UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

MISSISSIPPI BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS, ARVEST BANK, BANK OF FRANKLIN, 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. 3:24cv792-CWR-LGI

UNOPPOSED MOTION OF BPI AND ICBA TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Bank Policy Institute ("BPI") and Independent Community Bankers of America ("ICBA") respectfully move this Court for leave to file the brief, attached as Exhibit 1, as *amici curiae* in support of Plaintiffs' Motion for a Preliminary Injunction [Dkt. No. 12]. "While no rule specifically governs amicus status in district court proceedings, courts typically apply Rule 29 of the Federal Rules of Appellate Procedure." *Mississippi v. Becerra*, No. 1:22CV113-HSO-RPM, 2023 WL 5668024, at *7 (S.D. Miss. July 12, 2023). An amicus brief is permitted where the movant has an interest in the case and the brief is desirable and relevant to the disposition of the case. Fed. R. App. P. 29. Plaintiffs and Defendants do not oppose the filing of this amicus brief. *See id.* 29(a)(2).

BPI is a nonpartisan public policy, research, and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

ICBA is a national trade association with one mission: to create and promote an environment where community banks flourish. ICBA powers the potential of the nation's community banks through effective advocacy, education, and innovation. ICBA's membership consists of thousands of community banks located throughout the United States—more than half of the total depository institutions in the country. ICBA's members collectively operate nearly 50,000 locations nationwide, employ nearly 700,000 Americans, hold $5.8 trillion in assets, hold $4.8 trillion in deposits, and make $3.8 trillion in loans to consumers, small businesses, and the agricultural community.

BPI and ICBA have a strong interest in how the CFPB's final rule on overdraft protection services is likely to affect not only banks, but also their customers. The attached *amicus* brief provides an analysis of how the rule is likely to affect consumers of overdraft protections and consumer access to banking services generally—issues that the CFPB failed to adequately consider and that are important to this Court's assessment of whether it should issue a preliminary injunction. The analysis in this brief is not duplicative of Plaintiffs' briefing and may be of assistance to the Court.

Accordingly, BPI and ICBA timely file this motion and respectfully request the Court to grant their motion to file an amicus brief in the form attached as Exhibit 1.

Dated: January 7, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2025, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

MISSISSIPPI BANKERS ASSOCIATION,
CONSUMER BANKERS ASSOCIATION,
AMERICAN BANKERS ASSOCIATION,
AMERICA'S CREDIT UNIONS,
ARVEST BANK,
BANK OF FRANKLIN, 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. 3:24cv792-CWR-LGI

BRIEF OF *AMICI CURIAE* BPI AND ICBA IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTERESTS OF *AMICI CURIAE*[1]

Amicus the Bank Policy Institute ("BPI") is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial-services industry regarding cybersecurity, fraud, and other information-security issues.

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BPI and ICBA submit this brief to explain how the final rule promulgated by the Consumer Financial Protection Bureau ("CFPB") governing overdraft protection services would hurt the consumers it purportedly seeks to help: those who most rely on these services, particularly those with limited access to credit, as well as low-income consumers of banking services more generally. This final rule would require larger banks that choose to charge more than the artificially low cap set by the CFPB to convert discretionary overdraft protection services into a line of credit, subject

[1] *Amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

to all the regulatory requirements and restrictions that come with extending credit to consumers. That fundamental alteration of overdraft protection could severely reduce the availability of these services, harming customers who depend on them—the very population the CFPB purportedly seeks to protect. By imposing these restrictions on those banks' overdraft protection services, this final rule also hampers those banks' continued ability to provide free checking accounts and other services valuable to low-deposit consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

On December 12, 2024, the CFPB issued its rule titled Overdraft Lending: Very Large Financial Institutions ("Rule"), 89 Fed. Reg. 106,768. The Rule overturned over a half-century of practice and precedent by classifying discretionary overdraft protection services offered by financial institutions with more than $10 billion in assets ("Very Large Financial Institutions" or "VLFIs") as "credit" under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and requiring banks that opt not to reduce overdraft fees to artificially low levels to convert discretionary overdraft protection services to a credit product. We describe the CFPB's benchmark and "at cost" fees as "artificially low" because the agency does not account for real expenses incurred in offering those services and chooses instead to take account only of direct costs and charge-offs.

Although the CFPB was statutorily required to consider "the potential reduction of access by consumers to consumer financial products or services resulting from" its rule, 12 U.S.C. § 5512(b)(2)(A)(i), it failed to adequately analyze the likely effects of the Rule on those consumers who rely on overdraft protection for emergency liquidity. The Rule harms consumers it purportedly seeks to protect in three main ways: (i) VLFIs may be forced to reevaluate and limit access to overdraft products for consumers across the board; (ii) consumers who need overdraft protection

more often will not qualify for the service if it is treated as a credit product; and (iii) costs associated with checking accounts may increase, especially for those with low balances.

Studies show that customers who use overdraft protection services more than just occasionally (*i.e.*, more than 2 to 3 times a year) have far less access to liquidity than customers who never overdraw their accounts. They also typically have much lower credit scores—and, consequently, less access to viable credit options. And many users of overdraft protection use those services as a stopgap to timely pay for necessities, such as food, gas, utilities, and rent. The consequences of having insufficient account funds to cover such payments when due can be serious, including high penalty fees for missed or late payments, denial at checkout, and termination of service. Many would face serious hardship—and as a result may resort to expensive payday loans or pawning valuables—if, as a consequence of this Rule, they lose access to overdraft protection.[2]

VLFIs that do not adopt the Rule's artificially low fee cap or "breakeven" calculation would be required to convert their overdraft protection services into credit products, complete with ability-to-pay analyses, significantly revised or new disclosures, limitations on certain fees, and other underwriting requirements. But because the more frequent consumers of overdraft protections typically use those services precisely because they have limited access to credit, they are unlikely to qualify for the new credit product and could lose access to overdraft protections altogether. To make matters worse, VLFIs that do adopt the artificially low fee cap may be forced to limit discretionary overdraft services to customers, especially those who rely on the service more

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[2] *See, e.g.*, FDIC, *How America Banks: Household Use of Banking and Financial Services*, *2019 FDIC Survey*, p. 55 (Oct. 2020) (finding "37% of adults could not cover an emergency expense of $400 using only cash, savings, or a credit card paid in full on their next statement"), https://www.fdic.gov/analysis/household-survey/2019report.pdf.

often, to ensure appropriate risk-mitigation practices. The additional restrictions on discretionary overdraft products could also force banks to reevaluate the economic viability of certain other banking services for low-deposit consumers, many of whom are low-income.

In light of the CFPB's failure to adequately account for the harm the Rule is likely to impose on users of overdraft protection services, including low-income consumers, the Court should preliminarily enjoin implementation of the Rule until the conclusion of this litigation.

ARGUMENT

A court adjudicating a motion for preliminary relief examines four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether there is a substantial threat that the plaintiff would suffer irreparable injury absent the injunction; (3) the balance of harms to the parties; and (4) the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs have established all four factors. In this brief, *amici* focus on the final factor—whether the public interest would be served by preliminarily enjoining the Rule. As explained below, if implemented, the Rule is likely to limit financial alternatives for many people who depend upon overdraft protection to pay for necessities, and who lack access to traditional credit and other forms of liquidity. Requiring VLFIs to turn discretionary overdraft protection services into credit products or comply with an artificially low benchmark would leave some customers who rely on those services without access to overdraft protection and could further limit or eliminate low-income consumers' access to other important banking services. This both offends public policy and fails to comply with the CFPB's statutory obligation under 12 U.S.C. § 5512(b)(2)(A)(i). In light of these harms—which the CFPB failed to adequately consider—the Court should preliminarily enjoin the Rule.

A. The CFPB's Rule Breaks with Decades of Regulatory Practice and Interpretation by Reclassifying Discretionary Overdraft Protection Services as Credit.

Most of BPI's and ICBA's members offer their customers discretionary overdraft protection services. When a customer completes a transaction that would overdraw his account, financial institutions have the option of paying or declining such transaction; if the transaction is paid into overdraft, the institution typically charges the customer a fee pursuant to the customer's account agreement. As the CFPB explained, for this type of service, "the financial institution typically pays overdrafts up to certain limits but does not agree in advance to pay the overdrawn transactions, reserving discretion to decline any given overdraft transaction." 89 Fed. Reg. at 106,770.

For more than 50 years, bank regulators have purposefully not classified these discretionary overdraft protection services as "credit." Rather, the CFPB and its predecessor in regulation, the Board of Governors of the Federal Reserve System, consistently distinguished discretionary overdraft protection services—for which there is no "payment previously agreed upon in writing"—from services that include a "credit feature." *See e.g.*, Compl. Ex. 1 at 7 (Brief for Board of Governors of the Federal Reserve System as Amicus Curiae, *In re Washington Mut. Overdraft Protection Litig.*, No. 04-55885 (9th Cir. June 5, 2006)). That longstanding interpretation and treatment of overdraft protection services made sense because discretionary overdraft products are fundamentally different from true credit products like credit cards or overdraft lines of credit. Credit products are typically provided pursuant to a loan agreement and require a formal application. Unlike those traditional credit services, which include a financial institution's "obligation" to extend credit, discretionary overdraft protection services lack an "agreement to extend credit" as the financial institution has no "obligation to pay overdraft items." *Id.* at 8.

Notwithstanding the longstanding distinction by regulators between credit products, which are governed by agreements that obligate a bank to extend credit, and discretionary overdraft services, which are governed by the depositor's account agreement[3] expressly stating that the bank has no such obligation, the Rule blurs the line between the required and the discretionary by reclassifying discretionary overdraft protection services as "credit." The CFPB contends discretionary overdraft protection services fit the definition of "credit" under TILA because "the financial institution has provided the consumer with the 'right' to defer payment of debt or to incur debt and defer its payment, and has therefore extended 'credit' under the plain language of TILA's definition." 89 Fed. Reg. at 106,783. As Plaintiffs explain, that reclassification makes little sense because banks have no obligation to pay discretionary overdrafts and banks' account agreements do not confer on customers a right to defer payment of debt. Pls.' Mem. of Law in Supp. of Mot. for Preliminary Injunction ("Mem. in Supp. of P.I.") 11–14 [Dkt. No. 13].

The Rule offers VLFIs two choices if they opt to provide overdraft protection services. First, in order to avoid the heavily regulated regime and ill-suited framework that comes with offering a consumer credit product, VLFIs can either (1) cap overdraft fees at $5, which the CFPB incorrectly estimates would cover costs of offering discretionary overdraft protection services, or (2) cap overdraft fees at a "breakeven" amount calculated by unduly constrained standards set forth in the Rule. *Id.* at 106,769; *see* Pls.' Mem. in Supp. of P.I. 22–24 (explaining significant costs imposed by price cap and "breakeven" options). Although the CFPB acknowledges that many institutions offering overdraft protection services have adopted "consumer-friendly features, such as cure periods, de minimis limits, transaction limits, and real-time notifications," 89 Fed. Reg. at

[3] For debit-card transactions and ATM withdrawals, customers must affirmatively opt in to overdraft protection services. *See* p. 16, *infra*.

106,799, the Rule does not consider the cost of those consumer protections or other indirect costs of offering the product in setting the $5 cap and prohibits banks from considering these costs when calculating the "breakeven" amount, *id.*

Second, if VLFIs opt to continue offering overdraft protection services to their customers at costs above "breakeven," the overdraft protection services would be subject to Regulation Z's requirements applicable to open-end credit products, including calculations of annual percentage rates, periodic statements, due-date requirements, and account-opening disclosures. 89 Fed. Reg. at 106,769, 106,775. VLFIs utilizing above "breakeven" fees for overdraft protection services may no longer structure the overdraft payment and fee as a negative balance on a checking account but must instead create a "separate credit account" from which the institution would extend this "credit"—thus eliminating a fundamental difference between discretionary overdraft protection services and traditional overdraft credit lines. *Id.* at 106,787. VLFIs offering these services at above "breakeven" cost for checking accounts with a debit card or similar device must also comply with new, additional substantive restrictions and disclosure requirements, including an ability-to-pay underwriting requirement. *Id.* at 106,794.

In sum, breaking with over half a century of consistent regulatory interpretation, the CFPB now classifies discretionary overdraft protection services as "credit." This leaves VLFIs with the option of (i) taking a loss by charging only minimal fees for these services, (ii) decreasing access to overdraft services, especially to consumers who are less likely to cure their overdraft, or eliminating the service entirely; or (iii) continuing to charge an amount designed to cover those services, but subjecting the institution and the consumer to burdensome requirements (*e.g.*, assessing ability to repay) that may preclude the consumer from qualifying for the services.

B. Consumers Who Most Depend on Overdraft Protection Typically Rely on It to Purchase Necessities When Facing Temporary Cash-Flow Shortfalls.

In assessing whether implementation of the Rule would harm the public interest, the Court should focus on how the Rule is likely to affect those consumers who most value overdraft protection services. As detailed below, consumers who use overdraft protection on more than just sporadic occasions (*i.e.*, more than two to three times a year) typically have lower credit scores, lack access to lines of credit, and use the service to purchase necessities (*e.g.*, groceries and gasoline) that would otherwise be unobtainable without resorting to more expensive and riskier alternatives, including payday, auto-title, and pawn-shop loans. *See infra* pp. 13–14. By requiring VLFIs to artificially cap overdraft fees or convert overdraft protections into credit products, the Rule risks leaving consumers who most value overdraft protection without access to that protection at all.

Research shows that a low credit score is a defining feature of consumers who rely on overdraft protection more than just occasionally. Generally, a consumer's credit score is a measurement of their credit health. A subprime (*i.e.*, low) credit score indicates that the consumer has struggled to repay debts on time. *See, e.g.*, *Hoffman v. Grossinger Motor Corp.*, 218 F.3d 680, 681 (7th Cir. 2000). Recently, the CFPB found that nearly 4 in 10 consumers who incur overdraft fees do so more than three times per year,[4] and that these consumers have an average credit score that is more than 100 points lower than that of consumers who do not overdraft their accounts.[5] The CFPB also found that 41% of customers more likely to rely on overdraft protections have a

[4] Consumer Financial Protection Bureau, *Overdraft and Nonsufficient Fund Fees: Insights from the Making Ends Meet Survey and Consumer Credit Panel*, CFPB Office of Research Publication No. 2023-9, p. 12 (Dec. 2023), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf.

[5] *Id.* at 27.

subprime credit score (below 620), compared to 10% of consumers who do not overdraft.[6] Additional studies have confirmed the CFPB's finding that overdraft protection is most often used by consumers with lower credit scores.[7] The CFPB thus itself concluded that consumers who rely on overdraft protection are "substantially more likely" to experience difficulties "obtaining well-priced traditional credit."[8]

That finding is overwhelmingly supported by quantitative evidence. A consumer is far more likely to use overdraft protection if they have limited access to credit cards and other forms of credit. The CFPB found that consumers who had not incurred overdraft fees had, on average, access to nearly eighteen times as much credit and credit card limits nearly five times higher than consumers with more-than-occasional overdraft fees.[9] The CFPB's findings align with consumers' survey responses about whether they would rely on lines of credit if overdraft protection was not available.[10] One such survey that assessed customers of a large regional bank found that 53% of "elevated users" of overdraft protection reported that they would be unable to access money to cover shortfalls if they no longer had overdraft protection, with only 10% of such customers reporting that they would use a credit card.[11] As Professor Todd Zywicki[12] explains, "[t]his

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[6] *Id.* at 27–28.

[7] Moebs Services. Press Release, *Who Uses Overdrafts?* (Sept. 29, 2009), https://web.archive.org/web/20180906140110/http:/www.moebs.com/press-releases/ctl/details/mid/380/itemid/194; *accord* Todd J. Zywicki, *The Economics and Regulation of Bank Overdraft Protection*, 69 Wash & Lee L. Rev. 1141, 1164–65 (2012).

[8] CFPB, *Overdraft and Nonsufficient Fund Fees*, *supra* note 4, at 28.

[9] *Id.* at 30, Table 3.

[10] *See* Zywicki, *Economics and Regulation of Bank Overdraft Protection*, *supra* note 7, at 1173.

[11] *Id.* (citing Raddon Fin. Grp., Inc. Custom Survey Research Findings (June 2011) (on file with Washington and Lee Law Review)).

[12] Professor Zywicki previously served as the Chair of the CFPB's Taskforce on Consumer Financial Law and Director of the Office of Policy Planning at the Federal Trade Commission.

presumably reflects their lack of access to credit cards or that use of credit card[s] would cause them to exceed their credit lines leading to penalties."[13]

The lesson of these studies makes sense: many consumers who rely on overdraft protection do so because they have an immediate need to access funds, but their access to lines of credit is limited.[14] But that conclusion alone does not fully capture the important role overdraft protection plays in the financial lives of consumers. A report from the Mercatus Center confirms that the majority of overdrafts are to pay for necessities.[15] In that report, two professors highlighted the gaps in the CFPB's analysis of bank overdraft programs related to the economic benefit derived from overdrafts.[16] The professors reviewed a year's worth of data from a mid-sized regional bank providing Merchant Category Classification ("MCC") codes for all customer transactions for which consumers used overdraft protection to make a purchase.[17] The top 11 MCC categories accounted for 60% of the transactions and 55% of the principal amount withdrawn.[18] Based on these MCC codes, the majority of overdrafts by transaction amount related to necessities, like groceries (14%), gasoline (7%), telephone services (6%), utilities (4%), and insurance (3%).[19]

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[13] *See* Zywicki, *Economics and Regulation of Bank Overdraft Protection*, *supra* note 7, at 1173.

[14] This trend has continued even since 2010, when federal regulators required banks to provide greater protections for more frequent users of overdraft protection in order to lower the cost of that service to those customers. *See id.* at 1160 (summarizing FDIC, FIL-81-2010, Final Overdraft Payment Supervisory Guidance (Nov. 24, 2010)).

[15] The Mercatus Center at George Mason University is an American non-profit free-market-oriented research, education, and outreach think tank.

[16] *See* G. Michael Flores and Todd J. Zywicki, *Commentary: CFPB Study of Overdraft Programs*, p. 4 (Nov. 6, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349819.

[17] *Id.* at 8 (reviewing International Bank of Commerce, "Overdraft Data" (on file with the authors)).

[18] *Id.*

[19] *Id.* (chart of Top 11 Categories of Point-of Sale Overdrafts By MCC, August 1, 2012, to July 31, 2013).

Consumer surveys confirm the importance of overdraft protection to support the purchase of necessities when facing cash shortfalls. One such recent survey found that, among those who overdrew on more than two occasions, most did so either intentionally or knowing they were risking an overdraft.[20] The same survey found that "the overwhelming majority of people who overdrafted intentionally (92%) indicated that they would prefer to incur the fee rather than have the most recent transaction that incurred an overdraft declined."[21] As Professor Zywicki testified before the House of Representatives Committee on Financial Services, consumer surveys show that more frequent overdrafters do so to avoid shut-off or late fees.[22] The data thus indicate that consumers frequently "use overdraft protection to purchase goods and services that are of high and urgent value and for which the inability to obtain necessary funds to make the transaction could impose significant hardship on the consumer and his or her family."[23]

Consumers regularly incur overdraft fees when the dollar value of a particular transaction does not adequately capture the value of that transaction to the consumer. Survey data—and common sense—indicate that acquiring groceries, medicine, or gasoline at the precise moment such necessities are needed has inherent value to the consumer. Similarly, the cost of *not* paying a certain bill (*e.g.*, utilities or rent) on time can result in third-party costs—late fees, possible termination of service or eviction, and other fees associated with reinstating one's account or

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[20] Financial Health Network, *Overdraft Trends Amid Historic Policy Shifts* (June 2023), https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/.

[21] *Id.*

[22] Todd Zywicki, Statement on *The End of Overdraft Fees? Examining the Movement to Eliminate the Fees Costing Consumers Billions*: Hearing on H.R. 4277 before Subcommittee on Consumer Protection and Financial Institutions, 117th Cong., p. 11 (Mar. 31, 2022) (citing Novantas Consulting, *Understanding Consumer Choice: A Review of Consumer Overdraft Behaviors*, p. 21 (2015)).

[23] *Id.* (summarizing Novantas, *A Review of Consumer Overdraft Behaviors*, p. 21).

relocating—that are often greater than the fee for the overdraft protection and could far exceed the cost of the unpaid bill itself. Unpaid bills may also result in a lower credit score, thereby exacerbating existing difficulties with credit access. When consumers cannot use credit cards to pay for such necessities—either because their credit status limits their access to credit or due to limits on the use of credit to pay for things such as housing—they often rely on overdraft protection as a temporary and immediate solution to keep them afloat. The CFPB acknowledges, but fails to meaningful grapple with, that reality. *See* 89 Fed. Reg. at 106,828.

C. The Rule Will Leave Consumers with Fewer, More Expensive Options to Purchase Necessities.

As noted above, VLFIs that do not adhere to the Rule's constrained fee cap or narrowly defined "breakeven" measure may still offer a form of overdraft protection, but only if they convert it to something akin to an overdraft line of credit—a different product with fundamentally different features. Most significantly, to offer overdraft protection services for accounts accessible by a debit card, these financial institutions must first determine a consumer's "ability to pay." 89 Fed. Reg. at 106,769. In 2023, 90% of consumers had a debit card.[24] To conduct the underwriting the Rule would require, VLFIs would employ the same assessment currently used for consumers applying for traditional methods of credit, including an assessment of creditworthiness. Consumers who are unlikely to qualify for a credit card or line of credit would thus be unlikely to qualify for and have access to overdraft protection services.

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[24] Kevin Foster, Claire Greene, & Joanna Stavins, *2023 Survey and Diary of Consumer Payment Choice: Summary of Results*, Federal Reserve Bank of Atlanta, p. 7 (June 2024), https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2023/sdcpc_2023_report.pdf.

Because those more likely to use overdraft services are less likely to have access to credit cards, *see supra* pp. 8–10, many would not qualify for overdraft protection services premised on a mandatory ability-to-pay analysis. For overdraft users with poor credit scores, the Rule would reduce their financial options and potentially leave them unable to cover important expenses or force them to use costlier alternatives. Overdraft alternatives provided by banks and other reputable and regulated lenders "require some form of credit qualification" or a sufficient savings account.[25] A majority of these overdraft users would simply "not be able to get the money."[26] As a result, many consumers have reported that, without overdraft protection, they would have to pay late for essential services or resort to selling their belongings.[27]

As the CFPB acknowledged, "[f]inancially constrained consumers who do not have access to or cannot quickly obtain traditional credit may turn to high-cost alternative forms of credit," including "payday, auto title, or pawnshop loan[s]."[28] That is confirmed by data that suggest that 24% of elevated overdraft users would seek a payday loan if they could no longer access overdraft protection services.[29] And payday loans are not a preferable alternative for most consumers—as the CFPB has found, payday loans and other deposit-advance forms of high-interest credit "can

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[25] Hank Israel & Don Kumka, *Competition Drives Overdraft Disruption*, Curinos (Dec. 1, 2021), https://curinos.com/our-insights/competition-drives-overdraft-disruption/; *see also* Navy Federal Credit Union, *How to Get Approved for a Credit Card* (Oct. 22, 2024) (noting credit card approval includes minimum income and credit score requirements); Navy Federal Credit Union, *How to Get Approved for a Home Equity Loan or HELOC* (June 23, 2023) (noting credit scores can influence loan approval).

[26] Zywicki, *Economics and Regulation of Bank Overdraft Protection*, *supra* note 7, at 1173 (citing Raddon Fin. Grp., Inc. Custom Survey Research Findings (June 2011)).

[27] Consumer Bankers Ass'n, *CBA Releases National Empirical Survey Results Showing Consumer Value and Need for Bank Overdraft Products* (Mar. 21, 2024), https://consumerbankers.com/wp-content/uploads/2024/04/2024.03.21-CBA-Overdraft-Survey.pdf.

[28] CFPB, *Overdraft and Nonsufficient Fund Fees*, *supra* note 4, at 36.

[29] Zywicki, *Economics and Regulation of Bank Overdraft Protection*, *supra* note 7, at 1173 (citing Raddon Fin. Grp., Inc. Custom Survey Research Findings (June 2011)).

trap consumers in debt" and "a sizable share of consumers end up in cycles of repeated borrowing and incur significant costs over time."[30]

The CFPB's assertion that "[l]imited access to . . . overdraft [not covered by the Rule] could be beneficial to consumers with access to cheaper credit options," 89 Fed. Reg. at 106,828, is therefore flawed because it fails to account for the fact that consumers who rely on discretionary overdraft protection services the most are likely to lack access to supposedly cheaper options. The Rule further asserts that "not extending overdraft credit" to consumers who do not satisfy the ability-to-pay requirement "is an important consumer protection because a consumer defaulting on the overdraft credit may mean losing their asset account." *Id.* at 106,808. But that reasoning—which presupposes that overdraft protection is an extension of credit—ignores the other ramifications of denying a consumer access to overdraft protection services on which they have come to rely: many users are likely to simply lose their ability to pay their important expenses and thus face snowballing late fees or cessation of services, or turn to payday loans that impose costs greater than traditional overdraft fees.

D. The Rule Will Limit Access of Low-Income Consumers to Banking Services.

New restrictions on overdraft protection programs would also limit the access of low-income consumers—who are already significantly more likely to be unbanked in the United States—to banking services more generally.[31] Over the past two decades, the expansion of overdraft protection programs has benefitted low-balance banking customers in particular by "spurr[ing] rapid

[30] CFPB, *The CFPB Finds Payday and Deposit Advance Loans Can Trap Consumers in Debt* (Apr. 24, 2013), https://www.consumerfinance.gov/about-us/newsroom/the-cfpb-finds-payday-and-deposit-advance-loans-can-trap-consumers-in-debt/.

[31] FDIC, *2023 FDIC National Survey of Unbanked and Underbanked Households*, p. 23, Table 1.1 (Nov. 2024), https://www.fdic.gov/household-survey/2023-fdic-national-survey-unbanked-and-underbanked-households-report.

growth" in the availability of free checking and other banking services to consumers who previously lacked access to such services.[32] Existing research by government economists suggests that eliminating or substantially reducing overdraft protection may reasonably lead those banks to charge higher monthly maintenance fees or eliminate services for low-balance customers to mitigate risks connected to the absence of overdraft protection.

Additionally, as discussed, *supra* p. 6, the Rule's $5 cap and "breakeven calculation" do not account for the costs to VLFIs of "consumer-friendly features" like "cure periods, de minimis limits, transaction limits, and real-time notifications," 89 Fed. Reg. at 107,699, disincentivizing VLFIs from offering them to consumers. The CFPB responded to concerns about VLFIs discontinuing those features by concluding that "it would not need to provide an incentive to ensure uncharged transactions continue because the fact that financial institutions are providing them now at a loss suggests there is already sufficient logistical, competitive, or reputational incentive for them to exist." *Id.* at 106,800. That conclusion ignores the obvious—banks unable to charge a fee necessary to support overdraft protection services that include these features may no longer be able to offer these features to consumers or will have to increase other fees charged for banking services.

In a competitive marketplace, banks should have the ability to charge reasonable fees for services, including overdraft protection services, and consumers should have the ability to shop for the overdraft products that best suit their needs. Because low-balance customers are more likely to overdraw their checking accounts, overdraft protection is an essential component of checking services they would choose; without it, VLFIs would need to rely on minimum-balance requirements and other types of fees to mitigate the risk of offering checking-account services to

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[32] *See* Zywicki, *Economics and Regulation of Bank Overdraft Protection*, *supra* note 7, at 1177.

those customers[33]—or stop offering those services as broadly. Typically, multiple highly valued banking services come along with checking accounts for free, including debit card usage, online bill payment, mobile banking services, and ATM access.[34] Under the Rule's requirements, VLFIs may have to charge for or restrict the offering of those other services to mitigate risk.

History bears this out. In 2009, the Federal Reserve proposed a rule prohibiting banks from providing overdraft protection for ATM and point-of-sale debit transactions unless or until consumers chose to affirmatively "opt-in" to those services. According to one economic analysis, "within days" of the Federal Reserve's announcement of the amendments, banks imposed new monthly service fees for basic accounts.[35] Only "a few months" after the opt-in rule went into effect, the percentage of consumer accounts with free checking fell (from 76% in 2009 to 65% in 2010), newly excluding roughly 20 million accounts.[36] Most relevant here, the imposition of fees for checking-account services did not affect customers of different economic profiles in the same ways. Some banks waived their new monthly service fees for basic accounts for customers who could satisfy minimum monthly deposit and average-balance requirements.[37] As would be the case here, those monthly service fees and waiver requirements presented an obstacle for low-

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[33] *Id.* at 1177–78.

[34] *Id.* at 1178.

[35] *See* David S. Evans, Robert E. Litan, & Richard Schmalensee, *Economic Analysis of the Effects of the Federal Reserve Board's Proposed Debit Card Interchange Fee Regulations on Consumers and Small Businesses*, p. 40 (Feb. 22, 2011), https://www.federalreserve.gov/SECRS/2011/March/20110308/R-1404/R-1404_030811_69120_621655419027_1.pdf.

[36] *Id*. A recent survey from Bankrate indicates this number has increased over the past decade, but not to pre-regulation numbers. *See* Sarah Foster, *Survey: Nearly Half of Americans Are Sacrificing Recession Preparedness by Paying Checking Fees*, Bankrate (Jan. 17, 2023), https://www.bankrate.com/banking/checking-fees-survey/ (finding in 2022 that 73% of consumers with a checking account had access to free checking).

[37] *Id.* at 41 (Post Regulation E Checking Account Feature Chart).

income consumers. Indeed, in the FDIC's most recent survey, unbanked households cited inability to meet minimum balance requirements as the most frequent reason for not having bank accounts.[38]

In 2001, the Office of Comptroller of the Currency ("OCC"), which governs national banks, issued a rule clarifying that it did not expect national banks to abide by state fee limits for overdraft protection. *See* 12 CFR § 7.4002. The rule fostered additional variation in overdraft fee caps over time, across states, and across institutions—a scenario ripe for analyzing the effects of capping overdraft fees on the provision of other banking services. According to a recent Federal Reserve Bank of New York Staff Report, national banks exempted from state-level overdraft fee caps increased access to deposit accounts by lowering minimum-balance requirements by 30% or more, relative to state banks.[39] Notably, the share of low-income households with a checking account rose by 10% after the OCC issued the rule. Thus, the Staff Report highlights a "policy trade-off" that the CFPB has failed to adequately consider here: "the benefits of a fee limit [for overdraft protection] come at the cost of more unbanked, low-income households."[40]

The CFPB attempts to brush aside the Staff Report's findings because of the "differences" in "economic context" and "the nature of the regulatory change" between the OCC's rule and its own. 89 Fed. Reg. at 106,828. Whether or not the Staff Report's findings "directly" apply to the Rule, *id.*, the CFPB should not have ignored the real-world consequences that flowed from the OCC's rule exempting national banks from state-imposed overdraft fee caps. Instead of meaningfully engaging with how fee caps for overdraft protection bear on consumers' access to other

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[38] FDIC, *2023 FDIC National Survey of Unbanked and Underbanked Households*, *supra* note 31, at 28.

[39] Jennifer L. Dlugosz, Brian T. Melzer & Donald P. Morgan, *Who Pays the Price? Overdraft Fee Ceilings and the Unbanked*, Federal Reserve Bank of New York Staff Report No. 973, pp. 7–8 (June 2021) (revised July 2023).

[40] *Id*. at 3.

banking services, the CFPB dismissed such concerns because it is "difficult to conclude without strong assumptions about how consumers value deposit account access, overdraft credit, and overdraft fees." *Id.* But the CFPB need not assume what is plain in the data—eliminating caps on overdraft fees benefits low-income consumers by expanding their access to other important banking services.[41]

In short, the CFPB has failed to adequately consider that the Rule, aimed at aiding consumers, may disproportionately harm those that rely on overdraft protection the most and limit low-income consumers' access to other banking services.

CONCLUSION

For the foregoing reasons and those outlined in Plaintiffs' Memorandum in Support of a Preliminary Injunction, *amici* respectfully request that the Court grant Plaintiffs' Motion for a Preliminary Injunction.

Dated: January 7, 2025 Respectfully submitted,

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[41] *See* Dlugosz, et al., *Who Pays the Price? Overdraft Fee Ceilings and the Unbanked*, *supra* note 40, at 3, 23.

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2025, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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