No. 22-838

In the Supreme Court of the United States

INTEGRITY ADVANCE, LLC, ET AL., PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH FROTMAN
General Counsel
STEVEN Y. BRESSLER
Deputy General Counsel
KRISTIN BATEMAN
Assistant General Counsel
KEVIN E. FRIEDL
Senior Counsel
Consumer Financial Protection Bureau
Washington, D.C. 20552

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the new hearing conducted by the validly appointed new administrative law judge (ALJ) in this case was consistent with *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), where the new ALJ considered the parties' arguments about supplementing or modifying the existing record and decided the case de novo on that record.

2. Whether the statute providing funding to the Consumer Financial Protection Bureau, 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 22-838

INTEGRITY ADVANCE, LLC, ET AL., PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 48 F.4th 1161. The decision and order of the Director of the Consumer Financial Protection Bureau (Pet. App. 33a-119a) are reported at Federal Banking Law Reporter ¶ 157-370 and available at 2021 WL 9352225.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2022. A petition for rehearing was denied on November 1, 2022 (Pet. App. 165a). On January 17, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including March 1, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act), Pub. L. No. 111-203, 124 Stat. 1376. The Act established the Consumer Financial Protection Bureau (CFPB or Bureau) as an "independent bureau" within the Federal Reserve System, 12 U.S.C. 5491(a), and transferred certain consumer financial protection authorities of several existing agencies to the CFPB, see 12 U.S.C. 5581.

a. The Act directs the Bureau "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." 12 U.S.C. 5511(a). The laws enforced by the Bureau include: the Act's prohibitions against "unfair, deceptive, or abusive act[s] or practice[s]," 12 U.S.C. 5531(a), 5536(a)(1)(B); the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, which establishes certain requirements to ensure "meaningful disclosure of credit terms" to consumers, 15 U.S.C. 1601(a); and the Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 *et seq.*, which establishes certain requirements applicable to the electronic transfer of funds from consumers' accounts, 15 U.S.C. 1693c, 1693d, 1693e. See 12 U.S.C. 5481(12) and (14).

To enforce those laws, the Bureau may institute and conduct administrative adjudication proceedings against parties subject to the Bureau's jurisdiction. 12 U.S.C. 5563(a). An administrative law judge (ALJ) may conduct the initial phases of those proceedings, including receiving evidence and hearing argument, 12 C.F.R. 1081.104, and then may issue a recommended decision,

12 C.F.R. 1081.400. Either party may appeal the ALJ's recommendation to the CFPB Director, or the Director may review it on his own initiative. 12 C.F.R. 1081.402(a) and (b). If the Director's final order is adverse to the respondent, the respondent may obtain judicial review in a court of appeals. 12 U.S.C. 5563(b)(4).

b. Under the Act, the Bureau receives up to a capped amount of funding each year from the earnings of the Federal Reserve System. 12 U.S.C. 5497(a). Each year, the Federal Reserve Board transfers to the Bureau "the amount determined by the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year." 12 U.S.C. 5497(a)(1). Congress specified that, for 2013 and later, the amount transferred to the CFPB annually "shall not exceed" 12% "of the total operating expenses of the Federal Reserve System" as reported in 2009, an amount equal to $597.6 million. 12 U.S.C. 5497(a)(2)(A)(iii); see Board of Governors of the Federal Reserve System, *96th Annual Report 2009*, at 491 (May 2010). That statutory cap is then adjusted based on a measure of inflation. 12 U.S.C. 5497(a)(2)(B). In fiscal year 2022, the inflation-adjusted amount that Congress authorized the Bureau to receive through this mechanism was approximately $734 million, and the CFPB requested and received $641.5 million. See CFPB, *Financial Report of the Consumer Financial Protection Bureau, Fiscal Year 2022*, at 45 (Nov. 15, 2022).

2. Petitioners Integrity Advance, LLC and its CEO, James Carnes, operated a nationwide payday lending business. Pet. App. 3a. Integrity Advance offered short-term, small-dollar consumer loans (usually ranging from $100 to $1000) at high interest rates. *Ibid.*

Integrity Advance's loan documents misleadingly suggested that borrowers would pay off the loans with a single payment. *Id.* at 4a. But in fact, if a borrower did not call Integrity Advance three days before the borrower's payment was due and request to pay the loan in full, the loan would automatically default into four cycles of automatic renewal, followed by a graduated repayment schedule. *Id.* at 4a-5a. In turn, each automatic renewal and additional payment triggered undisclosed finance charges. See *id.* at 3a, 5a. As a result, "it could take a borrower many months to repay a $300 loan, and the loan would cost that borrower $1065 even though Integrity's TILA disclosures listed the total of payments as $390." *Id.* at 5a (brackets and citation omitted). In addition, Integrity Advance's loan documents required borrowers to authorize direct automatic withdrawals from their bank accounts. *Ibid.* If a borrower tried to rescind the authorization, Integrity Advance would remotely generate a payment instrument that would allow it to continue withdrawing payments directly from the borrower's account. *Ibid.*

2. On November 18, 2015, the Bureau filed a notice of charges against petitioners, alleging violations of the Act's prohibition against unfair and deceptive practices, the TILA, and the EFTA. Pet. App. 5a. An ALJ held a three-day evidentiary hearing on the charges, during which the parties called witnesses and introduced documentary evidence. *Id.* at 6a. After considering the evidence, the ALJ recommended that petitioners be held liable on all relevant counts and that they be required to pay $38 million in restitution (jointly and severally), as well as approximately $13.5 million in total civil monetary penalties (approximately $8.1 million for Integrity Advance and $5.4 million for Carnes). *Ibid.*

Petitioners appealed the ALJ's decision to the Bureau's Director. Pet. App. 7a. During the pendency of the appeal, this Court held in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), that an ALJ of the Securities and Exchange Commission (SEC) was an "Officer[] of the United States" who had not been appointed in compliance with the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, and remanded that case for a new hearing before a validly appointed new ALJ. Following *Lucia*, the CFPB Director remanded petitioners' case for a new hearing before a properly appointed ALJ. Pet. App. 7a. In so doing, the Director instructed the new ALJ to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by" the original ALJ. *Ibid.*

On remand, the new ALJ determined that the parties had received an adequate opportunity to present their cases before the prior ALJ. Pet. App. 7a-8a. She therefore announced that she would "conduct a *de novo* review of the record—to the extent possible," while also "consider[ing] the parties' arguments as to whether the record need[ed] to be supplemented or whether portions of the record that were previously admitted should be struck." *Id.* at 8a (citation omitted; second set of brackets in original). Petitioners requested additional pre-hearing discovery and an evidentiary hearing where both sides could present new evidence and examine new witnesses. *Ibid.* The ALJ denied petitioners' requests, explaining her rulings in written decisions. See *id.* at 120a-162a. Petitioners and the Bureau moved for summary disposition on the existing record. *Id.* at 8a.

In August 2020, the new ALJ recommended that petitioners be held liable on all counts. Pet. App. 9a. The

ALJ recommended that Integrity Advance be held responsible for approximately $132.5 million in restitution, and that Carnes be held jointly and severally liable for approximately $38.4 million of that amount. *Ibid.* And the ALJ also recommended that the Director impose approximately $7.5 million in civil monetary penalties against Integrity Advance and $5 million against Carnes. *Id.* at 10a. Petitioners appealed the ALJ's recommendations. *Ibid.*

c. On January 8, 2021, the CFPB Director adopted the ALJ's recommendations on petitioners' liability. Pet. App. 38a-105a.[1] The Director concluded that Integrity Advance had violated the TILA by using loan documents that misled borrowers into believing that they would pay off their loans in a single payment, rather than in multiple installments. *Id.* at 10a, 38a. The Director also determined that Integrity Advance had violated the EFTA by conditioning its loans on repayment by preauthorized electronic fund transfers. *Id.* at 11a, 38a. And the Director found that petitioners had violated the Act's prohibitions against unfair and deceptive acts or practices by providing deceptive loan disclosures and using instruments to withdraw funds from the accounts of borrowers who had attempted to block access. *Ibid.*

As for the remedy, the Director awarded approximately $38.4 million in restitution (for which petitioners were jointly and severally liable), in contrast to the

---

[1] In June 2020, this Court had held that the CFPB Director's for-cause removal protections were unconstitutional and had severed those protections from the rest of the Act. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183. Accordingly, the President had undisputed authority to remove the CFPB Director at will when she issued her decision in this case.

$132.5 million restitution award that the new ALJ had recommended. Pet. App. 11a, 33a. And the Director imposed $7.5 million in civil monetary penalties against Integrity Advance and $5 million against Carnes. *Id.* at 11a-12a, 34a-35a.

3. The court of appeals unanimously upheld the Director's decision and order. Pet. App. 1a-32a.

a. The court of appeals rejected petitioners' contention that the new ALJ's "proceeding fell short of the 'new hearing' referenced in *Lucia*." Pet. App. 15a. The court found "no support for a bright-line rule against a de novo review of a previous administrative hearing." *Id.* at 16a. To the contrary, the court explained, the D.C. Circuit has "reject[ed] an argument that a 'new hearing' must be more than de novo review by a different ALJ." *Ibid.* (citing *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 796 F.3d 111, 120 (D.C. Cir. 2015)). And the court emphasized that nothing in *Lucia* or *Ryder* v. *United States*, 515 U.S. 177 (1995), suggests that de novo review of the existing record is impermissible. See Pet. App. 16a.

Applying those principles here, the court of appeals determined that the new ALJ here committed "no error." Pet. App. 16a. "Petitioners had a full opportunity to present their case in the first proceeding," and the new ALJ "independently reviewed the existing record before relying on it," while also "permitt[ing] [p]etitioners to challenge [the first ALJ's] previous determinations." *Ibid.* "Ultimately," the court concluded, the new ALJ simply "agreed with most of [the first ALJ's] recommendations and rejected [p]etitioners' various challenges." *Ibid.*

The court of appeals also rejected certain specific challenges to the new ALJ's conduct of the proceeding.

First, the court rejected petitioners' challenge to the new ALJ's "decision to forgo live testimony." Pet. App. 18a. The court found "no abuse of discretion" in that decision because "nothing requires an ALJ to observe a witness's live testimony, and [petitioners] never articulated sufficient grounds" for the new ALJ "to recall any of the witnesses for this purpose." *Ibid.* (brackets and internal quotation marks omitted). Second, the court rejected petitioners' challenge to the new ALJ's decision to "deny[] Carnes additional discovery" on a statute of limitations defense. *Id.* at 21a; see *id.* at 19a. The court explained that "[p]etitioners cite no authority supporting their view that the ALJ abused her discretion," and emphasized that "the Bureau complied with [p]etitioners' valid discovery requests." *Id.* at 22a. Third, the court rejected petitioners' assertion that the ALJ "prevented them from presenting their advice-of-counsel defense." *Id.* at 17a. The court reasoned that the ALJ did not "prevent[] Carnes from presenting his defense," but rather "ruled that Carnes's testimony sufficed on this point." *Id.* at 17a-18a.

b. Petitioners' briefs on appeal raised no argument that the CFPB's funding mechanism violated the Appropriations Clause. Nor had petitioners raised such an argument before the Bureau. Accordingly, the court of appeals did not address any Appropriations Clause issue.

4. Petitioners filed a petition for rehearing en banc, renewing their contention that they had not received a proper new hearing under *Lucia*. See C.A. Pet. for Rehearing En Banc. Their rehearing petition again raised no Appropriations Clause argument. Approximately a month after filing their rehearing petition, petitioners submitted a notice of supplemental authority alerting

the court of appeals to a Fifth Circuit decision holding that the CFPB's funding mechanism violates the Appropriations Clause. See *Community Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB*, 51 F.4th 616 (2022), cert. denied, 143 S. Ct. 981, cert. granted, 143 S. Ct. 978 (2023); Pet. C.A. Letter (Oct. 26, 2022). The court of appeals denied the rehearing petition, with no judge calling for a vote. Pet. App. 165a.

ARGUMENT

Petitioners renew their contention (Pet. 10-31) that the validly appointed new ALJ in their case did not provide a proper hearing under this Court's decision in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioners additionally assert (Pet. 32-40) that the CFPB's statutory funding mechanism violates the Appropriations Clause. But petitioners forfeited that argument, and the court of appeals never passed on it. Accordingly, there is no basis for granting certiorari on that issue or holding this petition pending the outcome in *CFPB* v. *Community Financial Services Association of America*, cert. granted, No. 22-448 (Feb. 27, 2023).

A. The Court Of Appeals' Holding That Petitioners Received The Requisite New Hearing Under *Lucia* Does Not Warrant Review

1. The court of appeals correctly held that the validly appointed new ALJ committed "no error" by considering the parties' arguments about whether to modify the existing record, reviewing that record de novo, and "agree[ing] with most of [the first ALJ's] recommendations." Pet. App. 16a.

a. In *Lucia*, the Court concluded that an SEC ALJ had not been appointed in accordance with the Appointments Clause. 138 S. Ct. at 2053. To remedy the Appointments Clause violation, the Court required "a new 'hearing before a properly appointed' official" who was not the same individual as the one who had previously heard the case. *Id.* at 2055 (quoting *Ryder* v. *United States*, 515 U.S. 177, 183, 188 (1995)).

Nothing in *Lucia* or *Ryder* suggests that the new hearing following an Appointments Clause violation cannot consist of de novo review of the existing record by a new, validly appointed ALJ. To the contrary, those decisions focus only on the need for a new adjudicator with "a constitutional appointment" who can "consider the matter" afresh. *Lucia*, 138 S. Ct. at 2055; see *Ryder*, 515 U.S. at 188. Those requirements are fully met where, as here, a validly appointed new ALJ "independently review[s] the existing record," "permit[s] [the litigant] to challenge [the prior ALJ's] previous determinations," and reaches a decision de novo. Pet. App. 16a.

The Court's use of the word "hearing" does not imply that "such a hearing would have to involve live witnesses or additional evidence." *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 796 F.3d 111, 120 (D.C. Cir. 2015); see *id.* at 120 n.4. This Court has explained, for instance, that a statute's use of the word "hearing" did not "by its own force require [an agency] either to hear oral testimony, to permit cross-examination * * * or to hear oral argument." *United States* v. *Florida E. Coast. Ry. Co.*, 410 U.S. 224, 241 (1973). And in a seminal law review article, Judge Friendly explained that a "hearing" need not include "oral presentation," but rather can consist of presentation of

arguments "in written form." Henry J. Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1281 (1975).

b. Petitioners' contrary arguments lack merit. They initially contend (Pet. 11) that the only way to "actually cure [an] Appointments Clause violation [is] by allowing parties to redo the tainted hearing." But elsewhere, petitioners appear to concede that a "full soup-to-nuts redo" is not required in every case, Pet. 27 (citation omitted), and that sometimes there is "little purpose" in "regenerating some evidence," Pet. 28 n.5 (citation omitted).

Petitioners' reliance (Pet. 11-12) on the Solicitor General's guidance memorandum to agency general counsels following *Lucia* is misplaced. That memorandum expressly states that the Solicitor General "do[es] not believe a complete do-over is constitutionally required," and that "a 'new hearing' will be constitutionally adequate as long as the new ALJ is careful to avoid any taint from the prior ALJ's decision." Memorandum from the Solicitor Gen., to Agency Gen. Counsels, *Guidance on Administrative Law Judges after Lucia v. SEC (S. Ct.)* 8-9 (July 2018) (on file with the Office of the Solicitor General). And while the memorandum instructs that a new ALJ should generally "afford the parties a new opportunity to challenge the exclusion, admission, or weighing or particular evidence," *id.* at 9, the new ALJ adhered to that instruction here. Specifically, she stated that "she 'w[ould] consider the parties' arguments as to whether the record need[ed] to be supplemented or whether portions of the record that were previously admitted should be struck." Pet. App. 8a (citation omitted; brackets in original); see *id.* at 128a.

Petitioners also emphasize (Pet. 19) the goal of "provid[ing] parties an incentive" to litigate Appointments Clause claims. But *Lucia* determined that this "goal" is "best accomplish[ed] * * * by providing a successful litigant with a hearing before a new judge" who would not necessarily "be expected to reach all the same judgments" as the prior one. 138 S. Ct. at 2055 n.5. That is precisely what petitioners received in this case: A new ALJ who reached her own independent conclusion about the merits and appropriate remedy. And the new ALJ did not "simply rubberstamp" the prior decision. Pet. 20. She issued a new opinion and recommended a different remedy than the prior ALJ. See Pet. App. 9a-10a.

Petitioners err in analogizing (Pet. 21-22) to the doctrine of structural error in criminal law. As an initial matter, they provide no sound basis for importing that doctrine into the context of administrative adjudications and remedies. Even if the analogy were apt, however, it would not help them. In criminal law, "'structural'" errors are "subject to automatic reversal" rather than "harmless-error review." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted). But there is still a separate question about "what relief should be ordered to remedy" a structural error, and an entirely "new trial" is not invariably "require[d]"—particularly where it "would be a windfall for the defendant." *Waller* v. *Georgia*, 467 U.S. 39, 49-50 (1984). Correspondingly, here, petitioners *did* obtain automatic reversal of their first adjudication following *Lucia*, without having to show that the Appointments Clause violation harmed them. Pet. App. 7a. But that does not mean that they were also owed an entirely new oral hearing where, as here, the new ALJ concluded that petitioners' proposed

additional evidence would be duplicative, and that she could reach an independent determination on the existing record.

c. Petitioners object (Pet. 28-30) to three individual determinations made by the new ALJ in this case. Those fact-specific rulings—which are reviewable only for abuse of discretion, Pet. App. 17a—are not worthy of this Court's review. In any event, the court of appeals correctly rejected petitioners' objections.

First, the new ALJ did not abuse her discretion in declining to allow Carnes to give additional live testimony because "nothing requires an ALJ to observe a witness's live testimony, and [petitioners] never articulated sufficient grounds" for the new ALJ "to recall any of the witnesses for this purpose." Pet. App. 18a (brackets, citation, and internal quotation marks omitted). The new ALJ made clear that she was "not bound by the previous ALJ's rulings on credibility and they are irrelevant to my independent adjudication of this matter." *Id.* at 128a. And she set forth a list of factors that she would use to determine witness credibility based on her review of the prior testimony, including the witness's "ability to recall" information and the testimony's "consistency" with "other testimony or evidence." *Id.* at 132a.

Contrary to petitioners' assertion (Pet. 24), the new ALJ never suggested that she "disbelieved [Carnes'] testimony." The only relevant legal issue that could have involved Carnes' testimony was whether Carnes "knew about" or was "recklessly indifferent to" Integrity Advance's "misrepresentations." Pet. App. 23a (citation omitted). And on that issue, the ALJ (and Director) *credited* Carnes' testimony and determined that the "testimony establishe[d] that he was aware of the

elements of [Integrity Advance's] deceptive conduct." *Id.* at 63a; see CFPB Doc. 293, at 72-73 (Aug. 4, 2020).

Second, the new ALJ did not abuse her discretion in denying additional discovery concerning petitioners' statute of limitations defense. Pet. App. 22a. The Bureau had already "complied with [p]etitioners' valid discovery requests," including by "produc[ing] the consumer complaints and related external communications about [p]etitioners." *Ibid.* And the ALJ correctly rejected petitioners' requests for the Bureau's "internal correspondence" on privilege grounds. *Ibid.* (citation omitted); see *id.* at 154a. As the court of appeals recognized, any "additional discovery would have been pointless." *Id.* at 22a.

Third, contrary to petitioners' suggestion (Pet. 30), the new ALJ did not "prevent[] them from presenting their advice-of-counsel defense," but instead "just ruled that Carnes's testimony sufficed on this point." Pet. App. 17a-18a. Before the ALJ, Carnes had argued that he could not be held liable because he had relied on outside counsel to draft the loan documents and because a state regulator conducted a limited review of the documents. *Id.* at 64a-66a. But the facts about the attorney's involvement and the state regulator's review were not disputed, and any additional testimony "would [have] merely corroborate[d] Carnes' sworn testimony." *Id.* at 18a (citation omitted). Accordingly, the ALJ and Director simply ruled that, on the undisputed facts, Carnes' defense failed as a matter of law. *Id.* at 65a.

2. Petitioners do not contend that the decision below conflicts with the decision of any other court of appeals. To the contrary, they acknowledge (Pet. 25) that the decision below "joins" post-*Lucia* decisions from two

other circuits. In *Calcutt* v. *FDIC*, 37 F.4th 293 (2022), the Sixth Circuit held that a "new hearing" under *Lucia* "need not be from scratch," so long as "the new adjudicator can independently consider the merits." *Id.* at 323; see *id.* at 320-323.[2] And in *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 941 F.3d 1320 (2019), vacated on other grounds, *United States* v. *Arthrex*, 141 S. Ct. 1970 (2021), the Federal Circuit held that a "new hearing" under *Lucia* can involve a "new panel" of validly appointed judges reviewing "the existing written record." *Id.* at 1340 (citation omitted). Similarly, in a pre-*Lucia* decision, the D.C. Circuit reached the same basic conclusion, reasoning that where "the new Board [of validly appointed officials] had full authority to make its own determination" based on a de novo "review of the record," the relevant party had received the required new "hearing before a properly appointed panel." *Intercollegiate Broad.*, 796 F.3d at 120 (quoting *Ryder*, 515 U.S. at 188).

Petitioners suggest (Pet. 11-18) that different ALJs have used different approaches when conducting new hearings. But petitioners cite only one decision in which a new ALJ held a new live oral hearing after the prior ALJ had already done so. See *In re Anderson*, No. 3-16386, 2020 WL 260282 (SEC Jan. 10, 2020). The only other examples petitioners cite (Pet. 11) as adopting the assertedly "correct" approach involved a prior default judgment without a hearing, *In re Daspin*, No. 3-16509, 2020 WL 4463315, at *1 (SEC Aug. 3, 2020), and a Social

---

[2] This Court granted a stay application in *Calcutt*, but that application raised distinct legal issues not relevant here. See *Calcutt* v. *FDIC*, No. 22A255, 2022 WL 4546340 (Sept. 29, 2022). Those distinct issues are also the subject of a pending certiorari petition in that case. See *Calcutt* v. *FDIC*, No. 22-714 (filed Jan. 30, 2023).

Security Administration (SSA) policy statement explaining that the SSA Appeals Council may grant oral argument on remand following a *Lucia* violation only if "the case raises an important question of law or policy," or "oral argument would help to reach the proper result," 84 Fed. Reg. 9582, 9583 (Mar. 15, 2019). In any event, even if there were disagreement among *ALJs or agencies* about how best to implement *Lucia*'s new hearing instruction, such disagreement would not suggest a conflict among the *courts of appeals* that could warrant this Court's review.

B. There Is No Basis For Granting Certiorari Or Holding This Petition Based On Petitioners' Forfeited Appropriations Clause Argument

Petitioners' second question presented asks whether the CFPB's funding mechanism complies with the Appropriations Clause. Pet. i, 32-39. In *CFPB* v. *Community Financial Services Association of America,* No. 22-448 (Feb. 27, 2023), this Court granted the government's petition for a writ of certiorari seeking review of a Fifth Circuit decision holding that the CFPB's funding mechanism violates the Appropriations Clause. Petitioners' arguments (Pet. 33-37) about the constitutionality of that funding mechanism are incorrect for the reasons given in the government's petition in that case.

This Court should not grant certiorari or hold this petition pending the outcome in *Community Financial Services Ass'n*. Petitioners did not raise an Appropriations Clause argument before either the Bureau or the court of appeals panel, so neither the Bureau nor the court addressed any such argument. Petitioners also failed to raise an Appropriations Clause argument in their petition for rehearing en banc. The only time that petitioners referenced the Appropriations Clause in the

proceedings below was in a notice of supplemental authority submitted *after* they had filed their rehearing petition but before it had been denied. See Pet. C.A. Letter (Oct. 26, 2022). Petitioners therefore forfeited the issue. See, *e.g.*, *United States* v. *Henry*, 852 F.3d 1204, 1209 n.3 (10th Cir. 2017) ("[T]his particular argument never found its way to us until the petition for panel rehearing so it has been forfeited."). And this Court's "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see, *e.g.*, *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam).

Petitioners' efforts to escape their forfeiture are misconceived. They claim to have argued below that "the CFPB's structure in general conflicts with the Constitution's separation of powers," Pet. 37, but in fact their Tenth Circuit brief simply argued that the CFPB Director had not validly ratified the charges against them following *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020). See Pet. C.A. Br. 13-17; Pet. App. 8a n.7 (explaining that petitioners' only challenge "to the Bureau's unconstitutional 'structure,'" which the court of appeals rejected, "relate[s] to Congress's having limited the President's authority to remove the Bureau's Director by requiring that the removal be for cause"). Petitioners raised no Appropriations Clause or separation of powers arguments against the CFPB's funding mechanism. And as a result, the court of appeals never addressed such arguments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH FROTMAN
General Counsel
STEVEN Y. BRESSLER
Deputy General Counsel
KRISTIN BATEMAN
Assistant General Counsel
KEVIN E. FRIEDL
Senior Counsel
Consumer Financial Protection Bureau

ELIZABETH B. PRELOGAR
Solicitor General

MAY 2023