UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION (JACKSON)

MISSISSIPPI BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS, ARVEST BANK, BANK OF FRANLIN, and THE COMMERCIAL BANK *Plaintiffs* v. CONSUMER FINANCIAL PROTECTION BUREAU and ROHIT CHOPRA in his official capacity as Director of the CFPB *Defendants*	Civil Action No. 3:24-cv-00792-CWR-LGI Hon. Carlton W. Reeves, District Judge Hon. LaKeysha Greer Isaac, Magistrate

AMICUS CURIAE BRIEF ON BEHALF OF CALIFORNIA CREDIT UNION LEAGUE, CAROLINAS CREDIT UNION LEAGUE, COOPERATIVE CREDIT UNION ASSOCIATION, CORNERSTONE CREDIT UNION LEAGUE, ILLINOIS CREDIT UNION LEAGUE, KENTUCKY CREDIT UNION LEAGUE, LEAGUE OF SOUTHEASTERN CREDIT UNIONS, D/B/A/ THE LEAGUE OF CREDIT UNIONS & AFFILIATES, LOUISIANA CREDIT UNION ASSOCIATION, MICHIGAN CREDIT UNION LEAGUE & AFFILIATES, MINNESOTA CREDIT UNION NETWORK, MISSISSIPPI CREDIT UNION ASSOCIATION, NEBRASKA CREDIT UNION LEAGUE, NEVADA CREDIT UNION LEAGUE, NEW YORK CREDIT UNION ASSOCIATION, OHIO CREDIT UNION LEAGUE, TENNESSEE CREDIT UNION LEAGUE, UTAH'S CREDIT UNIONS, AND WISCONSIN CREDIT UNION LEAGUE

Walter D. Willson (MBN 7291)
Michael D. Anderson (MBN 105523)
WELLS MARBLE & HURST, PLLC
Post Office Box 131
Jackson, Mississippi 39205-0131
300 Concourse Boulevard, Suite 200
Ridgeland, Mississippi 39157
Telephone: (601) 605-6900 | Facsimile: (601) 605-6901
wwillson@wellsmarble.com
manderson@wellsmarble.com
Counsel for Amici Curiae

EXHIBIT
1

I. DISCLOSURE STATEMENT

All amici curiae who have joined in this brief are independent, not-for-profit state credit union leagues and associations. In accordance with the applicable disclosure rules, none of the state credit union leagues and associations have a parent company or parent companies who own or control any interest in the movant entities. Additionally, no publicly held corporation owns 10% or more of any stock or shares in the state credit union leagues and associations, nor controls any interest in the movant entities. Each of the leagues and association are comprised of and entirely owned by their credit union members. There is no public trading of any stock or shares in any of the state credit unions leagues and associations on any major indices or securities market.

II. TABLE OF CONTENTS

I. Disclosure Statement i

II. Table of Contents ii

III. Table of Citations and Authorities iv

IV. Statement Regarding Oral Argument vi

V. Statement Concerning Movants' Interest in the Proceedings 1

VI. Reasons for Granting Movants' Motion for Leave to File Amicus Brief 1

a. The individual credit unions that Movants represent are member-owned and member-controlled 1
b. Credit Unions operate differently from banks and the CFPB's Rule pertaining to overdraft fees fails to take into account those significant differences 3
c. The downstream ramifications associated with the CFPB's Rule will have significant negative consequences on Credit Union members across the country 5
d. Implementation of the CFPB's Rule will cause Credit Unions to make material adjustments or modifications to their operating procedures that will be a detriment to the consumer 6

VII. The Movants' Assertions are Relevant to the Disposition of the Case 8

a. Overdraft fees imposed by the Movants' member credit unions closely relate to the actual costs incurred to provide the protections afforded to the consumer by the service 8
b. The CFPB's Rule fails to factor in or consider material operational costs incurred by a credit union in providing overdraft protection services to their consumer members 9
c. Overdraft fees are avoidable, and Movants' member credit unions clearly and overtly disclose the imposition of overdraft fees to enable their consumer members to make an informed decision 12
d. Overdraft fees are not "junk" fees 14
e. Competition in the marketplace operates to limit or put a "check" on excessive and unreasonable overdraft fees 16
f. The Movants' member credit union consumer members understand that there are reasonable fees and costs associated with providing overdraft protection and the members choose to access the service on their own accord 17
g. Credit Unions prioritize consumer member outreach 18
h. The CFPB's Rule will impact all Credit Unions and related entities even if they are not so-called Very Large Financial Institutions 19
i. The alternatives to overdraft protection are worse for the consumer 20

VIII. Argument and Discussion 22

a. The CFPB's Rule Far Exceeds the Authority Delegated to it Under TILA……22
b. The Supreme Court's Decision in *Loper Bright Enterprises* Requires Judicial Scrutiny Without Any Deference to the CFPB ……. 26
c. Overdraft Services Do Not Constitute an Extension of "Credit" nor do the Fees Imposed qualify as "Finance Charges" under the plain language of TILA …….. 27
d. The CFPB's Rule Disregards Prior FRB Interpretations of TILA and Regulation Z ……..……..... 28

IX. Conclusion 30

Certificate of Service 31

III. TABLE OF CITATIONS AND LEGAL AUTHORITIES

CASES

Fawcett v. Citizens Bank, N.A., 919 F.3d 133, 139 (1st Cir. 2019) 28

Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1120 (9th Cir. 2009) 22

In re Capital One Bank Credit Card Interest Rate Litig., 51 F. Supp. 3d 1316, 1348 (N.D. Ga. 2014) 22

In re Washington Mut. Overdraft Prot. Litig., 201 F. App'x 409 (9th Cir. 2006) 27, 28

Loper Bright v. Raimondo, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L.Ed.2d 832 (2024) 26, 27

Nicolas v. Deposit Guar. Nat. Bank, 182 F.R.D. 226, 230 (S.D. Miss. 1998) 28

PayPal, Inc. v. CFPB, 512 F. Supp. 3d 1, 11 (D.D.C. 2020), *rev'd in part on other grounds*, 58 F.4th 1273 (D.C. Cir. 2023) 22

Rest. L. Ctr. v. United States Dep't of Lab., 120 F.4th 163, 168 (5th Cir. 2024) (citing *Loper Bright*, 603 U.S. at 413) 26

Taylor v. Union Planters Bank of S. Mississippi, 964 F. Supp. 1120 (S.D. Miss. 1997) 28

Van Loon v. Dep't of the Treasury, 122 F.4th 549, 562, 563 (5th Cir. 2024) 26

OTHER AUTHORITIES

12 CFR. § 1026.4(c)(3) 29

15 U.S.C. § 1601(a) 27

15 U.S.C. §1602(f) 22, 24, 27

15 U.S.C. § 1604(a) 24

15 U.S.C. § 1605(a) 27

34 Fed. Reg. 2002, 2004 (1969) 29

42 Fed. Reg. 22,360, 22,362 (1977) 29

1968 U.S.C.C.A.N. 1962, 1963 (H.R. Rep. 90-1040 at 7 (1967)) 23, 24

Federal Credit Union Act ("FCUA"), 12 U.S.C 1751, et seq. 2

NCUA Board. 12 U.S.C. §§ 1781–1790c (1988) 2

Regulation E (12 CFR 1005.17) 14

Regulation E, Regulation Z, and Regulation DD (NCUA part 707 for credit unions) 12

Truth in Savings Act regulations (12 CFR §707.11) 14

Truth in Lending; Official Staff Commentary, 46 Fed. Reg. 50,288, 50,293 (Oct. 9, 1981) 29

Wis. Stats. §186.01(2) 3

IV. STATEMENT REGARDING ORAL ARGUMENT

Movants do not believe that oral argument is warranted or required given the very straightforward nature of the issues and arguments presented and/or set forth herein. However, in the event the Court would like any of the points or legal arguments asserted by the Movants to be the subject of a hearing, Movants welcome the opportunity to comply with the Court's request in order to outline their position(s) at oral argument in a more fulsome manner or respond to any questions the Court may have.

V. STATEMENT CONCERNING MOVANTS' INTEREST IN THE PROCEEDINGS

The Movants represent Credit Union Leagues and/or Associations from twenty-nine (29) states and comprise members exceeding 105,000,000 individual consumers. Movants' operations impact and represent a significant and material segment of the consumer financial services industry.

Several of the Movants' member credit unions constitute a so-called Very Large Financial Institution ("VLFI"), as that term is defined by the CFPB inasmuch as their assets exceed ten billion dollars ($10,000,000,000.00). But for the reasons set forth and discussed hereinbelow, even those credit unions who do not constitute a VLFI will be similarly adversely impacted by the CFPB's Rule, because the CFPB's Rule will materially impact the manner in which Movants' credit unions offer services to their consumer members in a profoundly negative manner.

Moreover, the CFPB's Rule will materially change the way the Movants' credit unions' operations are conducted and will require that, among other things, new accounts (not requested by the consumer) be established, will require credit unions to pass along significant additional and unwarranted operational costs to their consumer members, and could result in the termination of the overdraft services they presently provide, none of which will benefit the consumer. In fact, the implementation of any of these operational changes in response to the CFPB's Rule will create and inflict significant irreparable harm to the more than 105,000,000 consumer members the Movants represent.

VI. REASONS FOR GRANTING MOVANTS' MOTION FOR LEAVE TO FILE AMICUS BRIEF

a. The individual credit unions that Movants represent are member-owned and member-controlled

The credit union system is a labyrinth of financial institutions and cooperatives, as well as administrative and regulatory agencies, on both the state and federal levels. The first credit unions were organized under state law, and are governed by state regulations. In 1934, Congress enacted the Federal Credit Union Act ("FCUA"), 12 U.S.C 1751, *et seq.*, which authorized the creation of federally-chartered credit unions and created the National Credit Union Administration ("NCUA") to supervise those federally-chartered credit unions. In 1970, Congress amended the FCUA and established the National Credit Union Share Insurance Fund ("NCUSIF"), which is administered by the NCUA Board. 12 U.S.C. §§ 1781–1790c (1988). This fund provided insurance for accounts of federal credit unions for the first $100,000 per account, *Id.* §§ 1781(a), 1787(k), as well as accounts of state chartered credit unions which elect to be covered. Each insured credit union pays and maintains with the NCUSIF a deposit in the amount of 1% of the credit union's insured shares. *Id*. at § 1782(c)(1)(A)(i). The NCUSIF provides the Board with broad regulatory authority over all federally-insured credit unions, and grants the Board authority to review the applications of state-chartered credit unions. In addition, the NCUA Board has the power to "prescribe such rules and regulations as it may deem necessary or appropriate to carry out the provisions" of the NCUSIF. *Id*. at § 1789(a)(11).

As credit unions increased in number, credit union leagues were formed to cooperatively accomplish various mutual goals. These are non-profit trade associations, representing the interests of their member credit unions. Much like the credit unions they represent, members of the leagues' boards of directors are democratically elected by and from their member credit unions and are not compensated for their services. All Movant credit union leagues belong to a national trade association, America's Credit Unions ("ACU"), which provides legislative, research, public relations, educational, and other types of services to its members.

b. Credit Unions operate differently from banks and the CFPB's Rule pertaining to overdraft fees fails to take into account those significant differences

Credit unions occupy a unique niche among consumer financial services providers. Unlike banks, credit unions are not-for-profit, member-owned financial cooperatives. They do not exist to provide dividends or a financial benefit of any kind to third-party shareholders. Instead, credit unions exist solely to "encourage thrift among [their] members, create a source of credit at a fair and reasonable cost, and provide an opportunity for [their] members to improve their economic and social conditions." *See e.g.*, Wis. Stats. §186.01(2). Membership in credit unions is typically limited to groups of people who share a "common bond," such as those living within a certain district, employees of a common employer, or the like. Ordinarily, to become a member of a credit union, a person must own at least one share in the credit union and pay a nominal fee.

The approach suggested by the CFPB in the implementation of its Rule, wherein financial institutions calculate their costs to operate an overdraft program and assess fees accordingly, overlooks the capital and budgeting realities of credit union operations. In addition, the CFPB's Rule fails to acknowledge the necessity of maintaining adequate revenue levels that ensure safety, soundness, and the ability to innovate, all while effectively serving credit union members. Specifically, the exclusion of costs not directly traceable to the provision of non-covered overdraft services poses significant challenges for credit unions, as general overhead costs are fundamental to their daily operations. Moreover, the distinction made by the CFPB between costs directly attributable to overdraft services and general operational costs fails to recognize the interconnected nature of these services within modern credit union operations.

Furthermore, the CFPB's reliance on data from only five (5) VLFIs to set a benchmark fee is both inadequate and misleading. This sample size represents a small percentage of the institutions directly affected by the Rule, and is not only insufficient to accurately reflect the

diverse operational and cost structures employed across the credit union industry, but also the greater financial services industry. These five VLFIs have large-scale operations, the ability to invest in sophisticated tools to minimize operational cost, and, for banks, the ability to conduct investment and other activities not available to credit unions. The proposed benchmark fee, based on such a narrow data set, cannot (and should not) be used as a standard for credit unions who are subject to the Rule (let alone influence the pricing strategies of smaller credit union institutions indirectly subject to the Rule). This approach risks standardizing overdraft fees in a way that does not account for the vast differences between credit unions and traditional banks in asset sizes, operational efficiencies, market focus, and consumer demographics.

The Rule's stated option to transition overdraft services to a checking line of credit (constituting an "overdraft credit account") presents a particularly impractical option for credit unions due to multiple requirements imposed upon credit unions under the FCUA. These federally-mandated requirements would significantly constrain Movants' member credit unions' ability to offer such products to their consumer members who had previously been eligible for overdraft protection, and would make it economically unfeasible for credit unions to provide an overdraft credit account as an alternative to traditional overdraft services, as the costs associated with offering and managing these lines of credit could far surpass the overdraft fee cap imposed by the Rule.

This shift would disproportionately affect credit unions, which often serve as the primary financial institution for underserved and lower-income populations. Many credit union members value the overdraft services not just for the financial flexibility those services provide, but because the consumer member may not qualify for traditional lines of credit due to their credit histories, income levels, or other adverse circumstances. By pushing credit unions towards offering a

product that is less accessible and potentially more costly to their members, the Rule will undermine and erode the very foundation of financial inclusion that credit unions support.

c. The downstream ramifications associated with the CFPB's Rule will have significant negative consequences on Credit Union members across the country

Overdraft protection programs are a service that credit union consumer members voluntarily select and which they can opt out of or decline at any time. Credit unions offer overdraft protection as a lifeline and a deterrent of sorts to mitigate or lessen the negative influence and impact of predatory lenders. Eliminating or limiting overdraft services will likely push consumers into the arms of largely unregulated predatory lenders who are able to charge astronomical interest rates, resulting in the infliction of significant harm to the consumer. That detrimental impact is the opposite effect the CFPB is purportedly attempting to achieve by implementing the Rule, and the "underbanked" may become the "unbanked" as an unintended (but entirely foreseeable) consequence of the Rule enacted by the CFPB.

Credit union members have consistently expressed their view that overdraft services are essential, evidenced by the fact that they choose to be a member of a credit union and opt in to use the service. Movants' credit union's members specifically request overdraft protection programs and choose to utilize them as a financial tool when it makes the most financial sense for them and their families. Additionally, current regulations imposed by the CFPB, Department of Justice, NCUA, and their state counterparts, already require financial institutions to disclose terms and fees to consumers both at account opening and regularly on periodic statements. Given these safeguards, credit union members should rarely incur a "surprise overdraft fee." In light of today's challenging economic climate, consumers do not want their credit card, debit card, or check to be declined when trying to buy life's necessities, and they trust their credit union to be there for them if they need to utilize overdraft services.

For those institutions that are unable to reduce their overdraft fees either by CFPB design or in response to artificially manufactured market pressures, the wholesale discontinuation of overdraft protection programs may be the only reasonable business decision. In a recent America's Credit Unions survey, among exempt credit union respondents, 73% stated that the reduction in overdraft fees would impose a hardship, and 11% stated that they would likely have to discontinue the service. Furthermore, the indirect pressure that the Rule would introduce will exacerbate the disparities between large and small financial institutions, potentially accelerating market consolidation as smaller entities struggle to compete. This consolidation is antithetical to the laudable objectives of financial inclusion and diversity within the financial services industry, as it reduces consumer choice and may lead to underserved areas becoming even more financially marginalized. Perhaps more concerning is the prospect of consumers turning to payday lenders as an alternative to traditional overdraft protection services. This outcome represents a significant regression from the CFPB's primary objective of consumer financial protection, exposing consumers to high-cost borrowing options characterized by predatory lending practices and spiraling debt cycles. Such a scenario starkly contrasts with the current responsible, regulated provision of overdraft protection services by credit unions, further highlighting a critical gap in the Rule's stated purpose and its broader negative market implications.

d. Implementation of the CFPB's Rule will cause Credit Unions to make material adjustments or modifications to their operating procedures that will be a detriment to the consumer

The CFPB's Rule fails to provide enough flexibility so that overdraft protection may continue to exist as a service. Specifically, the Rule is vague in its definition of "break-even." Credit unions must consider (a) administrative costs, (b) a buffer for potential losses if a consumer does not repay the overdraft, (c) technological costs to protect consumer data, among other items,

and (d) the ever-increasing fraud present in the financial services marketplace. Without the financial ability to thoroughly account for these considerations, credit unions may be forced to discontinue overdraft services that millions of Americans consciously and voluntarily opt-into and select on a daily basis.

The way the Rule is written, credit unions will face the difficult choice of either assuming greater risks from unchecked overdraft behavior, absorbing additional administrative costs and expenses, or discontinuing overdraft protection services entirely in order to stay competitive with services offered by institutions above the $10 billion asset threshold. In addition, credit unions may face safety and soundness challenges during exams conducted by the NCUA should they employ lower fees to remain competitive with larger financial institutions. As written, the CFPB's Rule will result in diminished access to financial services offered by the Movants' member credit unions and heightened expenses for their consumer members' essential needs, thereby disproportionately affecting economically vulnerable consumers. This action, as aforementioned, contradicts the goal of fostering accessibility and inclusivity in financial services pursued by regulators, including the CFPB.

Overdraft protection services function not merely as a financial product, but as a critical gateway for those who find themselves on the periphery of the financial system, offering them an entry point into the world of mainstream banking. For individuals lacking access to conventional credit options or those in the process of establishing a demonstrable banking history, the availability of overdraft services offered by the Movants' member credit unions provides an indispensable buffer against financial volatility. This buffer affords a credit union consumer member the flexibility to manage their finances in the face of unexpected expenses, without which they might resort to alternative financial services with much less favorable terms.

Furthermore, the presence of overdraft services within formal financial institutions plays a pivotal role in drawing underbanked individuals into a more stable and regulated financial environment. It serves as a key incentive for these individuals to transition from using cash or high-cost financial services to engaging with banks and/or credit unions, thereby fostering a sense of trust and belonging. And beyond the direct impact to overdraft protection programs, the Rule will inevitably impact other products and services that help draw in the underbanked.

By imposing limitations on overdraft services, the Rule risks alienating the very individuals it seeks to protect, potentially erecting barriers to their financial participation. This could deter those without robust banking relationships from seeking or maintaining engagement with credit unions or other formal financial institutions, thereby exacerbating the financial exclusion of vulnerable populations. The importance of carefully balancing consumer protection with the promotion of financial inclusion cannot be overstated, as any regulatory measures that inadvertently hinder the latter could have profound and lasting impacts on the economic well-being and empowerment of underserved communities.

These scenarios underscore the negative consequences of limiting the ability of credit unions to offer tailored, risk-based pricing for overdraft services. The Rule will no doubt reduce the overall availability of these services, forcing consumers into less desirable and more expensive alternatives.

VII. THE MOVANTS' ASSERTIONS ARE RELEVANT TO THE DISPOSITION OF THE CASE

a. Overdraft fees imposed by the Movants' member credit unions closely relate to the actual costs incurred to provide the protections afforded to the consumer by the service

The Rule's exclusion of certain costs, including fraud costs, in the breakeven calculation for providing overdraft protection services fails to factor in the realities of credit union operations.

The exclusion of costs deemed not specifically traceable to the provision of non-covered overdraft credit, which preliminarily excludes general overhead costs and certain charge-off losses not directly tied to overdraft services, presents significant challenges for credit unions, both in terms of accounting practices and operational realities. General overhead costs, while not directly attributable to any single service, are fundamental to credit union day-to-day operations, let alone the administration of an overdraft lending program. These costs include expenses related to maintaining physical branches, employee salaries, utilities, combating fraud, cybersecurity, and the infrastructure necessary to support all financial services offered by the credit union, including overdraft protection. The distinction the CFPB attempts to make between costs directly attributable to overdraft services and general operational costs ignores the fact that these services cannot (and do not) exist in a vacuum. For example, the cost of maintaining a secure and functional financial services environment—both physical and digital—is essential for the provision of all services, including overdraft protection. Excluding these costs from the breakeven fee artificially lowers the calculated costs of providing overdraft services, making the break-even option in the Rule less viable, and serving to funnel those institutions toward selecting the Rule's benchmark fee.

Additionally, the difficulty in segregating costs directly associated with overdraft protection from other financial services further complicates the application of the CFPB's break-even standard. Credit unions often employ integrated systems and cross-functional teams to manage various financial services, making it exceedingly difficult to assign costs to specific services without a degree of arbitrary allocation.

b. The CFPB's Rule fails to factor in or consider material operational costs incurred by a credit union in providing overdraft protection services to their consumer members

Regarding the proposed standards for financial institutions in handling overdraft fees, the Movants are very concerned about the feasibility of implementing either the "break-even fee" or "benchmark fee" standard. The Rule overlooks the actual operational costs and financial risks associated with covering overdrafts and managing repayment processes. Moreover, the Rule fails to take into account the comprehensive costs tied to overdraft programs. These include expenses related to account opening and servicing, such as collection efforts, administrative tasks associated with managing overdraft services (*e.g.*, postage for notices, branch services, core processors, and compliance testing), among others. Even the largest credit unions would struggle to achieve the economies of scale required to operate within the margins outlined in the Rule. This places credit unions of all asset sizes at a competitive disadvantage compared to other financial institutions.

A Federal Reserve Bank of New York study revealed that, "Overdraft fee caps hamper, rather than foster, financial inclusion." This is because financial institutions compensate for lost overdraft income by increasing monthly account fees and/or imposing stricter requirements to waive these fees, such as raising the minimum checking balance from $500 to $1,500 required to avoid a monthly service fee. Consequently, low-income consumers who cannot afford these higher fees—which can amount to hundreds of dollars annually—may opt to forgo the services offered by a credit union. Additionally, the study highlights that fee caps can lead to the "rationing" of overdraft liquidity, particularly affecting riskier depositors.

Although the CFPB acknowledged this study during the notice and comment period, it disagreed with the study's conclusion. However, the study's findings cannot be dismissed in such a cavalier manner. There is no empirical evidence supporting the CFPB's position that capping overdraft fees would genuinely benefit consumers.

Currently, credit unions offer rates that best support their particular field of membership. Under the current structure of the Rule, large financial institutions will be forced to cap overdraft fees. And smaller financial institutions, in order to remain competitive, will be forced to significantly adjust their fees or discontinue their overdraft program in its entirety. If credit unions are compelled to reduce or eliminate overdraft services due to market pressures, this will disproportionately impact those consumers who rely on it the most. Without overdraft protection, failing to cover these transactions could result in severe consequences, such as hefty third-party penalties or even eviction, or force members to seek out more expensive alternatives.

The Rule will impose additional operational and compliance costs on credit unions, including costs related to system upgrades, staff training, and regulatory compliance reporting. These increased expenses could strain credit union resources and undermine a credit union's ability to remain competitive and sustainable in the evolving financial services landscape. The Rule could also lead to an increase in consolidation across the financial services sector potentially reducing the number of consumer options as an alternative to larger banks and higher cost small lenders, such as payday lenders and check cashing outlets. In short, it is never in the consumer's best interest when choices and options are made more limited.

This also threatens Movants' member credit unions' ability to maintain a level of highly capitalized liquidity. If the CFPB continues to take away revenue and cost recoupment sources, credit unions will not be able to maintain adequate capital, invest in technology, continue to maintain adequate employee benefits, or invest in the communities they serve. "Break-even" does not take into account the infrastructure needed to maintain a healthy credit union, and needs to take into account the entire cost structure of maintaining a safe and sound not-for-profit financial institution that can continue to invest in the future for the benefit of the credit union's members.

Securing accounts against fraud is a critical component of providing financial services, regardless of whether an account includes overdraft protection. Fraud protection efforts are not just an operational choice but a necessity in today's financial ecosystem, ensuring the safety and trust of members in their credit union. The exclusion of fraud costs that benefit credit union members' accounts, regardless of overdraft status, overlooks the interconnected nature of fraud protection and overdraft services. When an account is compromised, the repercussions extend beyond the immediate assets in the account to potentially include the overdraft protection limits, thus exposing credit unions to additional financial risks. Fraud costs are, in many ways, directly related to the provision of overdraft services, as they are instrumental in mitigating losses associated with account takeovers and the unauthorized (or excessive) use of overdraft facilities. These fees, while not calculable as "break even," are often tied to account migration, new cards, and member financial education to ensure further harm to the member is mitigated.

Finally, the exclusion of such costs does not account for the reality that fraud detection and prevention are integral to maintaining the integrity of overdraft services. It requires substantial investment in technology, staff training, and ongoing monitoring, all of which contribute to the overall cost of providing these services.

c. Overdraft fees are avoidable and Movants' member credit unions clearly and overtly disclose the imposition of overdraft fees to enable their consumer members to make an informed decision

Credit unions and other financial institutions are subject to Regulation E, Regulation Z, and Regulation DD (NCUA part 707 for credit unions) which require disclosure of fees such as overdraft fees. As a result, overdraft fees are not a surprise to consumers. Moreover, in order to ensure transparency and a more fulsome understanding of the service being provided, credit unions maintain regular communication with members who use overdraft services, providing detailed

information about limits, fees, and how the service operates. And many credit unions provide a "heads up" to their members as funds run low, in order to help them to avoid overdraft fees, if at all possible.

Credit union consumer members have the ability to avoid overdraft fees by properly managing their accounts. That said, Movants acknowledge that financial responsibility can be a challenge for many consumers, which is why credit unions focus on providing financial education to their members in order to assist them in establishing savings so that overdrafts may be avoided in the future. And many credit unions offer low-balance alerts to notify members when they are approaching a zero balance and allow them to make informed decisions about whether or not to utilize overdraft protection.

Consumers actively anticipate and value overdraft protection and are willing to pay the fees associated with this service, as evidenced by their voluntary participation in these programs. According to a comprehensive 2021 study conducted by Curinos, two-thirds of consumers express a desire to maintain access to overdraft protection, demonstrating their preference for these services. More than 80% of overdraft transactions originate from consumers who opt into debit card or credit card overdraft programs, clearly indicating their intention to utilize this feature to cover payment transactions.

The Curinos study further highlights that consumers possess an understanding of overdraft protection and available alternatives, particularly among regular users. Over 60% of overdrafts originate from consumers who actively intend to use the service. Credit unions play a pivotal role in facilitating this participation by providing clear and meaningful disclosures, ensuring that members comprehend the associated terms and conditions. Additionally, the option to opt out at

any time empowers consumers to make informed decisions regarding their financial needs and preferences.

Before enrolling in overdraft protection, credit unions emphasize the importance of members carefully reviewing the service's terms and conditions. This includes a detailed explanation of the credit union's overdraft fees, any applicable limits on overdraft amounts, and a transparent overview of how overdraft transactions are processed. Such proactive communication fosters consumer understanding and helps mitigate potential misunderstandings or unexpected charges.

d. Overdraft fees are not "junk" fees

Overdraft fees are not inherently unfair or deceptive, and labeling them as "junk fees" is both a mischaracterization and unwarranted. Unlike "junk fees" charged by airlines, hotels, resorts, event ticket providers, and other entities, credit union overdraft fees are neither hidden nor unavoidable. Credit unions provide reasonable and transparent overdraft services to consumers. Regulation E (12 CFR 1005.17) mandates that financial institutions cannot charge a fee for paying an ATM or one-time debit card transaction as part of an overdraft service unless the consumer has expressly consented to participate. Credit union consumer members are under no obligation to participate in overdraft protection services and will suffer no adverse consequences for choosing not to do so. Similarly, the Truth in Savings Act regulations (12 CFR §707.11) require credit unions to disclose all fees imposed for returning items unpaid on periodic statements.

Consumers of any financial institution are given the opportunity to opt out of overdraft services at any time, ensuring transparency and control over their financial decisions. No consumer is ever obligated to incur an overdraft transaction or to remain enrolled in an overdraft program. The decision to do so is ultimately a matter of consumer choice. The current regulatory framework

ensures that credit unions offer overdraft services that are both reasonable and disclosed to consumers, aligning with consumer choice and applicable regulatory standards.

The CFPB's implication, if not outright statement, that overdraft fees are so-called "junk" fees fails to acknowledge that, as not-for-profit entities, credit unions exist to serve their member owners, not to profit from them by imposing unnecessary and/or unreasonable fees. The CFPB further fails to recognize that not all fees are abusive or excessive, but represent a legitimate cost of doing business and maintaining solvency. Indeed, the benchmark fee structure outlined by the CFPB would not come close to matching what it costs a credit union to administer and maintain overdraft protection services. To make matters even worse, the artificially low benchmark fee structure posited by the CFPB could incentivize overuse (and misuse) of overdraft programs. For example, if a credit union member borrowed $1,000, they would need to pay interest for the use of that money. But under the CFPB's Rule, the member could simply overdraft their account and only pay $3. The manifest unfairness and lack of financial soundness of that approach is readily apparent.

Overdraft fees are legitimately tied to the administrative and operational costs borne by credit unions to deliver a specific product or service offered to a member. As such, credit union overdraft fees are incomparable to airline, hotel, resort, and ticket price "junk fees." This is further underscored had the CFPB considered the not-for-profit nature of credit unions and their enhanced due diligence efforts required to drive sustainable operations while meeting the unique and customized services needed (and demanded) by their consumer members.

Operational income derived from service fees (not just limited to overdraft fees) is a vital prong of continued credit union success, supporting member service delivery. Unlike "junk" fees, credit union service fees are tied to a specific service being rendered, and that service is almost

always at the discretion and control of the consumer member. The CFPB's label of "junk fees" is inapposite given Movants' member credit unions' highly regulated and transparent fee structures and disclosures. Services cost money, and overdraft fees are part of a specific service being offered to help meet member needs and demands, and potentially outside of the day-to-day activities of an average consumer.

e. Competition in the marketplace operates to limit or put a "check" on excessive and unreasonable overdraft fees

The CFPB's ongoing narrative that overdraft fees constitute a form of anti-competitive behavior in the financial marketplace is misguided given the robust competition evident in the United States credit union system. The fact is that consumers continue to enjoy a multitude of choices when it comes to financial services, contributing to a highly competitive landscape that ultimately benefits consumers. Credit unions operate effectively within this competitive framework, facing challenges from traditional banks, online banks, and fintech companies.

Credit unions, as the only consumer member-owned cooperatives in the financial services sector, provide a valuable and necessary option in this competitive environment. Their mission specifically recognizes the importance of providing members with credit and related financial services at competitive rates, and they have a longstanding commitment to safeguarding consumer members' interests. The significant role credit unions play in promoting competition and consumer well-being within the financial services marketplace cannot be overstated.

That said, the Rule, as drafted, creates a significant risk of competitive harm. The market for deposit accounts and overdraft services is competitive, and each credit union serves members within its designated field of membership, and members may have needs that differ from those in other fields of membership. Credit unions face market pressures to structure their overdraft services in a way that best meets their members' unique needs. The Rule will limit and curtail

credit unions' ability to tailor their overdraft services to suit the diverse needs of their members, resulting in reduced member choice and less flexibility to effectively manage their finances. Moreover, credit unions continuously innovate and adapt their overdraft programs to align with changing member preferences and financial circumstances. Overdraft programs must strike a careful balance between providing services that protect a consumer's immediate interests, while simultaneously encouraging long-term behavior designed to ensure personal financial responsibility. Moreover, the cost and structure of overdraft programs must take into consideration the inherent level of risk assumed by a financial institution in paying overdrafts. Restrictive regulations, like those mandated in the Rule, will stifle this innovation and hinder credit unions' ability to provide responsive and member-centric solutions.

f. The Movants' member credit union consumer members understand that there are reasonable fees and costs associated with providing overdraft protection, and the members choose to access the service on their own accord

Overdraft protection programs serve as a critical financial safety net for many Americans, and they are immensely valued by consumers for their ability to help them manage their finances and obligations. These programs are designed to help individuals avoid the inconvenience or catastrophe of declined transactions, ensuring that payments for essential services and unexpected expenses can be covered even when account balances fall short.

Consumers need and want overdraft protection programs because sometimes they need and want immediate access to funds for unexpected situations, such as emergency repairs, medical bills, or other pressing needs. The convenience of being able to complete transactions without the worry of declined payments adds a layer of security to financial management that is difficult to quantify. Furthermore, overdraft protection shields consumers from potential fees and penalties linked to declined transactions. For example, when a credit union covers the shortfall or account

deficit through overdraft services, individuals are spared from nonsufficient funds fees imposed by merchants and the adverse effects on credit scores due to late or missed payments.

Credit union members are uniquely positioned as member-owners of their financial institution. As a member-owner, there is no fee, service, or offering that each and every member of that credit union does not have a say in. Merely by being, and remaining, a credit union member, that member is agreeing to the services, and fees, offered to them by the credit union.

g. Credit Unions prioritize consumer member outreach

In the interest of protecting their members, credit unions have implemented positive, proactive measures that expand choices, strengthen transparency, and increase affordability for their members. Across the credit union industry, many credit unions have already taken steps to: (1) reduce fees overall, (2) reduce fees on small transactions, (3) eliminate or reduce fees on transactions resulting in small negative balances, (4) eliminate transfer fees, (5) automate the fee waiver process, and (6) cap the number of instances certain fees can be charged per day or another specified period.

Furthermore, credit unions are focused on assisting members that frequently incur overdraft fees. According to the following data from America's Credit Unions (formerly CUNA)), credit unions nationwide exhibit a high degree of flexibility and consumer-centricity in their unique approach to overdraft fees incurred by their members:

- 98 % waive overdraft fees on a case-by-case basis.
- 78 % intervene when a member engages in frequent overdrafts.
- 71 % provide targeted outreach or education to members who miss payments.

When a credit union becomes aware of a member's frequent overdraft usage, the credit union may attempt to contact the member to address their financial situation and offer financial education and/or alternative credit products tailored to their unique needs. This proactive approach

exemplifies the pro-consumer nature of the credit union-member relationship, which distinguishes credit unions within the financial services industry.

In its current form, the Rule will undermine that long-standing approach and is antithetical to the CFPB's stated mission to promote fairness in consumer transactions, and will erode the ability of credit unions to effectively serve their members' legitimate articulated needs with reasonable and flexible alternatives.

h. The CFPB's Rule will impact all Credit Unions and related entities even if they are not so-called Very Large Financial Institutions

Despite the Rule being ostensibly applicable to only VLFIs, the Rule will without question impact credit unions (and other financial institutions) of all sizes—not just those with more than $10 billion in assets. If a benchmark fee is established for VLFIs, consumers will expect (and indeed demand) that this limitation apply to their credit union, regardless of its asset size. This will subject smaller credit unions to the risk of members moving deposits and banking relationships to larger financial institutions, creating pressure on the credit union's liquidity and retained earnings. The CFPB is clearly aware of this risk, as it made reference to this possibility during the notice and comment period, and recites that it plans to monitor the market's response to the Rule. But this approach provides little comfort to smaller credit unions because they have precious few actions they can take to make up for lost revenue or deposits, unlike larger financial institutions, and for many the only viable options may be eliminating services, raising other fees, or even possibly be forced to merge with another institution. None of these alternatives benefit consumers. The implementation of the Rule will without question have negative unintended (but entirely foreseeable and inevitable) consequences on them and their consumer members.

The implications of the Rule, while ostensibly targeting only VLFIs, extend far beyond its direct scope, potentially ushering in significant repercussions for smaller credit unions that are

integral to our nation's financial ecosystem. These smaller institutions, characterized by their close community ties and member-focused services, could find themselves in an untenable position as indirect casualties of a rule that purports to be inapplicable to their operations. While some larger institutions may be able to offer overdraft protection programs at or near cost, facilitated by their broader revenue bases and economies of scale, starkly contrasts with the operational realities of smaller credit unions and related financial institutions.

As the marketplace reacts to the constraints placed on larger entities, smaller credit unions may face intense pressure to lower their overdraft fees in order to stay competitive. This scenario is not merely hypothetical, but is a likely outcome of the natural market dynamics that drive pricing strategies across the financial services sector. Smaller institutions, many of which operate on thinner margins than their larger counterparts, rely on fee income, including overdraft fees, to sustain their operations and fund essential services for their consumer members. The forced reduction of these fees, in a bid to remain competitive, could severely impact their financial viability and undermine their ability to provide affordable, accessible financial services to underserved communities.

The CFPB failed to transparently articulate and/or consider the specific challenges smaller credit unions will encounter based upon the Rule's regulatory framework, nor has it explained how excluding these institutions from the rule would realistically exempt them from its far-reaching impacts. This utter lack of detailed analysis suggests an incomplete consideration of the Rule's consequences, potentially sidelining the concerns of a significant portion of smaller credit unions.

i. The alternatives to overdraft protection are worse for the consumer

If consumers run out of viable options for overdraft services at their credit union or related financial institution, the alternative options are far worse.

First, consumers may consider relying solely on credit cards if their credit union discontinues overdraft services. Consumers with limited funds may have a poor credit history, and "if" they do qualify for a credit card, it will likely be at a very high interest rate. Federally-chartered credit unions are capped at 18% for loans, which is significantly lower than the interest rate on most credit cards. Additionally, when consumers use credit cards, they may be tempted to charge more than they need without thinking about the long-term impact on their finances. This is just one reason some consumers prefer to avoid the use of credit cards.

Second, if credit cards don't work as an alternative, the next option for consumers is to turn to payday lenders or check-cashing services. These options involve the worst-case scenario for consumers. The Court can take judicial notice of the fact that payday lenders and check-cashing services are notorious for their abusive lending practices.

As previously stated, consumers voluntarily agree to enroll in overdraft protection services, after receiving disclosures that the CFPB itself may require. (See Reg. E §1005.17), because Movants' credit union members rely on these programs as flexible options to help make ends meet when needed. For many hardworking families, having their credit union cover an overdraft item, rather than reject it, provides peace of mind and a critical financial cushion in times of need. This is especially important now, since recent data reflects that 60% of Americans live paycheck to paycheck. And according to one recent survey, 92% of people who have overdrafted intentionally said that they would prefer to incur a fee than have the most recent transaction that prompted an overdraft declined.

The Rule doesn't apply to payday lenders or check-cashing services, so they're not limited to the $5 'breakeven' fee. That scenario begs the question – does the CFPB really prefer that

consumers use a payday lender or check-cashing service as opposed to an insured, well-run, not-for-profit financial institution with its members' best interests top-of-mind?

VIII. ARGUMENT AND DISCUSSION

Much of the arguments against the CFPB's Rule are set forth in great detail in the Plaintiffs' Complaint for Declaratory and Injunctive Relief [Doc. 1] and Plaintiffs' Memorandum of Law in Support of their Motion for a Preliminary Injunction [Doc. 13]. The Credit Union amici join in these arguments and supplement them as follows:

a. The CFPB's Rule Far Exceeds the Authority Delegated to it Under TILA

The CFPB's Rule stretches the boundaries of the Truth in Lending Act ("TILA") beyond recognition. First, Congress designed TILA to ensure that consumers receive clear and meaningful *disclosures* regarding credit terms—not to dictate how financial institutions structure their operations or impose substantive limitations. *See, PayPal, Inc. v. CFPB*, 512 F. Supp. 3d 1, 11 (D.D.C. 2020), *rev'd in part on other grounds*, 58 F.4th 1273 (D.C. Cir. 2023) ("[**C**]**ourts have consistently read TILA as a disclosure statute—not a statute that allows the bureau to substantively regulate credit**."); *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1120 (9th Cir. 2009) ("**TILA is only a disclosure statute and does not substantively regulate consumer credit**."); *In re Capital One Bank Credit Card Interest Rate Litig.*, 51 F. Supp. 3d 1316, 1348 (N.D. Ga. 2014) (same). Second, overdraft services, as historically understood and regulated, fall entirely outside TILA's scope because they do not meet TILA's statutory definition of an extension of "credit." 15 U.S.C. §1602(f) (defining "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment"). By classifying discretionary overdraft services as "credit" under Regulation Z, the CFPB seeks to regulate substantively (in

contravention of the disclosure purposes of the statute) a financial service that was never intended to fall within TILA's scope even for purposes of disclosure—a move unsupported by TILA's text or legislative history.

The report issued by the House Committee on Banking and Currency at the time of TILA's passage in 1968 makes Congress' intent abundantly clear that the Act was not meant to regulate the substantive terms and conditions of credit; rather, it was simply to provide proper disclosures so that consumers could make informed decisions:

> Title I, the truth in lending and credit advertising title, **neither regulates the credit industry, nor does it impose ceilings on credit cha[r]ges**.[1] **It provides for full disclosure of credit cha[r]ges, rather than regulation of the terms and conditions under which credit may be extended**. It is the view of your committee that such full disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed and further permit the consumer to 'comparison shop' for credit. It is your committee's view that the full disclosure of the terms and conditions of credit charges will encourage a wiser and more judicious use of consumer credit.

1968 U.S.C.C.A.N. 1962, 1963 (H.R. Rep. 90-1040 at 7 (1967)). Comments by the drafters of the original legislation rebut any contention by the CFPB that the regulatory body is authorized under TILA to set fee caps. The report states unambiguously that **TILA** "**does** [**not**] **impose ceilings on credit cha[r]ges**." *Id.* Even in the event the CFPB is able to successfully deem overdraft services as extensions of credit, this Rule runs completely counter to the CFPB's claimed authority that the statute authorizes the agency to impose *de facto* price caps.

For decades, financial institutions and credit unions have offered discretionary overdraft services while always retaining the contractual *discretion* to decline charges on an overdrawn account. Due to that discretion, consumers lack the "right" to "incur debt" as contemplated by the statutory definition of "credit." These services provide critical short-term liquidity to consumers

[1] The legislative history refers here to "credit changes"; however, it is submitted that this was simply a clerical mistake, given that the phrase "credit charges" is used multiple times throughout the report with no further references to "credit changes."

who may lack access to other financial products, allowing them to cover essential expenses. Unlike credit agreements, which grant borrowers a legal right to defer repayment, overdraft services do not entitle consumers to overdraft funds or delay repayment. Instead, financial institutions retain discretion over whether to honor transactions that exceed account balances and recover overdraft amounts immediately. This practical and well-settled understanding precludes overdraft services from being treated as "credit" within the meaning of TILA (15 U.S.C. § 1602(f)) and, thus, establish that the CFPB has exceeded its statutory authority.

The Rule's fee cap and related operational mandates underscore the extent of the CFPB's overreach. These provisions impose *de facto* price controls and compel financial institutions to restructure their products, effectively regulating substantive aspects of financial services rather than facilitating consumer understanding of credit terms. Such measures far exceed the "necessary and proper" rulemaking authority granted to the CFPB under TILA (15 U.S.C. § 1604(a)), because the wholesale capping of certain financial services does not advance the disclosure purposes of the statute. It regulates the terms and conditions of the service being provided, which legislative history explicitly states was not the intent of the statute. *See*, 1968 U.S.C.C.A.N. 1962, 1963 (H.R. Rep. 90-1040 at 7 (1967)).

Beyond the legal deficiencies, the Rule's real-world impact cannot be ignored. By redefining overdraft fees as "credit," the CFPB threatens the viability of these programs, which are relied upon by millions of consumers for financial flexibility and support lines. The Rule's fee cap of $5 or less undermines the economic foundation of overdraft services, making them unsustainable for many institutions. Financial institutions may be forced to eliminate overdraft services entirely, depriving consumers of a critical tool for managing unexpected expenses. The resulting reduction in access to overdraft services disproportionately harms low-income

consumers, who often lack viable alternatives and will, instead, resort to payday loans and high-cost credit products. The CFPB acted arbitrary and capriciously when it implemented the rule without weighing these considerations and failing to conduct a statutorily-required cost-benefit analysis. *See*, [Doc. 1; pgs. 7, 44-52]. This is particularly apropos with respect to amici. Movants' member credit unions are not-for-profit financial cooperatives, who principally use the revenue from overdraft-protection programs to recoup hard costs for the service provided to support their members (as the credit unions are entirely member owned). Those hard costs include, but are not limited to:

- Technology infrastructure for online banking;
- Transaction processing costs;
- Charge offs and collection costs;
- Write-offs for uncollectible overdraft amounts;
- Customer service and staffing costs;
- Dispute resolution and associated staff costs; and
- Investments in fraud prevention and cyber-security.

Furthermore, the Rule's administrative and compliance burdens are staggering. To the extent the October 1, 2025 effective date materializes, financial institutions must overhaul their operational systems, amend policies and procedures, and retrain staff to align with the Rule's requirements. These changes impose significant costs that will further erode the affordability and accessibility of a key financial service. The CFPB's disregard for these consequences underscores the Rule's overreach and its deviation from TILA's core purpose of promoting transparency and informed decision-making, as opposed to regulating credit terms—which overdraft services do not even fit within the scope of the definition. Instead, the CFPB has exceeded its statutory authority and acted arbitrary and capriciously in that these considerations appear not to have been adequately weighed, with far-reaching consequences that can upend financial stability and ultimately push consumers to predatory alternatives.

b. The Supreme Court's Decision in *Loper Bright Enterprises* Requires Judicial Scrutiny Without Any Deference to the CFPB

The Supreme Court's recent ruling in *Loper Bright v. Raimondo* reinforces the importance of judicial engagement in safeguarding statutory limits. *See, Loper Bright v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 2273, 219 L.Ed.2d 832 (2024). Under this framework, the CFPB's determination that overdraft services constitute "credit" under TILA must be scrutinized *de novo*, without any deference to the agency's interpretation. This shift aligns with the broader legal mandate to ensure that regulatory actions are firmly rooted in the statutory authority actually intended and set out by Congress. As the Fifth Circuit explained in its one of its most recent decisions "to consider agency deference in the wake of *Loper Bright v. Raimondo*," the Circuit Court first notes that the Supreme Court "eliminated the 'judicial invention' of deference to administrative action and rulemaking." *Van Loon v. Dep't of the Treasury*, 122 F.4th 549, 562 (5th Cir. 2024).

> In *Loper Bright*, the Supreme Court "clarified 'the unremarkable, yet elemental proposition reflected in judicial practice dating back to *Marbury*' that 'courts decide legal questions by applying their own judgment,' even in agency cases." When "Congress has clearly delegated discretionary authority to an agency, we discharge our duty by 'independently interpret[ing] the statute and effectuat[ing] the will of Congress subject to constitutional limits.'" In effect, the Supreme Court has instructed that we must "independently identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with" the Administrative Procedure Act or have engaged in reasoned decisionmaking within those boundaries. To do so, we must "determine the 'best' reading of a statute; a merely 'permissible' reading is not enough."

Id. at 563.

The *Loper Bright* decision makes clear "that courts 'may not defer to an agency interpretation of the law simply because a statute is ambiguous.'" *Rest. L. Ctr. v. United States Dep't of Lab.*, 120 F.4th 163, 168 (5th Cir. 2024) (citing *Loper Bright*, 603 U.S. at 413). Now that "*Chevron* is overruled[,]" the Supreme "Court has instructed that [federal courts] are to return to

the APA's basic textual command: 'independently interpret[ing] the statute and effectuat[ing] the will of Congress." *Id.* at 171 (citations omitted). For the reasons explained herein and in the briefing by Plaintiffs, the "will of Congress" and the declared purpose of TILA within the statutory text itself is to "to assure **a meaningful *disclosure* of credit terms** …." 15 U.S.C. § 1601(a). Congress did not intend for the CFPB to venture beyond the boundaries of the statute's intent for disclosures, let alone delve further into substantively regulating services that exceed the statute's purpose of governing "credit" and encroach upon a broad range of other financial services, such as the overdraft services at issue in the Rule.

c. Overdraft Services Do Not Constitute an Extension of "Credit" nor do the Fees Imposed qualify as "Finance Charges" under the plain language of TILA

The CFPB's classification of overdraft services as "credit" contradicts the plain language of the statutory definition of the term as contemplated by TILA. "Credit" is statutorily defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C.§ 1602(f). The term "finance charge" is necessarily predicated on a service qualifying as an extension of "credit," because a "finance charge" is "the sum of all charges . . . imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. § 1605(a).

Discretionary overdraft services are transaction-specific charges for covering account deficits, not agreements to extend credit. Courts have already drawn this distinction between charges that are incident to extensions of credit versus overdrawn accounts. *See, In re Washington Mut. Overdraft Prot. Litig.*, 201 F. App'x 409 (9th Cir. 2006) (affirming district court's "conclusion that the overdraft fees are not finance charges" and dismissal of disclosure-related claim under TILA, with Ninth Circuit's finding: "The charges in question do not satisfy the

definition of finance charges **because they are not incident to extensions of credit. Rather, they are incident to overdrawn accounts**.") (emphasis added).

Unlike traditional credit arrangements, overdraft programs do not provide consumers with a legally enforceable right to overdraw their accounts or defer repayment. In the first instance, financial institutions retain the discretion to decline charges on an overdrawn account. Thus, it is not a "right" that the depositors can unilaterally elect as is normally the case in a formal written financing agreement. *Nicolas v. Deposit Guar. Nat. Bank*, 182 F.R.D. 226, 230 (S.D. Miss. 1998) ("In *Taylor*, supra, the court held that a daily overdraft fee of $5.00, charged to checking account customers when their accounts became overdrawn, was not a 'finance charge' as defined by Regulation Z where the parties did not agree in writing that the banks would pay items on overdrawn accounts.") (citing *Taylor v. Union Planters Bank of S. Mississippi*, 964 F. Supp. 1120 (S.D. Miss. 1997)). As stated in *In re Washington*, the fees are "incident to overdrawn accounts" and holding the account open. *See also, Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 139 (1st Cir. 2019) (finding overdraft fees "may compensate a bank for the service of continuing to hold open an overdrawn checking account"). In contrast, services where a line of credit is linked to a checking account to provide overdraft protection is the type of service that constitutes "credit." Importantly, those credit services involve separate, written credit agreements and underwriting, with the accompanying right to defer payment—all unlike discretionary overdraft services, which provide no right to incur debt or to defer its payment.

d. The CFPB's Rule Disregards Prior FRB Interpretations of TILA and Regulation Z

The CFPB's Rule contravenes well-established interpretations of TILA and Regulation Z, as understood by the Board of Governors of the Federal Reserve System ("FRB") during its decades-long stewardship of these regulations. The FRB repeatedly affirmed that overdraft

services, as discretionary and immediate-payment obligations, do not constitute "credit" subject to TILA and Regulation Z, as they lack the hallmarks of a credit transaction.

Since its promulgation in 1969, Regulation Z has provided that an item for which the payment was not "previously agreed upon in writing" is "not a finance charge." 12 C.FR. § 1026.4(c)(3); 34 Fed. Reg. 2002, 2004 (1969). These would include discretionary overdraft services. For example, in a 1977 interpretative letter, the FRB explained that Regulation Z does not cover "demand deposit accounts which carry no credit features and in which a bank may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account." 42 Fed. Reg. 22,360, 22,362 (1977) (emphasis added). In 1981, FRB again reiterated the point that while the term "credit card" includes an "asset account . . . tied to an overdraft line [of credit]," it does not include a "debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft." *Truth in Lending; Official Staff Commentary*, 46 Fed. Reg. 50,288, 50,293 (Oct. 9, 1981). The Board repeatedly reaffirmed its decision not to regulate discretionary overdraft services under TILA and Regulation Z, including several times shortly before regulatory authority shifted from the FRB to the CFPB in 2011. *See*, [Doc. 1; pgs. 35-36, ¶¶ 87-89].

The FRB's historical understanding of "credit" and their refusal to bring discretionary overdraft services within the ambit of Regulation Z reflects what has long been understood with respect to TILA and decades of industry practice. Congress did not intend for the regulatory agencies to extend the meaning of "credit" to discretionary overdraft services that have never maintained the hallmarks of a credit transaction. For all of the reasons set forth *supra*, the Court should construe CFPB's scope of authority under TILA in accordance with this historical understanding and practice, and principally in line with the plain meaning of the statutory text.

IX. CONCLUSION

For all of the above and foregoing reasons, the Movants respectfully request that the Plaintiffs' Motion for a Preliminary Injunction [Doc. 12] be granted.

This, the 7th day of January, 2025.

Respectfully submitted:

CALIFORNIA CREDIT UNION LEAGUE, CAROLINAS CREDIT UNION LEAGUE, COOPERATIVE CREDIT UNION ASSOCIATION, CORNERSTONE CREDIT UNION LEAGUE, ILLINOIS CREDIT UNION LEAGUE, KENTUCKY CREDIT UNION LEAGUE, LEAGUE OF SOUTHEASTERN CREDIT UNIONS, D/B/A/ THE LEAGUE OF CREDIT UNIONS & AFFILIATES, LOUISIANA CREDIT UNION ASSOCIATION, MICHIGAN CREDIT UNION LEAGUE & AFFILIATES, MINNESOTA CREDIT UNION NETWORK, MISSISSIPPI CREDIT UNION ASSOCIATION, NEBRASKA CREDIT UNION LEAGUE, NEVADA CREDIT UNION LEAGUE, NEW YORK CREDIT UNION ASSOCIATION, OHIO CREDIT UNION LEAGUE, TENNESSEE CREDIT UNION LEAGUE, UTAH'S CREDIT UNIONS, AND WISCONSIN CREDIT UNION LEAGUE

By: *s/ Walter D. Willson*
Walter D. Willson (MSB #7291)
Michael D. Anderson (MSB #105523)
Their Attorneys

OF COUNSEL:

WELLS MARBLE & HURST, PLLC
Post Office Box 131
Jackson, Mississippi 39205-0131
300 Concourse Boulevard, Suite 200
Ridgeland, Mississippi 39157
Telephone: (601) 605-6900
Facsimile: (601) 605-6901
wwillson@wellsmarble.com
manderson@wellsmarble.com

CERTIFICATE OF SERVICE

The undersigned certifies on this date I electronically filed the foregoing document with the Clerk of the Court using the Court's CM/ECF system, which served the document on all counsel of record in accordance with Fed. R. Civ. P. 5(b)(2)(E) and Admin. P. for ECF § 4.

This, the 7th day of January, 2025.

s/ Walter D. Willson
Walter D. Willson