UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

MISSISSIPPI BANKERS ASSOC.,
CONSUMER BANKERS ASSOC.,
AMERICAN BANKERS ASSOC.,
AMERICA'S CREDIT UNIONS,
ARVEST BANK, BANK OF FRANKLIN and
THE COMMERCIAL BANK

PLAINTIFFS

v. CIVIL ACTION NO. 3:24cv0792-CWR-LGI

CONSUMER FINANCIAL PROTECTION
BUREAU and ROHIT CHOPRA in his official
capacity as Director of the Consumer Financial
Protection Bureau, 1700 G. St. NW,
Washington, DC 20552

DEFENDANTS

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO PUTATIVE DEFENDANT-INTERVENORS' [56] MOTION TO INTERVENE

Plaintiffs Mississippi Bankers Association, Consumer Bankers Association, American Bankers Association, America's Credit Unions, Arvest Bank, Bank of Franklin, and the Commercial Bank (collectively, "Plaintiffs") submit this Memorandum in Opposition to putative intervenors MyPath's and Mississippi Center for Justice's ("MCJ") (together, "Putative Intervenors") [56] Motion to Intervene.

INTRODUCTION

Fearing that the Consumer Financial Protection Bureau's ("CFPB") new leadership will discontinue its defense of the Final Rule, which was enacted by the CFPB's prior leadership in its waning days, the Putative Intervenors seek to intervene as of right to take over the defense of the action from the CFPB and object if the CFPB changes its position. But the Putative

Intervenors fail to show they have a "direct," "substantial," and "legally protectable" interest in the subject of the action that would entitle them to intervene as a matter of right. Putative Intervenors are not themselves subject to the Final Rule, are not within its "zone of interest," and did not have any involvement in lobbying for or enacting the Final Rule. At most, Putative Intervenors claim that their mission of serving their constituents and clients will be made "harder" by an adverse outcome in this action (even though the Final Rule has not taken effect and their actions would be no different than those they are taking now and have been taking for years before). But, as courts have found in analogous situations, such a showing, even if true, does not entitle them to intervene as a party and take over the defense of the action from the CFPB. Furthermore, because the CFPB has not announced any change of position with respect to the Final Rule, Putative Intervenors cannot overcome the presumption that the CFPB will adequately defend any interests they do have in the Final Rule.

Nor do the Putative Intervenors satisfy Rule 24(b)'s requirements for permissive intervention. Rule 24(b) requires a movant to have "a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b). Here, however, the Putative Intervenors, as entities that are not themselves subject to the Final Rule and that otherwise lack "legally protectable interests" with respect to the Rule, have no "claim" or "defense" in their own right related to this case that they are permitted to assert.

In short, although the Putative Intervenors no doubt support the Final Rule, and believe it will be beneficial for the communities they serve, that is insufficient to allow them to become parties to this case. Putative Intervenors had the right to express their views by submitting an amicus brief in opposition to Plaintiffs' preliminary injunction motion, and Plaintiffs would not oppose them filing an out-of-time amicus brief. Putative Intervenors also have the right to use the

political process to oppose any change of positions they fear the CFPB will announce, or even to file a lawsuit against the CFPB with respect to any future action the CFPB takes regarding the Final Rule should they believe they have a basis for doing so. What they are not entitled to do, however, is to interject themselves into this case, as complete strangers to it, and assume the defense of the Final Rule.

For these reasons, as well as the other reasons set forth more fully below, the Court should deny the Putative Intervenors' motion to intervene.

BACKGROUND AND PROCEDURAL HISTORY

Since its inception, the CFPB has been attacked for being too powerful and insulated from democratic accountability. The CFPB has "a standing source of funding," which "limits Congress' control" over the agency. *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 422 (2024). As its establishing legislation was drafted, the CFPB's single director "c[ould not] be removed by the President except for inefficiency, neglect, or malfeasance." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203 (2020). Although the Supreme Court later declared that removal protection "violate[d] the separation of powers," the director of the CFPB still "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy." *Id.* at 203, 232.

As one might expect, given the breadth of CFPB's authority, there have been non-delegation challenges to various CFPB powers. *See, e.g.*, *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 633 (5th Cir. 2022) (non-delegation challenge to CFPB's rulemaking authority), *rev'd and remanded on other grounds*, 601 U.S. 416 (2024); *Consumer Fin. Prot. Bureau v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 183 (2d Cir. 2023) (non-delegation challenge to CFPB's funding structure), *cert. denied*, 144 S. Ct. 2579 (2024). Those non-delegation suits have not been successful. *See Cmty. Fin. Servs.*, 51 F.4th at

635; *Law Offices of Crystal Moroney*, 63 F.4th at 183. There have, however, been successful challenges to the CFPB claiming authority beyond the already-vast powers given to the agency. *See Chamber of Com. of United States of Am. v. Consumer Fin. Prot. Bureau*, 691 F. Supp. 3d 730, 739-43 (E.D. Tex. 2023) (holding that Congress did not grant CFPB the power to regulate "discrimination" when it gave the CFPB the power to enforce prohibitions on "unfair, deceptive, or abusive acts or practices").

In addition to the legal challenges to the CFPB, numerous public officials on both sides of the aisle have criticized the agency or the positions it has taken and the discretion afforded to the Bureau's director. When he was a Republican Congressman, Mick Mulvaney, the CFPB's Acting Director from 2017 to 2018, lamented Congress's inability to oversee the CFPB, called the agency "incredibly frightening," and acknowledged that "some [in Congress] would like to get rid of it."[1] When President Biden was inaugurated in January 2021, he told the CFPB's Director, Kathy Kraninger, to resign and named an Acting Director, Dave Uejio, who rescinded Trump-era CFPB guidance that restricted enforcement of abusive acts and practices.[2] Recently, President Trump issued a press release decrying the CFPB as a "weaponized arm of the bureaucracy that leverages its power against certain individuals and industries,"[3] replaced the CFPB's Director, Rohit Chopra, with OMB Director Russell Vought in an acting capacity, and

[1] Credit Union Times, *Rep. Mick Mulvaney: CFPB 'Sick, Sad Joke'* (Sep. 10, 2014), https://www.youtube.com/watch?v=RaVeNafdyVA.

[2] Troutman Pepper, *CFPB Rescinds Trump-Era Guidance Regarding "Abusive Acts and Practices" Standard* (Mar. 15, 2021), https://www.troutman.com/insights/cfpb-rescinds-trump-era-guidance-regarding-abusive-acts-and-practices-standard.html.

[3] Donald J. Trump (2nd Term), *White House Press Release - CFPB Isn't a Wall Street Regulator, It's a Main Street Regulator*, The American Presidency Project (Feb. 10, 2025), https://www.presidency.ucsb.edu/node/376253.

nominated former FDIC board member Jonathan McKernan as the CFPB's next Director.[4]

In the waning days of the Biden administration, as the Trump transition team prepared to take office and implement the new President's deregulatory agenda,[5] the CFPB "rush[ed] out" one of its "last overreaching rules."[6] That rule, entitled Overdraft Lending: Very Large Financial Institutions (the "Final Rule" or the "Rule"), restricts the fees Very Large Financial Institutions ("VLFIs") may charge for providing overdraft services and dictates the features of overdraft services that exceed either $5 or a misnamed "breakeven" calculation that undercounts the actual cost of offering discretionary overdraft services. *See* ([1] Compl. ¶¶ 63–65.) The Rule was thus part of the final offensive in the Biden Administration's campaign against so-called "junk fees."[7]

The same day the CFPB published the Rule, Plaintiffs filed the instant lawsuit. Within a week, Plaintiffs filed their [12] motion for a preliminary injunction, which asks the Court to enjoin the Rule and extend the deadline for compliance day-for-day with the injunction. As attested in the declarations supporting Plaintiffs' [12] motion for a preliminary injunction, Plaintiffs are incurring *and will continue to incur* substantial costs to comply with the Rule. ([13] at 22-25) (citing Exs. 1-7). Accordingly, urgent action was, and remains, necessary.

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[4] Orrick, *Who Is Jonathan McKernan, the Nominee for CFPB Director?* (Feb. 12, 2025), https://www.orrick.com/en/Insights/2025/02/Who-is-Jonathan-McKernan-the-Nominee-for-CFPB-Director.

[5] *The Economic and Regulatory Implications of Trump's 2024 Election Victory*, Reuters (Nov. 6, 2024), https://www.thomsonreuters.com/en-us/posts/government/trump-economic-regulatory-implications/ ("Deregulation w[ill] be a key theme, affecting sectors from energy to finance").

[6] Editorial Board, *The CFPB vs. Checking Accounts* Wall Street Journal (Dec. 25, 2024), https://www.wsj.com/opinion/consumer-financial-protection-bureau-overdraft-fee-rule-banks-rohit-chopra-a2e6dc89?reflink=desktopwebshare_permalink.

[7] *See* James Broughel, *How the Biden Administration's 'Junk Fee' Policies Will Hurt Consumers*, Forbes (Mar. 14, 2024), https://www.forbes.com/sites/jamesbroughel/2024/03/14/bidens-misguided-war-on-junk-fees-will-hurt-consumers/.

Two days after Plaintiffs filed their [12] preliminary injunction motion, the Court entered an order setting the briefing schedule for the motion. (12.20.2024 CM/ECF Text-Only Order Granting [14].) Under that schedule, any motion to submit an amicus brief in support of Plaintiffs was due no later than January 7, 2025; CFPB's opposition brief was due no later than January 14, 2025; any motion to submit an amicus brief in support of CFPB was due no later than January 21, 2025; and Plaintiffs' reply brief was due no later than January 28, 2025. (*Id.*) Four groups of amici requested leave to file briefs in support of Plaintiffs. ([41]-[43] & [46].) No party—*including MyPath and MCJ*—requested leave to file an amicus brief in support of CFPB. As of January 28, 2025, the motion for a preliminary injunction is fully briefed.

A week after the briefing on Plaintiffs' [12] motion for a preliminary injunction concluded and two weeks after the deadline to request leave to file an amicus brief in support of CFPB, MyPath and MCJ filed their [56] motion to intervene as defendants in this action. Noting the election of President Trump and the recent change in leadership at the CFPB, the Putative Intervenors assert that "[t]here is every reason to believe this administration will be hostile to actions by the Bureau opposed by large financial institutions," ([61] at 11), and claim that the Putative Intervenors can no longer count on the CFPB to defend the Final Rule, (*id.* at 5). Putative Intervenors therefore moved "to intervene to defend the [Final] Rule." (*Id.* at 2). In essence, they seek to take over the defense of the Final Rule from the CFPB.

Putative Intervenors have not identified any members affected by the Rule and are not asserting associational standing. They instead seek to intervene as defendants based on the Final Rule's purported impact on themselves. But Putative Intervenors do not claim to be subject to, or the intended beneficiaries of, the Final Rule themselves (nor could they, as the rule regulates VLFIs and only applies to services offered to consumers) and were not involved in the passage

or enactment of the Final Rule. Indeed, although the Final Rule elicited over 48,000 comments, neither MyPath nor MCJ submitted anything during the notice-and-comment period.[8] Instead, the most the Putative Intervenors present in support of their claimed right to intervene is that the Final Rule will purportedly "mak[e] it easier for MyPath to succeed in its counseling mission," ([61] at 8), and would "reduce the financial burden on those individuals that MCJ helps and simplify MCJ's work," (*id.* at 9). In short, the Putative Intervenors are organizations that support the Final Rule and believe the Final Rule will benefit the communities they serve but cannot claim a direct impact on their own rights and interests.

The following day, the CFPB filed an [63] Agreed Motion to Stay Proceedings. In its motion, the CFPB did not announce any change of position with respect to the Final Rule. Instead, it explained that the agency's new leadership "needs time to review and consider its position on various agency actions, including the [Final] Rule challenged in this case." ([63] at 1-2.) The CFPB, with Plaintiffs' consent, requested the Court stay the litigation for 90 days and stay the effective date of the Final Rule for 90 days to conserve the Court's resources and preserve the status quo while the new leadership conducted its review. (*Id.* at 2.)

The next day, the Putative Intervenors filed their [64] "Notice of Opposition to Defendants' Motion to Stay Proceedings," seeking to insert themselves (as non-parties) into the Court's consideration of the consented-to motion to stay and attempting to usurp the new administration's constitutional prerogative to conduct this litigation in accordance with its policy views and electoral mandate. The Putative Intervenors' "Notice of Opposition" makes clear that they seek through their motion to intervene not only to take over the defense of the Final Rule

[8] *See* Rulemaking Docket, Overdraft Lending: Very Large Financial Institutions, https://www.regulations.gov/docket/CFPB-2024-0002/comments (listing all comments on the proposed rule).

but also to oppose what they expect will be the CFPB's change of position with respect to the Final Rule. ([64] at 2.)

The next business day, the Court entered a text-only order directing the parties "to fully brief the Motion to Intervene, on the schedule provided by the Local Rules" while the Court considered the CFPB's stay motion. (02.10.2025 CM/ECF Text-Only Order.)

ARGUMENT

Putative Intervenors claim a right to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). Alternatively, Putative Intervenors assert the Court should permit them to intervene pursuant to Fed. R. Civ. Proc. 24(b). But Putative Intervenors do *not* have a right to intervene, and the Court should *not* permit them to do so.

I. PUTATIVE INTERVENORS ARE NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT

The movant bears the burden of showing his right to intervene. *See Guenther v. BP Retirement Accumulation Plan*, 50 F.4th 536, 543 (5th Cir. 2022). Absent an unconditional statutory right to intervene (inapplicable here), an interested party may intervene as a matter of right only if: (a) he moves for intervention timely; (b) he "claims an interest relating to the property or transaction that is the subject of the action"; (c) he "is so situated that disposing of the action may as a practical matter impair or impede [his] ability to protect [his] interest"; and (d) the existing parties will not "adequately represent" his interest. FED. R. CIV. P. 24(a). "If a party seeking to intervene fails to meet any one of those requirements, it cannot intervene as a matter of right." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994).

Putative Intervenors fail to meet that burden in multiple respects. *First*, and most fundamentally, Putative Intervenors fail to show a direct, substantial, and legally protectable interest in this action sufficient to entitle them to intervene, let alone one that would be impaired by the outcome of this action. Asserting that the Final Rule might further their policy preference

or make their jobs easier is not enough.

Second, they have failed to show at this time that any interest they may have will not be adequately represented by the CFPB. The CFPB's representation is presumed adequate. Putative Intervenors fail to meet their burden of showing their interest is "in fact" different to overcome that presumption.

A. PUTATIVE INTERVENORS LACK A DIRECT, SUBSTANTIAL, AND LEGALLY PROTECTABLE INTEREST

To qualify for intervention as of right, the movant must have a "direct," "substantial," and "legally protectable" interest in the subject of the action. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) (en banc). "What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant." *Id.* (emphasis in original).

In this regard, "a party has no standing to assert a right if it is not its own." *Price v. Daigre*, No. 5:08cv16-DCB-JMR, 2011 WL 6046313, at *3 (S.D. Miss. Dec. 5, 2011) (internal quotation marks omitted) (quoting *New Orleans Pub. Serv.*, 732 F.2d at 464). That is, Federal Rule of Civil Procedure 17's real-party-in-interest requirement applies to intervenors. *Id.* Where (as here) one seeks to intervene as a defendant, this requires that "the suit *was intended* to have a '*direct* impact' on the intervenor." *See Ross v. Marshall*, 426 F.3d 745, 757 n.46 (5th Cir. 2005) (emphasis added) (quoting *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996)).

Ultimately, the "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." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). "So, an intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely *prefers* one outcome to the other." *Id.* (emphasis in original).

Likewise, courts unanimously hold that an asserted interest based on "incidental effects" of an action is too "attenuated and speculative" to give rise to intervention as of right. *See E. Bay Sanctuary Covenant v. Biden*, 102 F.4th 996, 1002 (9th Cir. 2024), *cert. denied sub nom. Kansas v. Mayorkas*, 2024 WL 4529811 (Oct. 21, 2024); *see also Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007) ("An interest that is 'contingent upon the occurrence of a sequence of events before it becomes colorable' is also not sufficient to satisfy Rule 24(a)(2)."") (quoting *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998)); *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 415 (2d Cir. 2001) ("An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.") (quoting *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990)).

Putative Intervenors, relying on *Brumfield v. Dodd*, 749 F.3d 339 (5th Cir. 2014), state that "the interest requirement may be judged by a more lenient standard if the case involves a public interest question or is brought by a public interest group." *See* ([61] at 6-7) (alterations omitted) (quoting *Brumfield*, 749 F.3d at 344). Putative Intervenors, however, omit important context. *Brumfield* and the decision on which it relied for the above-quoted sentence—*New Orleans Public Service*—provide that a public interest group, or another intervenor in a case involving a public question, may be held to a more lenient standard *if* it is in the "zone of interests" protected by the law being challenged, i.e., if they are the law's intended beneficiary. *See Brumfield*, 749 F.3d at 344; *New Orleans Pub. Serv.*, 732 F.2d at 464-66 ("In a sense, a party within the zone of interests protected by a statute may possess a type of substantive right not to

have the statute violated.").[9] This qualifier is critical because it would make little sense to, for example, hold a reproductive rights advocacy group to a lower standard in an action involving immigration regulations solely due to the fact that the organization is a public interest group or a public question is involved. Instead, "[a] court must be circumspect about allowing intervention of right by public-spirited citizens in suits by or against a public entity for simple reasons of expediency and judicial efficiency." *City of Houston v. Am. Traffic Sols., Inc.*, 668 F.3d 291, 294 (5th Cir. 2012).

Thus, when courts permit a private party, including public interest groups, to intervene in actions challenging a statute, regulation, or other law, it is because they fall within one of the following categories:

(1) **Directly Regulated.** They are directly regulated by that law, *see La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022);

(2) **Intended Beneficiaries.** They are the direct and intended beneficiaries of it (i.e., within the "zone of interests"), *see Texas*, 805 F.3d at 660;

(3) **Driving Force.** They were a driving force behind the law being enacted in the first place, *see Am. Traffic Sols., Inc.*, 668 F.3d at 294 (intervenors were "unique because they engineered the drive that led to a city charter amendment" being challenged and thus had a "particular interest" in "defending the charter amendment itself"); *see also Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1497-99 (S.D. Fla. 1991) (collecting cases and finding lobbying alone is not enough); or

(4) **Concrete Rights.** They assert concrete rights of their members based on associational standing, *see Franciscan All. v. Azar*, 414 F. Supp. 3d 928, 937-38 (N.D. Tex. 2019).

All of the cases that Plaintiffs cite in support of their claim of a legally protectable interest fall into one of the above categories—and Putative Intervenors fall into none of these

[9] Notably, the *en banc* Court in *New Orleans Public Service*—the root of Proposed Intervenors' proposition—affirmed the district court's denial of intervention, specifically rejecting that putative intervenors (officials of the City of New Orleans) could assert substantive rights which it "does not itself possess." 732 F.2d at 466. Their "purely economic interest" was insufficient. *Id.*

categories. For example, in *La Union*, committees associated with the Republican Party sought to intervene as defendants in a case challenging a Texas law governing election procedures. *See* 29 F.4th at 304. The court—relying on the principle discussed above that a public interest group may be held to a more lenient standard in a case involving a public question where they are in the zone of interests of that question (which subsets of political parties clearly are with respect to regulating elections)—permitted intervention because the challenged law directly regulated their conduct. *See id.* at 306 (quoting *Brumfield*, 749 F.3d at 344).

In another, *Jurisich Oysters, LLC v. United States Army Corps of Eng'rs*, No. CV 24-106, 2024 WL 3639528 (E.D. La. Aug. 2, 2024), *on reconsideration*, No. CV 24-106, 2024 WL 4346410 (E.D. La. Sept. 30, 2024), intervenors proffered concrete interests related to local environmental issues showing they were within the zone of interest of the agency action—specifically, that they shared a "geographic nexus" with the project at issue, a concept unique to establishing standing for environmental matters. *Id.* at *1, 4 & n.31 (citing *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533 (5th Cir. 2019)); *accord Ctr. for Biological Diversity*, 937 F.3d at 536-39 (discussing "geographic nexus" test). Notably, contrary to Putative Intervenors here, the intervenors in *Jurisich Oysters, LLC* specifically disclaimed any interest in the agency's "protect[ion of] the record of decision and final agency determination." 2024 WL 3639528 at *1. And, the court ultimately *denied* intervention as of right. *See id.* at *7.

None of the foregoing situations, however, are present here. The Rule does not regulate Putative Intervenors, and they make no argument that they are the intended beneficiaries of the Rule, or that they had a hand in the Rule's development. Further, Putative Intervenors make clear that they assert the interests of their respective organizations, and do not assert any associational standing or claim that their clients are "members" of those organizations for purposes of

associational standing.[10] That is, unlike in *Franciscan Alliance, Inc.*, Putative Intervenors seek intervention solely in their capacity as advocacy groups/public interest organizations. More specifically, the most that the Putative Intervenors present in support of their claimed legally protectable interest is their assertion that the Final Rule will "mak[e] it easier for MyPath to succeed in its counseling mission," ([61] at 8), and would "reduce the financial burden on those individuals that MCJ helps and simplify MCJ's work," (*id.* 9).

Such a claim, even if true, is not the type of "direct," "substantial," and "legally protectable" interest that courts have recognized as sufficient to entitle a party to intervene as a matter of right. *See Defense Distributed v. United States Dep't of State*, No. 1:15-cv-372-RP, 2018 WL 3614221 at *2-*3 (W.D. Tex. July 27, 2018) [hereinafter, *Def. Distributed II*] (providing there is "no authority to support the notion that simply expending organizational resources in support of a set of policy goals is sufficient to establish a legally protectable interest"); *Texas v. United States Dep't of Homeland Sec.*, --- F. Supp. 3d ----, ----, No. 6:24-CV-00306, 2024 WL 4579540, at *3 (E.D. Tex. Oct. 24, 2024) (providing that the "transaction that is the subject of the action" was the issuance of an agency rule, not its "hypothetical" future consequences); *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 323 F.R.D. 54, 63 (D.D.C. 2017) (holding "that the Rule will help [Putative Intervenors] achieve their organizational

[10] To qualify as "members" for purposes of associational standing, one must possess "indicia of membership," such as the ability to elect directors, participation in management, and the provision of financing. *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344-45 (1977); *see also Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (organization's clients" were not members for associational standing because they were "unable to participate in and guide the organization's efforts"). Even if Putative Intervenors attempted to assert associational standing on behalf of their clients, their clients' general desire for "trust in financial institutions" is too generalized to be a sufficient interest for intervention nor does the Final Rule have anything to do with trust. ([61] at 8).

objectives and that the Rule's demise would make it harder to achieve those" objectives was not enough for intervention).[11]

The facts at hand are strikingly like those in *Def. Distributed II*. There, plaintiff Defense Distributed, a non-profit Second Amendment advocacy group, developed software capable of building firearms with a 3D printer. *See Def. Distributed v. United States Dep't of State*, 838 F.3d 451, 454-55 (5th Cir. 2016) [hereinafter, *Def. Distributed I*]. Defense Distributed sought to enjoin certain regulations prohibiting the publishing of that software online, arguing they violated its First, Second, and Fifth Amendment rights. *See id.* at 456. The parties entered into a settlement agreement which would require the Department of State to propose a new rule exempting plaintiffs' data from those regulations. *See Def. Distributed II*, 2018 WL 3614221 at *1. Two gun-control-advocacy groups sought to intervene, alleging that, if the new rule was implemented, Defense Distributed would publish information online that could be used to manufacture firearms, which, intervenors claimed, "would make their work immeasurably more difficult, if not impossible," and force them "to expend additional resources to protect their respective missions." *Id.* at *1, 3 (quotation marks omitted).

The court determined these interests were "too generalized to establish their entitlement to intervention by right." *Id.* at *3. Although "an applicant has a legally protectable interest if it is subject to the regulations at issue in an action or if it is the beneficiary of the regulations at issue," there is "no authority to support the notion that simply expending organizational

[11] *See also Ross*, 426 F.3d at 757 n.46 (to intervene as defendant, suit must be "intended" to have a "direct impact" on the intervenor) (quoting *Sierra Club*, 82 F.3d at 109); *see also E. Bay Sanctuary Covenant*, 102 F.4th at 1002 (interest based on "incidental effects" of an action is too "attenuated and speculative" to support intervention as of right); *Northland Fam. Plan. Clinic, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007) ("As things now stand, STTOP's interest in this case simply pertains to the enforceability of the statute in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right.").

resources in support of a set of policy goals is sufficient to establish a legally protectable interest for purposes of" intervention as of right. *Id.* at *2-3. This Court subsequently endorsed Judge Pittman's reasoning from *Def. Distributed II*, doubting that an organization's "interest in limiting the financial resources it must spend" to accomplish its mission is a sufficient interest for purposes of intervention. *See Mississippi v. Becerra*, No. 1:22cv113-HSO-RPM, 2023 WL 5668024, at *4 n.5 (S.D. Miss. July 12, 2023) (citing *Def. Distributed II*, 2018 WL 3614221 at *3).

The types of interest claimed by the Putative Intervenors here is the very type that was rejected in *Defense Distributed II*. If anything, Putative Intervenors' claimed interest here is even less convincing than the "immeasurably more difficult, if not impossible" harm alleged in that case, *see Def. Distributed II*, 2018 WL 3614221 at *1 (quotation marks omitted), as the Putative Intervenors only assert that an adverse outcome in this litigation would make their jobs "more difficult," ([61] at 10), but not impossible. Even without the Rule, Putative Intervenors can continue to counsel their clients to decline to "opt in" to overdraft services (and any resulting fees) for using their debit card. Nor could Putative Intervenors make such a claim because the status quo is the absence of the Rule: they have been operating without it to date.

Moreover, Putative Intervenors' claimed interest is entirely dependent on: (1) speculation that their clients will respond in a certain manner to the Rule, *see* ([61] at 8-9); and (2) their conclusory assertions that these contingent, incidental reactions by third parties will make "easier" or "simplify" their missions, *see* (*id.*); *see also E.E.O.C. v. Air Exp. Int'l, USA, Inc.*, No. 3:11-cv-2581-L, 2011 WL 6409121, at *3 (N.D. Tex. Dec. 21, 2011) ("Furthermore, the court determines that Movants' conclusory assertion that their ability to protect their interests in the action will be impaired or impeded if not permitted to intervene is not sufficient to meet their

burden in this regard.").

In short, although the Putative Intervenors clearly support the Final Rule and claim their laudable work and their organizations' missions will be made easier if the Rule goes into effect, those are not the types of "direct," "substantial," and "legally protectable" interests that courts have found entitle parties to intervene in an action as a matter of right.

B. PUTATIVE INTERVENORS FAIL TO SHOW ANY INTEREST THEY MAY HAVE IS INADEQUATELY PROTECTED

"[W]here the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required." *Hopwood v. State of Texas*, 21 F.3d 603, 605 (5th Cir. 1994). In such a case, "the intervenor must show 'that its interest is ***in fact*** different from that of the governmental entity ***and*** that the interest will not be represented by it.'" *Texas*, 805 F.3d at 662 (emphasis added) (alterations omitted) (quoting *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996)); *see also Am. Traffic Sols., Inc.*, 668 F.3d at 294 ("More important, the public entity must normally be presumed to represent the interest of its citizens and to mount a good faith defense of its laws.").

This presumption may not be overcome by mere speculation. *See Bush v. Viterna*, 740 F.2d 350, 358 (5th Cir. 1984); *see also Jurisich Oysters, LLC*, 2024 WL 4346410 at *4 ("Nor does the mere possibility that a party may at some future time enter into settlement alone establish inadequate representation."). Speculation, however, is precisely what Putative Intervenors offer. At this juncture, CFPB has determined only that the new administration "needs time to review and consider its position on various agency actions." *See* ([63] at ¶ 1). As part of the CFPB's pause to assess the agency's various positions, the Acting Director has "told employees not to 'approve or issue any proposed or final rules or formal or informal guidance' and to 'suspend the effective dates of all final rules that have been issued or published but that

have not yet become effective.'"[12] Although the Putative Intervenors claim a *potential* "divergence of interest" with the CFPB that "*might easily* ripen into a divergence of representation," ([61] at 13 (emphasis added)), they acknowledge that a divergence of interest or representation has yet to occur. Speculation as to the actions the CFPB may take in the future is insufficient to meet their burden of showing the agency's interest is "in fact" different and that the CFPB's representation is in fact inadequate. *See Hopwood*, 21 F.3d at 605. Putative Intervenors, therefore, fail to overcome the presumption of adequate representation of any interest in this action they may have.

II. PUTATIVE INTERVENORS DO NOT MEET THE REQUIREMENTS FOR PERMISSIVE INTERVENTION AND THIS COURT SHOULD NOT GRANT PERMISSIVE INTERVENTION

Under Rule 24(b), a court has discretion to allow intervention where the movant makes a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b). Permissive intervention is "wholly discretionary" even where the requirements of Rule 24(b) are otherwise met. *New Orleans Pub. Serv.*, 732 F.2d at 470-71. Putative Intervenors lack a claim or defense meeting Rule 24(b)'s commonality requirement and are, therefore, ineligible for permissive intervention. Alternatively, this Court should exercise its discretion to deny intervention.

A. PUTATIVE INTERVENORS LACK A CLAIM OR DEFENSE MEETING RULE 24(B)'S COMMONALITY REQUIREMENT

As used in Rule 24(b), the "words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles*, 476 U.S. 54, 77 (1986) (O'Connor, J., concurring). Thus, the rule "plainly

[12] Katherine Doyle, Raquel Coronell Uribe and Megan Lebowitz, *Russell Vought, CFPB's New Acting Head, Issues Directives to Halt Parts of Bureau Activity* (Feb. 8, 2025), https://www.nbcnews.com/politics/doge/russell-vought-consumer-financial-protection-bureau-trump-rcna191356.

does require an interest sufficient to support a legal claim or defense which is 'founded upon that interest' and which satisfies the Rule's commonality requirement." *Id.* at 77 (quoting *SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 460 (1940)).[13] In that vein, as stated previously, a movant must be a real party in interest in order to intervene, and he has no standing to assert rights of another. *See Price*, 2011 WL 6046313 at *3.[14]

Putative Intervenors are complete strangers to this action. As explained above, their conduct is in no way at issue, and they lack a legally protectable interest in these proceedings. Although the Putative Intervenors may *desire* to defend the rule if the CFPB's new leadership decides that it will not, that *desire* is not the same thing as an *interest* sufficient to permit them to do so. *See Diamond*, 476 U.S. at 70-71 (intervenor lacked interest in an Illinois abortion statute to "step[] in" and "attempt[] to maintain the litigation abandoned by the State"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 691 (6th Cir. 1994) (holding organization lacked standing "to require the State of Michigan to enforce its own statute").

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[13] *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (following Justice O'Connor's concurrence from *Diamond*); *Selective Ins. Co. of the Se. v. William P. White Racing Stable, Inc.*, No. 15-21333-CIV, 2015 WL 11237014, at *5 (S.D. Fla. Dec. 22, 2015) (same); *United States v. Apple, Inc.*, No. 12 CIV. 2826 DLC, 2012 WL 4513541, at *1-2 (S.D.N.Y. Oct. 2, 2012) (same); *Laube v. Campbell*, 215 F.R.D. 655, 659 (M.D. Ala. 2003) (same).

[14] Although Rule 24(b) has been liberally construed in the sense that a putative intervenor need not have a "direct personal or pecuniary interest" in the case, *see In re Estelle*, 516 F.2d 480, 485 (5th Cir. 1975) (quoting *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)), such construction, as further explained above, does not displace the rule's express requirement that a putative intervenor must, *itself*, have "an interest or remedy recognized at law," *see United States ex rel Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 577 (5th Cir. 2023) (quotation marks omitted).

Without any legal interest in this action, Putative Intervenors are not a real party in interest. They "ha[ve]" no "claim" or "defense" in their own right related to this case. FED. R. CIV. P. 24(b); *accord In re Bal Harbour Quarzo, LLC*, 638 B.R. 660, 669 (Bankr. S.D. Fla. 2022). Instead, they merely seek to borrow defenses of the CFPB, which they lack standing to assert. *See Ross*, 426 F.3d at 757 n.46 (for intervenor-defendant to be a real party in interest, suit must be intended to have a direct impact on him). Construing otherwise would render Rule 24(b)'s threshold requirements meaningless, as *any* person would be eligible for permissive intervention in *any* suit by simply asserting a claim or defense belonging to an existing party.

Put simply, Putative Intervenors' "*individual* rights will [not] be impaired in any way," and their "legal theories are not 'claims or defenses' . . . envisioned by Rule 24(b)." *See United States v. Apple, Inc.*, No. 12 CIV. 2826 DLC, 2012 WL 4513541, at *2 (S.D.N.Y. Oct. 2, 2012) (emphasis added). As Putative Intervenors do not meet Rule 24(b)'s prerequisites, they must be denied permissive intervention. *See, e.g.*, *Braun v. Braun*, No. 322cv00357RJCDCK, 2023 WL 2582616, at *3 (W.D.N.C. Mar. 20, 2023) (denying permissive intervention where movant had "no claim or defense of his own that he share[d] with the main action"); *United States v. Scott*, No. 11cv01430-PAB-MEH, 2011 WL 7094382, at *5 (D. Colo. Oct. 19, 2011) ("Again, as set forth herein, the Court finds the movants do not have a sufficient interest in this case and, thus, their purported defense shares no common question in this lawsuit."), *report and recommendation adopted*, No. 11cv01430-PAB-MEH, 2012 WL 224500 (D. Colo. Jan. 25, 2012); *Voltage Pictures, LLC v. Vazquez*, 277 F.R.D. 28, 33 (D.D.C. 2011) ("The Movant does not presently have a legally protected interest sufficient to warrant intervention [under Rule 24(b)].").

B. EVEN IF PERMISSIVE INTERVENTION IS AVAILABLE, THIS COURT SHOULD EXERCISE ITS DISCRETION TO DENY IT

Even if the Putative Intervenors could satisfy Rule 24(b)'s "claim or defense" requirement, the Court should not permit their intervention. Intervention would prejudice the existing parties by delaying and impeding resolution, Putative Intervenors would add nothing to this case beyond what they could contribute as *amicus curiae* (should the Court allow them to file a belated amicus brief), and Putative Intervenors seek to improperly impose their policy preferences on the Executive Branch.

In deciding an application for intervention by permission, a court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3). Another critical factor is whether the putative intervenor will significantly contribute to "the relevant factual development of the case." *See New Orleans Pub. Serv.*, 732 F.2d at 473; *see also League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989). Further, a court may consider an intervenor's motive. *See Edmondson v. State of Neb. ex rel. Meyer*, 383 F.2d 123, 128 (8th Cir. 1967).[15]

Intervention undoubtedly would prejudice the existing parties by creating delay and diminishing their control "over their own lawsuit." *See New Orleans Pub. Serv.*, 732 F.2d at 473 ("When the intervention is for all purposes with full party rights[,] . . . the control of the original parties over their own lawsuit is significantly diminished . . . . NOPSI and United clearly had the power to settle their differences without the permission of the City officials, if suit had not been filed. Yet, if the City officials are granted the intervention they seek they could prevent any settlement between NOPSI and United, or prevent those parties from simply accepting a

[15] Although courts additionally consider whether a movant's interests are adequately represented, *see New Orleans Pub. Serv.*, 732 F.2d at 473, that factor is moot here where, as explained above, Putative Intervenors lack a protectable interest to be represented.

judgment of the district court by allowing it to become final without appeal."); *Bush*, 740 F.2d at 359 ("It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.") (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)). In fact, the Putative Intervenors' motion to intervene appears to have *already* prejudiced Plaintiffs by delaying resolution of the CFPB's agreed upon motion to stay the proceedings and the effective date of the Final Rule.

Moreover, Putative Intervenors cannot contribute to the facts of this case, not only because they lack privity with the relevant circumstances (as evidenced by their proposed answer overwhelmingly denying Plaintiffs' allegations based on lack of personal knowledge), but, more importantly, because review is limited to the administrative record. *See Fort Bend Cnty. v. United States Army Corps of Eng'rs*, 59 F.4th 180, 196 (5th Cir. 2023); *see also Arnesen v. Raimondo*, No. 1:23cv145-TBM-RPM, 2023 WL 6964762, at *3 (S.D. Miss. Oct. 20, 2023) ("Moreover, given the relatively narrow scope of the legal question before the Court . . ., the Court finds Proposed Intervenors would not significantly contribute to the underlying factual issues."), *review denied,* No. 1:23cv145-TBM-RPM, 2024 WL 377820 (S.D. Miss. Jan. 31, 2024).[16] Therefore, it is unclear what "unique perspective" ([61] at 14) or "expertise" ([61] at 13) Putative Intervenors can bring to this action. *See Becerra*, 2023 WL 5668024 at *7 (where

[16] "If the liability phase is limited to the administrative record, it is difficult to see how an outsider helps the court and the original litigants sift through that record." *Makhteshim Agan of N. Am., Inc. v. Nat'l Marine Fisheries Serv.*, No. 8:18-CV-00961-PWG, 2018 WL 5846816, at *6 (D. Md. Nov. 8, 2018) (quoting Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 281-82 (2000)).

review limited to agency record, putative intervenors' "experience with and expertise in discrimination and racial health disparities [could not] add any new facts in [the] case") (internal quotation marks and record citation omitted).

Putative Intervenors also assert they will "provide the Court with a robust legal defense of the Rule that may otherwise be lacking." (*Id.* at 14). But this just amounts to the Putative Intervenors' desire to have their view supersede the view of the CFPB's new leadership. That should not be permitted. When President Biden was inaugurated, his pick to lead the CFPB reversed policies that his President Trump-appointed predecessor had implemented, just as President's Trump's pick now may choose to revisit positions taken by his predecessor.

To the extent the Putative Intervenors disagree with the assessment of the Final Rule made by the CFPB's new leadership, the appropriate forum for that grievance is the legislature—in this case, Congress—or to participate in a notice-and-comment or other administrative process should the CFPB propose to rescind or modify the rule. Alternatively, should Putative Intervenors believe the CFPB's new leadership has taken unlawful action with respect to the Final Rule, they may file their own lawsuit against the CFPB.

What they should not be permitted to do, however, is to use this Action as a vehicle to usurp the authority placed in the Executive Branch and delegated to CFPB by unilaterally vetoing its ultimate decision based on their policy preferences. *See Texas*, 805 F.3d at 657 (movant cannot intervene for ideological interest); *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 454 (N.D. Tex. 2024) ("Where, as here, plaintiffs challenge a program with considerable policy implications, the Framers wanted to ensure federal courts don't become the de facto forum to air political grievances."), *appeal dismissed*, No. 24-10603, 2024 WL 5279784 (5th Cir. July 22, 2024); *Gen. Land Off. of State of Texas v. Biden*, No. 7:21cv00272, 2024 WL

2753253, at *3 (S.D. Tex. May 28, 2024) ("To be sure, those impacted by federal agency litigation are entitled to assert their claims, but they should do so in a separate suit that is tailored to their specific needs and issues rather than piling onto already complex cases of national consequence."); *United States v. Texas*, 599 U.S. 670, 685 (2023) (holding that "federal courts are not the proper forum to resolve" disputes regarding the Executive Branch's nonenforcement of laws); *id.* ("And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions. In any event, those are political checks for the political process.").[17]

In circumstances such as these, non-parties seeking to have their voices heard should be granted, if anything, only *amicus curiae* status. *See Louisiana v. Haaland*, No. 2:24cv00820, 2024 WL 4122494, at *5 (W.D. La. Sept. 9, 2024) ("API also claims it has a different perspective than defendants, but this perspective may be provided in an *amicus* brief."); *Gen. Land Off. of State of Texas*, 2024 WL 2753253 at *3; *Arnesen*, 2023 WL 6964762 at *3; *Second Amend. Found. Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 23-10707, 2023 WL 8597495, at *2 (5th Cir. Dec. 12, 2023); *Clements*, 884 F.2d at 189; *Bush*, 740 F.2d at 359; *New Orleans Pub. Serv.*, 732 F.2d at 473; *see also Voltage Pictures, LLC*, 277 F.R.D. at 33 ("The Movant does not presently have a legally protected interest sufficient to warrant intervention and her participation as an intervenor would consequently not further resolution of the case any more than it already has."); *Benjamin v. Dep't of Pub. Welfare of Cmwlth.*, 267

[17] *See also FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024) ("For example, a citizen does not have standing to challenge a government regulation simply because the plaintiff believes that the government is acting illegally. . . . Nor may citizens sue merely because their legal objection is accompanied by a strong moral, ideological, or policy objection to a government action."); *Gov't of Province of Manitoba v. Zinke*, 273 F. Supp. 3d 145, 151 (D.D.C. 2017) ("[T]he Court will not interfere with what is now a policy choice made by the Executive Branch."), *aff'd sub nom. Gov't of Manitoba v. Bernhardt*, 923 F.3d 173 (D.C. Cir. 2019).

F.R.D. 456, 476 (M.D. Pa. 2010) (denying intervention where applicant "would not add anything to the litigation" and did not have interest "implicated in the underlying suit"), *aff'd sub nom. Benjamin v. Dep't of Pub. Welfare of Pennsylvania*, 432 F. App'x 94 (3d Cir. 2011). Putative Intervenors could have already done so, as other interested persons have. *See* ([41-[43] & [46].) Nonetheless, Plaintiffs do not oppose Putative Intervenors filing an out-of-time amicus brief in opposition to the Preliminary Injunction, so long as they do so on an expedited basis with leave of Court. They, however, are not entitled to full party status.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court deny Putative Intervenors' Motion to Intervene.

Respectfully submitted, this the 19th day of February 2025.

PLAINTIFFS MISSISSIPPI BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS, ARVEST BANK, BANK OF FRANKLIN, AND THE COMMERCIAL BANK

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CERTIFICATE OF SERVICE

I, E. Barney Robinson III hereby certify that on this date I electronically filed the above and foregoing with the Clerk of the Court using the ECF system which provided notice to all counsel of record.

This the 19th day of February 2025.

/s/ E. Barney Robinson III
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