IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FORT WORTH CHAMBER OF COMMERCE; LONGVIEW CHAMBER OF COMMERCE; AMERICAN BANKERS ASSOCIATION; CONSUMER BANKERS ASSOCIATION; and TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU; and ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau,

Defendants.

Case No. 4:24-CV-213-P

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The CFPB's opposition is notable for what it does not contest. It does not contest that Plaintiffs are likely to succeed on the merits of their constitutional claim under *Community Financial Services Association of America v. CFPB*, 51 F. 4th 616 (5th Cir. 2022). *See* Opp'n 2 n.1. Nor does it contest that Plaintiffs have established that the Final Rule will cause Plaintiffs' members irreparable harm. *See id*. And it does not contest that one of the Plaintiffs—the Fort Worth Chamber of Commerce—is based in Fort Worth and has members affected by the Rule.

Instead, the CFPB's lead defense is that the Fort Worth Chamber of Commerce is not able to challenge the Final Rule in the Fort Worth Division of the Northern District of Texas. The CFPB urges this surprising result on the ground that the lawsuit is not "germane" to the Fort Worth Chamber's mission of cultivating a "thriving business climate in the Fort Worth region," and thus the Fort Worth Chamber supposedly lacks associational standing. But as a factual matter, it is the Fort Worth Chamber—not the CFPB—that is best suited to determine what is germane to its mission, and as a legal matter, "the germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd*., 627 F.3d 547, 550 n.2 (5th Cir. 2010) (internal citation omitted). Here, not only does the Fort Worth Chamber's mission include helping Fort Worth's "growing financial services industry which supports over 20,000 jobs and has increased the presence of corporate credit and consumer finance," but its members include banks that will be affected by this rule. App'x 21, Decl. of Steve Montgomery ¶¶ 4-5. Accordingly, the basis for venue is straightforward.

The CFPB also attempts to defend its new rulemaking against Plaintiffs' statutory claims through misdirection. The CARD Act indisputably allows issuers to charge a "penalty fee" that is "reasonable and proportional to [the] omission or violation" of the cardholder agreement and then enumerates relevant statutory criteria concerning deterrence, cost, and cardholder conduct. 15 U.S.C. § 1665d(a), (c). In their opening brief, Plaintiffs established that these statutory criteria confirm the plain meaning of a "penalty fee" for a "violation" as a fee that deters the violation, accounts for the conduct of the violation, and is not solely compensatory. The CFPB speculates without citation that this meaning is not how consumers "feel" about late fees and doubles down on the radical proposition that it need not consider Congress' text. Opp'n 16. But the CFPB is a creature of statute, not of consumer "feelings" and unbridled discretion.

Finally, the CFPB argues that the balance of equities weighs against a preliminary injunction because the rule effects the CFPB's "policy choices." Opp'n 24. But just a few years ago the Fifth Circuit rejected that argument, explaining that "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130, 1143 (5th Cir. 2021) (citation omitted). At the end of the day, the CFPB's rhetoric-laden argument gives away the game: this rulemaking reflects State of the Union policy preferences, not the statute that Congress enacted.

ARGUMENT

I. Venue Is Proper in this District.

This Court is the proper venue for a case brought by the Fort Worth Chamber of Commerce to challenge a rule governing credit card issuers in Fort Worth. The relevant statute provides that venue is proper in the district where at least one plaintiff resides, 28 U.S.C. § 1391(e)(1), and the Fort Worth Chamber resides in this District and Division, Compl. ¶ 23, ECF No. 1. In addition, venue is proper where "a substantial part of the events or omissions giving rise to the claim occurred"—so-called *transactional venue*. 28 U.S.C. § 1391(e)(1). For a rulemaking challenge, transactional venue includes each district in which the rule imposes its burdens, which includes this District. *See Texas v. United States*, 95 F. Supp. 3d 965, 973 (N.D. Tex. 2015) (O'Connor, J.); *infra* I.B; Compl. ¶ 23, ECF No. 1.

The CFPB contorts itself (Opp'n 9-13) to oppose this straightforward analysis. First, it argues that the Fort Worth Chamber lacks standing on the remarkable theory that the CFPB's unlawful multi-billion dollar rule regarding credit cards is not "germane" to the "business climate of Fort Worth." Opp'n 11-12. Second, the CFPB argues that transactional venue does not apply because none of the named plaintiffs are themselves card issuers. Both arguments fail.

A. The Fort Worth Chamber has standing.

Each Plaintiff, including the Fort Worth Chamber, has associational standing under Article III because (1) at least one of its members would have standing in its own right; (2) the rulemaking at issue is germane to Plaintiffs' organizational missions; and (3) the participation of individual members is unnecessary. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); Compl. ¶¶ 9-14, 18-22, ECF No. 1.

The CFPB primarily contests the second prong, asserting (Opp'n 11-12) that Plaintiffs' claims regarding a rule affecting credit cards that are issued and used in Fort Worth are somehow not germane to the Fort Worth Chamber's mission. "[T]he germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc.*, 627 F.3d at 550 n.2 (quoting *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006)). That requirement is easily met here. The mission of the Fort Worth Chamber "is to cultivate a thriving business climate in the Fort Worth region" and "to help businesses compete in the local and global marketplace." App'x 21, Decl. of Steve Montgomery ¶ 4. This includes helping Fort Worth's "growing financial services industry, which supports over 20,000 jobs and has increased the presence of corporate credit and consumer finance." *Id.* ¶ 5. This industry includes both indirectly-affected smaller issuers and directly-affected larger card-issuing banks. *Compare* Fort Worth Chamber, Member Directory: Finance & Insurance, https://business.fortworthchamber.com/list/ql/finance-insurance-10 (last visited Mar. 14, 2024) (listing local bank branches of credit card issuers), *with* CPFB, *Credit Card Late Fees* 14 n.33 (Mar. 2022)[1] (citing S&P Global report listing top issuers); *and* Adam McCann, *Credit Card Market Share by Issuer*, WalletHub, https://wallethub.com/edu/cc/market-share-by-credit-card-issuer/25530 (Feb. 26, 2024) (noting that these issuers have tens of millions of cards in circulation). The ability of those industry participants to manage cardholder risk, offer credit on competitive terms, and collect late-fee revenue is undoubtedly "pertinent" to Fort Worth's business climate, including because it will affect retailers and consumers.

The CFPB has cited no authority for the proposition that these numerous industry participants must be headquartered in Fort Worth for this litigation to be germane to the Fort Worth Chamber's mission, Opp'n 12, and plaintiffs are aware of none. Many card issuers headquartered outside of Fort Worth have customers in the District. *See, e.g.*, App'x 56, Susser Decl. ¶ 4. The rule harms their ability to offer credit to Fort Worth consumers on favorable terms, and their ability to offer such credit directly affects the region's business climate. It certainly meets the low bar of "mere pertinence." *Ass'n of Am. Physicians & Surgeons*, 627 F.3d at 550 n.2 (quoting *Bldg. & Constr. Trades*, 448 F.3d at 148).

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[1] Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf.

The CFPB also suggests in a footnote that the first prong for associational standing is not satisfied, asserting (Opp'n 11 n.6) that the Fort Worth Chamber has not done enough to identify its larger card issuer members. This is incorrect. The Fort Worth Chamber's members do include directly-affected large card issuers. *See, e.g.*, App'x 56, Decl. of Matthew Susser ¶¶ 3-4.[2] In addition to the member declaration it has submitted, its directory lists several branches of some of the country's largest card issuers, as noted in the CFPB's own report. *See supra* at 4.

The Fort Worth Chamber also counts among its members several smaller card issuers that will be harmed by the Final Rule, even if they are not directly subject to the $8 safe harbor. App'x 24, Steve Montgomery Decl. ¶ 15. These smaller issuers will face competitive pressure to reduce their late fees in line with their larger competitors. *Id.* The CFPB acknowledged this possibility in its rulemaking. *See* Credit Card Penalty Fees (Regulation Z) (released Mar. 5, 2024), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-penalty-fees_final-rule_2024-01.pdf ("Final Rule") at 253 ("[S]ignificant reductions in credit card late fees at Larger Card Issuers might create competitive pressure for Smaller Card Issuers to lower their own late fees, in which case their consumers could experience effects similar to those at Larger Card Issuers."). The CFPB does not contest that such issuers are members of the Fort Worth Chamber, nor that they would be injured by the Final Rule. These members provide an independent basis for the Fort Worth Chamber's standing.

[2] The CFPB appears to assert (Opp'n 11 n.6) that Synchrony Bank is not actually a member of the Fort Worth Chamber, because it did not see Synchrony Bank on the Fort Worth Chamber's public online directory. In fact, Synchrony Bank is a member of the Fort Worth Chamber and has been since before this suit was filed, notwithstanding the inadvertent omission of Synchrony Bank from the public directory. *See* Supp. App'x 2, Decl. of Steve Montgomery ¶ 4.

B. Transactional venue arises in this case.

Even if the Fort Worth Chamber lacked standing, transactional venue would be proper here. In *Texas v. United States*, this Court held venue to be proper in a challenge to a Department of Labor rulemaking that regulated employment. "Because Plaintiff Texas and its agencies are employers in Wichita Falls, a substantial part of the events or omissions giving rise to Plaintiffs' claims would occur in the Northern District of Texas were the Final Rule to become effective." 95 F. Supp. 3d at 973; *see also Umphress v. Hall*, 479 F. Supp. 3d 344, 351-52 (N.D. Tex. 2020) (Pittman, J.) (same under § 1391(b)(2)). Similarly, here, several card-issuing members of Plaintiff associations have customers in this District. *See, e.g.*, App'x 56, Susser Decl. ¶ 3-4. The Final Rule will burden those issuers' relationships with their many cardholders (and prospective cardholders) in Fort Worth. While Plaintiffs do not issue credit cards themselves (Opp'n 11), transactional venue looks to the "events or omissions giving rise to the claim," 28 U.S.C. § 1391(e)(1), not to the names on the caption. Because the interests of Plaintiffs' members will be burdened by the Final Rule in this District, venue would be proper here even if the Fort Worth Chamber lacked standing (which again, it does not).

II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

A. The CFPB promulgated the Final Rule in violation of the Constitution

The CFPB concedes (Opp'n 2 n.1) that *Community Financial* controls here. For that reason alone, Plaintiffs' success on the merits is more than likely.

B. The Final Rule violates the CARD Act, TILA, and the APA

Plaintiffs also are likely to succeed on the merits of their statutory challenges to the Rule, and the CFPB's opposition has given this Court no reason not to rule on these arguments now if it is able, in the interests of both judicial efficiency and providing certainty for the regulated industry that otherwise faces an unworkable compliance period if an injunction were to be lifted and the same 60-day period imposed. The CFPB's statutory argument boils down to an untenable proposition: that Congress allowed it to regulate penalty fees based solely on an issuer's costs—and a subset of those costs to boot. As is plain from the text of the CARD Act, Congress did not give the CFPB the wide-ranging, virtually unchecked authority that the CFPB now claims.[3]

To start, the CFPB's brief glides over a key term in the CARD Act—"penalty." Congress expressly permitted card issuers to impose a "penalty fee" for breaches of their cardholder agreements, "including any late payment fee." 15 U.S.C. § 1665d(a). A "penalty fee," by definition, requires more than compensation for costs. This definition comports with the common-law understanding of a "penalty" as something used "to deter." *Tull v. United States*, 481 U.S. 412, 421-22 (1987). And "we must presume that Congress intends to adopt the established common law meaning of a statutory term unless Congress explicitly rejects that meaning." *United States v. Trejo-Galvan*, 304 F.3d 406, 409-10 (5th Cir. 2002).

The CFPB answers (Opp'n 17 n.9) only that this well-established meaning has "little applicability" to credit cards, but it cites no authority for that proposition. Were there any doubt that a "penalty fee" is more than a cost-recovery mechanism, Congress provided a helpful list of mandatory factors for the CFPB to consider—including deterrence and cardholder conduct. 15 U.S.C. § 1665d(b); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014) ("[T]he words of a statute must be read in their context . . . .").

[3] The CFPB's brief goes to significant lengths defending the adequacy of the Final Rule's analysis and reasoning. Because Plaintiffs have not pressed their arbitrary-or-capricious claims at this stage, they reserve their right to address those issues at the appropriate time.

Instead of accepting this plain meaning, the CFPB presses several flawed statutory arguments. *First*, it argues (Opp'n 13-17) that Congress did not require the CFPB to account for deterrence and cardholder conduct, but merely "consider" doing so. But the wording and context of § 1665d(c) make evident that Congress wanted the CFPB to incorporate these considerations, not merely to think about them. Otherwise, the safe harbor would be inconsistent with Congress's own understanding of what it means for a "penalty fee" to be "reasonable and proportional to the omission or violation." The CFPB's reading effectively adds a word to the statute. On its account, § 1665d(c) requires that it "consider including" the listed factors while remaining free to disregard them. But that is not what the statute says, and Congress knows how to command a financial regulator to "consider including" certain items when it wants to. *See, e.g.*, 15 U.S.C. § 1681m(e)(2)(B) (federal banking agencies could "consider including" certain guidelines among those required by statute).

The CFPB's radical disregard of Congress' text is evidenced by the extreme positions that it takes. For example, the CFPB posits (Opp'n 20-21) that deterrence would be adequately considered in any rule with a non-zero deterrence effect. Congress did not require deterrence to be "meaningful," the CFPB argues (*id.* 20)—in other words, "deterrence" could be *meaningless*. But courts "should act under the assumption that Congress intended its enactment to have meaningful effect and must, accordingly, construe it so as to give it such effect." *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Likewise, the CFPB's creation of two dramatically different safe harbors for the same conduct solely based on the number of open accounts makes sense only in a world in which the CFPB is unconstrained by that statutory text.

Second, the CFPB argues that the three statutory considerations listed in § 1665d(c)—costs, deterrence, and cardholder conduct—apply only to the reasonable-and-proportional standard that it was "required" to promulgate, not to its optional safe-harbor. This reading would make little sense in light of the statutory scheme, since the safe harbor, while not required, nonetheless must specify the late fees that are "presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates"—in other words, that are presumed to meet the standard. 15 U.S.C. § 1665d(e). It would be nonsensical for the CFPB to consider these factors when setting a standard, only to disregard them when deciding which fees presumptively meet it. And here, the CFPB writes against the backdrop of a "standard" that is solely cost-based and relies upon the safe harbor to reflect the other statutory criteria. *See* Op. Br. at 16.

Third, the CFPB defends (Opp'n 18) its arbitrarily narrow reading of the word "costs" as including only those costs incurred before a delinquent account is charged off. But its defense is a policy argument—that other late payers should not bear the cost of trying to collect from cardholders whose accounts are charged off—not a statutory one.[4] Textually, there is no basis for distinguishing between pre- and post-charge-off collection costs incurred by issuers from the late payment. Elsewhere, Congress has required that certain costs be distinguished when setting similar "reasonable and proportional" fee standards. *See, e.g.*, 15 U.S.C. § 1693o-2(a)(3)(A), (4)(B)(i)-(ii) (requiring the Federal Reserve Board to distinguish between incremental and other costs). The CFPB's brief offers no response to this point.

Finally, the CFPB asserts that the Final Rule's effective date complies with TILA because the Rule does not itself require new disclosures. That argument misses the point. The Final Rule's raison d'être is the reduction of credit card late fees. Changes to late fees require, as the

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[4] This policy concern would seem to conflict with the CFPB's suggestion that issuers recover these post-charge-off costs by increasing rates for *all* cardholders. Final Rule at 80; *see also id.* at 81 (noting, in response to due process and Takings Clause concerns, that "Larger Card Issuers generally can adjust other fees or interest rates in order to recover any lost revenue").

CFPB acknowledges, updated disclosures, Final Rule at 218-19, which in turn require significant lead time to implement, especially when the country's largest issuers are expected to do so all at once. *See* App'x 61, Letter from Kimberly Ford to CFPB (Aug. 11, 2023). Beyond *ipse dixit*, the CFPB makes no effort to defend its cramped and impracticable reading of TILA.

III. Balance of Harms and the Public Interest

In a flurry of rhetoric—perhaps intended mostly for an audience other than the Court—the CFPB argues (Opp'n 23-25) the Final Rule is good policy and thus the equities disfavor an injunction. But whether an agency considers a rulemaking to be good policy is not the question. The CFPB makes no effort to demonstrate how it would be harmed, apart from delay in its policy choice, by maintaining the status quo. Nor does it contest (other than a citation to an article published a year before the *proposed* rule) the irreparable harm that Plaintiffs' members would suffer if the Final Rule is not enjoined—harm that is only more pressing now that the Rule is scheduled for publication in the Federal Register tomorrow. *See* https://www.federalregister.gov/public-inspection/2024-05011/credit-card-penalty-fees-regulation-z; Opp'n 16. The CFPB suggests that maintaining the status quo is important only when a historic building is threatened, Opp'n 24, but that is not the law in this circuit. *See, e.g.*, *Wages & White*, 16 F.4th at 1143.

As for the public interest, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Id.* (quoting *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021)). Contrary to the CFPB's curious footnote (Opp'n 25 n.16), this proposition extends to statutory violations as well as constitutional violations under controlling precedent. *See, e.g.*, *Wages & White*, 16 F.4th at 1143 (APA violation).

CONCLUSION

Plaintiffs respectfully ask that their motion for preliminary injunction be granted.

Dated: March 14, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 14, 2024, a true and correct copy of the foregoing document was served on counsel of record via this Court's ECF system.

/s/ Derek Carson
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