IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

TEXAS BANKERS ASSOCIATION; RIO BANK, MCALLEN, TEXAS; and AMERICAN BANKERS ASSOCIATION,	§	
Plaintiffs,	§	
TEXAS FIRST BANK, INDEPENDENT BANKERS ASSOCIATION OF TEXAS, and INDEPENDENT COMMUNITY BANKERS OF AMERICA,	§	Case No: 7:23-cv-00144
Proposed Intervenor Plaintiffs,	§	
v.	§	
CONSUMER FINANCIAL PROTECTION BUREAU and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau,	§	
Defendants.	§	

UNOPPOSED EMERGENCY MOTION FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT

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INTRODUCTION

In creating the Consumer Financial Protection Bureau (CFPB or Bureau), Congress "deviated from the structure of nearly every other independent administrative agency in our history." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). This deviation has necessitated constitutional scrutiny of the agency and its authority. Of course, in *Seila Law*, the Supreme Court held that a critical part of the Bureau's unprecedented structure—its single director removable only for cause—violated Article II of the Constitution by imposing an unconstitutional limit on the President's oversight of the Bureau. And last year the Fifth Circuit held that the Bureau's insulation from Congressional appropriations similarly violates Article I. *Community Fin. Servs. Ass'n of Am., Ltd. v. Consumer Financial Protection Bureau*, 41 F.4th 616, 642 (5th Cir. 2022). The Supreme Court has agreed to consider the Fifth Circuit's decision, which would render virtually all actions by the CFPB a nullity.

Notwithstanding the Supreme Court's pending review, the Bureau has only amplified its administrative work. Months after the Fifth Circuit's decision, the Bureau issued the Final Rule at issue in this case. Just three months ago, Plaintiffs Texas Bankers Association, American Bankers Association and Rio Bank brought this lawsuit seeking a nationwide preliminary and permanent injunction enjoining the enforcement of the Final Rule. On July 31, the court issued a preliminary injunction, "enjoin[ing] the CFPB from implementing and enforcing the Final Rule," but only against "Plaintiffs and its members." (Order 16, Doc. 25.) Intervenors—a credit union and regional and national trade associations of credit unions—seek to participate in this lawsuit as plaintiffs to vindicate their constitutional interest in the injunction of the Final Rule, which is identical to the interest of the original plaintiffs.

CREDIT UNION INTERVENORS AND THEIR INTERESTS

Rally Credit Union. **Rally** is a credit union chartered by the State of Texas with its headquarters in Corpus Christi, Texas. Rally serves over 200,000 members across an eight-county area that covers the Southern District of Texas. Rally has 20 branches, six of which are in

or around the McAllen area. Because of the cultural diversity in the communities it serves, Rally frequently makes loans to Texas women-owned, minority-owned, and small business.

Credit Union National Association. **CUNA** is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,000 federal and state credit unions, which collectively serve more than 135 million members nationwide. CUNA's mission, in part, is to advocate for the responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services of credit unions to their millions of members.

Cornerstone Credit Union League. **Cornerstone** is among the nation's largest regional credit union trade associations, serving approximately 700 credit unions in Texas, Arkansas, Kansas, Missouri, and Oklahoma. Cornerstone exists to advance the success of credit unions in the region through legislative and grassroots advocacy; regulatory and compliance support; training, educational, and networking opportunities; essential communications related to news and information affecting the credit union industry; and other products and services.

RELEVANT BACKGROUND

At the center of this case is the Bureau's Final Rule under section 1071 (Section 1071) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which in part amended the Equal Credit Opportunity Act of 1974 (ECOA). *See* Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 Fed. Reg. 35, 150 (May 31, 2023) (Final Rule). The ECOA protects individuals and businesses against discrimination in accessing and using credit. *See Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 707 (5th Cir. 2017). Congress originally tasked the Board of Governors of the Federal Reserve System (Board) with setting the ECOA's implementing regulations, which the Board did by rulemaking. *See* 40 Fed. Reg. 49,298 (Oct. 22, 1975). The Board issued its rules as Regulation B. 12 C.F.R. § 202.

The Final Rule. On September 1, 2021, the Bureau—also a creature of Dodd-Frank—issued a notice of proposed rulemaking amending Regulation B to implement its interpretation of

the changes to ECOA required by Section 1071. The notice-and-comment period ran from September 1, 2021 until January 6, 2022. After litigation in *California Reinvestment Coalition v. CFPB*, No. 4:19-cv-02572-JSW (N.D. Cal.) over the Bureau's review of the proposed rule, the Bureau issued the Final Rule. The effective date of the Final Rule is August 29, 2023.

Curiously, the Bureau issued the Final Rule ***after*** the Fifth Circuit held that the agency's funding scheme violates the Constitution and vacated a different rule promulgated by the agency. Indeed, the Final Rule came ***after*** the U.S. Supreme Court granted review in that case, *CFPB v. Community Financial Services Association of America, Ltd.*, No. 22-448 (U.S.), which presents a first-impression separation-of-powers question. When Congress created the Bureau in 2010, it "deviated from the structure of nearly every other independent administrative agency in our history." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). From the very beginning, this ingenuity in design invited constitutional scrutiny from all corners, including the Supreme Court. In *Seila Law*, the Supreme Court held that a critical part of the Bureau's unprecedented structure—its single director removable only for cause—violated separation of powers by imposing an unconstitutional limit on the President's oversight of the Bureau. The *CFSA* case concerns yet another separation-of-powers problem: Congress's lack of oversight of the Bureau through traditional congressional appropriations.

Plaintiffs' Complaint and Motion for Nationwide Preliminary Injunction. Unsurprisingly, soon after the Bureau promulgated the Final Rule, Plaintiffs sued alleging, in part, that the Rule is invalid and unenforceable because of the constitutional defects in the Bureau's funding scheme. (Compl. 15, Doc. 1 (Count I).) Plaintiffs sought "both a preliminary and permanent injunction setting aside and holding unlawful the CFPB's ECOA Final Rule." (*Id.* at 20.) Subsequently, Plaintiffs "move[d] for a nationwide preliminary injunction to prevent [the Bureau] from enforcing the rule." (Order 8, Doc. 25.)

The Scope of the Court's Preliminary Injunction. On July 31, 2023, the Court granted Plaintiffs' motion for preliminary injunction but narrowed the scope of the injunction to only Plaintiffs and their member banks. Specifically, the Court ordered that the Bureau is

"preliminarily enjoined from implementing and enforcing the Final Rule, 88 Fed. Reg. 35,150 (May 31, 2023), against Plaintiffs and their members pending the Supreme Court's reversal of [*CFSA*], a trial on the merits of this action, or until further order of this Court." (*Id.* at 16.) The Court clarified that the Bureau "shall immediately cease all implementation or enforcement of the Final Rule against Plaintiffs and their members" and "that all deadlines for compliance with the requirements of the Final Rule are stayed for Plaintiffs and their members until after the Supreme Court's final decision in [the *CFSA* case]." (*Id.* at 16–17.)

Credit Union Intervenors' Interest and Irreparable Harm. Due to the limited scope of the preliminary injunction, Credit Union Intervenors and their members now have a unique, unprotected interest in this litigation. To be clear, Credit Union Intervenors and their members will be harmed the same—if not more—by the Bureau's enforcement of the Final Rule. That harm, however, is compounded now that Plaintiffs' member banks (Credit Union Intervenors' competitors) are preliminarily relieved from compliance from, or preparing to comply with, the Final Rule while credit unions must bear the cost of compliance.

This is particularly problematic due to credit unions unique, member-owned design. Credit unions are not-for-profit, financial cooperatives, established "for the purpose of promoting thrift among [their] members and creating a source of credit for provident and productive purposes." Federal Credit Union Act of 1934, Pub. L. No. 73- 467, § 2, 48 Stat. 1216, 1216 (1934) (codified as amended at 12 U.S.C. § 1752(1)). Most credit unions are small, local financial institutions with limited staff and resources. Over 40 percent of all credit unions employ five or fewer full-time employees, more than 25 percent have less than $10 million in assets, and almost 75 percent have less than $100 million in assets. Additionally, credit unions do not issue stock. Their capitalization is based on member deposits and retained earnings, meaning members' deposits may be at risk from increased compliance costs due to the Final Rule. Even the Small Business Administration Office of Advocacy warned during the comment period for the Final Rule that the Bureau's approach "may be unnecessarily burdensome to small entities, may impact the cost of credit for small businesses and may lead to a decrease in lending to small,

minority- and women-owned businesses." Letter from Major L. Clark, III, U.S. Small Bus. Admin. Office of Advocacy, to Dir. Rohit Chopra, CFPB, Re: Notice of Proposed Rulemaking on Small Business Lending Data Collection, Jan. 6, 2022, https://tinyurl.com/y4cwptj7.

Based on the uneven playing field, Credit Union Intervenors are left no choice but to intervene in this case and file a motion to modify the preliminary injunction or motion for preliminary injunction, or seek the same relief in a separate action in this Court. Credit Union Intervenors agree with Proposed Intervenors Texas First Bank, Independent Bankers Association of Texas, and Independent Community Bankers of America (Community Bank Intervenors), that the more efficient path is to litigate the common legal issues and claims in this case, as opposed to filing separate actions. (*See* Community Bank Intervenors Mot. to Intervene 4–5, Doc. 26.) Accordingly, attached to this motion as **Exhibit 1** is Credit Union Intervenors proposed complaint in intervention, which largely follows Plaintiffs' first amended complaint.

ARGUMENT

Rule 24 provides two avenues for a non-party to intervene in a pending lawsuit: as a matter of right under Rule 24(a)(2), and as a matter of permission under Rule 24(b). The Fifth Circuit has recognized that "Rule 24 represents an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex." *United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991) (cleaned up). Rule 24 is therefore to be "liberally construed," based on the Circuit's "broad policy favoring intervention." *Wal–Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565, 569 (5th Cir. 2016) (quoting *Texas v. United States*, 805 F.3d 653, 656 (5th Cir. 2015)). To be clear, any doubts over the propriety of intervention should be "resolved in favor of the proposed intervenor." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009).

Here, both avenues broadly favor intervention. Thus, Credit Union Intervenors should be permitted to intervene as plaintiffs under Rule 24(a)(2) or, alternatively, under Rule 24(b).

I. Credit Union Intervenors Are Entitled to Intervene As of Right.

The "starting point" is Rule 24(a)(2), which "provides that a 'court must permit anyone to intervene' who, (1) '[o]n timely motion,' (2) 'claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest,' (3) 'unless existing parties adequately represent that interest.'" *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2200–01 (2022). In evaluating these factors, courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint in intervention, and declarations supporting the motion as true. *See La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305 (5th Cir. 2022). Credit Union Intervenors satisfy each Rule 24(a)(2) requirement.

A. Credit Union Intervenors' motion is timely.

The Fifth Circuit applies the *Stallworth* factors to timeliness questions, which include: "(1) the length of time between the would-be intervenor's learning of his interest and his petition to intervene; (2) the extent of prejudice to existing parties from allowing late intervention; (3) the extent of prejudice to the would-be intervenor if the petition is denied; and (4) any unusual circumstances [weighing in favor of or against intervention]." *In re Lease Oil Antitrust Litig.*, 570 F.3d at 247–48 (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977)). Timeliness is not confined "to chronological considerations" but rather is "determined from all the circumstances." *Wal–Mart Stores*, 834 F.3d at 565 (quoting *Stallworth*, 558 F.2d at 263). Further, because courts "discourage premature intervention"—because it "wastes judicial resources," *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994)—"[t]he timeliness clock runs … from the time [the proposed intervenor] became aware that his interest would no longer be protected by the existing parties to the lawsuit," *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (citation omitted).

This case is very much in its infancy. Plaintiffs filed the operative complaint less than three months ago, seeking a nationwide preliminary and permanent injunction enjoining the enforcement of the Final Rule. (*See* First Am. Compl., Doc. 12) The Bureau only filed its answer

on July 3, 2023. (*See* Answer, Doc. 19.) And 10 days ago, the Court issued a preliminary injunction, "enjoin[ing] the CFPB from implementing and enforcing the Final Rule," but only against "Plaintiffs and its members." (Order 16, Doc. 25.) It was not until the Court's order narrowing the scope of the requested injunction that it became apparent that Credit Union Intervenors' interest were no longer protected. In just 10 days, Credit Union Intervenors promptly organized, hired counsel, and now present a single motion in support of credit unions' unique interest in this litigation and the relief awarded. The motion is therefore timely.

Nor will any party be prejudiced by the Credit Union Intervenors' intervention here. As the Community Bank Intervenors explained in their August 4, 2023 motion to intervene, other than briefing the motion for preliminary injunction, there has been no other case activity. No discovery, no Rule 26(f) conference, no appeal of the order granting in part the preliminary injunction, and no other substantive activity. (*See* Community Bank Intervenors Mot. to Intervene 7, Doc. 26.) Simply, no prejudice will result from ensuring that key stakeholders subject to the Final Rule are before the Court in a single case.

B. Credit Union Intervenors have a significant, protectable interest in this case.

Rule 24(a)(2)'s "interest" showing requires a "direct, substantial, legally protectable interest in the proceedings." *Texas*, 805 F.3d at 657. This "inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Id.* That Credit Union Intervenors' interests are "concrete, personalized, and legally protectable" is readily apparent. *See id.* at 658.

As to Rally, it has a direct interest in seeking relief from the Final Rule, which is unconstitutional and unenforceable because of defects in the CFPB's funding scheme. (*See generally* Credit Union Intervenors' Compl. in Intervention.) Like Plaintiff Rio Bank and Proposed Intervenor Texas First, Rally frequently makes loans to Texas women-owned, minority-owned, and small businesses, and it is subject to the Final Rule as "covered financial institution" that made at least 100 "covered credit transactions" in each of 2021 and 2022, and

expect to make at least 100 of these transactions in 2023. *See* 88 Fed. Reg. 35529–30 (to be codified at 12 C.F.R. §§ 1002.102(g), (h), 1002.104, 1002.105(b)).

As to CUNA and Cornerstone, they also have an interest in seeking relief from the Final Rule for their credit union members, the vast majority of which are "covered financial institutions" that engage in, or will engage in, "covered credit transactions." In that way, CUNA's and Cornerstone's thousands of members are in the same position as Rally—they are subject to the Final Rule but not presently covered by the Court's preliminary injunction because they are neither members of ABA nor TBA. At bottom, Credit Union Intervenors' participation in the case will ensure that credit unions have the opportunity to protect their unique interests and explain how the Final Rule harms these financial institutions.

C. Disposition of this action without Credit Union Intervenors will impede their ability to protects their interests.

"If an absentee would be substantially affected in a practical sense by the determination made in an action, [it] should, as a general rule, be entitled to intervene." Rule 24, adv. comm. notes. This is not a high bar. "Once a movant has successfully established a sufficient interest in the subject of the action, the movant must demonstrate that disposition of that action ***may***, as a practical [and not merely 'theoretical'] matter, impair or impede the movant's ability to protect that interest." *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014) (citations omitted) (emphasis added). A legal or practical impact to the Credit Union Intervenors' interests suffices, such as that of stare decisis. *See Espy*, 18 F.3d at 1207.

Here, Credit Union Intervenors would plainly be "substantially affected in a practical sense" based on how the Court decides the ultimate question of the Final Rule's constitutionality. The Final Rule greatly expands Credit Union Intervenors' and their members' compliance obligations under the ECOA, requiring covered institutions to collect and report to the Bureau on 80 data points related to applications for credit for small businesses. Further, technology providers are already building functionality to capture the additional data points and passing the increased cost to financial institutions, immediately increasing the cost for processing and

providing small-business loans. Any decision on the constitutionality of the Final Rule in this case therefore may impair Credit Union Intervenors' and their members' interest, particularly those credit unions in Texas and the Fifth Circuit more broadly. (*See* Community Bank Intervenors Mot. to Intervene 9 (collecting cases).)

D. The current parties do not adequately represent Credit Union Intervenors' interests.

The burden of showing inadequacy of representation is "minimal" and satisfied if the proposed intervenor can show that representation of its interests "*may* be inadequate." *Wal–Mart Stores*, 834 F.3d at 569 (quoting *Texas*, 805 F.3d at 662). The current posture of the case proves Plaintiffs—and the Bureau for that matter—do not adequately represent Credit Union Intervenors' interests. True, both Plaintiffs and Credit Union Intervenors share an interest in challenging the Final Rule. And before the order granting a preliminary injunction in part, Plaintiffs and Credit Union Intervenors shared an interest in nationwide relief in the form of a preliminary injunction that covered ***all*** covered financial institutions. But the Court denied nationwide relief. Now Plaintiffs, which represent banks (including some of the largest in the world), are uniquely positioned to leverage this competitive advantage over non-banks, including credit unions, which, by design, do not enjoy the same economies of scale that large banks do. Thus, based on the case's current posture, there is little incentive for Plaintiffs to represent their own interests ***and*** credit unions' interests going forward. *See Students for Fair Admissions, Inc. v. Univ. of Texas at Austin*, 338 F.R.D. 364, 372 (W.D. Tex. 2021) (granting intervention because movants' "evidence and arguments" were "unlikely to be put forth by Defendants" thus movants demonstrated their divergent interests in the litigation); *VanDerStok v. Garland*, No. 4:22-CV-00691-O, 2022 WL 19023858, at *4 (N.D. Tex. Dec. 19, 2022) (granting intervention because "[t]he existing parties and Putative Intervenors do not … have the same ultimate objective"). For this reason, Credit Union Intervenors should be granted intervention to protect the interests of a class of covered financial institutions otherwise absent from the case.

II. Alternatively, Credit Union Intervenors Should Be Granted Permissive Intervention.

Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Permissive intervention is subject to the discretion of the Court. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 470–71 (5th Cir. 1984) (en banc).

The threshold inquiry is whether Credit Union Intervenors' claims and the underlying litigation share a question of law or fact. *Newby v. Enron Corp.*, 443 F.3d 416, 421 (5th Cir. 2006). Here, the answer is unquestionably yes. Credit Union Intervenors' claims track Plaintiffs' and Community Bank Intervenors' claims; thus, by default Credit Union Intervenors' claims present common questions of law or fact. Likewise, Credit Union Intervenors' motion is timely. It was filed 10 days from when the Court granted a narrowed preliminary injunction covering only the plaintiff-banks. (*See* I.A, *supra.*)

Next, granting intervention will not unduly delay the case or prejudice the parties. Granting intervention will avoid dueling litigation over the precise issues already pending before the Court. (*See* Community Banks Mot. to Intervene 11 (explaining the same).) Rather than multiple cases presenting the same issues—in the same court—permissive intervention joins interested parties in a single action and ensures consistent treatment, as it relates to the Final Rule, while the Supreme Court considers the constitutionality of the Bureau's funding scheme in *CFPB v. Community Financial Services Association of America, Ltd.*, No. 22-448.

For these reasons, Credit Union Intervenors should be allowed to participate in this case.

III. The Court Should Consider this Motion on an Expediated Basis.

Like the Community Bank Intervenors, Credit Union Intervenors respectfully request expediated treatment of this motion. (*See* Community Banks Mot. to Intervene 11–12 (citing S.D. Tex. Local Rule 7.8; Judge R. Crane's Court Procedures VII(3)).) The Final Rule goes into effect August 29, 2023. While covered financial institutions have a year to comply with the Final Rule, compliance preparation is beginning now. As mentioned, technology providers are

building functionality now to capture the additional data points. And they are immediately passing the increased cost to financial institutions, which must either absorb the increased cost or pass them along to small-business loan applicants. Thus, any delay guarantees credit unions will be disadvantaged as they budget and spend capital on resources to comply with the Final Rule's new data collection and reporting requirements.

CONCLUSION

Credit Union Intervenors request that this Court grant them intervention as of right in this lawsuit as defendants under Rule 24(a)(2), or in the alternative, permissive intervention under Rule 24(b). Credit Union Intervenors also request expediated treatment of their motion.

Dated: August 10, 2023.

Respectfully submitted,

/s/ Christopher O. Murray

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CERTIFICATE OF CONFERRAL

I certify that, on August 8–10, 2023, I conferred with counsel for Plaintiffs, counsel for Defendants, and counsel for Community Bank Intervenors, and they advised they do not oppose Credit Union Intervenors' motion to intervene.

/s/ Christopher O. Murray
Christopher O. Murray

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

TEXAS BANKERS ASSOCIATION; RIO BANK, MCALLEN, TEXAS; and AMERICAN BANKERS ASSOCIATION, Plaintiffs, TEXAS FIRST BANK, INDEPENDENT BANKERS ASSOCIATION OF TEXAS, and INDEPENDENT COMMUNITY BANKERS OF AMERICA, Proposed Intervenor Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU and ROHIT CHOPRA, in his official capacity aa Director of the Consumer Financial Protection Bureau, Defendants.	§ § § § § § § § § § § § § § § § § §	Case No: 7:23-cv-00144

COMPLAINT IN INTERVENTION

Intervenor-Plaintiffs Credit Union National Association (CUNA), Cornerstone Credit Union League (Cornerstone) and Rally Credit Union (Rally) (collectively, Credit Union Intervenors), file this complaint in intervention and allege as follows:

INTRODUCTION

1. Loans to small businesses are critical to the functioning of the United States' economy.

2. These loans also form a core portion of the business of credit unions.

3. On March 30, 2023, Defendants (collectively referred to as the CFPB or Bureau) published a final rule (Final Rule) amending Regulation B governing small business lending under the federal Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, *et seq.* Small

Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 Fed. Reg. 35,150 (May 31, 2023).

4. Ostensibly, the Final Rule is intended to implement changes to the ECOA made by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act).

5. The Final Rule takes three pages of text in the Dodd-Frank Act as the basis for more than 880 pages of regulations and commentary.

6. Critically, the Final Rule requires financial institutions to develop and implement systems and compliance mechanisms to gather and report more than eighty "data points" to be reported in accordance with a 40 page "Small Business Lending Rule: Data Points Chart." 88 Fed. Reg. 35,545-35, 561 (to be codified at 12 C.F.R. § 1002.107); *see also* https://files.consumerfinance.gov./f/documents/cfpb_small-business-lending-data-points-chart.pdf.

7. The Final Rule will irreparably harm credit unions, including Intervenor Rally and other members of Intervenors CUNA and Cornerstone. Moreover, by disincentivizing the loans it purports to encourage, the Final Rule will also harm women-owned, minority-owned, and small businesses in contravention of the Dodd-Frank Act. Credit unions like Rally will be required either to exit or curtail their small business lending and/or dedicate more staff and financial resources into government reporting rather than lending.

8. The Final Rule is also unconstitutional and unenforceable. The Final Rule is unconstitutional in the first instance because the CFPB lacked the authority to issue it. Both the Fifth Circuit and this Court have held that the CFPB's "funding apparatus cannot be reconciled with the Appropriations Clause [of the U.S. Constitution] and the clause's underpinning, the constitutional separation of powers." *Community Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 41 F.4th 616, 642 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023); *see also* the July 31, 2023 Order Granting In-Part and Denying In-Part Plaintiffs' Motion for Preliminary Injunction (the

"Preliminary Injunction"), at 1 (Doc. 25). "[W]ithout its unconstitutional funding, the [CFPB] lacked any other means to promulgate" the Final Rule. *Community Fin.*, 41 F.4th at 643.

9. The Final Rule is also unenforceable because it was promulgated in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559.

10. Nevertheless, financial institutions covered by the Final Rule, including credit unions like Rally and other members of Intervenors CUNA and Cornerstone, are implementing the Final Rule, and, in doing so, are incurring significant compliance costs.

11. This Court's July 31 preliminary injunction enjoins the CFPB from implementing and enforcing the Final Rule only against the original Plaintiffs and their members pending the U.S. Supreme Court's ruling in the *Community Financial* case. As a credit union, Rally is not a member of either the Texas Bankers Association or American Bankers Association and it therefore remains subject to CFPB's enforcement of the Final Rule. Indeed, as credit unions, none of CUNA or Cornerstone's members are eligible for membership in the Texas Bankers Association or American Bankers Association.

12. Nevertheless, the immediate and real harms to banks identified by this Court in its Preliminary Injunction apply equally to credit unions. Intervenors seek judgment vacating the Final Rule, as well as preliminary and permanent injunctive relief.

PARTIES

13. CUNA is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,000 federal and state credit unions, which collectively serve more than 135 million members nationwide. CUNA's mission, in part, is to advocate for the responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services of credit unions to their millions of members.

14. Cornerstone is a non-profit corporation organized in accordance with the laws of Texas. Cornerstone is the largest regional credit union trade association in the United States,

serving over 700 credit unions in Arkansas, Kansas, Missouri, Oklahoma and Texas. Cornerstone provides resources for credit unions and credit union staff including federal and state policy advocacy, compliance assistance and research, and statistics affecting the markets its member credit unions participate in.

15. Chartered in 1955 and headquartered in Corpus Christi, Rally is the largest credit union in South Texas. Rally serves over 200,000 members and operates 20 branches in the region. As a credit union, Rally is owned by its members. Rally frequently makes loans to small businesses, including woman-owned and minority-owned businesses. Because it made at least 100 "covered credit transactions" in each of 2021 and 2022, and because consistent with its mission as a member-owned credit union, it expects to continue to make over 100 such transactions in coming years, it is a "covered financial institution" subject to the requirements of the Final Rule. *See* 88 Fed. Reg. at 35,529-30 (to be codified at 12 C.F.R. §§ 1002.102, 1002.104, and 1002.105). Rally is a member of both CUNA and Cornerstone.

16. CFPB is a federal executive agency and an independent bureau in the Federal Reserve System. It regulates the offering and provision of consumer financial products and services throughout the United States. *See* 5 U.S.C. § 105, 12 U.S.C. § 5491(a).

17. Rohit Chopra is the Director of the CFPB and is sued in his official capacity only.

JURISDICTION AND VENUE

18. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because this is a civil action arising under the Constitution, laws, or treaties of the United States.

19. Venue is proper in this Court because Defendants include a federal agency and an officer of that federal agency sued in his official capacity. Venue is also proper because Rally is headquartered in this district. 28 U.S.C. § 1391(e)(1).

FACTUAL ALLEGATIONS

The CFPB's Creation, Authority and Constitutionally Dubious Structure

20. The CFPB was created by Title X of the Dodd-Frank Act. This legislation assigned to the CFPB the responsibility—previously divided among seven other federal agencies—for regulating almost all individuals and companies providing financial products and services in the United States pursuant to federal consumer protection laws. *See* Pub. L. No. 111-203.

21. Unlike virtually all other federal agencies, the CFPB was created with a single Director who did not serve at the pleasure of the President, but rather was removable only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. §§ 5491(c)(1), (3). This functioned to insulate the Director from Presidential oversight. Similarly, the CFPB was authorized to receive funding outside the normal Congressional appropriations process, being funded instead by a direct requisition from the Director of the CFPB to the Federal Reserve. 12 U.S.C. § 5497(a). Once these funds are received they are held in a Federal Reserve bank rather than the Treasury and these funds are permanently at the disposal of the CFPB Director. This has functioned to insulate the CFPB from Congressional oversight.

22. In June 2020, the Supreme Court held that Title X's requirement that a CFPB Director be removed only for cause violated the Constitution's separation of powers by imposing an unconstitutional limit on the President's oversight of the CFPB. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Indeed, the Court noted that when Congress created the CFPB it "deviated from the structure of nearly every other independent administrative agency in our history." *Seila Law*, 140 S. Ct. at 2191.

23. Now, the CFPB's funding outside the Congressional appropriations is being similarly scrutinized on separation of powers grounds. The Fifth Circuit recently held that the CFPB's "funding apparatus cannot be reconciled with the Appropriations Claus and the clause's underpinning, the constitutional separation of powers." *Community Fin. Servs. Ass'n of Am., Ltd.*

v. CFPB, 41 F.4th 616, 642 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023). The Supreme Court will conclusively determine the issue of the CFPB's funding in the next year.

The Final Rule and its Adoption

24. The CFPB issued the Proposed Rule that would become the Final Rule on September 1, 2021.

25. The Proposed Rule purported to implement § 1071 of the Dodd-Frank Act. This section directs financial institutions, including credit unions, to collect and report 13 specific data points.

26. The Proposed Rule expanded these 13 data points to 81 data points.

27. During the notice and comment period, the vast majority of comments by financial institutions subject to the rule argued the rule was overbroad, particularly in its expansion of data points to be collected, and noted the disincentivizing effect this would have on such institutions making loans to woman and minority-owned businesses.

28. In a comment letter dated January 6, 2022, CUNA provided detailed comments. In its letter, CUNA noted that "[i]t is not evident how the proposed discretionary data points would benefit the Bureau or consumers to justify the cost and resources required for their collection." *See* https://downloads.regulations.gov/CFPB-2021-0015-1514/attachment_1.pdf.

29. Despite these comments, the CFPB failed to perform a meaningful cost/benefit analysis of the Proposed Rule.

30. CFPB claimed to have used an analysis that it described as "[a] Bayesian independent univariate conditional multiple ordinary least squares (OLS) regression model." CFPB Supplemental Estimation at 4 (September 2021), https://files.consumerfinance.gov/f/documents/cfpb_section-1071- nprm-supplemental-estimation-methodologies_report_2021-09.pdf.

31. According to CFPB, it used this model "because the data are missing at random," and it "need[ed] to impute data for multiple variables, origination number and dollar volume."

Id. CFPB further claimed that the missing variables are "monotone," and it therefore used "an independent univariate conditional model to generate the multivariate imputations." *Id.*

32. Leaving aside the incomprehensibility of the CFPB's model for its purported cost/benefit analysis, the CFPB did not even attempt to estimate the full extent of lenders' costs.

33. The CFPB admitted that its Cost Survey was limited to only the 13 data points required by section 1071 of the Dodd-Frank Act and not the 81 data points required by the rule.

34. The CFPB claimed that it "c[ould] only estimate how ongoing costs would be different," but suggested that "going from 13 statutory data points to 81 in the Final Rule would increase compliance costs by $10,000,000 per year." 86 Fed. Reg. 56,354.

35. The CFPB did not differentiate between lenders of different sizes to account for the fact that total small-business loans as a percentage of total loans decline as lender size increases.

36. The CFPB nevertheless issued the Final Rule on March 30, 2023. The Final Rule is effective August 29, 2023. 88 Fed. Reg. 35,150.

37. Rally, along with CUNA and Cornerstone's other credit union members are now and will continue to incur costs to prepare to comply with the Final Rule.

38. At Rally, these will include updating computer software systems (that are yet to be available to address the requirements of the Rule); hiring and training additional employees for the implementation of new policy and procedures; and securing additional internal audit resources to ensure policy and procedures are adequate for the information collection, report preparation, intracompany segmentation procedures, and overall privacy protection needed to safeguard the extensive accumulation of personal, demographic, and sexual orientation data mandated by the Final Rule.

39. Indeed, the Final Rule will force credit unions including Rally and other members of CUNA and Cornerstone to demonstrate their progress toward identifying and initiating compliance with the Final Rule during examinations and other agency communications.

FIRST CLAIM FOR RELIEF
Violation of Constitution and APA
(Article I, § 9, Clause 7; 5 U.S.C. § 706(2)(A))

40. Credit Union Intervenors incorporate by reference the preceding paragraphs as if fully set forth here.

41. As the Fifth Circuit held in *Community Financial* and this Court recognized in its Preliminary Injunction, CFPB's funding structure violates the U.S. Constitution's separation of powers. Further, CFPB promulgated the Final Rule using the same procedure as the rule set aside in *Community Financial*.

42. Because CFPB issued the Final Rule with funds derived from unconstitutional sources, it violates the Constitution. *Community Fin.*, 51 F.4th at 642. Accordingly, the Final Rule is invalid, and the Court should set it aside. *See id.* at 643.

43. Further, under the APA, agency action must be vacated if it is "not in accordance with law." 5 U.S.C. § 706(2)(A). For the reasons described above, the Final Rule is not in accordance with law and therefore must be set aside. *See Community Fin.*, 51 F.4th at 643.

SECOND CLAIM FOR RELIEF
Violation of APA
(5 U.S.C. § 706(2)(C))

44. Credit Union Intervenors incorporate by reference the preceding paragraphs as if fully set forth here.

45. Agency actions must be set aside where they exceed an agency's statutory authority or contravene that authority. 5 U.S.C. § 706.

46. By requiring lenders like Rally to collect 68 categories of data in excess of the 13 required by § 1071, the CFPB exceeded and simultaneously contravened its statutory authority in adopting the Final Rule. The reporting requirements are so burdensome as to defeat the intent of § 1071: they will disincentivize loans to minority- and women-owned businesses.

THIRD CLAIM FOR RELIEF
Violation of APA
(5 U.S.C. § 706(2)(A))

47. Credit Union Intervenors incorporate by reference the preceding paragraphs as if fully set forth here.

48. Agency actions must be taken in response to relevant and significant issues raised by interested parties.

49. During the notice and comment period for the Final Rule, many interested parties, including CUNA and Cornerstone, informed the CFPB of the outsized costs and resulting disincentives to loan to woman and minority-owned businesses that would result from the Final Rule's then-proposed expansion of the § 1071 reporting requirements.

50. Defendants acted arbitrarily and capriciously in failing to even consider and respond to comments raised to this effect by interested parties.

51. Courts reviewing agency actions "must set aside agency action if the agency 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass'n of US v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

52. Because the CFPB entirely failed to consider the inherent conflict between the perverse disincentive created by the Final Rule's expanded reporting requirements and the purposes of § 1071, it acted arbitrarily and capriciously in violation of the APA. Hence the Final Rule should be set aside.

FOURTH CLAIM FOR RELIEF
Violation of APA
(5 U.S.C. § 706(2)(A) and (C))

53. Credit Union Intervenors incorporate by reference the preceding paragraphs as if fully set forth here.

54. In adopting regulations like the Final Rule, federal agencies must consider whether the costs of the proposed regulation are justified by its benefits.

55. Section 1022(a) of the Dodd-Frank Act requires the CFPB to consider "the potential benefits and costs to consumer and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule" and "the impact of proposed rules on covered persons … and the impact on consumers in rural areas."

56. The CFPB failed to undertake the required cost/benefit analysis in adopting the Final Rule. Specifically, the CFPB did not properly consider the cost of compliance to smaller lenders (like Rally) and the necessary consequence of these costs: a decrease in loans available to woman and minority-owned businesses.

57. The CFPB even conceded that additional costs of compliance with the Final Rule would be "passed on to small business credit borrowers in the form of higher interest rates and fees." CFPB *Supplemental Estimation* at 870 (Sept. 2021).[1]

58. Despite this concession, the CFPB did not articulate how or why these increased costs of compliance—and their necessarily deleterious effect on the availability of loans to woman and minority-owned businesses—were consistent with the Dodd-Frank Act or even the CFPB's stated purpose of increasing the availability of such loans.

59. "Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action." *U.S. Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 382 (5th Cir. 2018).

60. Because the CFPB failed to engage in the required cost/benefit analysis for the Final Rule, it must be set aside.

[1] *Available at*: https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf.

PRAYER FOR RELIEF

WHEREFORE, Credit Union Intervenors ask this Court to enter judgment in their favor and to provide the following relief:

A. a declaration that the Final Rule is invalid and unenforceable;

B. both a preliminary and permanent injunction setting aside and holding unlawful the Final Rule;

C. attorney's fees and costs incurred in relation to this case; and

D. such other and further relief as the Court deems just and proper.

Dated: August 10, 2023.

Respectfully submitted,

/s/ Christopher O. Murray

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Attorneys for Credit Union Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

TEXAS BANKERS ASSOCIATION; RIO BANK, MCALLEN, TEXAS; and AMERICAN BANKERS ASSOCIATION,	§	
Plaintiffs,	§	
TEXAS FIRST BANK, INDEPENDENT BANKERS ASSOCIATION OF TEXAS, and INDEPENDENT COMMUNITY BANKERS OF AMERICA,	§	Case No: 7:23-cv-00144
Proposed Intervenor Plaintiffs,	§	
v.	§	
CONSUMER FINANCIAL PROTECTION BUREAU and ROHIT CHOPRA, in his official capacity aa Director of the Consumer Financial Protection Bureau,	§	
Defendants.	§	

ORDER GRANTING UNOPPOSED EMERGENCY MOTION FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT

Before the Court is Credit Union National Association, Cornerstone Credit Union League, and Rally Credit Union's (Credit Union Intervenors) Unopposed Emergency Motion for Leave to Intervene (Motion). The Court hereby GRANTS the Motion. Credit Union Intervenors are granted leave to file their Complaint in Intervention attached as Exhibit 1 to the Motion.

Entered on this ___ day of _____, 2023.

The Honorable Randy Crane
Chief U.S. District Judge