IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS and ILLINOIS CREDIT LEAGUE,

Plaintiffs,

v.

KWAME RAOUL, in his official capacity as Illinois Attorney General,

Defendant.

Case No. 1:24-cv-07307

Hon. Virginia M. Kendall

PLAINTIFFS' MEMORANDUM OF LAW IN
OPPOSITION TO THE RETAIL ASSOCIATIONS' MOTION TO INTERVENE

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INTRODUCTION

The Retail Associations' motion to intervene under Federal Rule of Civil Procedure 24(b) should be denied because they do not meet the substantive or procedural requirements for participating as a party in this case. The Retail Associations' motion should also be denied because additional discretionary factors weigh decidedly against them.[1]

First, there is no justification for the Retail Associations to participate as a defendant where the Attorney General is already defending the Interchange Fee Prohibition Act ("IFPA"). Indeed, courts routinely "recognize . . . that permissive intervention is unwarranted . . . when the proposed intervenor's interests are adequately represented by the government." *Sweeney v. Rauner*, 2018 WL 11275902, at *1 (N.D. Ill. Nov. 8, 2018). The Retail Associations do not identify—and do not even try to identify—any lack of vigor in the Attorney General's representation.

Second, the Retail Associations do not meet the substantive and procedural requirements demanded by Federal Rules of Civil Procedure 24(b) and (c) for permissive intervention. In particular, they identify no "claim or defense" as Rule 24(b) demands. Nor is their motion "accompanied by a pleading that sets out the claim or defense for which intervention is sought" as Rule 24(c) requires. These shortfalls should doom their request to intervene.

Third, even if the Retail Associations had met the criteria for permissive intervention, the decision whether to grant leave would remain in the Court's discretion, and many factors counsel against exercising such discretion here. Allowing the Retail Associations to participate as a party threatens to inject delays, prejudice Plaintiffs, and add unnecessary burdens for this Court because

[1] The Retail Associations are: the Illinois Retail Merchants Association, the Illinois Fuel and Retail Association, the National Association of Convenience Stores, the National Retail Federation, and Food Marketplace Inc. dba FMI-the Food Industry Association.

"adding parties is not costless." *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 691 (7th Cir. 2023) ("*Bost II*"). The Retail Associations also do not propose to add anything to the merits of the case because their legal arguments mirror those of the Attorney General. And understandably so: At the heart of Plaintiffs' case is a pure question of law about whether the IFPA's interchange and data usage restrictions impermissibly interfere with federal banking powers—a question the Attorney General is fully competent to litigate. By contrast, the Retail Associations would only add distraction and complexity by using party status as a staging ground for their policy interests.

Finally, the Retail Associations have not even tried to meet any factor for intervening as of right under Rule 24(a)—and courts properly "consider 'the elements of intervention as of right as discretionary factors' in weighing permissive intervention." *Bost v. Ill. State Bd. of Elections*, 2022 WL 6750940, at *3 (N.D. Ill. Oct. 11, 2022) ("*Bost I*") (quoting *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019)), *aff'd*, *Bost II*, 75 F.4th 682 (7th Cir. 2023).

Thus, the Retail Associations can express their views on the IFPA as *amici curiae*, just like many other interested entities (including the relevant federal agency) have already done.

BACKGROUND

Plaintiffs Illinois Bankers Association ("IBA"), American Bankers Association ("ABA"), America's Credit Unions ("ACU"), and Illinois Credit Union League ("ICUL") sued Attorney General Raoul in his official capacity to challenge the IFPA's constitutionality on August 15, 2024. (Dkt. No. 1.) Plaintiffs allege that the IFPA's prohibitions on charging or receiving interchange fees on portions of credit or debit card transactions attributable to gratuities or Illinois state or local taxes, as well as its restrictions on financial institutions' use of transaction data, are preempted by federal laws and regulations, including the National Bank Act. (*See, e.g.*, *id.* ¶¶ 5-17.)

Plaintiffs moved to preliminarily enjoin the IFPA on August 21, 2024. (Dkt. No. 24.) Plaintiffs presented declarations from several financial institutions and Visa and Mastercard,

describing the havoc that the IFPA would wreak to the nation's uniform payment processing system, as well as the irreparable harm they would suffer absent an injunction. (Dkt. No. 24, Exs. 1-13.) Many entities have since expressed their views supporting Plaintiffs' challenge to the IFPA as *amici,* including the Office of the Comptroller of the Currency ("OCC"), which is the federal agency charged with implementing the National Bank Act (Dkt. No. 61 at 3), as well as the Bank Policy Institute, the Consumer Bankers Association, The Clearing House Association L.L.C. (Dkt. No. 35), the Electronic Payments Coalition (Dkt. No. 45), the American Free Enterprise Chamber of Commerce (Dkt. No. 50), and the Electronic Transactions Association (Dkt. No. 53).

The Attorney General opposed Plaintiffs' motion for a preliminary injunction on October 4, 2024, seeking dismissal of Plaintiffs' complaint and arguing that Plaintiffs are unlikely to succeed on their claims and have not suffered irreparable harm. (Dkt. No. 76.) A few *amici* supported the Attorney General's opposition. (Dkt. Nos. 69, 71.)

The Retail Associations also seek to lend their support to the Attorney General's opposition as *amici*, but ask to take an extra step that no other *amicus*—not even the OCC—has sought: to intervene as a party under Federal Rule of Civil Procedure 24. (Dkt. No 73 ("Mot.").) The Retail Associations seek only permissive intervention under Rule 24(b). (*Id.*) Rather than attach a proposed pleading to their motion to intervene, the Retail Associations attach a proposed brief opposing Plaintiffs' motion for preliminary injunction. (Dkt. No. 73, Ex. 1.) This proposed brief does not seek to dismiss Plaintiffs' complaint, but largely repeats the Attorney General's arguments that Plaintiffs are unlikely to succeed on the merits of their claims (*id.* at 7-13), while relying on two declarations from their members to try to rebut Plaintiffs' showing of irreparable harm (Dkt. Nos. 73, Exs. 2-3).

LEGAL STANDARDS

Federal Rule of Civil Procedure 24 governs intervention. Under Rule 24(a), a "party has a right to intervene when: (1) the motion to intervene is timely filed; (2) the proposed intervenors possess an interest related to the subject matter of the action; (3) disposition of the action threatens to impair that interest; and (4) the named parties inadequately represent that interest." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 657-58 (7th Cir. 2013). "A proposed . . . intervenor's failure to meet its burden as to even one of the necessary elements requires the court to deny intervention as of right." *Bost I*, 2022 WL 6750940, at *2; *accord Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007).

Rule 24(b) vests courts with discretion to allow permissive interventions, if the movant is (1) "given a conditional right to intervene by a federal statute," or (2) has "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Considerations guiding courts' discretion as to whether to allow permissive intervention include whether the requirements of Rule 24(a) have been met, *see Bost I*, 2022 WL 6750940, at *7, whether the potential intervenor would "prejudice" the original parties, and "the potential for slowing down the case." *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015).

Under Rule 24(c), a motion for intervention "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought."

ARGUMENT

The Retail Associations' motion for permissive intervention should be denied because: (I) the Attorney General's defense of the IFPA should preclude it; (II) they fail to meet the requirements of Rules 24(b) and (c); and (III) other factors weigh strongly against the Court exercising its discretion to allow them to intervene.

I. THE ATTORNEY GENERAL'S DEFENSE OF THE IFPA SHOULD BAR THE RETAIL ASSOCIATIONS' INTERVENTION

The Retail Associations should not be permitted to intervene because the Attorney General is actively defending the IFPA. "[W]hen the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith." *Ligas*, 478 F.3d at 774. Courts in the Seventh Circuit "generally recognize . . . that permissive intervention is unwarranted when the proposed intervenor's interests are adequately represented by the government." *Sweeney*, 2018 WL 11275902, at *2; *see also Kaul*, 942 F.3d at 802 (denying intervention in defense of a law where the attorney general represented the state's interests). And "where a group of plaintiffs challenge state legislation, the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *One Wis.*, 310 F.R.D. at 397.

For example, in *One Wisconsin*, state legislators and other individuals sought to intervene as defendants in a case challenging several state voting laws. 310 F.R.D. at 396. The court denied both mandatory and permissive intervention because "the attorney general [was] adequately pursuing the outcome that the proposed intervenors seek," and "the existing parties [were] capable of identifying and presenting the relevant issues." *Id.* at 399; *see also Sweeney*, 2018 WL 11275902, at *1 (no permissive intervention because a citizen with an interest in defending state law against constitutional challenge was adequately represented by the Illinois attorney general).

Here, "permissive intervention is unwarranted" because the Retail Associations' "interests are adequately represented by the" Attorney General. *Sweeney*, 2018 WL 11275902, at *2. There is no dispute that the "Illinois Attorney General, the State's chief law enforcement officer, [is]

charged with defending the State's interests." *Gray v. Orr*, 4 F.Supp.3d 984, 993 (N.D. Ill. 2013); *see also* 15 ILCS 205/4 (describing Attorney General's duty to defend the state's laws); *see also* (Dkt. No. 76 at 6 (Attorney General's brief acknowledging this duty)). The Retail Associations do not assert that the Attorney General is exercising his duties "gross[ly] negligen[tly] or [in] bad faith" in defending the IFPA. *Ligas*, 478 F.3d at 774.

Instead, the Attorney General has vigorously defended the IFPA, including by: (i) opposing Plaintiffs' motion for a preliminary injunction (Dkt. No. 76); (ii) moving to dismiss Plaintiffs' complaint (*id.*); and (iii) unsuccessfully opposing the OCC's motion for leave to file an *amicus* brief in support of Plaintiffs' motion (Dkt. No. 62). Indeed, the Retail Associations tacitly concede that the Attorney General is doing its best to defend the IFPA because their arguments on the merits of Plaintiffs' claims largely parrot the arguments the Attorney General makes in his opposition. (*Compare* Dkt. No. 73, Ex. 1 at 7-13, *with* Dkt. No. 76 at 17-35.) Thus, the Retail Associations' attempt to intervene should be denied because the Attorney General is adequately representing their interests in defending the IFPA.

II. THE RETAIL ASSOCIATIONS CANNOT INTERVENE BECAUSE THEY FAIL TO SATISFY FEDERAL RULES OF CIVIL PROCEDURE 24(b)-(c)

The Retail Associations' motion should also be denied because they fail to meet the procedural requirements of Rule 24(c) and the substantive requirements of Rule 24(b). "Federal Rule of Civil Procedure 24[(b)] allows th[e] Court to permit a movant to intervene if he has a claim or defense that shares a common question of law or fact with the main action." *Sweeney*, 2018 WL 11275902, at *2. Rule 24(c) reinforces the movant's obligation to identify a claim or defense by mandating that "a motion to intervene, whether permissive or required, must 'be accompanied by a pleading that sets out the claim or defense for which intervention is sought.'" *Perez v. J.A.S.*

Granite & Tile, LLC, 2013 WL 1632055, at *2 (N.D. Ill. Apr. 16, 2013) (quoting Fed. R. Civ. P. 24(c)).

The Retail Associations are foreclosed from intervening because they flunk both requirements. Rather than comply with Rule 24(c) by attaching "a pleading that sets out the claim or defense for which intervention is sought," *Perez*, 2013 WL 1632055, at *2, the Retail Associations filed a brief opposing Plaintiffs' motion for a preliminary injunction (Dkt. No 73, Ex. 1). But "[a] brief is not a pleading," *Webb v. City of Joliet*, 2005 WL 1126555, at *2 (N.D. Ill. May 4, 2005), and mere "disagreement with the requested injunction . . . is neither a claim nor a defense against any of the parties in the litigation," *Philips Med. Sys. (Cleveland) Inc. v. Buan*, 2022 WL 16635551, at *3 (N.D. Ill. Nov. 2, 2022).

While the Retail Associations request that they be excused from filing a pleading because they might file an answer in the future (Mot. at 1), the procedural course that they chart contradicts Seventh Circuit precedent. For example, in *Shevlin v. Schewe*, 809 F.2d 447 (7th Cir. 1987), the court concluded that "Federal Rule of Civil Procedure 24(c) is unambiguous" in "requir[ing]" a pleading to accompany a motion to intervene. *Id.* at 450. The court affirmed the district court's denial of the movant's motion to intervene because all that the movant filed was a supporting brief, and "[l]awsuits cannot be tried merely on memoranda." *Id.*

Here, because the Retail Associations take the same brief-now-plead-later approach as the intervenor in *Shevlin*, their motion should also be denied. The Retail Associations' effort to delay their burden by arguing they might file an answer later (Mot. at 1) should be rejected because a "motion to intervene may not just . . . merely describe a future pleading," *Shevlin*, 809 F.2d at 450.

The Retail Associations' motion also should be denied because they fail to identify a claim or defense. Proposed intervenors' "failure to identify a claim or defense . . . in the litigation

forecloses intervention under Rule 24(b)." *Philips*, 2022 WL 16635551, at *3; *see also Gen. Ins. Co. of Am. v. Clark Mali Corp.*, 2010 WL 807433, at *8 (N.D. Ill. Mar. 10, 2010) (intervenor's failure to identify its claim made it impossible to tell whether it met Rule 24(b)'s "claim or defense" requirement).

Here, the Retail Associations argue they "share a clear common question of law with the main action" (Mot. at 4), but they never identify a claim or defense, much less one that has commonality with the Attorney General's defenses. At most, they cite *Planned Parenthood of Wisconsin v. Kaul*, 942 F.3d at 803, which they say in a parenthetical recognized that the movant there sufficiently identified a defense by arguing that the "complaint fails to state a claim." (Mot. at 4.) But the Retail Associations nowhere contend that Plaintiffs' complaint in this case fails to state a claim. Even if they did, *Kaul* was a special case, where a state legislature sought to intervene not in its own right as the legislature, but as a "representative" and "agent of the State." *Id.* at 798. It has no applicability here: In *Kaul*, a successful intervention would have let the legislature represent—and thus move to dismiss on behalf of—the original state party to the case. Here, by contrast, the Retail Associations could not seek dismissal on the Attorney General's behalf.

For these reasons, too, the Court should deny the request for intervention.

III. ADDITIONAL DISCRETIONARY FACTORS WEIGH AGAINST PERMISSIVE INTERVENTION

Finally, even if the Attorney General's vigorous defense of the IFPA and the Retail Associations' failure to comply with Rules 24(b)-(c) did not foreclose the Retail Association's request to intervene, this Court should exercise its discretion to deny intervention for several more reasons.

First, the Retail Associations' attempt to intervene threatens to inject delays and prejudice, while adding nothing to the Attorney General's defense on the merits. Courts in this Circuit

regularly deny intervention if "adding the proposed intervenors could unnecessarily complicate and delay all stages of this case: discovery, dispositive motions, and trial." *One Wis.*, 310 F.R.D. at 399; *see also Kaul*, 942 F.3d at 803 (district court properly weighs whether allowing intervention will "overcomplicat[e] the case with additional claims, defenses, discovery, and conflicting positions"). Courts also deny motions to intervene if granting them "would use up the court's time and resources" and if the intervenor's "legal interests and arguments are closely aligned with those of the [defendant], meaning [the intervenor's] addition as a party would add little substance." *Bost II*, 75 F.4th at 691.

Here, the Retail Associations incorrectly argue that delay and expansion of the case is justified because they "offer the perspective of a businessperson with first-hand knowledge of the payments system . . . and how they would need to be upgraded in response to the IFPA." (Mot. at 6.) But adding another defendant "is not costless, and time is not the only payment." *Bost II*, 75 F.4th at 691. Adding the Retail Associations as defendants "would likely further impede the timely resolution of the action; indeed, the contested motion to intervene has already required the Court to divert resources away from the substantive arguments of the parties." *Bost I*, 2022 WL 6750940, at *7.

The Retail Associations also identify nothing that they would contribute to the case's merits that would warrant this potential prejudice and delay. Their "addition as a party would add little substance," *Bost II*, 75 F.4th at 691, because they mostly recycle the Attorney General's arguments on the merits of Plaintiffs' claims (Dkt. No. 73 Ex. 1 at 7-13). While they argue that the declarations they offer from individuals affiliated with two of their members would "provide the Court with a more comprehensive understanding of the payments industry" (Mot. at 5), the facts

asserted in those declarations are irrelevant to the merits of Plaintiffs' case.[2] And, as noted, this case involves pure legal questions about whether the IFPA impermissibly interferes with federal banking powers.

Nor is the Retail Associations' argument that "the IFPA explicitly affects merchants like [their] members" (Mot. at 4) sufficient to justify adding them as defendants. As Judge Coleman explained in *Sweeney*, allowing anybody "who might be potentially impacted by a change in the [law] to join in this action" cannot justify intervention because it makes litigation "unfeasible." 2018 WL 11275902, at *1; *see also* *Bost II*, 75 F.4th at 691 ("Increasing the number of parties to a suit can make the suit unwieldy.").

Second, the Retail Associations' failure to even try to meet the factors governing intervention as of right under Rule 24(a) also supports denying their motion. "Although the district court may not 'deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right,' it may consider 'the elements of intervention as of right as discretionary factors' in weighing permissive intervention." *Bost I*, 2022 WL 6750940, at *3 (quoting *Kaul*, 942 F.3d at 803). To intervene as of right, a proposed intervenor must have a "direct, significant and legally protectable interest in the [subject] at issue in the lawsuit" and demonstrate that the plaintiffs' lawsuit threatens that interest. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985). The interest must also be "unique," must "belong to the would-be intervenor in its own right," *Bost II*, 75 F.4th at 687, and must be "inadequately represent[ed]" by the parties, *Kaul*, 942 F.3d at 801.

[2] For the reasons explained in Plaintiffs' reply in support of their preliminary injunction motion, the declarations are also irrelevant to the question of whether Plaintiffs will suffer irreparable harm absent a preliminary injunction.

Here, the only interests the Retail Associations assert are interests in the enforcement of the IFPA—the very interest that the Attorney General is duty-bound to pursue as well. *See Sweeney*, 2018 WL 11275902, at *1 ("This injury, however, is not unique to Trygg any more than it is 'unique' to any other non-union public employee."). Indeed, the Retail Associations spend their motion trying to explain how their defenses share common questions of fact and law with the Attorney General and how they have an interest in seeing the IFPA upheld (*see* Mot. at 3-6), without trying to explain how their interest is not "derived from the rights of an existing party," *Bost II*, 75 F.4th at 687. This failure to even try to satisfy Rule 24(a) counsels against granting the Retail Associations' motion under Rule 24(b). *Bost I*, 2022 WL 6750940, at *7.

Finally, any "perspective" (Mot. at 6) that the Retail Associations might wish to share can be adequately presented as *amici curiae* without unduly burdening the Court and prejudicing Plaintiffs. Plenty of other entities—including the federal agency with relevant authority and expertise—have done just that. And Plaintiffs do not object to the Retail Associations' alternative request to file their brief as an *amici curiae*.

CONCLUSION

For these reasons, the Court should deny the Retail Associations' motion to intervene.

Dated: October 11, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 11, 2024, a copy of the foregoing was filed using the CM/ECF system, which will effectuate service on all counsel of record.

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Attorney for Illinois Bankers Association, American Bankers Association, America's Credit Unions, and Illinois Credit Union League