contrary, "[t]he Court has made it plain that, as a matter of its discretion, it will 'decline to entertain' questions presented by a respondent 'in the absence of * * * an indication that the issues are of sufficient general importance to justify the grant of certiorari.'" Stephen M. Shapiro et al., *Supreme Court Practice* 6-134 (11th ed. 2019) (quoting *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975)). To proceed otherwise would mean, for example, that each time a court of appeals vacates a criminal conviction on constitutional grounds that warrant this Court's review, this Court would be compelled to grant review on every non-constitutional issue in the case—no matter how factbound or insignificant. That has not been, and should not be, this Court's practice. See, *e.g.*, *Nobles*, 422 U.S. at 233, 241-242 n.16 ("declin[ing] to entertain" a non-constitutional challenge that was not of "sufficient general importance to justify the grant of certiorari," even though it would have provided an alternative ground of affirmance that would have avoided the need to address the lower court's constitutional holding).

The three cases cited by cross-petitioners (22-448 Br. in Opp. 31-32) are not to the contrary. As cross-petitioners acknowledge, two of them did not involve discretionary review at all; they instead invoked this Court's "mandatory appellate jurisdiction." *Id.* at 32 (citing *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999), and *Schweiker* v. *Hogan*, 457 U.S. 569 (1982)). Moreover, the "statutory claim[s]" at issue in those cases "would have mooted the constitutional claim in *all* cases," *ibid.*, which is not true of the arguments raised in the cross-petition here. And the third case on which cross-petitioners rely, *Hernandez* v. *Mesa*, 137 S. Ct. 2003 (2017) (per curiam), affirmatively undermines their view: The Court there explained that "disposing of a *Bivens* claim by resolving the constitutional question, while assuming the existence of a *Bivens* remedy * * * is appropriate in many cases." *Id.* at 2007. The Court declined to follow that path in *Hernandez* only because it determined that the court of appeals should have the opportunity to consider an intervening decision of this Court in the first instance. *Ibid.* Cross-petitioners point to no comparable intervening developments here.

b. In any event, neither of the questions presented in the cross-petition would allow this Court to avoid the important Appropriations Clause issue on which the court of appeals' judgment rests.

On the removal question, cross-petitioners argue (Cross-Pet. 14) that a plaintiff can obtain vacatur of agency action merely by showing that the President "would have fired" the officer who took the action "absent the statutory impediment" to removal, without regard to whether the President approved or disapproved of the specific action in question. As already discussed, pp. 13-14, *supra*, the court of appeals properly rejected that legal position. But even if this Court disagreed, cross-petitioners would still need to prove that "President Trump would have fired Cordray" but for the removal restriction. Cross-Pet. 14. On the present record, they have not done so. Indeed, cross-petitioners introduced no evidence at all on that point at summary judgment. Rather, they based their summary-judgment motion on the argument—later rejected in *Collins* and no longer pressed here—that actions taken by an "unconstitutionally insulated Director" are categorically "void ab initio." D. Ct. Doc. 80, at 19 (Sept. 25, 2020); see *Collins*, 141 S. Ct. at 1787.

Lacking record evidence, cross-petitioners have instead relied on "secondhand accounts of President Trump's supposed intentions" gleaned from materials outside the record (primarily Director Cordray's memoir). Pet. App. 23a; see Cross-Pet. 14-15. But cross-petitioners offer no justification for asking this Court to vacate the Payday Lending Rule's payment provisions based on a summary-judgment argument they did not make, resting in turn on summary-judgment evidence they did not introduce.[5] Even if the Court agreed with cross-petitioners' argument about the applicable legal standard for their removal claim, therefore, that would lead at most to a vacatur and remand for consideration of new evidence. See Cross-Pet. 15 (acknowledging possible need for discovery). And because cross-petitioners' argument would not provide an alternative basis for affirming the Fifth Circuit's invalidation of the payment provisions, it would not actually enable this Court to avoid the Appropriations Clause issue presented by the government's petition.

Cross-petitioners' statutory argument also provides no plausible alternative basis for affirmance. As noted, p. 19, *supra*, the court of appeals rejected their statutory challenge solely on the ground that "the Bureau

[5] Requiring cross-petitioners to present evidence and make a summary-judgment motion on this argument is no mere formality. The Executive Branch publicly adopted the position that the removal restriction was unconstitutional, and thus unenforceable, in March 2017, well before the Payday Lending Rule was finalized. See U.S. *PHH* Br. at 5-23. That strongly suggests that President Trump refrained from removing Director Cordray for reasons other than a belief that such removal would be unlawful.

acted within its statutory authority in deeming the proscribed practice unfair," without "address[ing] the alternative ground of abusiveness." Pet. App. 10a n.1. Even if cross-petitioners could persuade this Court that the court of appeals' unfairness holding was wrong, the proper remedy would be to remand for the court of appeals to consider whether the payment provisions fall within the CFPB's authority to prohibit abusive practices. See, *e.g.*, *City of Austin* v. *Reagan Nat'l Adver. of Austin*, 142 S. Ct. 1464, 1476 (2022) ("This Court * * * is a 'court of final review and not first view,' and it does not 'ordinarily decide in the first instance issues not decided below.'") (brackets and ellipsis omitted). Again, that would not allow the Court to avoid deciding whether the judgment below should be affirmed based on the court of appeals' Appropriations Clause holding.

3. For the foregoing reasons, the Court should grant the government's petition, deny the cross-petition, and reject cross-petitioners' alternative request to add the questions presented in the cross-petition to the question presented in the government's petition. Those questions do not warrant this Court's review and would not allow the Court to avoid the important constitutional question presented in the government's petition. Instead, taking up those questions would needlessly complicate the litigation by compelling the parties and Court to address the unusual history of the Payday Lending Rule's adoption, ratification, and partial rescission, as well as the extensive rulemaking record.

To the extent the Court wishes to review one or both of the questions presented in the cross-petition, however, the appropriate course would be to grant the government's petition and simply add the other question(s) presented. That course would permit a three-brief schedule, as opposed to the four-brief schedule that sometimes applies where the Court grants a cross-petition. See Sup. Ct. R. 25.4. And a three-brief schedule would better facilitate the Court's review of the case this Term on an expedited briefing schedule. Reviewing the case this Term is critical for the reasons the government gave in its petition and will further elaborate in its reply brief. Pet. 10-11, 30-31; see Letter from Elizabeth B. Prelogar, Solicitor General, to Scott Harris, Clerk of Court (Nov. 21, 2022). If the Court were to wait to hear the case until next Term, severe disruption and uncertainty will hang over the CFPB, consumers, and the financial industry until sometime in 2024. The mere fact that cross-petitioners filed a concededly unnecessary cross-petition "in an abundance of caution" (Cross-Pet. 11-12) does not justify that delay.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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