**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

MISSISSIPPI BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION AMERICA'S CREDIT UNION, ARVEST BANK, BANK OF FRANKLIN, and THE COMMERCIAL BANK, Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU and ROHIT CHOPRA, Defendants.	Civil Action No. 3:24-cv-792-CWR-LGI

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MISSISSIPPI ECONOMIC COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber's Center for Capital Markets Competitiveness ("CCMC") advances America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that regulations strengthen our capital markets by allowing businesses to mitigate risks, manage liquidity, access credit, and raise capital. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

The Mississippi Economic Council ("MEC") is the State Chamber of Commerce and has been "the voice of Mississippi business" since its inception in 1949. With more than 10,000 members from nearly 1,000 member companies and organizations with business locations across Mississippi, including numerous businesses involved in the financial sector, the MEC provides leadership, resources, research, and advocacy to a broad range of business and legal issues important to its constituents. The MEC thus plays a key role in developing and implementing sound and efficient economic and business policies — all of which are aimed at making

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[1] *Amici curiae* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici curiae,* their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Mississippi an attractive climate for recruiting, expanding, and growing businesses within the State.

Amici have a strong interest in this matter because the Consumer Financial Protection Bureau ("CFPB") adopted an unlawfully expansive interpretation of its statutory authority and promulgated a regulation that, if permitted to stand, will impose unjustifiable burdens on financial institutions and consumers. Congress enacted the Truth in Lending Act ("TILA") to empower consumers to make their own financial choices by requiring lenders to disclose the costs of credit and the terms under which credit is offered. Since TILA's passage in 1968, federal regulators have agreed that TILA does not reach discretionary overdraft services because those services are not "credit" within the meaning of the statute. The CFPB rejected that decades-long understanding by adopting a new definition of "credit" that sweeps in discretionary overdraft services.

In addition, the challenged rule adopts, in practical effect, a price cap on overdraft fees that will inevitably result in a decline in the availability of overdraft services, particularly for the vulnerable consumers most in need of those services. That means consumers will be unable to make critical purchases of food, gas, medicine, shelter, and other necessities. The Chamber submitted comments to the agency during the rulemaking process explaining that the Bureau's proposal was "an anti-consumer measure that would restrict consumer access to financial products." CCMC Comments, CPFB-2024-0002 (Apr. 1, 2024), https://bit.ly/40blMpI. *Amici* submit this brief for the additional reason that they have an interest in protecting consumer access to financial products, like discretionary overdraft services, that provide consumers with a seamless process for making essential purchases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The CFPB rulemaking challenged in this action amends Regulation Z – the implementing regulation for the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq*. – to impose, for the first

time in TILA's history, restrictions on the fees that financial institutions may charge for discretionary overdraft services. *See* CFPB Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 106,768 (Dec. 30, 2024) (Rule). This Court should grant Plaintiffs' motion for a preliminary injunction because Plaintiffs are likely to succeed on their claim that the Rule must be set aside.

Discretionary overdraft services are overdraft services accompanying a checking or other deposit account that are just that – discretionary. The financial institution may choose to honor the overdraft transaction, or not, and consumers have long understood that they will pay a set fee if their bank authorizes a transaction that overdraws their account. Discretionary overdraft services are distinct from services provided pursuant to an agreement between the bank and the customer that enable the bank to draw from another account (such as a savings account affiliated with the overdrawn checking account) or from a line of credit (such as an affiliated credit card) in order to pay the transaction. Those services are not discretionary: when such a mechanism is in place to ensure payment, consumers are entitled to complete the transaction.

The Rule's restrictions on discretionary overdraft fees exceed the CFPB's statutory authority because TILA authorizes rulemaking only with respect to "credit" products – and discretionary overdraft services are not credit. Indeed, that was the consistent position of federal financial service regulators for decades until the CFPB's adoption of this Rule.

The Rule upends this longstanding understanding for very large financial institutions ("VLFIs") with assets of more than $10 billion. Rule, 89 Fed. Reg. at 106,769. Overdraft charges by VLFIs will continue to be exempt from regulation only if the fee is no more than the "breakeven" cost for providing the overdraft service. *Id*. VLFIs can determine whether their overdraft fees are above their breakeven costs by either calculating their breakeven cost using a formula set out in the Rule – a formula that fails to account for all of the actual costs of an overdraft

service – or by charging an overdraft fee of $5, the CFPB-dictated "benchmark" for breakeven costs. *Id.*

If a VLFI chooses to charge an overdraft fee above the CFPB's definition of "breakeven" cost, that fee will be deemed a "finance charge" subject to Regulation Z, which will trigger a host of regulatory requirements. The VLFI will be obligated to provide "annual percentage rate disclosures, other account opening disclosures, periodic statements," and to comply with all applicable "advertising rules." Rule, 89 Fed. Reg. at 106,769. The VLFI also will have to create a credit account, separate from the overdrawn account, for the overdraft charges – so that the overdrawn charges are paid via the separate credit line. *Id.* If the consumer can access their account with a debit card (as consumers with checking accounts typically can), the Rule also requires the VLFI to comply with the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act). *Id.* Under the CARD Act, the VLFI will have to, among other things, ensure compliance with "ability to pay" underwriting requirements – *i.e.*, the underwriting requirements consumers undergo when opening a new credit card. *Id.* In effect, the CFPB is requiring VLFIs to provide an entirely different type of financial product if they want to charge an overdraft fee above the CFPB-determined "breakeven" cost.

The Rule is unlawful and should be enjoined, for multiple reasons.

First, the Rule exceeds the CFPB's statutory authority because TILA does not authorize the agency to regulate discretionary overdraft services. TILA authorizes rulemaking with respect to "credit" products, and it defines credit 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), 1604(a). As Plaintiffs explain (Mem. ISO Preliminary Inj. 11-13, Dec. 18, 2024, ECF No. 13), discretionary overdraft services are not credit under TILA's plain language, because financial institutions retain the ability to reject any transaction that would overdraw an account. As a result, account holders

lack the "right" to incur debt. And account holders lack the "right" to defer payment because financial institutions typically use the next immediate deposit to the account to pay the negative account balance.

The Bureau tries to justify its interpretation of TILA by claiming that the Federal Reserve Board – which was tasked with implementing TILA for forty years – had classified discretionary overdraft services as a form of credit but chose to "except" them from Regulation Z in 1969, and that the new CFPB Rule merely eliminates that exemption for VLFIs. Rule, 89 Fed. Reg. at 106,768, 106,769, 106,789.

That is revisionist history. The Bureau's assertion ignores a long line of statements by the Federal Reserve Board and other federal regulators repeatedly affirming that discretionary overdraft services are not "credit" within the meaning of the statute because they lack the hallmarks of a credit product. That is, there is no written agreement requiring the financial institution to honor overdraft transactions; consumers have no right to defer payment of the overdraft amount; and consumers do not have to apply for discretionary overdraft services or qualify for such services based on their ability to pay. "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024), but the long history of agency statements affirming that discretionary overdraft services are not "credit" supports what is already plain from the language of the statute: The CFPB lacks authority to promulgate the Rule.

Second, a preliminary injunction is in the public interest because the Rule will inflict significant harm on consumers. The Rule effectively requires VLFIs to provide discretionary overdraft services at a loss, because the Rule limits VLFIs' charges to either $5 or a supposed "breakeven" cost that inevitably will be less than the actual cost of providing the service. Financial institutions unable to recoup the true cost of honoring overdraft transactions will respond by

reducing or ending the service. Consumers, particularly those who rely on overdraft services to purchase necessities, will suffer as a result. While VLFIs could charge a higher overdraft fee by complying with Regulation Z, the resulting service would be an entirely different financial product that would require, among other things, for consumers to satisfy ability-to-pay underwriting requirements. The consumers who depend most on discretionary overdraft services will likely not qualify for this new financial product. Because consumers will be harmed if the Rule goes into effect, the Rule should be preliminarily enjoined for this reason as well.

The Court should grant the motion for preliminary injunction.

ARGUMENT

I. The Rule Adopts An Unprecedented And Impermissibly Broad Definition Of "Credit."

Congress passed the Truth in Lending Act ("TILA") in 1968 in response to Americans' expanding reliance on credit products. *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363 (1973). Extensive congressional hearings revealed that "consumers remained remarkably ignorant of the nature of their credit obligations and of the costs of deferring payment" due, in part, to the sometimes "fraudulent[] practices by which consumers were informed of the terms of the credit extended to them." *Id*. TILA thus "has the broad purpose of promoting 'the informed use of credit' by assuring 'meaningful disclosure of credit terms' to consumers." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980) (quoting 15 U.S.C. § 1601). Congress initially authorized the Federal Reserve Board to issue regulations implementing the statute. *Mourning*, 411 U.S. at 365. But in 2010, "Congress transferred the administration of [TILA] to the CFPB." *Seila Law LLC v. CFPB*, 591 U.S. 197, 206 (2020).

TILA's reach hinges on a key term: "credit." Congress authorized first the Board, and then the Bureau, to "prescribe regulations" to ensure "the informed use of credit," which the statute

defines 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. §§ 1601(a), 1602(f), 1604(a). Discretionary overdraft fees do not qualify because the account holder does not have a "right" to defer payment – whether the overdraft will be honored, and payment deferred, depends entirely on the financial institution's discretionary decision.

The plain meaning of the statutory text is supported by the longstanding construction by federal bank regulators. For decades, the Board and other federal regulators agreed that discretionary overdraft services are not "credit" within the meaning of the statute. The CFPB's brand new, contrary interpretation of the statute is wrong.

A. Regulators have acknowledged for decades that discretionary overdraft services are not "credit" within the meaning of TILA.

The Federal Reserve Board has long held that discretionary overdraft services are *outside* TILA's scope. More than fifty years ago, the Board made clear by regulation that overdraft charges are not "finance charges" – the statutory term of art for the cost consumers pay for "credit" – and therefore are not subject to TILA. *See* Rule, 89 Fed. Reg. at 106,768 n.3 (citing 34 FR 2002 (Feb. 11, 1969)). The Board determined that TILA's definition of "credit" (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)), requires a written agreement between the creditor and debtor, the ability for the debtor to defer the immediate re-payment of the loan through the making of regular payments over time, and, typically, also includes an application for credit that would include information about the would-be debtor's ability to pay. Federal regulators consistently and repeatedly agreed that discretionary overdraft services are not "credit," until this Rule.

1. The 1968 Task Force Report

As early as 1968 – the same year TILA was enacted – a task force appointed by the Federal Reserve Board (which included several Board members) recognized the existence of discretionary overdraft services that were distinct from "credit" products. The task force reported on the emergence of bank-issued credit cards and check credit plans – both of which the task force identified as "a form of open-end or revolving credit . . . covered under the Federal Truth in Lending Act." Fed. Reserve Bd. Sys. Task Grp., *Bank Credit-Card and Check-Credit Plans* 44 (July 1968), https://bit.ly/4fDnxkd. Particularly relevant here, the task force explained that the check credit plans covered by TILA provided a form of overdraft coverage for checking accounts through a "prearranged automatic line of credit that is activated the moment the individual's account is overdrawn," allowing the "honoring of checks . . . up to [an] authorized line." *Id*. at 13. These "loans" were then "repaid on a revolving basis," typically through "formal, separate loan repayments to the bank." *Id*. Check-credit plans also were "made available only upon application and after bank approval." *Id*. at 14.

In contrast, the task force identified a different type of overdraft service then being offered to "preferred customers without requiring any formal overdraft application." *Id*. at 13. This overdraft service, the task force observed, "of course, do[es] not constitute either a credit-card or a check-credit plan." *Id*. The lack of a formal application for credit was critical to the task force's differentiation between the two products.

2. The Board's 1977 Interpretive Letter

The Board confirmed this distinction between discretionary overdraft services and overdraft services pursuant to an agreement in a 1977 interpretive letter. *See* Fed. Reserve Sys., Official Staff Interpretations, 42 Fed. Reg. 22,360-02 (May 3, 1977). The letter addressed a scenario in which a demand deposit account is associated with a bank credit card account, with

overdrafts on the deposit account being charged to the credit line. *Id*. at 22,361. Once the customer reaches the credit limit, the Board explained, the bank has a choice – if it honors any overdraft transaction, it could "[t]reat the amount as an overdraft on the demand deposit account" or "[d]ebit the bank credit card account . . . thus exceeding the credit limit." *Id*. The Board explained that the key was whether the bank honored the overdraft "pursuant to a written agreement between the bank and the customer to pay the check." *Id*. If it did, the bank was extending credit.

If, however, the bank "may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account," TILA does not apply. 42 Fed. Reg. at 22,362. The discretionary nature of the overdraft privilege and the lack of any prior agreement to honor the overdraft transaction thus were important to the Board's analysis.[2]

3. The Official Staff Commentary to Regulation Z

That discretionary overdraft services are *not* credit was reiterated again four years later in 1981, with the publication of the Board's official staff commentary to Regulation Z. The commentary explained that a credit card includes a "card that guarantees checks or similar instruments, if the asset account is also tied to an overdraft line or if the instrument directly accesses a line of credit." Fed. Reserve Sys., Truth in Lending, Official Staff Commentary, 46 Fed. Reg. 50,288, 50,293 (Oct. 9, 1981). By contrast, a credit card does *not* include a "debit card with no credit feature or agreement," and this is so "even if the creditor occasionally honors an

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[2] The CFPB discounts the 1977 interpretative letter, saying that the letter discusses whether the overdraft fees at issue were "finance charges," not whether the overdraft service at issue was "credit." Rule, 89 Fed. Reg. at 106,783. But TILA defines a finance charge as the sum paid for a credit product. *See* 15 U.S.C. § 1605(a) ("finance charge" means "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit"). If the overdraft services constituted "credit," then the associated fees would qualify as "finance charges." The conclusion with respect to "finance charges" therefore necessarily embodied the Board's determination regarding the meaning of "credit."

inadvertent overdraft." *Id*. In other words, to qualify as "credit" under TILA there must be a pre-existing agreement regarding the extension of credit. And there is no such agreement for discretionary overdraft services.

4. Regulations pursuant to the Truth in Savings Act

The Federal Reserve Board's treatment of the Truth in Savings Act ("TISA"), 12 U.S.C. § 4301 *et seq*., is also relevant. TISA "assist[s] consumers in comparing deposit accounts . . . , principally through the disclosure of fees" and "other account terms." Fed. Reserve Sys., Truth in Savings, 70 Fed. Reg. 29,582, 29,582 (May 24, 2005). In 2005 amendments to Regulation DD, which implements TISA, the Board rejected a proposal "urg[ing] the Board to cover certain overdraft services under Regulation Z." *Id*. at 29,583. Commenters argued that "[discretionary] overdraft services compete with traditional credit products," "which are covered under TILA and Regulation Z and provide consumers with the cost of credit expressed as a dollar finance charge and an APR." *Id*. at 29,585. But after "the Board's Consumer Advisory Counsel . . . discussed this issue, including ways to distinguish between an institution's infrequent, ad hoc accommodation of a customer, and an overdraft service that operates more like a line of credit," the Board declined to extend TILA requirements to discretionary overdraft services. *Id*.

5. The Board's 2006 *Amicus* Brief

In a 2006 *amicus* brief filed in the Ninth Circuit, the Board opposed a private plaintiff's argument that TILA's disclosure requirements should apply to discretionary overdraft fees. *See Amicus* Br. of Bd. of Governors of the Fed. Reserve Sys., *In re Washington Mut. Overdraft Protection Litig*., No. 04-55885 (9th Cir. June 2, 2006) ("Amicus Br.") (Compl. Ex. 1, ECF No. 1-1).

The Board first made clear that Regulation Z's statement that TILA does not reach overdraft fees was the agency's interpretation of the statute, not the result of the agency's authority

to grant exceptions. The Board recited TILA's definition of "finance charge" – "'the sum of all charges . . . incident to the extension of credit.'" *Amicus* Br. 6 (quoting 15 U.S.C. § 1605(a)). "*Following this statutory definition*," the Board continued, "Regulation Z provides that the 'finance charge' is 'the cost of consumer credit as a dollar amount,' and includes 'any charge . . . imposed . . . as an incident to or a condition of the extension of credit.'" *Id*. (quoting 12 C.F.R. § 226.4(a)) (emphasis added). The Board explained that, "[i]mportantly for this discussion, [Regulation Z] identifies a number of charges that 'are not finance charges,' including '[c]harges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.'" *Id*. at 6-7 (quoting 12 C.F.R. § 226.4(c)(3)); *see also id*. at 10-11 ("From the outset, the Board determined that these non-agreement overdraft programs were not subject to Regulation Z disclosure.").

The Board explained why a pre-existing written agreement to pay overdraft charges is critical to whether the financial institution has extended "credit." There is, the Board stated, a "general rule underlying all of the regulation's disclosure requirements," which is "that they are based on the legal obligations of the parties." *Amicus* Br. 7. "[I]n the absence of a written agreement, a financial institution offering an overdraft protection program other than pursuant to a written agreement is not a 'creditor' with respect to that program" and is "not required to make disclosures under Regulation Z." *Id*. Instead, the overdraft fees are covered by the Truth in Savings Act. *Id*. And, the Board clarified, "[t]he requirement that there be a written agreement is not met simply because there is a deposit account agreement that addresses overdrafts." *Id*. Instead, "there must be an agreement *to extend credit* through the bank's *obligation* to pay overdraft items." *Id*. at 8 (emphasis added).

Finally, the Board addressed whether financial institutions transform their discretionary overdraft services into a credit product when they automate the overdraft programs – and the Board

explained that they do not: "The Board does not consider the type of overdraft program . . . to be distinct from programs in which a financial institution occasionally honors an inadvertent overdraft without an automated program." *Amicus* Br. 9. While the Board was aware of "changes in technology [that] enabled institutions to adopt more automated overdraft payment programs," the Board "has made a deliberate choice not to cover these programs under Regulation Z" absent a written agreement from the financial institution to extend credit to the consumer. *Id*. at 11.

6. Regulations pursuant to the Electronic Fund Transfer Act

The Board again distinguished between discretionary overdraft services and overdraft privileges provided through a line of credit when, in 2009, it amended Regulation E, which implements the Electronic Fund Transfer Act. The Board explained that the primary method for covering overdrafts in connection with electronic fund transfers used to be "an overdraft line of credit linked to a debit card or other access device." Fed. Reserve Sys., Electronic Fund Transfers, 74 Fed. Reg. 59,033, 59,037 (Nov. 17, 2009). The Board explained that by 2009, however, "consumers [were] more likely to have these overdrafts covered by their institution's overdraft service, rather than by a separate overdraft line of credit." *Id*. Thus, the Board differentiated an "overdraft service" from a "line of credit." The rulemaking additionally confirmed that the two are different financial services by defining "overdraft service" to specifically exclude "payment of overdrafts pursuant to a line of credit." *Id*. at 59,039. There would have been no need to distinguish between an "overdraft service" and an "overdraft line of credit" if both were extensions of credit.

7. Guidance from the Office of the Comptroller of the Currency

The Board is not the only federal financial services regulator that has long understood that discretionary overdraft services do not qualify as "credit." For example, in 2001, the Chief Counsel of the Office of the Comptroller of the Currency ("OCC") issued Interpretive Letter No.

1082, which considered whether overdraft fees are "deposit account service" charges under 12 C.F.R. § 7.4002 or "interest" on a debt. OCC, Interpretive Letter No. 1082, at 3 (May 17, 2007), https://bit.ly/3PjOnD2. The OCC explained that "[a] bank's authority to provide products or services to its customers" (*i.e.*, deposit accounts with overdraft protection) "necessarily encompasses the ability to charge a fee for the product or service" (*i.e.*, an overdraft fee). *Id.* The OCC continued: "When the Bank processes an overdraft item and recovers a fee for doing so, it is not exercising its right to collect a debt." *Id.* at 6. To the contrary, "the processing of an overdraft and recovery of an overdraft fee by balancing debits and credits on a deposit account are activities directly connected with the maintenance of a deposit account." *Id.* And in fact, the OCC recognized that a bank can "offer[] a separate overdraft line of credit product, which is not an element of the Bank's routine deposit account service." *Id.* at 7 n.13. The OCC concluded that "[f]undamentally, the Bank is not creating a 'debt' that it then 'collects' by recovering the overdraft and the overdraft fee from the account." *Id.* at 6.[3]

B. Discretionary overdraft services are different in kind from traditional credit products.

TILA's statutory definition of "credit" is consistent with the longstanding understanding of what constitutes a credit product, and discretionary overdraft services lack the hallmark features of credit.

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[3] The Rule cites (at 106,781) an earlier OCC letter that states, without analysis, that "[a]n overdraft would be 'credit,' as defined in the Truth in Lending Act and Regulation Z." OCC, Interpretive Letter No. 914, at 1 (Aug. 3, 2001), https://bit.ly/4fEI3ky. But that letter did not address a discretionary overdraft service. Instead, the financial institution at issue was making express promises to cover overdraft transactions, essentially promising a $500 credit line. *See id.* at 3 (marketing materials state that overdraft program "adds a pre-approved $500 overdraft limit to your personal checking account" so that "[i]f you overdraw your account, Bank *will cover* each check up to $500 limit") (emphasis added).

TILA defines "credit" 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). As the Federal Reserve Board has explained, *see* pp. 10-11, *supra*, the debtor's right to incur a debt is described in a written agreement. That written agreement also describes the extent to which the repayment of the debt may be deferred – typically, the agreement will describe minimum payments the debtor must make over a fixed period of time. As the Board has also explained, *see* pp. 7-8, *supra*, financial institutions also typically extend credit after reviewing an application from the would-be debtor that establishes the applicant's ability to pay. These three features – a written agreement establishing the right to incur a debt, a written agreement establishing the deferred repayment plan, and an application establishing creditworthiness – are the hallmarks of a credit product.

Other traditional credit products share these features. Credit cards, mortgages, and car loans all come with expansive written agreements detailing the amount of debt the debtor may incur and how long the debtor may defer repayment. Consumers must submit an application describing their income and financial obligations when they want to open a credit card, get a mortgage on real property, or finance the purchase of a new car. Even overdraft protection tied to a distinct credit line shares these three features: consumers have a written agreement detailing how much credit is available and how they will repay it, typically after applying for the financial product in a manner that establishes their creditworthiness. *See* Bank Policy Inst. Comments 4, CPFB-2024-0002 (Apr. 1, 2024), https://bit.ly/3W0wWLK ("Unlike the more commonly used discretionary overdraft products, overdraft lines of credit resemble other types of credit products such as credit cards, and thus involve a formal application and a written credit agreement."); First Fed Comments 2, CPFB-2024-0002 (Apr. 1, 2024), https://bit.ly/3DOTzMF (explaining that "most banks have strict underwriting criteria for overdraft lines of credit because they are unsecured and default rates are high," so "[i]n 2022 and 2023, our decline rate for the overdraft

line of credit was approximately 84-85%" and "[m]any of our customers do not qualify for the overdraft line of credit because of not meeting minimum credit score criteria").

Discretionary overdraft services lack these critical features. Discretionary overdraft services do not afford account holders the right to incur a debt (because the financial institution may decline, in its discretion, a transaction that overdraws the account) or the right to defer repayment of that debt (because the overdraft amount is recouped with the next deposit to the account). *See* Rule, 89 Fed. Reg. at 106,770. And when these overdraft services are provided, they are typically included with a checking or other deposit account without account holders needing to apply for the product or establish their creditworthiness. *See id.*; CCMC Comments 9; Bank Policy Inst. Comments 4 CPFB-2024-0002 (Apr. 1, 2024), https://bit.ly/3W0wWLK ("Discretionary overdraft products . . . are often provided on equal terms to all depositors and do not require standalone applications.").

The CFPB insists that TILA's reference to a "right" to incur debt "does not require that such right be previously agreed upon." Rule, 89 Fed. Reg. at 106,783. But an unenforceable "right" that is subject to another's discretion is not a right at all. *See* "Right," Black's Law Dictionary (12th ed. 2024) ("[a] power, privilege, or immunity secured to a person by law"). The CFPB points to the fact that financial institutions may decline transactions made with credit cards yet no one disputes that credit cards are a form of credit. Rule, 89 Fed. Reg. at 106,783. But a financial institution's ability to decline a transaction that would exceed a card's credit limit – and thus exceed the agreed-upon terms for the debtor's right to incur debt – or to prevent suspected fraud, as many credit card agreements permit, is very different from a financial institution's unfettered discretion to decline any transaction that would overdraft an account. *See* Fed. Trade Comm'n, *When a Company Declines Your Credit or Debit Card*, (Aug. 2022), https://bit.ly/4fEwtph.

The CFPB also insists that discretionary overdraft services afford a debtor the "right" to defer the payment of debt, because the overdraft remains outstanding until the next deposit into the account. Rule, 89 Fed. Reg. at 106,783. But that is an immediate, not a deferred, repayment. Credit products allow debtors to make minimum payments across a set time period (*i.e.*, 15 or 30 years for mortgages, 24 to 84 months for car loans) to repay the loan. When a transaction overdrafts a deposit account, however, financial institutions do not allow the overdraft amount to remain outstanding for an agreed upon period of time – instead, whatever money is paid to the account goes immediately to cover the overdraft amount.

As for other "hallmarks of credit," such as an application establishing creditworthiness, the CFPB dismisses them without an explanation, saying simply that "TILA does not require a transaction to have any of the so-called hallmarks to be considered credit." Rule, 89 Fed. Reg. at 106,783. The agency wholly ignores the Federal Reserve Board's prior statements that an application for credit is an important indication for identifying a credit product. *See* pp. 7-8, *supra*.

In sum, the CFPB has adopted an expansive definition of "credit" to bring discretionary overdraft services within the scope of its rulemaking authority. But in doing so, it has exceeded the plain language of the statute and sought to regulate a financial product that lacks the key features of other well-established credit products. The CFPB's interpretation should be rejected by this Court. And without the necessary statutory authority, the Rule is invalid.

II. The Rule Will Harm Consumers Because Financial Institutions Will Reduce Or End Their Overdraft Services.

The preliminary injunction should be granted for an additional reason: The Rule will harm consumers by curtailing their access to discretionary overdraft services. It therefore is in the public interest for the Rule to be enjoined.

A. Financial institutions will respond to the Rule by reducing or ending discretionary overdraft services.

The Rule gives VLFIs three choices: (1) charge no more than a supposed "breakeven" cost calculated using a complex formula specified in the Rule; (2) charge an overdraft fee of no more than $5; or (3) if the financial institution seeks to charge more for overdraft services than the $5 capped fee or the "breakeven" calculated cost, offer a new type of credit – which is not a discretionary overdraft service at all – called "overdraft credit," which would be subject to the provisions of Regulation Z.

Faced with these choices, financial institutions will limit their discretionary overdraft services. The result will be an overall reduction in the availability of overdraft services, particularly for the financially vulnerable consumers who rely on those services most. *See* American Bankers Ass'n Comments, No. CFPB-2024-0002 (Apr. 1, 2024), https://bit.ly/3W2kg6O (explaining that banks will "stop offering or sharply restrict access to overdraft services" in response to the Rule) (capitalization omitted); Consumer Bankers Ass'n ("CBA") Comments 2, No. CFPB-2024-0002 (Apr. 1, 2024) ("CBA members are clear on one thing: The [Rule] will result in fewer consumers having access to overdraft services."), https://bit.ly/3PkCJbm.

First of all, financial institutions are very unlikely to rely on the Rule's "breakeven" formula. To use this standard, a VLFI "determines its total direct costs and charge-off losses for providing [discretionary overdraft services] to all accounts open at any point during the prior year and then divides that figure by the total number of non-covered overdraft transactions attributable to those accounts occurring in the prior year." Rule, 89 Fed. Reg. at 106,800. Only those "costs and charge-off losses that are specifically traceable" to the VLFI's provision of discretionary overdraft services may be used for this calculation. *Id*. at 106,801.

Calculating this figure would require significant resources – especially given the risk of the CFPB second-guessing of an institution's calculation. For instance, the CFPB explains that a VLFI could not attribute the costs of customer service calls about its discretionary overdraft service unless it "had used issue tagging in its call center to reasonably and accurately gauge the number of customer service calls it received" on the topic. Rule, 89 Fed. Reg. at 106,801. In other words, a VLFI must be able to "provide evidence to demonstrate" a "direct relationship" between a cost or charge-off loss and its provision of discretionary overdraft services. *Id.* Identifying all possible costs and charge-off losses, implementing systems to track those costs and losses, and then tallying those costs and losses to arrive at the final "breakeven" cost is simply too burdensome and expensive for VLFIs to adopt this standard, especially because attempting to satisfy the standard comes with significant compliance risks, including litigation. *See* CCMC Comments 11.

The $5 overdraft fee option would potentially eliminate a VLFI's need to calculate its "breakeven" cost and avoid the risk of litigation or enforcement actions based on the suspicion that the complex calculation may be wrong. But the capped $5 fee also will trigger a substantial diminution of overdraft services, as well as additional costs to financial institutions for implementing changes to the financial institution's account offerings.

That is because such a significant reduction in the cost for initiating an overdraft transaction will result in many more overdrawn accounts. *See* CCMC Comments 6. If consumers overdraft too frequently, a financial institution will be forced to manage the resulting increased risk of nonpayment by declining more transactions outright or otherwise significantly curtailing its discretionary overdraft service by, for instance, limiting the number of times a year that an accountholder may initiate an overdraft transaction. *Id.*; *see also* Consumer Banker's Ass'n, *Ex Parte* Submission, No. CFPB-2024-0002 (Nov. 14, 2024) (explaining that "financial institutions are disincentivized to implement the CFPB-mandated price caps" for overdraft fees due to the need

to manage "the risk associated with providing overdraft services"), https://bit.ly/4ahESyd. Additionally, if VLFIs start charging no more than $5 per overdraft, the reduced fee income may cause them to end consumer-friendly features they are currently able to offer as part of their discretionary overdraft program, such as grace periods, waiving overdraft fees for transactions below a certain amount, or limiting the number of overdraft fees a consumer may incur per day. *See* CCMC Comments 7.

With the "breakeven" cost standard and the $5 capped fee both presenting significant flaws, VLFIs may turn to the Rule's third option: offering overdraft services as a separate credit account under TILA and Regulation Z. But this option transforms discretionary overdraft services into an entirely different financial product that will only be available to a smaller subset of consumers. The Rule requires VFLIs acting on this option to, among other things, establish a separate credit account for the payment of overdraft transactions; calculate and disclose the annual percentage rate for each overdraft fee; and impose ability-to-pay underwriting requirements on consumers seeking this overdraft service. *See* Compl. ¶¶ 67, 115, 126-27; Rule, 89 Fed. Reg. at 106,769, 106,787.

Offering a significant amount of overdraft services as a line of credit may be impractical, if not impossible, for some financial institutions from an operational or financial standpoint. The CFPB itself admits that it lacks "evidence . . . to confidently predict" whether "very large financial institutions will find it profitable to offer" this new product. Rule, 89 Fed. Reg. at 106,830. That is because building out overdraft credit as an additional product will require significant capital, as well as technology investment, risk-monitoring, compliance with credit bureau reporting requirements, and customer servicing investments. *See* CCMC Comments 16; Rule, 89 Fed. Reg. at 106,833 ("The one-time cost of setting up a new covered overdraft program or transitioning consumers to existing covered overdraft programs could be *substantial*.") (emphasis added).

Institutions unable or unwilling to invest in this new product offering may severely curtail their overdraft protections or stop offering overdraft services entirely.

But, even if VLFIs choose to offer this new overdraft-as-credit product, the product will likely be limited to a subset of consumers: those who can qualify for a loan under the terms of TILA and Regulation Z. That would mean consumers who need overdraft services most (because they lack access to other credit products) would not have access to this product. *See* Consumer Bankers Ass'n, *CBA Releases National Empirical Survey Results Showing Consumer Value and Need for Bank Overdraft Products* (Mar. 21, 2024), https://bit.ly/3Plef1E (explaining that 67% of consumers who "report overdrafting four or more times in the past year" have been denied a credit card) (Nat'l Survey); Michael J. Hsu, Acting Comptroller, Off. of the Comptroller of the Currency, *Remarks before the Consumer Federation of America's 34th Annual Financial Services Conference: "Reforming Overdraft Programs to Empower and Promote Financial Health"* 4 (Dec. 8, 2021), https://bit.ly/4gwVrIy ("Nearly 20 percent of those frequent overdraft users identified in the CFPB study did not have a credit score, suggesting that at least some of the recurring usage may have been driven by consumers' challenges in obtaining traditional forms of credit.").

The CFPB concedes this point, stating that "[t]he ability to obtain and use covered overdraft credit [which complies with TILA and Regulation Z] is typically limited to consumers whose credit history allows them to qualify for an overdraft line of credit or who have available credit on a credit card." Rule, 89 Fed. Reg. at 106,770.

In sum, the CFPB cannot dispute that the Rule will largely limit overdraft services to the subset of consumers who can meet underwriting standards – which will dramatically reduce the availability of those services to other consumers who rely on discretionary overdraft services to make critical purchases during times of financial stress.

B. Reducing the availability of and access to overdraft services will harm consumers.

American consumers, including the financially vulnerable, choose to use a broad range of financial products to meet their varying needs. Taking away one of these options will inevitably harm consumers. Failing to seriously consider these negative repercussions will only compound these problems. But this is what the CFPB has done: The agency significantly limited the availability of discretionary overdraft services offered by VLFIs and it did so without seriously considering the resulting harm to American consumers, and particularly the harm to the financially vulnerable consumers who may rely on overdraft services to make critical purchases.

The CFPB acknowledges that "financially vulnerable households" are more likely to use discretionary overdraft services than other households. Rule, 89 Fed. Reg. at 106,820; *see also id*. at 106,773; Fin. Health Network, Overdraft Trends Amid Historic Policy Shifts (Jun. 1, 2023), https://bit.ly/4ahFGDf ("Of individuals who reported overdrafting more than 10 times in 2022, 82% were Financially Vulnerable."). These consumers rely on overdraft services for critical transactions – to pay for necessities like food, medicine, shelter, and utilities. CCMC Comments 3. Often these consumers use discretionary overdraft services because they do not qualify for traditional credit offerings, and because other financial products for which they do qualify – such as payday loans – are generally more expensive. *Id*. at 8; *see also* Rule, 89 Fed. Reg. at 106,773 ("financially insecure" consumers who "are frequently overdrawn" are "less likely to have access to alternative credit options").

And discretionary overdraft services allow consumers to avoid late fees from service providers; the possibility of having critical services – like internet or electricity – shut off; and the embarrassment of having payment declined at the point of sale. CCMC Comments 6; *see also* Nat'l Survey (37% of frequent overdrafters would choose to pay late "to cover a gap in funds if

they lost access to overdraft services"; 10% of frequent overdrafters would opt to pawn or sell households items if overdraft services were unavailable).

The CFPB does not deny that the Rule will result in a reduction in discretionary overdraft transactions. *See* Rule, 89 Fed. Reg. at 106,828-29. And the CFPB admits that the vulnerable consumers who rely on overdraft services for critical purchases will suffer most from the effects of the Rule. *Id*. at 106,829. But the CFPB blithely justifies this change by claiming that a reduction in discretionary overdraft services "could . . . be beneficial to some affected consumers" because they will not incur overdraft fees. *Id*. at 106,823; *see also id*. at 106,829; *id*. at 106,820 ("Those disadvantaged consumers who are not offered any overdraft credit at all will benefit from avoiding the harms associated with [discretionary overdraft services."). The CFPB similarly discounts the harms that will result when consumers are denied access to the new Regulation Z-compliant overdraft credit product. According to the agency, while the underwriting requirement for that product will "generally reduce the amount of [overdraft] credit available to some consumers," those "consumers may benefit . . . if it makes it less likely that they are burdened with covered overdraft debt for which they are unlikely to be able to make required minimum periodic payments." *Id*. at 106,834.

In other words, the CFPB believes that consumers should not be purchasing items if they cannot satisfy underwriting requirements – but the CFPB ignores that consumers use overdraft services to buy necessities at critical times when they have few other options, and also to avoid the late fees they may otherwise incur for failing to pay their phone, internet, utility, or other bills. And it ignores the basic principle that consumers should make their own choices, not have their choices limited by regulatory fiat.

The obvious reality is that if consumers cannot access overdraft services, they will go without necessities or be forced to turn to other more expensive products (such as rent-to-own

services, and payday, pawn shop, tax refund anticipation, and auto title loans) to finance needed purchases – as the CFPB itself has acknowledged. *See* CFPB Office of Research Publication No. 2023-9, *Overdraft and Nonsufficient Funds Fees, Insights from the Making Ends Meet Survey and Consumer Credit Panel* 36 (Dec. 2023), https://bit.ly/49YSKNk ("Financially constrained consumers who do not have access to or cannot quickly obtain traditional credit may turn to high-cost alternative forms of credit . . . ."). The Rule will undermine consumers' ability to buy basic necessities. It is in the public interest for the Rule to be enjoined.

CONCLUSION

The motion for a preliminary injunction should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2025, I filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will serve all counsel of record.

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