

**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,* )

v. )

Case No. 7:23-cv-00144

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

*Defendants.* )

**INTERVENOR-PLAINTIFFS’ MOTION TO AMEND THE COMPLAINT IN  
INTERVENTION**

Pursuant to Federal Rule 15(a) of the Federal Rules of Civil Procedure, Intervenor-Plaintiffs the Farm Credit Council (the “Council”), Texas Farm Credit (“TFC”), and Capital Farm Credit (“CFC”) (collectively, the “Farm Credit Intervenors”), hereby move for leave to amend their Complaint in Intervention, Dkt.67. The requested amendments seek to account for a recent Supreme Court decision that fundamentally changes the Complaint in Intervention.

This motion is made on the grounds that good cause exists for amendment, that no Defendant, Plaintiff, or other Intervenor-Plaintiff will be prejudiced, and the amendment is in the public interest. Filed herewith is the verified First Amended Complaint in Intervention (Exhibit 1). For the reasons set forth in the accompanying Brief, Farm Credit Intervenors request that the Court grant the motion to amend the Complaint in Intervention.

Dated: August 2, 2024

Respectfully submitted,

/s/ Daniel G. Gurwitz

Daniel G. Gurwitz  
State Bar No. 00787608  
Southern Dist. ID No. 16895  
Email: dgurwitz@atlashall.com

OF COUNSEL:

Atlas, Hall & Rodriguez, LLP  
818 Pecan Blvd.  
P.O. Box 3725  
McAllen, Texas 78501/ 78502-3725  
Tel: 956-682-5501  
Fax: 956-686-6106

Attorney in charge for Farm Credit Council,  
Texas Farm Credit, and Capital Farm Credit

Misha Tseytlin  
TROUTMAN PEPPER  
HAMILTON SANDERS LLP  
227 W. Monroe Street  
Suite 3900  
Chicago, IL 60606  
(312) 759-5947  
misha.tseytlin@troutman.com

Joseph J. Reilly  
TROUTMAN PEPPER  
HAMILTON SANDERS LLP  
401 9<sup>th</sup> Street NW, Suite 1000  
Washington, DC 20004  
(202) 274-2908  
joseph.reilly@troutman.com

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**INTERVENOR-PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO AMEND THE  
COMPLAINT IN INTERVENTION**

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## INTRODUCTION

Pursuant to Federal Rule 15(a) of the Federal Rules of Civil Procedure, Intervenor-Plaintiffs the Farm Credit Council (the “Council”), Texas Farm Credit (“TFC”), and Capital Farm Credit (“CFC”) (collectively, the “Farm Credit Intervenors”), move for leave (the “Motion”) to amend their Complaint in Intervention, Dkt.67. The requested amendments seek to account for a recent Supreme Court decision that fundamentally changes one of the counts in the Farm Credit Intervenors’ Complaint. At the time the Farm Credit Intervenors filed the Complaint in Intervention, the Fifth Circuit had held the Consumer Financial Protection Bureau (the “CFPB”) had promulgated a rule and operated unconstitutionally because its funding structure violated the U.S. Constitution’s Appropriations Clause (hereinafter “Appropriations Clause”). *Cnty. Fin. Servs. Ass’n of Am., Ltd. (“CFSA”) v. CFPB*, 51 F.4th 616, 642 (5th Cir. 2022), *rev’d and remanded on other grounds, CFPB v. CFSA*, 601 U.S. 416 (2024). Farm Credit Intervenors’ amendment of the Complaint in Intervention in response to change in controlling precedent is made in good faith and should be permitted under Federal Rule 15(a)’s and this Court’s liberal amendment policy and because “justice so requires.” Fed. R. Civ. P. 15(a).

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY<sup>1</sup>

In 2010, Congress enacted Title X of the Dodd-Frank Act and, in so doing, established the CFPB, Pub. L. No. 111-203, an agency possessing broad statutory authority to regulate individuals and entities that provide financial products and services, *see* 12 U.S.C. § 5511(a). Congress structured the CFPB’s funding method to provide that the CFPB’s funding come only from the Federal Reserve’s “combined earnings.” 12 U.S.C. § 5497(a)(1). If the Federal Reserve has no

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<sup>1</sup> Farm Credit Intervenors reproduce this Factual Background and Procedural in their accompanying *Motion to Amend Complaint in Intervention*, No. 7:23-cv-00144 (S.D. Tex., Aug. 2, 2024).

“combined earnings” with which to fund the CFPB, Congress requires the CFPB to return to Congress to ask for lawful appropriations to continue its operations. 12 U.S.C. § 5497(e)(1)(A). The Dodd-Frank Act contains numerous provisions intended to promote the CFPB’s implementation of fair lending laws, including Section 1071. Section 1071 added a new Section 704B to the Equal Credit Opportunity Act (“ECOA”), requiring banks and other small business lenders to report on a limited universe of data points from small business credit applications, including, for instance, “the number of the application and the date on which the application was received” and “the type and purpose of the loan or other credit being applied for.” 15 U.S.C. § 1691c-2(e)(2)(A)–(B). The new ECOA provision also grants the CFPB authority to require additional reporting obligations that “would aid in fulfilling the purposes of this section.” *Id.* § 1691c-2(e)(2)(H).

The CFPB published a proposed rule on September 1, 2021. 86 Fed. Reg. 56356 (Oct. 8, 2021). On October 19, 2022, while the proposed rule was still pending, the Fifth Circuit issued its decision in *CFSA*, holding that the CFPB’s funding structure violates the U.S. Constitution’s Appropriations Clause and separation of powers, 51 F.4th at 642; U.S. Const. art. I, § 9, cl. 7. The Fifth Circuit then held that the remedy for this constitutional violation was to “rewind[ ]” the CFPB’s unlawfully funded rule. 51 F.4th at 643 (quoting *Collins v. Yellen*, 594 U.S. 220, 273–74 (2021) (Kagan, J., concurring)). A few months later, the U.S. Supreme Court granted the CFPB’s petition for a writ of certiorari to address the question of whether the CFPB’s funding structure violated the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7.

Despite the Fifth Circuit’s decision and the then-pending U.S. Supreme Court’s grant of certiorari, the CFPB published a version of the Final Rule on its website March 30, 2023, indicating an intent to officially publish the Final Rule in the Federal Register at a later date. *See* CFPB,



Small Business Lending under the Equal Credit Opportunity Act (Regulation B) (Mar. 30, 2023).<sup>2</sup> The original Plaintiffs—Texas Bankers Association; Rio Bank, McAllen, Texas; and American Bankers Association—then filed this suit challenging the Final Rule on constitutional and statutory grounds and seeking preliminary and permanent injunctive relief. Dkt.12. On July 31, 2023, this Court entered its Order Granting In-Part And Denying In-Part Plaintiffs’ Motion For Preliminary Injunction, Dkt.25, barring the CFPB from implementing the Final Rule. Subsequently, other Intervenor-Plaintiffs filed motions for preliminary injunction to extend the motion to themselves and other financial institutions. *See* Dkts.44, 45, 54, 55. This Court granted those motions to intervene. On October 26, 2023, the Court issued its Order Granting Intervenors’ Motions For Preliminary Injunction, granting injunctive relief to all Intervenor-Plaintiffs and covered financial institutions, which preliminary injunction was to last until the Supreme Court’s reversal of *CFSA*, 51 F.4th 616, in *CFSA*, 601 U.S. 416. Dkt.69 at 7–8.

All Plaintiffs and Plaintiff-Intervenors collectively filed a Motion for Summary Judgment on March 1, 2024. Dkt.79. They argued that summary judgment was appropriate because, *inter alia*, the CFPB exceeded its statutory authority by imposing additional data requirements in the Final Rule, *id.* at 10–22, that the Final Rule is arbitrary and capricious because the CFPB failed to adequately consider the real-world costs it imposed on the banking community, *id.* at 22–26, and that the CFPB’s cost/benefit analysis of the Final Rule was arbitrary and capricious, *id.* at 26–35. That motion and a cross-motion by the CFPB were fully briefed as of June 7, 2024. Dkt.100.

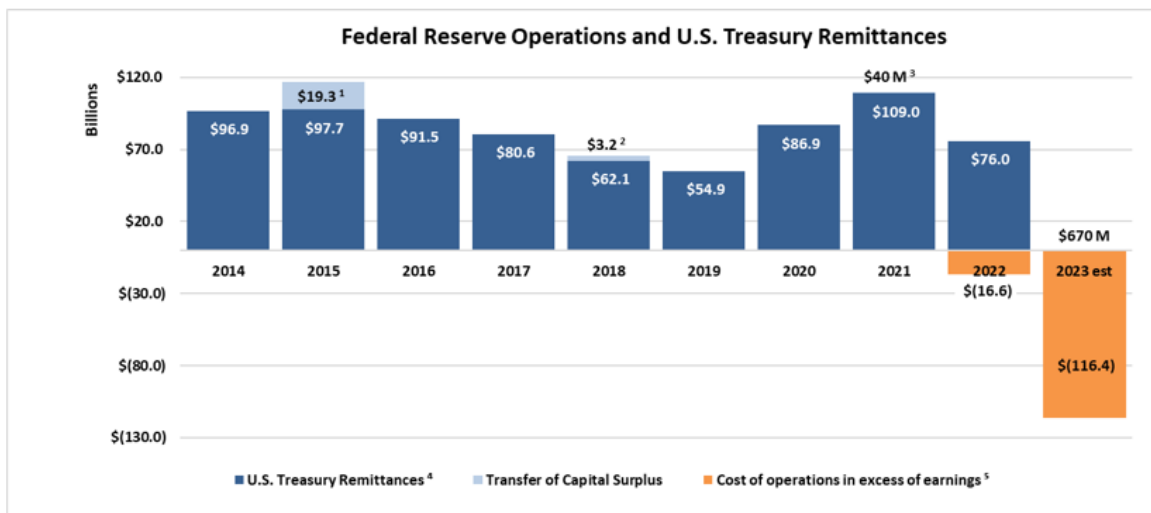
The Supreme Court issued its opinion in *CFSA* on May 16, 2024. 601 U.S. 416. There, the Supreme Court decided that CFPB’s funding mechanism complied with the Appropriations

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<sup>2</sup> Available at <https://www.consumerfinance.gov/rules-policy/final-rules/small-business-lending-under-the-equal-credit-opportunity-act-regulation-b/> (all websites last visited on August 2, 2024).

Clause. *Id.* at 420–21. Specifically, the Supreme Court held that the CFPB’s funding complied with Appropriations Clause only because the Federal Reserve’s “combined earnings” transferred to the CFPB are also subject to the Appropriations Clause. *Id.* at 425, 435, 441. The Appropriations Clause governs the CFPB’s funds because the “money [is] otherwise destined for the general fund of the Treasury.” *Id.* at 425.

But the Federal Reserve has lacked “combined earnings” to transfer to the CFPB since September 2022, when the Federal Reserve first ceased “earnings” transfers to the Treasury. *See* Miguel Faria e Castro, Samuel Jordan-Wood, *The Fed’s Remittances to the Treasury: Explaining the ‘Deferred Asset’*, Fed. Rsrv. Bank of St. Louis (Nov. 21, 2023) (“beginning in September 2022, remittances due [to the Treasury] became negative”)<sup>3</sup>; *see generally* Bd. of Governors of the Fed. Rsrv. Sys., *Federal Reserve Banks Combined Quarterly Financial Report 2*, 25 (Mar. 31, 2024) (hereinafter “March 2024 Financial Statement”).<sup>4</sup>



<sup>3</sup> Available at <https://www.stlouisfed.org/on-the-economy/2023/nov/fed-remittances-treasury-explaining-deferred-asset>.

<sup>4</sup> Available at <https://www.federalreserve.gov/aboutthefed/files/quarterly-report-20240517.pdf>.

Bd. of Governors of the Fed. Rsrv. Sys., *Federal Reserve Board announces preliminary financial information for the Federal Reserve Banks' income and expenses in 2023* (Jan. 12, 2024).<sup>5</sup> The Federal Reserve made its last transfer to the Treasury on August 31, 2023. See Fed. Rsrv. Bank of St. Louis, *Liabilities and Capital: Liabilities: Earnings Remittances Due to the U.S. Treasury: Wednesday Level*.<sup>6</sup> Without “combined earnings,” the CFPB had only one method to fund itself: by entreating Congress for regular Appropriations. 12 U.S.C. § 5497(e)(1)(A). The CFPB did not do so; instead, it has continued funding itself with monies from the Federal Reserve that are not “combined earnings,” beginning with a \$315,700,000 transfer to the CFPB in October 2022. Letter from Rohit Chopra, Director, CFPB, to Jerome Powell, Chair, Bd. of Governors of Fed. Rsrv. Sys. (Oct. 14, 2022)<sup>7</sup>; Letter from Ricardo A. Aguilera, Div. Dir. and Chief Fin. Off., Bd. of Governors of the Fed. Rsrv. Sys., to Dana James, Acting Chief Fin. Off., CFPB (Oct. 19, 2022).<sup>8</sup>

After the Supreme Court’s *CFSA* decision, the CFPB modified the Final Rule on July 3, 2024, through issuance of an interim final rule, 89 Fed. Reg. 55024 (July 3, 2024) (to be codified at 12 C.F.R. § 1002). While the CFPB pursued the Final Rule’s modification, it relied upon the Federal Reserve’s unappropriated funds—not from its “combined earnings” since it had lacked combined earnings since September 2022—to promulgate the interim rule, just as it had when it issued the Final Rule to begin with.

## ARGUMENT

A. Courts must “freely give[ ]” leave to amend a complaint “when justice so requires.” *Day v. McDonough*, 547 U.S. 198, 209 (2006) (quoting Fed. R. Civ. P. 15(a)). A court should

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<sup>5</sup> Available at <https://www.federalreserve.gov/newsevents/pressreleases/other20240112a.htm>.

<sup>6</sup> Available at <https://fred.stlouisfed.org/series/RESPPLLOPNWW>.

<sup>7</sup> Available at [https://files.consumerfinance.gov/f/documents/cfpb\\_funds-transfer-request\\_fy2023-q1.pdf](https://files.consumerfinance.gov/f/documents/cfpb_funds-transfer-request_fy2023-q1.pdf).

<sup>8</sup> Available at [https://files.consumerfinance.gov/f/documents/cfpb\\_transfer-of-funds-fy2023-q1.pdf](https://files.consumerfinance.gov/f/documents/cfpb_transfer-of-funds-fy2023-q1.pdf).

only deny leave to amend for reasons such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.” *Ayers v. Peterson*, 130 Fed. App’x 666, 669 (5th Cir. 2005). “Federal Rule 15(a) counsels a liberal amendment policy, which is limited by considerations of judicial economy and fairness to the nonmovant and which abhors bad faith or a dilatory motive.” *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1180 (5th Cir. 1987); *see also United States ex rel. Bennett v. Medtronic, Inc.*, 747 F. Supp. 2d 745, 749 (S.D. Tex. 2010). Courts “may grant leave to amend in situations where the controlling precedents changed midway through the litigation.” *Sonoma Cnty. Ass’n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117–18 (9th Cir. 2013). When plaintiffs request an amendment to “add new, potentially viable, claims in reaction to an unforeseeable change in legal precedent[.]” then such amendment does not constitute bad faith under Federal Rule 15(a). *Lundy v. Morgan Stanley & Co.*, No. C-90-2796 TEH, 1991 WL 238293, at \*1–2 (N.D. Cal. July 18, 1991); *see Cruper-Weinmann v. Paris Baguette Am., Inc.*, 653 F. App’x 81, 82 (2d Cir. 2016) (granting leave to amend complaint due to an interceding Supreme Court decision overturning case law plaintiffs relied upon); *see also United States v. Vaught*, No. 1:18-cv-00452-DCN, 2019 WL 4786045 at \*9–11, 124 A.F.T.R.2d (RIA) 2019-6184 (D. Idaho Sep. 30, 2019) (granting motion to amend complaint because of new controlling case law).

B. This Court should grant this motion for leave to amend the Complaint in Intervention because the U.S. Supreme Court overruled binding Fifth Circuit law, necessarily modifying the legal theories in the Amended Complaint in Intervention and generating a new U.S. Constitution Appropriation Clause issue. Furthermore, the CFPB cannot demonstrate undue delay, bad faith or

dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility, given that no developments have occurred since the Supreme Court issued *CFSA*.

The Complaint in Intervention relied on the Fifth Circuit’s then-binding holding in *CFSA*, 51 F.4th 616, that the CFPB’s funding structure was unconstitutional. *See* Dkt.67 ¶¶ 6, 23, 24, 30–33. The Fifth Circuit had held there that the CFPB’s “funding apparatus cannot be reconciled with the [U.S. Constitution’s] Appropriations Clause and the clause’s underpinning, the constitutional separation of powers.” *CFSA*, 51 F.4th at 642.

Subsequently, in *CFSA* the Supreme Court “decide[d] the narrow question [of] whether” the CFPB’s funding mechanism complied with the Appropriations Clause, 601 U.S. at 421. Although the Final Rule is arbitrary and capricious for the reasons outlined by the Plaintiffs in this case, it is also unconstitutional and unlawful in another respect, which only became pertinent after the U.S. Supreme Court reversed *CFSA*, 51 F.4th 616. In particular, the Supreme Court explained that the CFPB’s only constitutional funding comes from 12 U.S.C. § 5497, which “authorizes the [CFPB] to draw public funds from a particular source—‘the combined earnings of the Federal Reserve System.’” *CFSA*, 601 U.S. at 418 (citation omitted). The Supreme Court held that only CFPB’s funding from the “combined earnings” of the Federal Reserve complied with the Appropriations Clause because the “money [is] otherwise destined for the general fund of the Treasury.” *Id.* at 425, 441. This created a new legal issue as to whether the CFPB’s promulgation, modification and enforcement of the Final Rule complied with the Appropriations Clause since the Federal Reserve had no constitutional “combined earnings” with which to fund the CFPB, nor did CFPB ever ask for additional appropriations under 12 U.S.C. § 5497(e)(1)(A). As such, the overarching legal issue is the same in the original Complaint in Intervention and the Amended Complaint in Intervention: the CFPB’s promulgation of the Final Rule is unlawful because the

CFPB violated the Appropriations Clause. *Compare* Dkt.67 ¶¶ 6, 23, 24, 30–33 to Ex.1 ¶¶ 6, 23, 24, 30–36, 37–42.

The Court should grant the motion for leave to amend here because there is no “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.” *Ayers*, 130 F. App’x at 669; Fed. R. Civ. P. 15(a). Prior to the Supreme Court’s *CFPB* decision, Farm Credit Intervenors pursued their claims under controlling Fifth Circuit Precedent and there is no any indication they sought to unduly delay the case or operate in bad faith, nor does responding to a change in controlling precedent constitute bad faith. *See Sonoma Cnty.*, 708 F.3d at 1117–18.

Farm Credit Intervenors’ amendment of the Complaint in Intervention in response to a change in controlling precedent would not cause any undue prejudice to the CFPB. *See Cruper-Weinmann*, 653 F. App’x at 82. The parties have completed summary judgment briefing, and the Court has yet to issue a decision. *See* Dkts.75, 76, 79, 90, 91, 95, 96, 100. Amending the Complaint in Intervention would only require that CFPB brief the one discrete issue of whether the CFPB complied with the U.S. Appropriations Clause while it promulgated the Final Rule. Further, Farm Credit Intervenors have no objection to the Court’s issuance of a decision on the Administrative Procedure Act claims if it was to do so as a partial summary judgment. This case is not close to trial and such amendment would not require the gathering and analysis of new facts—in fact, it is purely legal considering the nature of the Supreme Court’s decision and the plain statutory text. Finally, as explained in the Farm Credit Intervenors’ Motion for Judgment on the Pleadings, No. 7:23-cv-00144 (S.D. Tex., Aug. 2, 2024), the Amended Complaint in

Intervention is not a futile effort; and, in fact, Farm Credit Intervenors are entitled to judgment on their new claim.

Accordingly, and pursuant to the liberal amendment policy of Federal Rule 15(a), the Court should grant leave to the Farm Credit Intervenors to amend their Complaint in Intervention to account for the recent Supreme Court *CFPB* decision.

Dated: August 2, 2024

Respectfully submitted,

/s/ Daniel G. Gurwitz

Daniel G. Gurwitz

State Bar No. 00787608

Southern Dist. ID No. 16895

Email: dgurwitz@atlashall.com

OF COUNSEL:

Atlas, Hall & Rodriguez, LLP

818 Pecan Blvd.

P.O. Box 3725

McAllen, Texas 78501/ 78502-3725

Tel: 956-682-5501

Fax: 956-686-6106

Attorney in charge for Farm Credit Council,

Texas Farm Credit, and Capital Farm Credit

Misha Tseytlin

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe Street

Suite 3900

Chicago, IL 60606

(312) 759-5947

misha.tseytlin@troutman.com

Joseph J. Reilly

TROUTMAN PEPPER

HAMILTON SANDERS LLP

401 9<sup>th</sup> Street NW, Suite 1000

Washington, DC 20004

(202) 274-2908

joseph.reilly@troutman.com

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been filed on August 2, 2024, via the CM/ECF system and via email courtesy copy to Counsel for Defendants.

/s/ Daniel G. Gurwitz  
Daniel G. Gurwitz

Attorney in charge for Farm Credit  
Council, Texas Farm Credit, and  
Capital Farm Credit

**CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 7.1(D), I hereby certify that I conferred with Kevin Friedl and Karen Bloom, Senior Counsel for the CFPB, by email regarding this Motion. The parties were unable to reach an agreement on the relief sought in the Motion and thus Defendants oppose this Motion.



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*Defendants.* )

**FIRST AMENDED COMPLAINT IN INTERVENTION**

Intervenor-Plaintiffs the Farm Credit Council (the “Council”), Texas Farm Credit (“TFC”), and Capital Farm Credit (“CFC”) (collectively, the “Farm Credit Intervenors”), file this First Amended Complaint In Intervention and allege as follows:

**NATURE OF THE ACTION**

1. On March 30, 2023, Defendants the Consumer Financial Protection Bureau and Rohit Chopra, in his official capacity as Director (collectively, the “CFPB”), issued a final rule (the “Final Rule”) amending Regulation B governing small business lending under the Equal Credit Opportunity Act (“ECOA”). *Small Business Lending Under the Equal Credit Opportunity Act (Regulation B)*, 88 Fed. Reg. 35,150 (May 31, 2023). The Final Rule’s stated purpose is to implement changes to ECOA made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. Congress enacted the Dodd-Frank Act in 2010. Section 1071 of the Dodd-Frank Act added a new Section 704B to ECOA, which requires banks and other small business lenders to report on a limited set of data points from credit applications by small businesses, such as “the number of the application and the date on which the application was received” and “the type and purpose of the loan or other credit being applied for.” 15 U.S.C. § 1691c-2(e)(2). The new ECOA provision then authorizes the CFPB to impose additional reporting requirements that “would aid in fulfilling the purposes of this section.” *Id.* § 1691c-2(e)(2)(H).

3. The Final Rule imposes numerous reporting requirements on small business lenders. Specifically, the Final Rule requires covered financial institutions to develop and implement the necessary systems and compliance mechanisms for collecting and reporting 81 data points. 88 Fed. Reg. at 35,545 (codified at 12 C.F.R. § 1002.107); *see* CFPB, *Small Business Lending Rule: Data Points Chart* (Aug. 17, 2023), [https://files.consumerfinance.gov/f/documents/cfpb\\_small-business-lending-data-points-chart.pdf](https://files.consumerfinance.gov/f/documents/cfpb_small-business-lending-data-points-chart.pdf).

4. Intervenor the Council is the national trade association for the institutions of the Farm Credit System, a nationwide network of customer-owned financial institutions with a specific mission to provide credit and other support to rural communities and agriculture. Intervenor TFC and CFC are members of the Council. The CFPB estimates that about 95% of the Council’s members are covered by the Final Rule. 88 Fed. Reg. at 35,165, 35,495.

5. The Final Rule, which considers agricultural credit to be “business credit,” causes unique and irreparable harm to the Council’s members, including CFC and TFC. In contrast to the customer bases of other lenders, nearly all customers of Farm Credit institutions qualify as “small businesses” under the Final Rule’s definition of that term. *Id.* at 35,544 (codified at 12 C.F.R. § 1002.106(b)(1)). Accordingly, Council members will be required to undertake significant

efforts and expend significant labor and financial resources to ensure compliance with the Final Rule's burdensome reporting requirements.

6. On August 29, 2023, the Final Rule went into effect. 88 Fed. Reg. at 35,150. The Council's members are currently implementing the Final Rule and, in doing so, are incurring substantial and unrecoverable compliance costs. These compliance costs are unjustified, as the Final Rule is both unconstitutional and unenforceable under recent Supreme Court precedent, *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.* ("CFSA"), 601 U.S. 416 (2024), and binding Fifth Circuit precedent as to the appropriate remedy, 51 F.4th 616 (5th Cir. 2022), *rev'd and remanded on other grounds*, 601 U.S. 416, and is otherwise unlawful in multiple respects.

7. This Court's preliminary injunction entered July 31, 2023, enjoined the CFPB from implementing and enforcing the Final Rule as against the original Plaintiffs in this action—including the Texas Bankers Association ("TBA") and the American Bankers Association ("ABA")—and their members pending the U.S. Supreme Court's *Community Financial* decision. At least the vast majority of the Council's members, including TFC and CFC, are not members of either the TBA or the ABA.

8. The Council's members will, however, suffer the same immediate and real harms identified by the Court in its preliminary injunction in complying with the Final Rule. Accordingly, the Council, on behalf of its members, and CFC and TFC, seek a judgment vacating the Final Rule, as well as preliminary and permanent injunctive relief.

## **PARTIES**

9. The Council is the national trade association representing the institutions of this country's Farm Credit System. The Council therefore has members located across the country, including in the Southern District of Texas. The vast majority of the Council's members make small business loans and are covered under the Final Rule.

10. CFC is a Council member headquartered in Bryan, Texas, and chartered to serve 192 counties across Texas, including the area that encompasses this district. CFC provides loans to support small businesses, including rural farmers, ranchers, and agribusinesses, and is a covered financial institution under the Final Rule. CFC estimates that it may be a "Tier 2" lender under the Final Rule, with a compliance date of April 1, 2025.

11. TFC is a Council member with headquarters in Nueces County, Texas, and chartered to serve 100 counties across Texas, including Hidalgo County, Texas, where it has offices. TFC provides loans to support small businesses, including rural farmers, ranchers, and agribusinesses, and is a covered financial institution under the Final Rule. TFC estimates that it may be a "Tier 3" lender under the Final Rule, with a compliance date of January 1, 2026.

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

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

## **JURISDICTION AND VENUE**

14. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this civil action arises under the Constitution, laws, or treaties of the United States.

15. 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 CFC and TFC are chartered under the Farm Credit Act of 1971, as amended, 12 U.S.C. § 2001, et seq., to serve eligible farmers and ranchers in this district and a substantial part of the events or omissions giving rise to the claim occurred in this district, 28 U.S.C. § 1391(e)(1).

## **FACTUAL BACKGROUND**

### **A. The Farm Credit System**

16. The Farm Credit System is a federally chartered nationwide network of cooperative, borrower-owned lending institutions that provide loans to the nation's farmers, ranchers, and agribusinesses. Each of the banks and associations that comprise the Farm Credit System, including CFC and TFC, are federally chartered, owned by their borrower-members, and operated on a cooperative basis.

17. For over a century, Congress has purposely designed the Farm Credit System “to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.” 12 U.S.C. § 2001(a). As of September 1, 2023, the Farm Credit System included four banks and 67 associations, which together provide approximately 45% of agricultural lending in the United States. These 71 institutions serve all 50 states and the Commonwealth of Puerto Rico. Each institution is structured as a cooperative owned by its customers, that is, farmers, ranchers, farmer-owned cooperatives, and other rural businesses.

18. The Farm Credit Administration (“FCA”), an independent federal financial regulatory agency, supervises and examines the Farm Credit System, based on the Farm Credit

Act of 1971, as amended, 12 U.S.C. § 2001, et seq., and regulations issued by that agency.<sup>1</sup> With respect to Farm Credit institutions, the FCA also examines and enforces compliance with consumer-finance laws, including ECOA and rules issued thereunder, such as the Final Rule. Thus, the FCA (not the CFPB) will be the agency responsible for examining Farm Credit lenders for compliance with the Final Rule and for bringing any administrative actions to enforce compliance with that rule.<sup>2</sup>

19. The costs of complying with CFPB and other federal regulations is ultimately borne by each Farm Credit institution's customer-owners. That is so because the net income that Farm Credit institutions generate can generally only be used in two ways: (1) retained within the Farm Credit institution as capital to build financial strength to serve customer-owners; or (2) passed on to customer-owners by way of patronage dividends (a practice that effectively reduces those customers' costs of borrowing).

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<sup>1</sup> The FCA is predominantly funded via assessments on Farm Credit institutions. *See generally* FCA, Fiscal Year 2023 Proposed Budget and Performance Plan (Mar. 2, 2023), <https://www.fca.gov/template-fca/about/BudgetFY2023.pdf> (all websites last visited on August 2, 2024).

<sup>2</sup> ECOA specifically provides that with respect to Farm Credit institutions, compliance with ECOA and rules issued thereunder “shall be enforced under . . . [t]he Farm Credit Act[, 12 U.S.C. § 2001, et seq.], by the Farm Credit Administration.” 15 U.S.C. § 1691c(a)(6). Similarly, the Consumer Financial Protection Act (“CFPA”), which created the CFPB, provides that “[t]he Bureau shall have no authority to exercise any power to enforce [the CFPA] with respect to a person regulated by the Farm Credit Administration.” Pub. L. No. 111-203, tit. X, subtit. B, § 1027, 124 Stat. at 2002 (codified at 12 U.S.C. § 5517(k)(1)).

The CFPA also provides that “[n]o provision of [the CFPA] shall be construed as altering, amending, or affecting the authority of the Farm Credit Administration to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by the Farm Credit Administration.” *Id.* Separately, in a section describing the CFPB's authority to supervise certain other nondepository institutions, the CFPA provides that “[n]o provision of [the CFPA] may be construed as modifying, limiting, or otherwise affecting the authority of the Farm Credit Administration.” *Id.* at 1990 (codified at 12 U.S.C. § 5514(f)).

## **B. The Proposed Rule**

20. On September 1, 2021, the CFPB issued a proposed rule purporting to implement Section 1071 of the Dodd-Frank Act, *Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B)*, 86 Fed. Reg. 56,356 (Oct. 8, 2021), which section directs certain covered financial institutions to gather and report on a handful of data points relevant to small business credit applications, *see* Pub. L. No. 111-203, tit. X, subtit. G, § 1071, 124 Stat. at 2057 (codified at 15 U.S.C. § 1691c-2(e)(2)). The proposed rule significantly expanded the Dodd-Frank Act’s short list of enumerated data points.

21. During the notice and comment period, the Council submitted comments explaining that the rule was overbroad and would place significant costs and burdens on Farm Credit institutions. Specifically, the Council explained that the proposed rule would cover a greater proportion of Farm Credit lenders than any other category of lenders identified in the proposed rule, because (1) Farm Credit lenders are statutorily structured primarily to provide agricultural-purpose credit, considered “business credit” under the proposed rule, and (2) the overwhelming majority of Farm Credit borrowers are “small businesses” under the proposed rule’s definition of that term. Farm Credit Council, Comment Letter on Proposed Rule – Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B) 3–4 (Jan. 4, 2022).

22. Among other things, the Council explained that agricultural credit is unique within the broader category of “business credit,” and that the proposed rule failed to account for the material difference between agricultural credit, specifically, and business-purpose credit, in general. *Id.* at 4. The proposed rule defined “small business” as any business with a “gross annual revenue . . . for its preceding fiscal year [of] \$5 million or less.” 86 Fed. Reg. at 56,577 (proposed

to be codified at § 1002.106(b)). But, as the Council explained, that \$5 million threshold was vastly too high as applied to farming and would cover close to *all* farmers who borrow from Farm Credit institutions, rather than those farming enterprises that are actually “small.” Farm Credit Council, *supra*, at 4–5. To that end, the Council urged that in the Farm Credit System, the CFPB’s definition of “small business” should align with the FCA’s well-settled definition of “small farmer” as a “farmer, rancher, or producer or harvester of aquatic products who normally generates less than \$250,000 in annual gross sales of agricultural or aquatic products.” *Id.* at 4–6 (quoting FCA, Bookletter BL-040 (REVISED) at 2 (Aug. 10, 2007)). (This figure will be \$350,000 in 2024.) As the Council explained, aligning those definitions would still result in the rule covering approximately 50% of Farm Credit System loans. Farm Credit Council, *supra*, at 4.

### **C. Fifth Circuit Precedent and the Final Rule**

23. On October 19, 2022, while the proposed rule was still pending, the U.S. Court of Appeals for the Fifth Circuit issued its decision in *Community Financial*, regarding a challenge to the CFPB’s Payday Lending Rule. *Community Financial* held that the CFPB’s funding structure violates the U.S. Constitution’s Appropriations Clause and its “underpinning, the constitutional separation of powers.” 51 F.4th at 642–43. The Fifth Circuit further concluded that there was a “linear nexus” between the CFPB’s unconstitutional funding structure and the challenged rule, given that the CFPB relied upon its unlawfully unappropriated funds to promulgate and defend that rule. *Id.* at 643. Accordingly, the court determined that the only remedy for this constitutional violation was to “rewind[ ]” the CFPB’s unlawful action and vacate the challenged rule. *Id.* (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring)).

24. On February 27, 2023, the U.S. Supreme Court granted the CFPB’s petition for a writ of certiorari, 143 S. Ct. 978, to address whether the Fifth Circuit “erred in holding that the



statute providing funding to the Consumer Financial Protection Bureau . . . , 12 U.S.C. [§] 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding,” Pet. for Writ of Cert. I, *CFPB v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, No. 22-448 (U.S. Nov. 14, 2022). The Court heard oral argument on that case on October 3, 2023.

25. Despite the Fifth Circuit’s decision and the U.S. Supreme Court’s grant of certiorari, the CFPB issued the Final Rule on March 30, 2023. 88 Fed. Reg. 35,150.

#### **D. This Litigation**

26. On July 31, 2023, this Court entered an order granting a preliminary injunction enjoining the CFPB from implementing and enforcing the Final Rule against the original Plaintiffs and their members pending the Supreme Court’s *CFSA* decision, 601 U.S. 416. The Court expressly declined to issue nationwide injunctive relief and stayed all deadlines for compliance with the requirements of the Final Rule only as to the original Plaintiffs and their members.

27. On August 10, 2023, the Council, on behalf of its members, delivered a letter to the Honorable Rohit Chopra, Director of the CFPB, asking that the CFPB voluntarily stay the Final Rule as to *all* covered financial institutions pending the Supreme Court’s *CFSA* decision, 601 U.S. 416. Two weeks later, the CFPB denied the Council’s request via letter dated August 24, 2023.

28. The Final Rule became effective on August 29, 2023. 88 Fed. Reg. at 35,150.

29. The Council’s members—including CFC, TFC, and all other Farm Credit institutions—are now incurring and will continue to incur substantial costs to ensure compliance with the Final Rule.

#### **E. The Supreme Court’s CFPB Decision**

30. On May 16, 2024, the Supreme Court issued its opinion in *CFSA*, 601 U.S. 416. The Supreme Court decided that the CFPB’s funding mechanism complied with the Appropriations Clause. *Id.* at 420–21.

31. The Supreme Court then held that only CFPB’s funding from the “combined earnings” of the Federal Reserve complied with the requirements of the Appropriations Clause because the “money [is] otherwise destined for the general fund of the Treasury.” *Id.* at 425, 435.

32. On June 25, 2024, after the Supreme Court’s *CFSA*, 601 U.S. 416 decision, the CFPB modified the Final Rule by issuing an interim final rule, 89 F.R. § 55024 (published July 3, 2024) (to be codified at 12 C.F.R. § 1002).

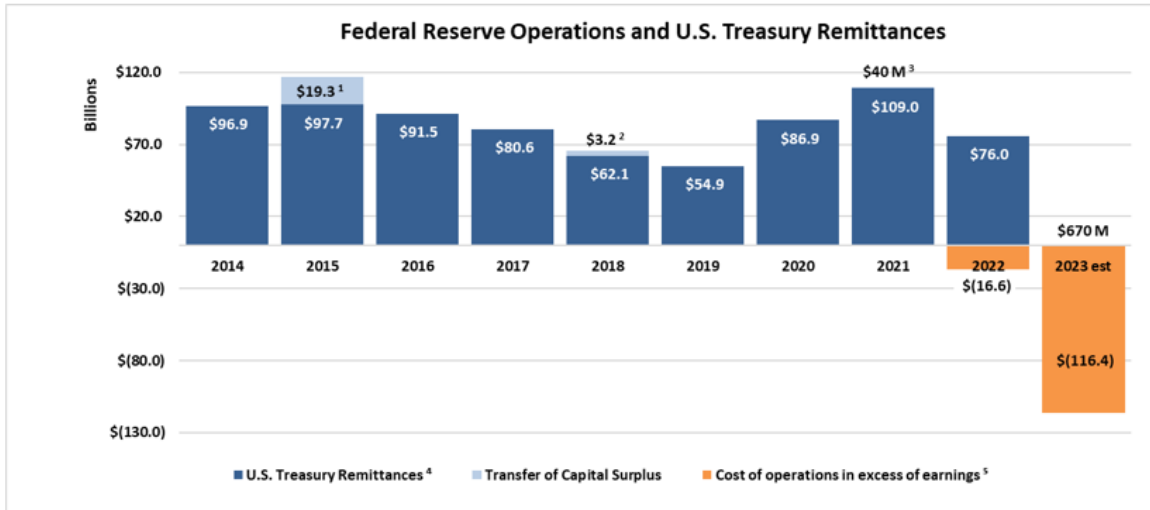
#### **F. The CFPB Lacks Funding To Promulgate, Modify Or Enforce The Final Rule**

33. As the Supreme Court made clear, the CFPB only has constitutional funding from the Federal Reserve’s “combined earnings.” 12 U.S.C. § 5497(a)(1).

34. But the Federal Reserve has had no “earnings” since September 2022, when the Federal Reserve’s costs and expenses first exceeded its income, as demonstrated in the chart below. *See generally*, Bd. of Governors of the Fed. Rsrv. Sys., *Federal Reserve Banks Combined Quarterly Financial Report 2, 25* (Mar. 31, 2024).<sup>3</sup>

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<sup>3</sup> Available at <https://www.federalreserve.gov/aboutthefed/files/quarterly-report-20240517.pdf>.



Bd. of Governors of the Fed. Rsrv. Sys., *Federal Reserve Board announces preliminary financial information for the Federal Reserve Banks' income and expenses in 2023* (Jan. 12, 2024).<sup>4</sup>

35. Without “earnings,” the Federal Reserve’s transfers of funds to the CFPB after September 2022 were not in compliance with the statute governing the CFPB’s funding. *See* 12 U.S.C. § 5497; *CFSA*, 601 U.S. at 435.

36. The CFPB lacked constitutionally appropriated funding when it published the Final Rule in the Federal Register on May 31, 2023 or when it published a modification of the Final Rule on July 3, 2024. As such, the Final Rule and the CFPB’s associated rulemaking violate the Appropriations Clause and must be vacated. *CFSA*, 51 F.4th at 642–43; *rev’d and remanded on other grounds*, 601 U.S. 416; *Collins v. Yellen*, 594 U.S. 220, 258 (2021); *Seila Law LLC v. CFPB*, 591 U.S. 197, 233 (2020).

<sup>4</sup> Available at <https://www.federalreserve.gov/newsevents/pressreleases/other20240112a.htm>.

**COUNT I**

**Violation of the U.S. Constitution, 12 U.S.C. § 5497, Antideficiency Act, and APA  
(Article I, § 9, Clause 7; 12 U.S.C. § 5497(a)(1);  
31 U.S.C. §§ 1341–425, U.S.C. § 706(2)(A), (B))**

37. The Farm Credit Intervenor incorporates by reference the preceding paragraphs as if set forth fully herein.

38. The United States Supreme Court held in *CFSA* that only CFPB’s funding from the “combined earnings” of the Federal Reserve complied with the Appropriations Clause because the “money [is] otherwise destined for the general fund of the Treasury.” 601 U.S. at 421, 425, 435.

39. The Federal Reserve has had no “combined earnings” since September 2022, when its expenses first exceeded its revenue. The Federal Reserve may only transfer funds that are “combined earnings” pursuant to 12 U.S.C. § 5497(a)(1).

40. The CFPB lacks constitutionally appropriated to issue, modify and enforce the Final Rule because the Federal Reserve’s has lacked “combined earnings” since September 2022.

41. Thus, the CFPB unlawfully promulgated and modified the Final Rule because it lacked constitutionally authorized funding to issue, modify, and enforce the Final Rule, violating the U.S. Constitution’s Appropriation Clause, Antideficiency Act, and 12 U.S.C. § 5497(a)(1). As such, the Final Rule must be vacated. *See CFSA*, 601 U.S. at 643.

42. Moreover, under the APA, agency action must be vacated if it is “not in accordance with law,” 5 U.S.C. § 706(2)(A), or “contrary to constitutional right, power, privilege, or immunity,” *id.* § 706(2)(B). Because the Final Rule was promulgated and modified in violation of the U.S. Constitution, it is not in accordance with law and contrary to constitutional right and power and must be set aside. *See CFSA*, 51 F.4th at 642–43, *rev’d and remanded on other grounds*, 601 U.S. 416.

**COUNT II**  
**Violation of APA**  
**(5 U.S.C. § 706(2)(C))**

43. The Farm Credit Intervenors incorporate by reference the preceding paragraphs as if set forth fully herein.

44. Agency actions must be set aside where they “exce[ed]” or contravene an agency’s statutory authority. 5 U.S.C. § 706(2)(C).

45. By requiring small-business lenders like CFC, TFC, and other Farm Credit System institutions to collect 81 categories of data, thus vastly expanding the original data points prescribed by Congress in Section 1071 of the Dodd-Frank Act, *see* Pub. L. No. 111-203, tit. X, subtit. G, § 1071, 124 Stat. at 2057 (codified at 15 U.S.C. § 1691c-2(e)(2)), the Final Rule “exce[eds]” the CFPB’s statutory authority, 5 U.S.C. § 706(2)(C).

46. The Final Rule should, accordingly, be set aside.

**COUNT III**  
**Violation of APA**  
**(5 U.S.C. § 706(2)(A))**

47. The Farm Credit Intervenors incorporate by reference the preceding paragraphs as if fully set forth herein.

48. Agency action must be vacated if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Put another way, a reviewing court must set aside agency action where the agency fails to “consider” the “relevant factors” or “important aspect[s] of the problem,” *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015); *Data Mktg. P’ship, LP v. U.S. Dep’t of Labor*, 45 F.4th 846, 856 (5th Cir. 2022), or offers “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,” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

49. The Final Rule is arbitrary and capricious because, among other things, it:
  - a. fails to account for the material differences between agricultural credit, specifically, and business credit, more generally, in particular with respect to the definition of “small business”;
  - b. fails to account for the substantial burden the Final Rule’s data collection requirements will place on agricultural and rural lenders, as opposed to business credit lenders more generally;
  - c. fails to account for the burden on agricultural and rural consumers; and
  - d. will result in outsized costs and resulting disincentives to small farmers, contrary to the Final Rule’s purpose.
50. The CFPB acted arbitrarily and capriciously in issuing the Final Rule, so it must be vacated.

**COUNT IV**  
**Violation of APA**  
**(5 U.S.C. § 706(2)(A) and (C))**

51. The Farm Credit Intervenors incorporate by reference the preceding paragraphs as if fully set forth herein.

52. The Dodd-Frank Act requires the CFPB to consider whether the costs of a proposed regulation outweigh its benefits. 12 U.S.C. § 5512(b)(2)(A). Specifically, the CFPB must consider “the potential benefits and costs to consumers 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.” *Id.*

53. In adopting the Final Rule, the CFPB failed to undertake adequately the cost/benefit analysis required by statute. Among other things, the CFPB did not properly consider the cost of compliance for the Council’s members, including CFC, TFC, and other Farm Credit institutions, which will be disproportionately impacted by the Final Rule, as well as the inevitable effect of these additional costs: more costly credit for the nation’s rural farmers, ranchers, and agribusinesses.

54. Because the CFPB failed to undertake adequately the necessary cost/benefit analysis, the Final Rule must be vacated.

### **REQUEST FOR RELIEF**

WHEREFORE, Intervenor-Plaintiffs the Farm Credit Council, Capital Farm Credit, and Texas Farm Credit respectfully request that the Court:

- a. enter a declaration that the Final Rule and the CFPB’s subsequent modification of the Final Rule are invalid and unenforceable;
- b. enter both a preliminary and permanent injunction setting aside and holding unlawful the Final Rule, as modified, as to the Council and its members, including CFC and TFC;
- c. award the Farm Credit Intervenor’s attorneys’ fees and costs incurred in connection with this action; and
- d. award such further relief as the Court deems just and proper.

Dated: August 2, 2024

Respectfully submitted,

/s/ Daniel G. Gurwitz

Daniel G. Gurwitz  
State Bar No. 00787608  
Southern Dist. ID No. 16895  
Email: dgurwitz@atlashall.com

Attorney in charge for Farm Credit Council,  
Texas Farm Credit, and Capital Farm Credit

OF COUNSEL:

Atlas, Hall & Rodriguez, LLP  
818 Pecan Blvd.  
P.O. Box 3725  
McAllen, Texas 78501/ 78502-3725  
Tel: 956-682-5501  
Fax: 956-686-6106

Misha Tseytlin  
TROUTMAN PEPPER  
HAMILTON SANDERS LLP  
227 W. Monroe Street  
Suite 3900  
Chicago, IL 60606  
(312) 759-5947  
misha.tseytlin@troutman.com

Joseph J. Reilly  
TROUTMAN PEPPER  
HAMILTON SANDERS LLP  
401 9<sup>th</sup> Street NW, Suite 1000  
Washington, DC 20004  
(202) 274-2908  
joseph.reilly@troutman.com



**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,* )

v. )

) Case No. 7:23-cv-00144

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

*Defendants.* )

**[PROPOSED] ORDER**

Upon consideration of the Motion to Amend Complaint in Intervention and Brief in Support (the “Motion”) filed by Farm Credit Council (the “Council”), Texas Farm Credit (“TFC”), and Capital Farm Credit (“CFC”) (collectively, the “Farm Credit Intervenors”), the Court hereby ORDERS that the Motion is GRANTED and the Complaint in Intervention is amended in substantially the same form as the First Amended Complaint in Intervention which accompanies the Motion.

SO ORDERED \_\_\_\_\_, 2024, at McAllen, Texas.

\_\_\_\_\_  
The Honorable Randy Crane  
United States Chief District Judge