NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 21-5057

In the United States Court of Appeals for the District of Columbia Circuit

PAYPAL, INC., PLAINTIFF-APPELLEE

v.

CONSUMER FINANCIAL PROTECTION BUREAU
AND ROHIT CHOPRA, IN HIS OFFICIAL CAPACITY AS DIRECTOR,
CONSUMER FINANCIAL PROTECTION BUREAU,
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 19-3700) (THE HONORABLE RICHARD J. LEON, J.)

BRIEF OF APPELLEE PAYPAL, INC.

KELLY P. DUNBAR
JAMES D. BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
WILLIAM T. MARKS
BRIAN M. LIPSHUTZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiff-appellee PayPal, Inc., makes the following certification:

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief of Appellants. Rohit Chopra, in his official capacity as Director of the Consumer Financial Protection Bureau, has automatically succeeded David Uejio, in his official capacity as Acting Director, as a Defendant-Appellant.

B. Ruling Under Review

References to the ruling at issue appear in the Brief of Appellants.

C. Related Cases

This case has not previously been before this Court. Counsel is unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

OCTOBER 27, 2021

CORPORATE DISCLOSURE STATEMENT

PayPal is a leading technology company that enables digital and mobile payments on behalf of consumers and merchants worldwide. It is a wholly owned subsidiary of PayPal Holdings, Inc. PayPal Holdings, Inc., is a publicly traded company, and no corporation holds 10% or more of its stock.

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MISCELLANEOUS

GLOSSARY OF ABBREVIATIONS

Bureau ..... Consumer Financial Protection Bureau

EFTA ..... Electronic Fund Transfer Act

STATEMENT OF JURISDICTION

This Court has jurisdiction for the reasons set forth in appellants' brief.

STATEMENT OF THE ISSUE

Whether the short-form disclosure requirements promulgated by the Consumer Financial Protection Bureau for providers of prepaid cards and digital wallets, *see* 81 Fed. Reg. 83,934 (Nov. 22, 2016), exceed the Bureau's statutory authority.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in appellants' brief.

INTRODUCTION

Plaintiff-appellee PayPal, Inc., provides digital-wallet products that primarily allow consumers to store and access credits cards, debit cards, bank accounts, and other payment credentials electronically. When a consumer wishes to make a purchase online or transfer funds to family or friends, PayPal uses the stored credentials to carry out the transaction securely, without disclosing the credentials to the recipient of the funds. PayPal's business model focuses predominantly on collecting fees from merchants who accept payment through PayPal. Consumers incur fees only in rare circumstances, and only after disclosures are provided in advance of such transactions.

The Consumer Financial Protection Bureau promulgated a regulation known as the "Prepaid Rule" (formally, Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z)) that requires PayPal to make specific disclosures in long form and in short form. PayPal's long-form disclosure must set forth (among other things) the limited fees associated with consumer use of its digital-wallet products and the qualifying conditions for those fees. The short-form disclosure is far different and far more problematic.

In the short-form disclosure, PayPal must prominently refer to certain types of fees, regardless of whether it charges those fees. When PayPal charges a type of fee that can vary in amount depending on the circumstances of a particular transaction, it must disclose only the highest possible amount under the worst-case scenario for its entire customer base and cannot explain in the short-form disclosure how a customer could lower or avoid the fee. The Prepaid Rule also severely limits the words that PayPal can use in the short-form disclosure to describe the nature of the fees, and it even mandates the layout, ordering, typeface, type size, and type color to be used.

The Bureau imposed those requirements on digital wallets such as PayPal's despite significant differences between digital wallets and the product on which the Bureau was primarily focused: general-purpose reloadable cards, also known as prepaid cards. Prepaid cards are typically purchased at brick-

and-mortar retailers and loaded with funds by the consumer. The physical size of prepaid cards provides limited space to disclose fees and other terms and conditions at the time of sale or issuance, which arguably gives rise to a need for abbreviated, formulaic disclosures with limited detail. Digital wallets, by contrast, are not subject to such tangible constraints. In addition, providers of prepaid cards mainly earn revenue by charging fees to consumers, rather than the merchants that accept prepaid cards for payment. Despite the obvious differences, the Bureau nevertheless imposed the same short-form disclosure requirements on digital wallets that it did on prepaid cards.

In this action, PayPal is challenging only the short-form disclosure requirements. PayPal is not challenging its obligation to disclose its fees to consumers in other ways; PayPal currently discloses its fees in its user agreement, in the long-form disclosure, and each time a consumer authorizes a transaction that could trigger a particular fee.

This appeal concerns the Bureau's statutory authority to promulgate the short-form requirements. The Bureau invokes the Electronic Fund Transfer Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act as authority for its imposition of the short-form disclosure requirements. But the text, structure, and legislative history of those statutes demonstrate that Congress mandated a flexible approach to disclosures for electronic fund transfers, authorizing the Bureau to promulgate only "model clauses for optional

use" by regulated entities. 15 U.S.C. § 1693b(b). The Bureau now appears to acknowledge that it lacks authority to issue mandatory disclosure clauses, and its argument that it has issued only optional clauses is belied by the exacting nature of the requirements. The district court correctly held that the short-form disclosure requirements exceeded the Bureau's statutory authority and set them aside to the extent they were mandatory. The district court's judgment should be affirmed.

STATEMENT OF THE CASE

A. Background

1. PayPal is a leading provider of digital-wallet products. 2 A.R. 5861, J.A. ___. When setting up a digital wallet with PayPal, either on its website or mobile application, the substantial majority of consumers elect to "link" one or more traditional funding instruments—such as credit cards, debit cards, and bank accounts—to the digital wallet. 2 A.R. 5862, 5868, J.A. ___, ___. PayPal securely stores the account numbers, expiration dates, and other credentials associated with those payment accounts as part of the user's digital wallet. 2 A.R. 5862, J.A. ___. When a user wishes to make a payment to a merchant or transfer funds to a friend, family member, or other third party, PayPal accesses the credentials for a particular funding instrument on the customer's behalf without the counterparty obtaining the user's sensitive information. 2 A.R. 5868, 5869, J.A. ___, ___. Some digital wallets can be used to

store funds, but they are most commonly used to store information for credit cards and other funding instruments for use online. *See* 81 Fed. Reg. 83,934, 83,943 (Nov. 22, 2016), J.A. ___; *see also* 2 A.R. 5868, J.A. ___. Only a small percentage of PayPal consumer transactions in the United States are funded by stored funds, and the average balance held in a PayPal account in the United States is only a few dollars. 2 A.R. 5868, J.A. ___.

PayPal's revenue model is based primarily on charging fees to merchants when a consumer pays with PayPal. 2 A.R. 5864, J.A. ___. Merchants that elect to use PayPal benefit from its efficiency, accessibility, and reputation for facilitating transactions while keeping payment information secure. 2 A.R. 5864, 5869, J.A. ___, ___. PayPal generally does not charge fees to consumers for the use of its digital-wallet products. 2 A.R. 5864, J.A. ___. For example, it does not charge a fee to acquire or maintain a digital wallet, make purchases from merchants using stored credentials, send money using a linked bank account, or obtain customer service. *See* 2 A.R. 5864, 5871-5872, J.A. ___, ___-___. Nor does PayPal charge a fee to transfer funds that a user receives online to a linked bank account or debit card using the standard transfer option. *See* 2 A.R. 5871-5872, J.A. ___-___. PayPal imposes a fee on consumers only in rare circumstances, such as multi-currency transactions—and then only after obtaining express consent from the user. 2 A.R. 5864, J.A. ___.

PayPal's digital-wallet offering differs significantly from prepaid cards. Those cards are used primarily to access loaded funds and may even serve as "substitutes for traditional checking accounts." 81 Fed. Reg. 83,936, J.A. ___; *see* 2 A.R. 5862, 5865, J.A. ___, ___. They are often sold in physical form at brick-and-mortar stores, where they are accompanied by packaging with details about the card and displayed on a rack. *See* 81 Fed. Reg. 83,939, J.A. ___. To use a prepaid card, consumers usually must load the card with funds in advance of a purchase, using cash or another financial account. *Id.* at 83,937, J.A. ___. In general, prepaid-card issuers earn revenue by charging consumers various fees for basic services, such as opening or maintaining an account, loading or reloading funds, receiving customer service, or receiving a written copy of their account history. 79 Fed. Reg. 77,102, 77,105 (Dec. 23, 2014), J.A. ___; 2 A.R. 552, J.A. ___.

2. The "primary objective" of the Electronic Fund Transfer Act (EFTA) is "the provision of individual consumer rights," 15 U.S.C. § 1693(b), but EFTA also imposes certain duties on financial institutions. Under EFTA, PayPal and other covered entities must disclose "[t]he terms and conditions of electronic fund transfers involving a consumer's account . . . at the time the consumer contracts for an electronic fund transfer service, in accordance with regulations of the Bureau." 15 U.S.C. § 1693c(a). Those disclosures must be "in readily understandable language," 15 U.S.C. § 1693c(a), and must cover

certain categories of information, including "any charges for electronic fund transfers" and any "fee [that] may be imposed" by an ATM operator or network. 15 U.S.C. § 1693c(a)(4), (10). EFTA lists a number of such categories, but it requires financial institutions to make a disclosure only "to the extent" an enumerated category is "applicable" to the particular account at issue. 15 U.S.C. § 1693c(a).

In EFTA, Congress mandated that the Bureau "shall issue model clauses for optional use by financial institutions" to "facilitate compliance with the disclosure requirements of section 1693c" and to "aid consumers in understanding the rights and responsibilities of participants in electronic fund transfers." 15 U.S.C. § 1693b(b). Congress thus gave financial institutions the option not to use any model clauses, although it also provided a safe harbor from civil liability for "any failure to make disclosure in proper form if a financial institution utilized an appropriate model clause." 15 U.S.C. § 1693m(d)(2). When creating model clauses, the Bureau is obligated to "take account of variations in the services and charges under different electronic fund transfer systems." 15 U.S.C. § 1693b(b). Where appropriate, it must "issue alternative model clauses for disclosure of these differing account terms." *Id.*

The Dodd-Frank Act grants the Bureau a similar power to issue model disclosures. It provides that "[a]ny final rule prescribed by the Bureau . . . requiring disclosures may include a model form that may be used at the option

of the covered person for provision of the required disclosures." 12 U.S.C. § 5532(b)(1).

3. In addition to the power to issue optional model clauses, the Bureau also possesses general rulemaking authority from two sources. *First*, EFTA delegates authority to the Bureau to "prescribe rules to carry out the [statute's] purposes." 15 U.S.C. § 1693b(a). Those rules are codified in what is known as Regulation E, which governs electronic fund transfers and includes general disclosure obligations. *See* 12 C.F.R. pt. 1005. *Second*, the Dodd-Frank Act vests the Bureau with the general power to "prescribe rules to ensure that the features of any consumer financial product or service . . . are fully, accurately, and effectively disclosed to consumers." 12 U.S.C. § 5532(a).

B. The 'Prepaid Rule'

1. In 2012, the Bureau issued an advance notice of proposed rulemaking announcing its intent to issue rules governing prepaid financial accounts. *See* 77 Fed. Reg. 30,923, 30,923 (May 24, 2012), J.A. ___. The notice sought "comment, data, and information from the public about prepaid cards." *Id.* It did not mention digital wallets.

The Bureau subsequently issued a notice of proposed rulemaking that, by its own admission, "cast a wide net." 79 Fed. Reg. 77,128, J.A ___. The Bureau proposed to regulate all "prepaid accounts," which it defined to include

digital wallets that consumers can "store funds in . . . directly" in addition to physical prepaid cards purchased at retail locations. *Id.* at 77,110, 77,129, J.A. ___, ___. Like the advance notice, however, the proposed rule focused on prepaid cards. It described several examples of how the disclosures would work, such as when a customer "takes a package containing a prepaid account access device off a J-hook in a retail store." *Id.* at 77,149, J.A. ___. The proposed rule also described focus groups and consumer testing conducted by the Bureau, in which all participants reported using prepaid cards but no mention was made of digital wallets. *Id.* at 77,121-77,123, J.A. ___-___.

The Bureau proposed that providers of both prepaid cards and digital wallets would offer two pre-acquisition disclosures to customers, one in short form and one in long form. 79 Fed. Reg. 77,148-77,149, J.A. ___-___. The long-form disclosure would "set forth all of a prepaid account product's fees and their qualifying conditions, except for accounts that consumers acquire in retail stores or orally by telephone." *Id.* at 77,149, J.A. ___. For those prepaid cards, providers "could disclose a [web address] and telephone number on the short form that a consumer would use to access the content of the long form disclosure prior to acquisition." *Id.*

The proposed short-form disclosure would contain a "'static' portion that set forth fees that must be disclosed for all prepaid account products, even

if such fees are $0 or if they relate to features not offered for a particular prepaid account product." 79 Fed. Reg. 77,148-77,149, J.A. ___-___. Providers would include a "'top-line' component highlighting four types of fees . . . at the top of the form": a periodic fee (often charged monthly or annually), a per-purchase fee, an ATM withdrawal fee, and a cash-reload fee. *Id.* at 77,149, J.A. ___. Those fees would appear "in a more prominent and larger font size than the remainder of the disclosures." *Id.* In addition, ATM balance-inquiry fees, customer-service fees, inactivity fees, and information about overdraft services and other credit features would be included in the static portion of the short-form disclosure. *Id.* The short-form disclosure would also include an "'incidence-based' portion that would list up to three additional fees that consumers most commonly incur for a particular prepaid account product." *Id.*

PayPal and other commenters objected to the application of the short-form disclosure regime to digital wallets. 2 A.R. 5862, J.A. ___. Commenters explained that disclosures designed for prepaid cards were a "fundamental mismatch in the digital-wallet context." 2 A.R. 10435, J.A. ___. They warned that, for "free products" like most digital wallets, "repeatedly disclosing '$0' or 'N/A' risks consumer confusion and imposes substantial cost without a commensurate consumer benefit, or any benefit at all." 2 A.R. 10434, J.A. ___. PayPal also explained that "[d]igital wallets do not present the same consumer risks" as prepaid cards. 2 A.R. 5865, J.A. ___.

2. On November 22, 2016, the Bureau issued the final version of the Prepaid Rule, which included the short-form disclosure requirements at issue in this appeal. 81 Fed. Reg. 83,934, J.A. ___.

The final version of the requirements addresses every aspect of the substance and form of the short-form disclosure. To begin with, financial institutions must refer to a specified list of fees. The list includes the four top-line fees (a periodic fee, a per-purchase fee, an ATM withdrawal fee, and a cash-reload fee) and three other fees (an ATM balance-inquiry fee, a customer-service fee, and an inactivity fee). *See* 12 C.F.R. § 1005.18(b)(2)(i)-(vii). Financial institutions must list those fee categories in the disclosure, "even when a particular feature is free or is not applicable to a specific prepaid account product." 12 C.F.R. pt. 1005, supp. I, cmt. 18(b)(2), ¶ 1. They must also disclose the number of additional fees charged, if any, and list up to "two fee types that generate the highest revenue from consumers," subject to certain exceptions not relevant to this appeal. 12 C.F.R. § 1005.18(b)(2)(viii)-(ix). Financial institutions must further include a statement that they "charge [x] other types of fees." 12 C.F.R. § 1005.18(b)(2)(viii)(A). When a fee is variable, the disclosure must list only the "highest fee amount" possible under the variable regime, and issuers are prohibited from explaining in the short-form disclosure when the fee would be lower than the referenced amount. 12 C.F.R. § 1005.18(b)

(3)(i), (b)(7)(iii). The Prepaid Rule also mandates that the short-form disclosure contain several other statements and the address of the Bureau's website. *See* 12 C.F.R. § 1005.18(b)(2)(x)-(xiii).

In addition to specifying the content of the short-form disclosure, the Prepaid Rule dictates the wording, organization, and typography of the disclosure. The rule requires providers to use certain terms or "substantially similar term[s]" to describe the specified fees. 12 C.F.R. § 1005.18(b)(2)(i)-(vii). The rule prescribes that the disclosures be made "in the form of a table" that is "substantially similar" to one created by the Bureau, subject to an exception not relevant here. 12 C.F.R. § 1005.18(b)(6)(iii)(A). It mandates that the top-line fees, the additional fees, and the textual statements each be "grouped together" and provided in a specified order. 12 C.F.R. § 1005.18(b)(7)(i). Further, "[a]ll text used to disclose" fees "must be in a single, easy-to-read type that is all black or one color and printed on a background that provides a clear contrast." 12 C.F.R. § 1005.18(b)(7)(ii)(A). The fees must be "bold-faced." 12 C.F.R. § 1005.18(b)(7)(ii)(B). The top-line fees must be in 15-point type size or use 21 pixels; "two-tier" amounts for ATM fees must be in at least 11-point type size or use 16 pixels; certain other fees must be in at least 8-point type size or use 11 pixels; and the remaining statements must be in at least 7-point type size or use 9 pixels. *See id.* The top-line fees may not be in a smaller type

size than the other fees, which may not be in a smaller type size than the other statements. *See id.*

With respect to digital wallets, the Bureau asserted without elaboration that it was "not convinced" that digital wallets are "fundamentally dissimilar to other types of prepaid accounts." 81 Fed. Reg. 83,968, J.A. ___. The Bureau speculated that, even if "digital wallets currently on the market" did "not charge usage fees," that state of affairs "may not hold true in the future." *Id.* The Bureau further stated, again without elaboration, that it was "not persuaded that there are sufficient factors distinguishing digital wallets from other types of prepaid accounts" to justify exempting digital wallets from the short-form disclosure requirements in particular. *Id.* at 84,015, J.A. ___. Instead, the Bureau expressed its belief that "consumers who buy these product types will benefit from the short form disclosure." *Id.*

The Bureau later promulgated amendments to the Prepaid Rule, the substance of which are not at issue here. 83 Fed. Reg. 6,364 (Feb. 13, 2018), J.A. ___. The Prepaid Rule took effect on April 1, 2019. *Id.*

PayPal complied with the Prepaid Rule and provided users with the required short-form disclosures:

Monthly Fee	Per purchase	ATM withdrawal	Cash reload
$0	**$0**	**N/A**	**N/A**
ATM balance inquiry (in-network or out-of-network)			N/A
Customer Service (automated or live agent)			$0
Inactivity			$0
We charge 3 other types of fees. Here are some of them:			
Electronic withdrawal (standard or Instant)			$0 or 1%*(max $10)
International transaction (excluding ATM withdrawal and balance inquiry)			2.5%*
*This fee can be lower depending on how and where this account is used.			
No overdraft/credit feature.			
Not FDIC insured.			
For general information about prepaid accounts, visit cfpb.gov/prepaid.			
Find details and conditions for all fees and services in the PayPal Cash Account Long Form, which can be accessed in the applicable Terms and Conditions on PayPal.com			

D. Ct. Dkt. 1, at 5, J.A. ___.

Those mandatory disclosures resulted in substantial confusion for many PayPal customers. Customers expressed alarm to PayPal that the company appeared to have "changed things" and would be charging "fees to spend [or] use [their] money." D. Ct. Dkt. 1, at 6, J.A. ___. They also complained that they did not "understand this new rule" and that the disclosures were "not clear." *Id.*

C. Proceedings Below

On December 11, 2019, PayPal filed this action against the Bureau in the United States District Court for the District of Columbia, challenging the Prepaid Rule under the Administrative Procedure Act. D. Ct. Dkt. 1, at 1-42, J.A. ___-___. The complaint alleged that the Bureau erred in a number of respects in adopting the Prepaid Rule. Specifically, the complaint alleged that the Bureau exceeded its statutory authority under EFTA and the Dodd-Frank Act

by promulgating mandatory disclosure clauses; that the Bureau's decision to subject digital wallets to the Prepaid Rule was arbitrary and capricious; that the Bureau's cost-benefit analysis supporting the rule was arbitrary and capricious; and that the Prepaid Rule violated the First Amendment by imposing a content-based speech restriction. *Id.* at 31-32, 34-41, J.A. ___-___, ___-___. The complaint also alleged that the Bureau exceeded its statutory authority by imposing a prohibition in the Prepaid Rule on the linking of credit cards to prepaid accounts for 30 days after registration. *Id.* at 32-34, J.A. ___-___.

The parties cross-moved for summary judgment, and the district court granted summary judgment for PayPal. D. Ct. Dkt. 27, at 1-20, J.A. ___-___. The district court first concluded that the Bureau unambiguously exceeded its statutory authority by promulgating the short-form disclosure requirements. It reasoned that EFTA requires the Bureau to "issue model clauses that providers may utilize," but that "the plain text does not permit the Bureau to issue mandatory clauses." *Id.* at 9, J.A. ___ (emphasis omitted). It also explained that the legislative history demonstrated that "Congress intended to provide flexibility to the providers by ensuring that the Bureau issued *example* disclosure clauses that the providers could utilize (and limit liability under the safe harbor provision [of EFTA]) or ignore (and instead issue their own disclosure at their own risk)." *Id.* at 10, J.A. ___.

The district court reasoned that defendants' claim of authority to impose mandatory disclosure clauses "ignores the other provisions within the statute that speak specifically to how the Bureau can issue disclosures and how providers must use them." D. Ct. Dkt. 27, at 11, J.A. ___ (emphasis omitted) (citing 15 U.S.C. §§ 1693b(b), 1693m(d)(2)). After applying the canons of statutory interpretation, the district court concluded that "Congress's specific requirement that the Bureau issue *optional, model* clauses governs the Bureau's general rulemaking authority" and its authority to require the disclosure of the "'terms and conditions' of electronic funds transfers" under EFTA. *Id.* at 11-12, J.A. ___-___ (quoting 15 U.S.C. § 1693c). For similar reasons, the district court rejected defendants' reliance on the general grant of rulemaking authority in the Dodd-Frank Act. *Id.* at 12-13, J.A. ___-___.

The district court next determined that the short-form disclosure requirements in the Prepaid Rule imposed mandatory disclosure clauses. The district court stated that the disclosure requirements were "*mandatory*" and "provide[d] the specific form, structure, and contents of disclosures that providers *must* use." D. Ct. Dkt. 27, at 14, J.A. ___. Because the short-form disclosure requirements exceeded the Bureau's statutory authority, the district court vacated the Prepaid Rule "to the extent that the short-form disclosure requirement provides [for] mandatory disclosure." *Id.* at 20, J.A. ___.

With respect to PayPal's other claims, the district court vacated the 30-day restriction on linking credit cards on the ground that it exceeded the Bureau's statutory authority under the Truth in Lending Act. D. Ct. Dkt. 27, at 19-20, J.A. ___-___. In light of its holdings, the district court did not reach PayPal's challenges to the Bureau's decision to apply the Prepaid Rule to providers of digital wallets, to the Bureau's cost-benefit analysis, or to the constitutionality of the rule under the First Amendment. *Id.* at 20 n.9, J.A. ___ n.9.

The Bureau appealed the judgment of the district court as to the short-form disclosure requirements; it has not challenged the district court's vacatur of the credit-linking restriction. *See* Br. 20 n.1.

SUMMARY OF ARGUMENT

The district court correctly concluded that the Bureau exceeded its statutory authority under EFTA and the Dodd-Frank Act when it promulgated the short-form disclosure requirements.

I. A. EFTA speaks directly to the Bureau's limited authority to issue disclosure clauses by requiring that the Bureau issue "model clauses for optional use." 15 U.S.C. § 1693b(b). As a textual matter, the obligation to issue a model clause for optional use forecloses the power to issue a model clause for mandatory use; indeed, the Bureau does not appear to argue otherwise. Congress further made clear its intent that the Bureau must provide financial institutions with flexibility by requiring the Bureau to issue multiple clauses

where appropriate and by providing a safe harbor for financial institutions that choose to use a model clause. A power to issue mandatory disclosure clauses would be at odds with the plain text and structure of EFTA.

The Bureau argues that negative inferences about statutory text are unreliable. But PayPal's argument does not rest on the negative-implication canon; it rests instead on the logical incompatibility of optional clauses (which Congress required) and mandatory clauses (which it did not).

The legislative history confirms that Congress deliberately delegated the power to issue only optional clauses, not mandatory ones. An earlier draft of what became EFTA merely authorized, and did not require, the issuance of model clauses. And there would have been no reason for Congress specifically to authorize the issuance of optional model clauses in that draft if the general rulemaking power included the power to issue optional clauses, let alone mandatory ones. The Bureau responds that Congress sought to provide certainty to financial institutions, but it is clear that flexibility was an equally important goal—and one that is inconsistent with mandatory clauses.

B. Basic principles of statutory interpretation require this Court to construe the general grant of rulemaking power in Section 1693b(a)(1) of EFTA so that it does not conflict with the obligation to issue optional model clauses in Section 1693b(b). To harmonize those two provisions, the specific

obligation to issue only optional model clauses in Section 1693b(b) must control the more general grant of authority in Section 1693b(a)(1).

The Bureau no longer appears to dispute that EFTA precludes it from adopting mandatory clauses—thereby effectively conceding that the provision requiring it to issue optional model clauses is logically incompatible with a power to issue mandatory clauses. Instead, the Bureau contends that it has not issued mandatory clauses as part of the short-form disclosure requirements because it has regulated only "formatting" and "content," not "wording." But that position is inconsistent with the Bureau's own use of the word "clause" in the Prepaid Rule and official commentary.

In any event, no matter how "clause" is defined, the Prepaid Rule imposes mandatory disclosure clauses. It specifies the fees that may and may not be listed. It severely restricts the words that can be used to describe those fees and prohibits unauthorized explanations of those fees. More drastically, it mandates that only the highest possible fees under worst-case scenarios be disclosed, and it bars issuers from explaining in the short-form disclosure the circumstances in which fee amounts would be lower. It specifies that the disclosure must be in a table. It specifies the ordering of the fees. It even specifies the type size, weight, and colors to be used. Taken together, the requirements in the Prepaid Rule go beyond an optional disclosure clause and create

a collection of mandatory requirements and prohibitions regarding the disclosure of information.

What is more, the Bureau's assertion of authority to issue mandatory clauses appears to be unprecedented. The only two purported examples it offers are one in which EFTA specifically contemplates mandatory disclosure forms and another in which the Bureau conditions an exemption from a general prohibition on the provision of a particular disclosure. Neither of those examples is analogous to the blanket short-form disclosure requirements in the Prepaid Rule.

C. The Bureau also invokes a provision of EFTA specifying certain "terms and conditions" that financial institutions must disclose "to the extent applicable." 15 U.S.C. § 1693c(a). Just as the general grant of rulemaking power must be read consistently with the obligation to create model clauses for optional use in Section 1693b(b), Section 1693c(a) cannot be read to authorize the issuance of mandatory disclosure clauses. Indeed, the Prepaid Rule's requirement to refer to inapplicable fees is contrary to the statutory language about making disclosures "involving a consumer's account . . . to the extent applicable." 15 U.S.C. § 1693c(a). EFTA unambiguously does not authorize the short-form disclosure requirements promulgated by the Bureau.

D. Because the text of EFTA is unambiguous, the Bureau is not entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense*

Council, Inc., 467 U.S. 837 (1984). But even if the statute were ambiguous, deference would be inappropriate because the Bureau's interpretation is a new one adopted in the course of litigation that has no basis in the Bureau's previous position. Further, the content-based speech regulations in the short-form disclosure requirements raise serious constitutional concerns that would compel the Court to interpret any ambiguity in favor of PayPal.

II. The Bureau further invokes its general rulemaking power under Section 5532(a) of the Dodd-Frank Act. But that argument fails for the same reason: EFTA requires the Bureau to issue optional model disclosures, and interpreting the Dodd-Frank Act to permit the promulgation of mandatory disclosure clauses would conflict with the more specific prohibition in EFTA. If the Bureau's reading of Section 5532(a) were correct, moreover, that seemingly innocuous grant of gap-filling rulemaking power would allow it to ignore congressional limitations in a wide range of other statutes administered by the Bureau. Like the provisions of EFTA relied on by the Bureau, Section 5532(a) unambiguously does not authorize the promulgation of the short-form disclosure requirements.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant a motion for summary judgment de novo. *See, e.g.*, *Genus Medical Technologies LLC* v. *FDA*,

994 F.3d 631, 636 (D.C. Cir. 2021). This Court "owe[s] an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,'" it is "unable to discern Congress's meaning." *SAS Institute, Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

ARGUMENT

The Bureau invokes three provisions in two different statutes as authority to promulgate the short-form disclosure requirements. None of those provisions empowers the Bureau to take the sweeping step it did in the Prepaid Rule. Instead, the statutory text, structure, and legislative history establish that the Bureau has power to issue only optional model clauses, not mandatory ones. By dictating the precise details of financial institutions' disclosures—including the wording and even the size of the type—the Bureau exceeded its authority under both EFTA and the Dodd-Frank Act. The district court thus correctly held that the short-form disclosure requirements are unlawful. Its judgment setting aside those requirements, to the extent they are mandatory, should be affirmed.

I. EFTA DOES NOT AUTHORIZE THE CONSUMER FINANCIAL PROTECTION BUREAU TO PROMULGATE THE SHORT-FORM DISCLOSURE REQUIREMENTS

The Bureau relies on EFTA as its primary source of authority to promulgate the short-form disclosure requirements. Specifically, the Bureau invokes two provisions of EFTA: the general rulemaking power in Section 1693b(a)(1) and the list of statutorily required disclosures in Section 1693c(a). As the district court correctly concluded, neither provision vests the Bureau with authority to promulgate the mandatory clauses contained in the Prepaid Rule.

A. EFTA Limits The Bureau To Issuing 'Model Clauses For Optional Use'

The text and structure of EFTA unambiguously demonstrate that the Bureau does not have general authority to issue mandatory disclosure clauses. Instead, the Bureau's authority is limited to issuing optional model disclosure clauses absent a specific statutory provision permitting mandatory clauses. While resort to legislative history is unnecessary given the clarity of the statutory text, the history removes any doubt that Congress intended the Bureau to have the power to issue only optional model clauses.

1. The plain text of EFTA establishes that the Bureau generally lacks the statutory authority to issue mandatory disclosure clauses in connection with the disclosure requirements under 15 U.S.C. § 1693c.

a. Section 1693b(b) directs that the "Bureau shall issue model clauses for *optional* use by financial institutions to facilitate compliance with the disclosure requirements of [S]ection 1693c." 15 U.S.C. § 1693b(b) (emphasis added). If a disclosure clause is mandatory, then it cannot, by definition, be "optional." *See American Heritage Dictionary* 923 (1973) (defining "optional" as "[l]eft to choice; not compulsory or automatic"); *Webster's Third New International Dictionary* 1585 (1971) (defining "optional" as "left to the discretion of the one concerned; not compulsory or obligate").

As the Supreme Court has explained when interpreting other statutes, the "discretionary/mandatory distinction" is one that has "practical significance" in the interpretation and application of statutory provisions. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 444 (1987); *see also Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 223 n.2 (2003). So too here: the obligation to issue optional model clauses to facilitate compliance with Section 1693c is incompatible with a power to issue mandatory clauses to facilitate compliance with Section 1693c. If the Bureau had the power to issue mandatory disclosure clauses for use in complying with Section 1693c, then it would have the power not to issue optional clauses at all. But the Bureau does not have that power; it cannot simply ignore Congress's command to issue "model clauses for optional use" and thereby override Section 1693b(b). Congress could not have intended for the Bureau to have the power to construe EFTA "in a way that

completely nullifies textually applicable provisions meant to limit [the Bureau's] discretion." *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 485 (2001); *see*, *e.g.*, *Humane Society* v. *Zinke*, 865 F.3d 585, 602 (D.C. Cir. 2017).

The rest of Section 1693b(b) confirms that Congress intended for the Bureau to provide financial institutions with the flexibility of optional model disclosure clauses, not to tie their hands with a one-size-fits-all mandatory clause. Section 1693b(b) specifically requires the Bureau to "take account of variations in the services and charges under different electronic fund transfer systems and, as appropriate, . . . issue alternative model clauses for disclosure of these differing account terms." 15 U.S.C. § 1693b(b). PayPal does not contend, as the Bureau suggests (Br. 44-45), that this language by itself forbids mandatory disclosure clauses. But it does reflect a congressional desire to give financial institutions flexibility in how they comply with EFTA. *See* Br. of Appellants 44. A mandatory disclosure clause necessarily undermines the flexibility that Congress built into the structure of the Act—flexibility that is important given the significant differences among accounts covered by the Prepaid Rule. *See* pp. 4-6, *supra*.

Courts "construe statutes, not isolated provisions," *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (citation omitted), and Section 1693m confirms that Congress

did not give the Bureau authority to issue mandatory clauses. Under that provision, model clauses play an important but limited role in the liability scheme, consistent with the flexibility that an optional clause affords. Section 1693m initially provides that "any person who fails to comply with any provision of this subchapter with respect to any consumer . . . is liable" for damages. 15 U.S.C. § 1693m(a). But Section 1693m then creates a safe harbor from liability for "any failure to make disclosure in proper form" for financial institutions that chose to "utilize[] an appropriate model clause issued by the Bureau." 15 U.S.C. § 1693m(d)(2). EFTA thus envisions a particular role for "model clauses" as a tool for protecting good-faith attempts at compliance with Section 1693c, while providing a financial institution with the flexibility not to adopt a model clause if it so chooses. It is inconsistent with that statutory design to assume that Congress delegated to the Bureau the power to prescribe mandatory clauses.

This Court has set aside a regulation promulgated under the Clean Air Act for a similar reason. In *American Petroleum Institute* v. *EPA*, 52 F.3d 1113 (1995), the Court considered the validity of a regulation promulgated by EPA that mandated the use of certain additives in gasoline. *Id.* at 1115. EPA purported to act pursuant to its authority under the first sentence of 42 U.S.C. § 7545(k)(1)(A), which broadly requires EPA to promulgate regulations "establishing requirements for reformulated gasoline to be used in gasoline-

fueled vehicles." 42 U.S.C. § 7545(k)(1)(A). The mandated additives, however, could increase emissions of volatile organic compounds during the high-ozone season, and the second sentence of Section 7545(k)(1)(A) specifically dictates that EPA "shall require" the "greatest reduction in emissions of ozone forming volatile organic compounds (during the high ozone season)," taking certain specified considerations into account. *Id.*

The Court held that EPA's regulation violated the plain text of Section 7545(k)(1)(A). *American Petroleum Institute*, 52 F.3d at 1119. The Court explained that "EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area." *Id.* The Court elaborated that EPA was not permitted to "uncouple the first sentence of Section 7545(k)(1) from the rest of the section in order to expand its authority beyond the aims and limits of the section as a whole." *Id.* at 1119-1120. As the Court's reasoning makes clear, an agency may not take an action that is logically incompatible with a statutory duty to take another action. Here, by issuing mandatory clauses in the face of a congressional command for optional clauses, the Bureau did precisely what *American Petroleum Institute* forbids.

b. As the district court recognized, PayPal is not invoking the *expressio unius* canon of statutory interpretation to make an argument about negative inferences. Instead, PayPal is invoking the simple logic that, if Congress

intended to afford flexibility to financial institutions, it could not have intended to give the Bureau the power to take that flexibility away. *See* D. Ct. Dkt. 27, at 10 n.2, J.A. ___ n.2. In other words, Congress did more than grant power to do one thing and remain silent about the power to do another thing—it required the Bureau to issue model clauses for optional use, which is logically incompatible with a power to issue mandatory clauses. *See* pp. 24-27, *supra*.

For that reason, this Court's cases cited by the Bureau (Br. 38-40) that apply the *expressio unius* canon are all inapposite. Each of those cases involves a situation in which Congress spoke to one issue but not another, logically unrelated one.

For example, in *CSX Transportation, Inc.* v. *Surface Transportation Board*, 754 F.3d 1056 (2014), the Court rejected the inference that a statute mandating the use of a simplified procedure in some cases precluded the agency from using a simplified procedure in other cases. *See id.* at 1063-1064. Likewise, in *FTC* v. *Tarriff*, 584 F.3d 1088 (2009), the Court rejected the inference that a rule requiring the use of stenographic transcription at a hearing precluded the simultaneous use of video transcription. *See id.* at 1090-1091. So too in *Catawba County* v. *EPA*, 571 F.3d 20 (2009), the Court reasoned that a statutory requirement to apply a presumption in some contexts did not preclude the application of the presumption in other contexts. *See id.* at 36. Again in *Children's Hospital Association of Texas* v. *Azar*, 933 F.3d 764 (2019), *cert.*

denied, 141 S. Ct. 235 (2020), the Court explained that a rule requiring the agency to consider certain payments did not preclude it from considering other payments. *See id.* at 770-771. And in *Cheney Railroad Co.* v. *Interstate Commerce Commission*, 902 F.2d 66 (1990), the Court concluded that a statutory requirement to consider multiple applications in one circumstance did not preclude the agency from accepting multiple applications in another. *See id.* at 68-69. None of those cases addresses the situation presented here, where Congress spoke to an issue and an agency asserted the power to act in a way "inconsistent with the mandated performance." *Tarriff*, 584 F.3d at 1091. Accordingly, they do not stand for the unlikely proposition the Bureau would need to establish: namely, that a requirement to take one action permits a conflicting action.

2. Because the statutory text is clear, there is no need to consider legislative history. *See American Fuel & Petrochemical Manufacturers* v. *EPA*, 3 F.4th 373, 383 (D.C. Cir. 2021), *cert. pending*, No. 21-519 (filed Oct. 4, 2021). To the extent that the Court considers it, the legislative history confirms that Congress deliberately gave the Bureau power to issue only optional clauses.

As the Bureau has itself recounted (Br. 36-37), an earlier draft of the law would have permitted—but not required—the creation of model clauses. *See* S. 2546, 95th Cong. § 904(b) (1978). At the urging of financial institutions, the

Senate amended the bill to require that the Bureau's predecessor in administering EFTA issue model clauses. *See* 95 Cong. Rec. 8,283 (Mar. 23, 1978). The committee report emphasized the "optional" nature of the model clauses. *See* S. Rep. No. 95-915, at 4 (1978). The statute's directive that the model clauses be "optional" is thus not an ancillary element or careless insertion. Rather, it was the product of deliberate legislative choice—one that afforded discretion to financial institutions to choose the manner in which they conform to statutory disclosure requirements.

That drafting history makes the Bureau's lack of authority to issue mandatory clauses more apparent in another way as well. As discussed above, the earlier draft of what became EFTA did not require the issuance of model clauses. That draft instead merely authorized their issuance, even though the draft also delegated general rulemaking authority. *See* S. 2546, 95th Cong. § 904(a)-(b) (1978). To state the obvious, if Congress had intended to include authority to issue model clauses within the Bureau's general rulemaking powers, there would have been no need to delineate such authority specifically. *See Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004). And if the specific authorization for optional model clauses was in fact necessary, then *a fortiori* the Bureau would need specific authorization to issue mandatory clauses. At no point, however, did Congress grant such specific authorization to issue the short-form disclosure requirements.

It is also fair to infer from the lack of authorization to issue mandatory clauses in a draft that authorized (but did not require) optional clauses that Congress did not intend for the Bureau to have that power. Issuing "optional" and "mandatory" clauses are closely related concepts, such that a statute authorizing the former without mentioning the latter reflects a "deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Thus, while EFTA's final statutory language obviates any need for PayPal to rely on the *expressio unius* canon because Congress *required* the Bureau to issue optional model clauses, applying that canon to the earlier draft confirms that Congress never intended for the Bureau to have the power to issue mandatory clauses.

The Bureau mentions briefly another bill that prohibited "prescrib[ing] regulations to carry out" anything other than certain enumerated provisions, which did not include the disclosure requirements. Br. 36 n.4 (quoting H.R. 12193, 95th Cong. § 918 (1978)). But that limitation appears to confirm the district court's conclusion that the general rulemaking power was not meant to abolish all limitations on agency power contained elsewhere in the statute. *See* D. Ct. Dkt. 27, at 11-12, J.A. ___-___.

The Bureau has no real response to the use of the word "optional" in the text and legislative history, other than to fall back on the congressional goal of "certainty" for financial institutions. *See* Br. 37. PayPal does not dispute that

certainty was important to Congress. But the text, structure, and legislative history of EFTA all make clear that flexibility was equally important. The obligation to issue "model clauses for optional use," 15 U.S.C. § 1693b(b), forecloses a power to issue mandatory short-form disclosure clauses.

B. Section 1693b(a)(1) Does Not Authorize The Short-Form Disclosure Requirements

The Bureau contends that it has power to issue mandatory disclosure clauses pursuant to EFTA's general grant of rulemaking power in Section 1693b(a)(1), which vests the Bureau with authority to "prescribe rules to carry out the purposes" of EFTA. 15 U.S.C. § 1693b(a)(1). The Bureau's interpretation of that general rulemaking authority would make the power to issue optional model clauses pointless and the congressionally imposed limitation in Section 1693b(b) toothless. In accordance with basic principles of statutory interpretation, this Court should give effect to the more specific provision and not permit the general rulemaking power in subsection (a)(1) to render the limit in subsection (b) superfluous.

1. Two fundamental rules of statutory interpretation require this Court to read the general grant in subsection (a)(1) of Section 1693b in light of the limitation in subsection (b). The first is the "basic interpretive canon that a statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Genus Medical Technologies LLC* v. *FDA*, 994 F.3d 631, 638 (D.C. Cir. 2021) (alteration in

original; internal quotation marks and citation omitted). The second is the "well established canon of statutory interpretation . . . that the specific governs the general." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks and citation omitted). As the Supreme Court has explained, when "a general authorization and a more limited, specific authorization exist side-by-side," the "terms of the specific authorization must be complied with." *Id.* That rule "is particularly appropriate where . . . the provisions at issue are interrelated and closely positioned as parts of the same statutory scheme." *Genus*, 994 F.3d at 638 (internal quotation marks and citation omitted).

Those principles squarely govern the relationship between subsections (a)(1) and (b). The provisions are "interrelated and closely positioned as parts of" EFTA. *Genus*, 994 F.3d at 638. Subsection (a)(1) contains a "general rulemaking authority," Br. of Appellants 40, and subsection (b) deals specifically with the Bureau's power to issue "model clauses for optional use," 15 U.S.C. § 1693b(b). Both provisions thus authorize action by the Bureau, but subsection (b) places more specific limits on the agency's power. If the provisions were read in isolation, the "specific provision [would be] swallowed by the general one." *RadLAX*, 566 U.S. at 645. Accordingly, Section 1693b(b) must control.

This Court has made clear that the bare invocation of a "general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Colorado River Indian Tribes* v. *National Indian Gaming Commission*, 466 F.3d 134, 139 (2006). "Merely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation." *New York Stock Exchange LLC* v. *SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020). An exercise of a general rulemaking power is invalid if it is exercised "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Id.* at 546 (citation omitted).

Here, EFTA reflects an administrative structure designed to preserve flexibility for financial institutions and to impose limitations on the Bureau's authority. *See* pp. 24-27, 29-32, *supra*. It would betray, rather than "carry out," EFTA's design, 15 U.S.C. § 1693b(a)(1), to ignore those structural limitations by reading the general grant of rulemaking authority in isolation.

2. In response, the Bureau contends that the invocation of its general rulemaking authority under subsection (a)(1) of Section 1693b does not conflict with the requirement to issue optional model clauses under subsection (b), because the short-form disclosure requirements do not mandate the use of "any specific *wording*." Br. 32 (emphasis added). Instead, the Bureau argues, the short-form disclosure requirements impose only "mandatory requirements for

disclosures' *contents*" and "some aspects of their *formatting*." Br. 34 (emphasis added). In the Bureau's apparent view, the word "clauses" in subsection (b) thus refers only to particular wording and not the substance, format, or any other aspect of a disclosure. And by leaving any modicum of choice in the wording, the Bureau concludes, it has not issued "clauses" within the meaning of EFTA. Notably, the Bureau did not raise that argument in the district court. And in making the argument, the Bureau appears to concede that it lacks the authority to promulgate mandatory "clauses."

The Bureau does indeed lack authority to promulgate mandatory disclosure "clauses," *see* pp. 24-32, *supra*, but the Bureau's conclusion that it has not mandated disclosure "clauses" is flawed. As an initial matter, the Bureau's own rule and official commentary make clear that it has issued "clauses." The Prepaid Rule refers to various parts of the short-form disclosure as "clause[s]." *See* 12 C.F.R. § 1005.18(b)(2)(viii), (x), (xiii). The official commentary on the Prepaid Rule similarly refers to "model disclosure clauses" and explains that the use of "appropriate clauses"—a category that includes the short-form disclosure requirements—"will protect a financial institution . . . from liability" under the safe harbor in Section 1693m. 12 C.F.R. pt. 1005, Supp. I, cmt. app. A, ¶ 2. And that safe harbor applies to financial institutions that have "utilized an appropriate model *clause* issued by the Bureau." 15 U.S.C. § 1693m(d)(2) (emphasis added). The Bureau thus recognized that the

short-form disclosure requirements constitute "clauses" for purposes of EFTA.

Even setting that evidence aside, it is clear that the Bureau promulgated mandatory disclosure clauses that leave PayPal and other financial institutions with no meaningful discretion. The Bureau appears to concede (Br. 34) that it has mandated the exact content—though not the "wording," it insists—of the short-form disclosure. But PayPal does not dispute that the Bureau can require financial institutions to disclose certain information, as long as it stops short of requiring the use of mandatory clauses.

Here, the Bureau has gone far beyond simply requiring content. The short-form disclosure requirements plainly restrict the wording in the disclosure, notwithstanding the Bureau's argument to the contrary (Br. 32-34). With respect to the "static" portion of the disclosure, the rule specifies a set of terms to describe the fees that must appear. *See* 12 C.F.R. § 1005.18(b)(2)(i)-(vii). It requires providers to use those terms or "substantially similar ones." *Id.* And the rule requires those terms in every short-form disclosure, regardless of whether a particular provider charges a particular fee to a particular consumer. *See* 12 C.F.R. pt. 1005, supp. I, cmt. 18(b)(2), ¶ 1.

With respect to the rest of the disclosure, the rule mandates a statement about any additional fees charged and generally requires a company to disclose the two highest-revenue fees it collects. *See* 12 C.F.R. § 1005.18(b)(2)(viii). When one of those fees has a variable amount, a company is required to list only the "highest amount." 12 C.F.R. § 1005.18(b)(3)(i).

The rule does not stop at mandating particular wording, either. It also limits the wording that a financial institution can use: most notably, by "not permit[ting] a financial institution to describe in the short form disclosure the specific conditions under which a fee may be reduced or waived." 12 C.F.R. pt. 1005, supp. I, cmt. 18(b)(3)(i). The result is that PayPal must refer to fees that it does not charge in words that are chosen by the Bureau (or that are "substantially similar"), yet it cannot explain how consumers may avoid incurring fees or minimize fees that it is required to present.

The Bureau places great weight on the fact that companies can use words that are "substantially similar" to the ones specified by the Prepaid Rule, but that argument distorts the meaning of the phrase "substantially similar." *See* Br. 33 (citing 12 C.F.R. § 1005.18(b)(2)(i)-(viii), (b)(2)(x)-(xiv), (b)(3)(i)). Items are "substantially similar" when "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them." *Sturdza* v. *United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002). That

is, two items are "substantially similar" when there are only "immaterial variations" between them. *Bateman* v. *Mnemonics, Inc.*, 79 F.3d 1532, 1543 n.25 (11th Cir. 1996) (quoting *Nichols* v. *Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.)). The Bureau's allowance for "substantially similar" wording permits immaterial variations, not meaningful alternatives.

The Bureau's examples of "substantially similar" words illustrate the implausibility of its contention that the short-form disclosure requirements do not constitute the issuance of mandatory clauses. One example of a purported option is that, instead of "us[ing] the specified clause—'Your funds are not FDIC insured'—[a disclosure] could instead say something like 'Not covered by FDIC insurance' or 'No FDIC insurance.'" Br. 33. Financial institutions also have the meaningless options to use "ATM balance look-up," "Check balance at ATM," or "ATM balance inquiry"; "client service" or "customer service"; "real person" or "live agent"; and "reload with cash" or "cash reload." *Id.* As these examples demonstrate, a financial institution has no meaningful discretion under the short-form disclosure requirements.

The Bureau's contention (Br. 34) that the short-form disclosure requirements merely regulate "some aspects" of formatting also strains credulity. To the contrary, the rule dictates the organization of the short-form disclosure clauses in painstaking detail, down to the pixel.

The requirements begin with the overall layout of the disclosure. It must be "in the form of a table." 12 C.F.R. § 1005.18(b)(6)(iii). In that table, the top-line fees "must be grouped together and provided in th[e] order" listed in the regulation. 12 C.F.R. § 1005.18(b)(7)(i)(A). The remaining fees must in turn be "grouped together and provided in th[e] order" listed in the regulation. *Id.* And the miscellaneous statements at the bottom likewise "must be generally grouped together and provided in th[e] order" listed in the regulation. *Id.*

The Prepaid Rule even regulates the typeface, type weight, type size, and type color of the disclosure—in excruciating detail. The text "must be in a single, easy-to-read type that is all black or one color and printed on a background that provides a clear contrast." 12 C.F.R. § 1005.18(b)(7)(ii)(A). All fees must be "in bold-faced type." 12 C.F.R. § 1005.18(b)(7)(ii)(B)(1). The top-line fees must be in 15-point type size or use 21 pixels; "two-tier" amounts for ATM fees must be in at least 11-point type size or use 16 pixels; the remaining fees must appear in at least 8-point type size or use 11 pixels; and the remaining statements must be in at least 7-point type size or use 9 pixels. *See id.* The top-line fees may not be in a smaller type size than the other fees, and the other fees may not be in a smaller type size than the miscellaneous statements. *See id.* The end result of those specifications, in combination with the requirements on wording and content, is a set of mandatory clauses.

3. That the Bureau issued mandatory model clauses becomes even more apparent when the Prepaid Rule is compared with the version of Regulation E that it amended. With two exceptions that are plainly distinguishable, the previous version of Regulation E did not mandate particular wording (or "substantially similar" terms) and mandatory formatting (or "substantially similar" formatting). It simply required that financial institutions disclose certain *categories* of information, without specifying that particular words or terms be used. *See*, *e.g.*, 12 C.F.R. §§ 1005.7(b), 1005.18(c)(1)(i) (2019); *see also* 12 C.F.R. pt. 1005, app. A (2019) (providing model disclosures). When referring to model disclosures, the previous version of Regulation E provided that companies "may" use the model, not that they "shall" use the model. *See* 12 C.F.R. § 1005.18(c)(1)(i) (2019). In the Prepaid Rule, by contrast, the Bureau used the mandatory "shall." *See* 12 C.F.R. § 1005.18(b)(6)(iii)(A). Those textual variations demonstrate that Prepaid Rule prescribes mandatory clauses.

The Bureau seeks to downplay the changes wrought by the Prepaid Rule by arguing (Br. 45) that Regulation E already contained two provisions that seem to mandate disclosures in a specific form: the provisions governing error-resolution notices and overdraft-service notices. *See* 12 C.F.R. §§ 1005.8 (b), 1005.17(d). But those provisions simply highlight the unprecedented nature of the Prepaid Rule's mandatory clauses.

First, EFTA specifically contemplates that the Bureau will issue mandatory model error-resolution notices. Section 1693c(a)(7) provides that financial institutions must disclose "a summary, *in a form prescribed by regulations of the Bureau*, of the error resolution provisions of section 1693f of this title and the consumer's rights thereunder." 15 U.S.C. § 1693c(a)(7) (emphasis added). The phrase "in a form prescribed by regulations of the Bureau" is absent from the description of every other "term and condition" that must be disclosed under Section 1693c(a). *See* 15 U.S.C. § 1693c(a)(1)-(6), (8)-(10). The error-resolution provision is thus the exception that proves the rule: the Bureau may issue a mandatory model clause only where it has specific statutory authorization that overrides the more general requirement to issue model clauses in Section 1693b(b). The Bureau's attempt in the Prepaid Rule to treat all other "terms and conditions" as if they were error-resolution notices is unprecedented and contrary to law.

Second, the Bureau's invocation of the regulatory provision covering overdraft-service notices fails because it does not require a general mandatory disclosure by all participants in the industry. Both before and after the promulgation of the Prepaid Rule, Regulation E has generally prohibited the collection of overdraft-service fees. *See* 12 C.F.R. § 1005.17(b)(1). There is a limited exception to that blanket prohibition for institutions that choose to provide a specific notice. *See* 12 C.F.R. § 1005.17(b)(1)(i), (d). Financial institutions

are thus not generally required to provide an overdraft-service notice, let alone a particular model notice. The structure of this regulatory scheme—a condition tied to an exception rather than a mandate—confirms the unprecedented nature of the Prepaid Rule. Indeed, overdraft-service notices do not even appear in EFTA's list of required "terms and conditions." *See* 15 U.S.C. § 1693c(a). In "the circumstances of this case"—most notably the text, context, and history of the statute and Regulation E—it is "rather telling" that the CFPB's assertion of power is unprecedented. *Loving* v. *IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014); *see also Bankamerica Corp.* v. *United States*, 462 U.S. 122, 130-131 (1983).

The short-form disclosure clauses spelled out in the Prepaid Rule are plainly mandatory. Accordingly, the requirements unambiguously exceed the Bureau's authority under subsection (a)(1) of Section 1693b, as limited by the obligation to issue only model clauses for optional use in subsection (b).

C. Section 1693c(a) Does Not Authorize The Short-Form Disclosure Requirements

Section 1693c(a), which the Bureau also invokes, does not alter the analysis. That provision mandates that the "terms and conditions of electronic fund transfers involving a consumer's account shall be disclosed at the time the consumer contracts for an electronic fund transfer service, in accordance with regulations of the Bureau." 15 U.S.C. § 1693c(a). The disclosures must be "in readily understandable language." *Id.* They must also contain, "to the

extent applicable," certain fees and other information, including "any charges for electronic fund transfers or for the right to make such transfers." 15 U.S.C. § 1693c(a), (a)(4). Section 1693c(a) is not an independent grant of rulemaking authority: it merely directs that financial institutions must comply with "regulations of the Bureau," which are promulgated pursuant to the general rulemaking power in Section 1693b(a)(1).

Unsurprisingly, then, the Bureau's reliance on Section 1693c(a) presents precisely the same problems as its reliance on Section 1693b(a)(1). Section 1693c(a) must be read in light of the specific requirement in Section 1693b(b) to issue model clauses for optional use. For the reasons discussed above, therefore, the Bureau's authority under Section 1693c(a) does not authorize the promulgation of the short-form disclosure requirements. *See* pp. 32-42, *supra*.

If anything, the Bureau's lack of authority to issue a mandatory disclosure clause is even clearer when the language of Section 1693c(a) is taken into account. Financial institutions must disclose the "terms and conditions of electronic fund transfers *involving a consumer's account*," not a laundry list devised by the Bureau. 15 U.S.C. § 1693c(a) (emphasis added). And those terms and conditions must be disclosed only "to the extent applicable." *Id.* PayPal has complied with those requirements, as implemented in Regulation E before

the promulgation of the Prepaid Rule. Under the Prepaid Rule, however, PayPal is required to "disclose" prominently several fees that it does not even charge digital-wallet users. *See* 12 C.F.R § 1005.18(b)(2)(ii)-(iv); *see also* 2 A.R. 5880, J.A. ___. Far from supporting the Bureau's position, therefore, Section 1693c(a) affirmatively undermines it.

D. Deference To The Bureau's Interpretation Of EFTA Is Unwarranted

In the alternative, the Bureau asks this Court to give *Chevron* deference to its interpretation of Sections 1693b and 1693c(a). The Court should decline that request.

1. To begin with, deference is unwarranted because the text is "clear enough" on its own. *Wisconsin Central Limited* v. *United States*, 138 S. Ct. 2067, 2074 (2018). "[T]he failure of Congress to use 'Thou Shalt Not' language [does not] create a statutory ambiguity of the sort that triggers *Chevron* deference." *United States Telecom Association* v. *FCC*, 359 F.3d 554, 566 (D.C. Cir. 1994); *see also American Petroleum Institute*, 52 F.3d at 1120. Instead, "a reviewing court must first ask whether Congress has directly spoken to the precise question at issue." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (internal quotation marks and citation omitted). "If Congress has done so, the inquiry is at an end," and a court must follow the unambiguous statutory text. *Id.*

As explained above, the canons of interpretation make clear that the general grant of rulemaking authority in subsection (a)(1) of Section 1693b does not override the limits placed on the power to issue model clauses in subsection (b). "Where, as here, the canons supply an answer, *Chevron* leaves the stage." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) (internal quotation marks and citation omitted).

The Bureau repackages its misplaced attack on the *expressio unius* canon in the trappings of *Chevron* deference. *See* Br. 42-44. But as discussed above, *see* pp. 27-29, *supra*, PayPal is not invoking that canon. Accordingly, the additional cases cited by the Bureau about that canon are inapplicable. *See Farrell* v. *Blinken*, 4 F.4th 124, 136-137 (D.C. Cir. 2021); *Doe* v. *FEC*, 920 F.3d 866, 870 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 2506 (2020); *National Shooting Sports Foundation, Inc.* v. *Jones*, 716 F.3d 200, 211 (D.C. Cir. 2013).

2. Deference is also unwarranted for the independent reason that the Bureau's brief offers a new interpretation with no basis in the rule or official commentary. The Supreme Court has repeatedly refused to afford deference to agency litigating positions that are "wholly unsupported by regulations, rulings, or administrative practice." *See*, *e.g.*, *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988). As explained above, the Bureau's novel interpretation of the phrase "model clause" to refer only to specific wording is

advanced for the first time in litigation and inconsistent with the official commentary adopted at the time of the rulemaking. *See* pp. 35-36, *supra*.

3. Finally, to the extent there is any ambiguity regarding the Bureau's authority to promulgate the short-form disclosure requirements, it should be resolved against the Bureau for the sake of constitutional avoidance. Courts must "make every effort" to construe statutes in a manner that "avoid[s] needless constitutional confrontations." *National Mining Association* v. *Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). And the "constitutional avoidance canon of statutory interpretation trumps *Chevron* deference." *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1340-1341 (D.C. Cir. 2002); *cf. Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (declining to extend *Chevron* deference to a statute on the ground that, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, [courts] expect a clear indication that Congress intended that result").

The short-form disclosure requirements are content-based regulations of speech that pose serious constitutional concerns under the First Amendment. Regulations that "target speech based on its communicative content" are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Regulations are

"content-based" when they "compel[] individuals to speak a particular message" or deliver a "government-drafted script." *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018). Here, the short-form disclosure requirements mandate that a speaker communicate a particular message in a form closely scripted by the government. *Compare id.* at 2370 (holding unconstitutional a notice that was required to be "at least 8.5 inches by 11 inches and written in no less than 48-point type" in one setting and "in the same size or larger font than the surrounding text, or otherwise set off in a way that draws attention to it" in another setting (citations omitted)), *with* 12 C.F.R. § 1005.18(b)(7)(ii)(B) (dictating "bold-faced type" and "a minimum type size" for various fees).

Although the Supreme Court has at times exempted from the strictest scrutiny certain regulations of commercial speech that are not "unduly burdensome" and that govern purely "factual and uncontroversial information," *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 650-651 (1985), the Court recently emphasized that content-based regulations of commercial speech still warrant "heightened scrutiny." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 566 (2011). Like the regulations at issue in both *Reed* and *Becerra*, the short-form disclosure requirements do not fit within the narrow exception provided by *Zauderer*. That is so because the short-form disclosure requirements both fail to regulate purely "factual and uncontroversial information"

and are "unduly burdensome." *Zauderer*, 471 U.S. at 650-651; *see Sorrell*, 564 U.S. at 566-567.

As PayPal explained below and in its comments on the proposed rule, the short-form disclosure requirements would mislead rather than educate users of digital wallets. Designed without digital wallets in mind, the rule requires financial service providers to highlight specific fees, such as periodic, per-purchase, and customer-service fees, *see* 81 Fed. Reg. 84,008, J.A. ___, even though those fees are generally inapplicable to digital wallets, *see* 2 A.R. 5880, J.A. ___. The short-form disclosure requirements "confuse and alarm" potential customers by outlining fees that a "consumer would not [actually] incur." *Id.* Users have repeatedly expressed concern to PayPal that the company had changed its policies and begun charging fees. *See*, *e.g.*, D. Ct. Dkt. 1, at 6, J.A. ___ ("[It] [s]eems like you changed things and now [there are] fees to spend [or] use my money. . . . [M]aybe I misread things but if so, then [I]'d say your description is not clear."). Eliciting confusion and alarm is the opposite of providing "factual and uncontroversial information" and "dissipat[ing] the possibility of consumer confusion." *Zauderer*, 471 U.S. at 651 (citation omitted).

The short-form disclosure requirements also fall outside of the *Zauderer* exception for the additional reason that they are "unduly burdensome." PayPal faces the burdens not only of complying with intricate regulations, but also

of misleading and frustrating customers and potential customers who are confused by references to inapplicable fees. *See* 2 A.R. 5880, J.A. ___. Such burdens are unnecessary. As described above, the short-form disclosure was designed to ameliorate problems associated with physical prepaid cards, which operate differently from digital wallets. *See* pp. 4-6, *supra*; *see also* 81 Fed. Reg. 83,936-83,943, J.A. ___-___ (discussing studies and problems associated with the sale of prepaid cards at brick-and-mortar retailers, not digital wallets). The regulations here are precisely the sort of "unduly burdensome" speech restrictions that are prohibited by the First Amendment.

Even if the restrictions at issue were analyzed as commercial-speech regulations, they would still present serious constitutional difficulties. "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the [government] shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136, 142 (1994).

The short-form disclosure requirements not only *compel* the disclosure of certain information, but also *prohibit* financial institutions from speaking truthfully. *See* 12 C.F.R. § 1005.18(b)(3)(ii) and (7)(iii); 12 C.F.R. pt. 1005, supp. I, cmt. 18(b)(3)(i), ¶ 1 and cmt. 18(b)(7)(iii), ¶ 1. This Court has never

blessed such restrictions, as distinct from ones that permit the speaker to clarify a required disclosure. *See*, *e.g.*, *Spirit Airlines, Inc.* v. *Department of Transportation*, 687 F.3d 403, 409 (D.C. Cir. 2012). And the Supreme Court has repeatedly struck down prohibitions on truthful communication where the prohibition was justified merely on the ground that such communications are "*potentially* misleading." *Ibanez*, 512 U.S. at 146 (emphasis added); *accord Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 111 (1990). The Bureau argued below that PayPal is free to provide clarification outside of the short-form disclosure, D. Ct. Dkt. 20-1, at 59-60, J.A. ___-___, but the efficacy of that option is undermined by the Bureau's own reasoning that the short-form disclosure will attract consumers' attention and provide the essential information.

As the Supreme Court has explained, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993). Given the absence of *any* evidence that including additional information in the short-form disclosure would mislead digital-wallet users, the Bureau simply cannot meet its burden even under a lower degree of scrutiny.

For the foregoing reasons, the Bureau's dismissal of the constitutional difficulties as insufficiently "serious," Br. 49, misses the mark. If this Court

were to conclude that EFTA is ambiguous, it should apply the canon of constitutional avoidance, not *Chevron*. But as explained above, the unambiguous statutory text and structure, confirmed by the drafting and legislative history of EFTA, provide ample grounds to justify setting aside the Bureau's short-form disclosure requirements.

II. THE DODD-FRANK ACT DOES NOT AUTHORIZE THE SHORT-FORM DISCLOSURE REQUIREMENTS

The Bureau devotes just over three pages at the end of its brief to a third and final source of authority for the short-form disclosure requirements: namely Section 5532(a) of the Dodd-Frank Act, 12 U.S.C. § 5532(a). Like Section 1693b(a)(1) of EFTA, Section 5532(a) provides a general grant of rulemaking authority. It authorizes the Bureau to "prescribe rules to ensure that the features of any consumer financial product or service . . . are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances." 12 U.S.C. § 5532(a).

The Bureau's reliance on the general rulemaking power in Section 5532(a) is unavailing. There is no dispute that the Dodd-Frank Act provides the Bureau with substantial rulemaking power, including some authority to regulate disclosures regarding the terms and conditions of electronic fund transfers. But as with the general rulemaking power of Section 1693b(a)(1) of EFTA, the general permission granted in Section 5532(a) is bounded by the

specific provision governing model disclosure clauses in Section 1693b(b) of EFTA. *See* pp. 32-39, *supra*. It makes no difference that the Dodd-Frank Act was enacted after EFTA: a "specific statute controls over a general one without regard to priority of enactment," *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961) (internal quotation marks and citation omitted), and courts must "aim[] for harmony over conflict in statutory interpretation" by applying a "strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Systems*, 138 S. Ct. at 1624 (citation, alterations, and internal quotation marks omitted).

The Bureau's general rulemaking powers in subsection (a) of Section 5532 are further limited by subsection (b)(1), which authorizes the Bureau to issue "model form[s] that may be used *at the option* of the covered person for provision of the required disclosures." 12 U.S.C. § 5532(b)(1) (emphasis added). That provision, like the power to issue optional model disclosures in Section 1693b(b), comes with a "[s]afe harbor" for regulated entities that "us[e] a model form." *See* 12 U.S.C. § 5532(d); *see also* p. 26, *supra*. The express grant of authority to promulgate optional model disclosures buttresses the conclusion that no authority to promulgate mandatory disclosures has been granted. If issuing model disclosures were within the general grant of

rulemaking power in Section 5532(a), the Bureau would have the power to render the specific grant of authority in subsection (b)(1) superfluous. To avoid that problem, the specific power to issue model forms for optional use must be read to control the general power in subsection (a). *Cf.* pp. 32-34, *supra*.

What is more, if the Bureau's interpretation of Section 5532(a) were correct, it would eviscerate the limitations on the powers granted by numerous statutes other than EFTA and the Dodd-Frank Act. When Congress created the Bureau in Title X of the Dodd-Frank Act, it consolidated in the Bureau "all authority to prescribe rules or issue orders or guidelines pursuant to any [f]ederal consumer financial law," 12 U.S.C. § 5581(a)(1)(A), including some eighteen preexisting federal consumer-protection laws. *See* 12 U.S.C. § 5481(12), (14). Many of those laws, however, include specific limitations on agencies' rulemaking powers and particular exemptions from disclosure requirements. For example, the Truth in Lending Act lists "[e]xempted transactions" to which the law's disclosure requirements "do[] not apply." 15 U.S.C. § 1603. Similarly, the Truth in Savings Act provides that its disclosure requirements "shall not apply to any sign (including a rate board) disclosing a rate or rates of interest which is displayed on the premises of [a] depository institution" if certain conditions are satisfied. 12 U.S.C. § 4302(c). Under the Bureau's reading of the Dodd-Frank Act, it could make those requirements apply anyway. Other examples abound. *See*, *e.g.*, 12 U.S.C. §§ 1831t(b)(2)(B),

4311(a); 15 U.S.C. § 1631(b). It is implausible that Congress lifted numerous restrictions on the Bureau's authority across a number of statutes with a garden-variety grant of general power in the Dodd-Frank Act.

Because there is no ambiguity to be resolved, *Chevron* deference is inappropriate. *See* pp. 44-45, *supra*. But even if there were ambiguity, *Chevron* deference would be unwarranted because the Bureau's interpretation is novel, *see* pp. 45-46, *supra*, and because any ambiguity should be construed against the Bureau under the canon of constitutional avoidance, *see* pp. 46-51, *supra*.

* * * * *

The statutory text and structure, amplified by legislative history that reflects a congressional intent to preserve flexibility for financial institutions, barred the Bureau from promulgating the short-form disclosure requirements. There is no ambiguity, but even if there were, the Bureau would not be entitled to deference. The provisions of EFTA and the Dodd-Frank Act relied on by the Bureau do not support the short-form disclosure requirements. The district court correctly set aside those requirements to the extent they were mandatory, and the judgment below should be affirmed.[*]

[*] PayPal's complaint and motion for summary judgment raised other claims that the district court did not address. *See* D. Ct. Dkt. 27, at 20 n.9, J.A. ___ n.9. If this Court were to agree with the Bureau, it should vacate the district court's judgment and remand for that court to address in the first instance whether imposing the Prepaid Rule on digital wallets was arbitrary and capricious; whether the Bureau's cost-benefit analysis was arbitrary and capricious; and whether the Prepaid Rule violates the First Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Kannon K. Shanmugam

KELLY P. DUNBAR
JAMES D. BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
WILLIAM T. MARKS
BRIAN M. LIPSHUTZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

OCTOBER 27, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellee PayPal, Inc., and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the foregoing Brief of Appellee is proportionately spaced, has a typeface of 14 points or more, and contains 12,319 words.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

OCTOBER 27, 2021

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellee PayPal, Inc., and a member of the Bar of this Court, certify that, on October 27, 2021, a copy of the attached Brief of Appellee was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM