United States District Court
Eastern District Of Kentucky
London Division

CASE NO.: 6:23-cv-00148-KKC

THE MONTICELLO BANKING COMPANY, *et al.*,

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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Certificate of Service

On August 21, 2023, I electronically filed this document, along with the motion and tendered order, through the Court's ECF filing which will send a notice of electronic filing to all counsel of record. I also emailed a copy of this motion to the Defendants' counsel of record in the Texas CFPB Lawsuit who has also filed an entry of appearance in this case: Kevin E. Friedl, Senior Counsel, Consumer Financial Protection Bureau, 1700 G. Street NW, Washington, D.C. 20552, kevin.friedl@cfpb.gov.

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Plaintiffs, The Monticello Banking Company, Citizens Deposit Bank Of Arlington, Inc., First Community Bank Of The Heartland, Inc., First Southern National Bank, Morgantown Bank & Trust Company, The Farmers Bank Of Milton, Ky, The Peoples Bank, Marion, Kentucky, The Sacramento Deposit Bank, and the Kentucky Bankers Association, state as following in support of their motion for a preliminary injunction enjoining the Defendants from implementing and enforcing the Small Business Lending Rule promulgated by the Defendant, Consumer Financial Protection Bureau (the "CFPB"), published in the Federal Register on May 31, 2023, 88 Fed. Reg. 35150-35571, and generally codified at 12 C.F.R. §1002.101 to §1002.114 (the "Small Business Lending Rule" or the "Final Rule").

I. Summary Of Argument.

There is already a nationwide preliminary injunction staying implementation and enforcement of the Final Rule as to some, but not all, of the persons affected by the Final Rule. That injunction was issued by the United States District Court for the Southern District of Texas in a lawsuit, Case No. 7:23-cv-00144, filed by the Texas Bankers Association, Rio Bank, and the American Bankers Association against the Defendants in this action (the "Texas CFPB Lawsuit"). A copy of that injunction (the "Texas Preliminary Injunction") is attached as Exhibit 5 to Plaintiffs' Complaint in this proceeding.

However, the Texas Preliminary Injunction is limited only to members of the Texas Bankers Association and the American Bankers Association. The named Plaintiff banks as well as numerous other Kentucky banks that are neither members of the Texas Bankers Association nor the American Bankers Association were not granted relief by the Texas Preliminary Injunction. Thus, the Kentucky Plaintiffs now seek protections equal to that already granted in the Texas CFPB Lawsuit.

It is entirely appropriate that the Plaintiffs in this case be protected from unrecoverable compliance costs pursuant to an invalid Rule, particularly when financial institutions located in Kentucky who are members of the American Bankers Association are currently receiving this injunctive relief. The Plaintiffs are seeking a "level playing field" in Kentucky.

II. Overview Of The CFPB's Final Rule And The Illegal Aspects Of It.

In 2010, Congress added a single new section to the Equal Credit Opportunity Act (15 U.S.C. §1691 *et seq.*)(the "ECOA") to create a small business loan data collection system. The legislation was Section 1071 of the Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub.L. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"), and it is codified at 15 U.S.C. §1691c-2. A copy of that legislation is attached as Exhibit 1 to Plaintiff's Complaint. Section 1691c-2(e)(2)(A)-(G) lists 13 items of loan data that Congress directed to be "compiled and maintained" by covered financial institutions. Subparagraph (H) is a catchall for "any additional data that the Bureau determines would aid in fulfilling the purposes of this section."

The "Bureau" is the Defendant, CFPB, which was created by the same Dodd-Frank Act. Congress constructed the CFPB in a manner that illegally attempted to insulate the CFPB from oversight and accountability. It did that first by providing that the CFPB would be governed by a single Director whose actions could not be questioned or controlled because the President could only remove him or her for inefficiency, neglect or malfeasance. In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 207 L.Ed.2d 494 (2020), the United States Supreme Court declared this structure unconstitutional and contrary to separation of powers because it insulated the CFPB from accountability to the President.

The next effort in the Dodd-Frank Act to illegally insulate the CFPB was by creating a "funding scheme" that the Fifth Circuit observed "is unique across the myriad independent

executive agencies across the federal government. It is not funded with periodic Congressional appropriations." *See Community Fin. Servs. Ass'n of Am., Ltd v. Consumer Financial Protection Bureau*, 51 F.4th 616, 624 (5th Cir. 2021), *cert. granted*, 215 L.Ed.2d 104, 143 S. Ct. 978 (Feb. 27, 2023). Rather, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. Each year, the CFPB simply requests an amount "determined by the Director to be reasonably necessary to carry out" the agency's functions. The Federal Reserve must then transfer that amount so long as it does not exceed 12% of the Federal Reserve's "total operating expenses." *See* 12 U.S.C. 5497(a). Because this funding mechanism circumvents the Congressional appropriations process of the U.S. Constitution, it was declared unconstitutional in the *Community Fin. Servs.* case, and that decision is currently under review by the Supreme Court.

The CFPB has now abused its powers to craft a Final Rule that has transformed a short and simple piece of ECOA legislation (<u>21 lines specifying the specific data to be complied</u>) into a monstrous federal regulation that took 421 pages of three-column, single spaced Federal Register pages to state and <u>begin</u> to explain. The Plaintiffs emphasize "begin" because the needed explanations, guidances and warnings from the CFPB go on and on. The Final Rule was published on May 31, 2023. Plaintiffs have attached only two of the "rule extensions" as exhibits to their Complaint. Exhibit 3 is a forty page "Small Business Lending Rule: Data Points Chart" that sets forth 81 separate data or sub-data points (in contrast to the 13 in the statute). Exhibit 4 is a 123 page "CFPB Filing Instructions Guide" the discusses how to submit all of this additional information that the CFPB has abused its powers to demand. As recently as last week, August 17, 202, the CFPB made additional modifications to the filing instructions.

It cannot be disputed that the CFPB developed the Final Rule using money that it

obtained under a funding mechanism whose constitutionality is being directly questioned and will be decided in due course by the Supreme Court. A CFPB report indicates that it spent over $39 million for "Research, Markets & Regulations" during the first three quarters of the fiscal year just prior to the quarter in which the rule was issued. *See* Consumer Protection Financial Bureau, CFO Updated For The Third Quarter Of Fiscal Year 2022 (available at https://files.consumerfinance.gov/f/documents/cfpb cfo-update_report_fy-2022 q3.pdf). The CFPB would have been unable to promulgate any rules "without its unconstitutional funding" and thus would not have issued the Final Rule here absent that scheme. *See Community Financial*, 51 F.4th at 643.

In general, the Final Rule requires the collection of an expanded set of data that is far in excess of the statutory categories listed in Section 1691c-2(e)(2)(A)-(G). The 81 “data points” now to be collected and submitted is described in the 40-page Data Points Chart that is Exhibit 3 to Plaintiffs’ Complaint. *See also* 12 C.F.R. §1002.107(a) (listing various “data [to be] compiled”). The “Filing Instructions” on how to submit all this data is itself 123 pages long. *See* Complaint Exhibit 4. The sole statutory basis for this dramatic expansion in data collection is §1691c-2(e)(2)(H) which includes the catch-all “any additional data that the Bureau determines would aid in fulfilling the purposes of this section.”

The Final Rule imposes significant other obligations upon covered financial institutions such as how to collect the data from loan applicants (§1002.107(c)); establishing procedures to monitor compliance with the Final Rule (§1002.107(3)); creating a “firewall” in the financial institution’s systems for various data (§1002.108); statements to be placed on a financial institution’s website about availability of data reports (§1002.110); and recordkeeping (§1002.111).

While the Final Rule takes effect August 29, 2023 (12 C.F.R. §1002.114(a)), the Final Rule has rolling compliance and reporting deadlines that depend upon the number of covered credit transactions a financial institution originates. *See* 12 C.F.R. §1002.114(b). "Tier 1" institutions originate at least 2,500 covered credit transactions per year, and their compliance date is October 1, 2023. "Tier 2" institutions originate between 500 to 2,499, and their compliance date is April 1, 2024. "Tier 3" institutions originate 100 to 249, and their compliance date is January 1, 2026. The testing dates for determining what tier applies are for the years 2022 and 2023. The CFPB set these deadlines in recognition of the complexity and breadth of the Final Rule along with the perceived compliance resources available to the financial institutions in the various tiers. Given that data used to establish tiers is for 2022 and 2023 and that the Final Rule is incredibly complex, financial institutions are already working on compliance.

The Plaintiffs' Complaint alleges five counts on why the Final Rule is illegal and improper. Count 1 challenges the Final Rule based upon its being created using funds derived from an unconstitutional funding method. Counts 2 through 4 challenge the Final Rule based upon various requirements of the Administrative Procedure Act. Count 5 challenges specific provisions of the Final Rule that interfere with a loan applicant's statutory right under 15 U.S.C. §1691c-2-(c) to "refuse to provide any information requested."

III. The Texas Litigation Over The Final Rule And The Texas Preliminary Injunction.

On April 26, 2023, The Texas Bankers Association (the "TBA") and one of its member banks, Rio Bank, McAllen, Texas ("Rio Bank") filed a Complaint challenging the legality of the Final Rule. They filed an amended complaint to add the American Bankers Association (the "ABA") as a Plaintiff, on May 14, 2023. That amended complaint included as an exhibit the Declaration Of Virginia O'Neill, an Executive Vice President for Regulatory Compliance And

Policy at the ABA, discussing costs of compliance by depository institutions.

After briefing by the parties, on July 31, 2023, the Chief United States District Judge Randy Crane entered in the Texas CFPB Lawsuit an "Order Granting In Part And Denying In-Part Plaintiffs' Motion For Preliminary Injunction" (the "Texas Preliminary Injunction"). A copy of the Texas Preliminary Injunction was filed as **Exhibit 5** to the Kentucky Complaint in this action.

IV. The Irreparable Harm Being Suffered By The Kentucky Plaintiffs In This Case And Their Preliminary Injunction Request.

All nine of the Plaintiffs in this case have tendered as exhibits to this memorandum declarations explaining the irreparable harm they are suffering on account of the Final Rule. *See* Declaration Of Kenny Ramsey, **Monticello Banking Company** (**Exhibit 7**)[1] (hereinafter "Monticello Bank Decl."); Declaration of Danny D. Beyer, **Citizens Deposit Bank Of Arlington, Inc.** (**Exhibit 8**) (hereinafter "Citizens Deposit Decl."); Declaration of Bruce Kimbell, **First Community Bank Of The Heartland** (**Exhibit 9**) (hereinafter "First Community Decl."; Declaration of Melissa Mahoney, **First Southern National Bank** (**Exhibit 10**) (hereinafter "First Southern Decl."); Declaration of Jason Jones, **Morgantown Bank & Trust Company** (**Exhibit 11**) (hereinafter "Morgantown Bank Decl."); Declaration of David A. Hertz, **The Farmers Bank Of Milton, Kentucky** (**Exhibit 12**) (hereinafter "Farmers Bank Decl."; Declaration of Terry L. Bunnell, **The Peoples Bank, Marion, Kentucky** (**Exhibit 13**) (hereinafter "Peoples Bank Decl."); Declaration of Michael W. Hunt, **The Sacramento Deposit Bank** (**Exhibit 14**) (hereinafter "Sacramento Bank Decl."); Declaration of Timothy A. Schenk, **Kentucky Bankers Association** (**Exhibit 15**) (hereinafter "KBA Decl.")

[1]This exhibit is given exhibit number seven as the Complaint has six exhibits. The remainder of the exhibits are numbered consecutively thereafter.

Each of the bank declarations includes the statement that each bank "has already begun working on how it will need to change its operations in order to comply with the Small Business Lending Rule." *See* Monticello Bank Decl. ¶7; Citizens Deposit Decl. ¶7; First Community Decl. ¶7; First Southern Decl. ¶7; Morgantown Bank Decl. ¶7; Farmers Bank Decl. ¶7; Peoples Bank Decl. ¶8; Sacramento Bank Decl. ¶7.

The KBA Decl. discusses how it and consumer compliance experts (such as Compliance Alliance) "advised their bank customer to commence compliance preparation steps immediately after the Final Rule was announced and made public." KBA Decl. ¶7. It notes that 32 bank representatives paid $195 each to attend a seminar on the necessary compliance work on March 29, 2023. KBA Decl. ¶8. A second formal training program is scheduled for August 31, 2023. KBA Decl. ¶11. Mr. Schenk of the KBA notes that he has "been fielding telephone calls daily from representatives of KBA Member Banks asking questions about the Final Rule and how to implement it." KBA Decl. ¶12. He also notes how its implementation was discussed at two KBA Compliance and Risk Roundtables and two Regulators Forums. KBA Decl. ¶13. He reports the obvious – "KBA Member Banks currently are taking steps to implement the Final Rule" and that "[a]s a result our members are already incurring, and will continue to incur, direct economic injury caused by the Final Rule." KBA Decl. ¶13.

Each of the bank declarations includes a statement about the dollar costs of the work the bank will have to incur to comply with the Final Rule. In general, compliance activities will include professional staff time reviewing the 421 federal register pages of the Final Rule and monitoring the issuance of and reviewing all of the other supporting materials the CFPB is issuing relating to complying with the Final Rule; engaging consultants and/or attorneys to advise on requirements and operational changes required to ensure compliance; searching for and

purchasing new software *(e.g.,* loan origination software systems); integrating the new software with existing software and systems; updating existing computer systems; testing and validating systems; engaging vendors to assist with data quality control and analysis; developing forms and applications; drafting new policies and procedures, and amending existing policies and procedures; conducting legal and compliance review; and hiring new employees. *See* KBA Decl. ¶7-¶8; Exh. 17. *See also* Declaration Of Virginia O'Neill, American Bankers Association (**Exhibit 18**).[2]

Once all that is done, then there is the practical day-to-day work of processing each covered application and obtaining all of the required data points for it. There will be the work of answering the inevitable questions from small business loan applicants about the data collection, data submission, and data utilization process. There will be the steps of assembling and submitting the data to the CFPB. The Final Rule itself categorizes these as "several operational steps … [which are] transcribing data, resolving reportability questions, transferring data to a data entry system, geocoding, researching questions, resolving question responses, and checking post-submission edits." *See* 88 Fed. Reg. at p. 35, 517 (column 3).

All of this work triggers the three (3) year record retention requirements under 12 C.F.R. §1002.111(a). Also, the Plaintiff Banks will have to demonstrate their compliance during their regular bank examinations. Whew!! In recognition of this incredible volume of very complex work, the KBA appropriately titled the handout for its March 29, 2023, training seminar – "Prepare Your Bank for Small Business Reporting <u>Burden</u> under 1071" (emphasis added). *See* KBA Decl. ¶8 (**Exhibit 16**).

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[2]Ms. O'Neill's Declaration was filed in the Texas CFPB Lawsuit, but it can be used in this proceeding as it is sworn to pursuant to 28 U.S.C. §1746.

The lead bank, and one of the two largest of the Plaintiff banks, is the Monticello Banking Company ("Monticello Bank") with deposits of $937.9 million, and loans and leases of $840.6 million. *See* Monticello Bank Decl. ¶5. The declaration of its President, Kenny Ramsey, discusses the efforts that have been taken, so far, to comply with the Final Rule. Monticello Bank will be assembling a compliance implementation team of roughly ten (10) full time equivalent employees at a cost of $50,000. *See* Monticello Bank Decl. ¶8. It also expects to hire one (1) full time equivalent employee to handle Final Rule implementation for another $50,000. *Id.* at ¶9. Employee responsibilities will have to be reassigned to handle the data collection with an estimated cost of another $30,000. *Id.* at ¶10. It will cost another $10,000 to identify, train and compensate the employee who will be the authorized representative to certify the accuracy and completeness of its data being reported to the CFPB. *Id.* at ¶11. Monticello Bank expects to have to spend $3,000 to update or purchase new computer software. *Id.* at ¶12. Five thousand dollars has been budgeted for expected necessary training seminars. *Id.* at ¶13. Monticello Bank will have to change its record retention practices at a cost of another $10,000. *Id.* at ¶14.

The smallest of the Plaintiff banks is the Sacramento Deposit Bank with loans and leases of $78.5 million and deposits of $123.6 million. All of the bank's lending staff will have to be involved, and it expects to incur $10,000 in employee compliance set-up costs. *See* Sacramento Bank Decl. at ¶7. It will incur $35,000 to $50,000 for continued compliance work. ¶8-¶9. It expects to have to purchase or upgrade computer software, but it does not yet know the exact cost of that. Even though a small bank may incur smaller compliance costs than a larger bank, the impact can be as great or greater given the smaller amount of resources available.

The declarations from the other six Plaintiff banks reflect costs that range from those of Sacramento Deposit bank to Monticello Bank depending upon the size and complexity of their

operations. The KBA estimates that the average initial compliance costs will be in the range of $100,000 per community bank. *See* KBA Decl. ¶10.

The CFPB really cannot dispute that the Plaintiff banks are incurring significant initial set-up compliance costs since the CFPB's Final Rule states: "The Bureau estimates that the overall market impact of one-time costs for depository institutions will be between $147,000,000 and $159,000,000." *See* Final Rule, 88 Fed. Reg. at p. 35,509 (column 2). To repeat, this is just the cost estimate for initial work to be in a position to comply. For continuing compliance costs, the CFPB Final Rule states: "The Bureau estimates that the total annual ongoing costs for depository institutions will be between about $297,000,000 and $313,000,000 per year". *See* Final Rule, 88 Fed. Reg. at p. 35,511 (column 3).

The KBA's representative, Tim Schenk, who has been given primary responsibility at the KBA for addressing compliance work to understand and help member banks implement the Final Rule believes, based upon his own work trying to understand the Final Rule and help member banks deal with it, that these compliance cost estimates of the CFPB are "wholly inadequate and inaccurate." *See* KBA Decl. at ¶9.

To avoid this irreparable harm, the Plaintiffs have filed their motion for a preliminary injunction.

V. The Considerations For Deciding When A Preliminary Injunction Should be Issued.

In the Sixth Circuit:

> [f]our factors guide the decision to grant a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction."

S. Glazer's Distributors of Ohio, LLC v. Great Lakes Brewing Co., 860 F.3d 844, 849 (6th Cir. 2017) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012)). "[T]hese are factors to be balanced, not prerequisites to be met." *Id.* (citing *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007)). "For example, a finding that the movant has not established a strong probability of success on the merits will not preclude a court from exercising its discretion to issue a preliminary injunction if the movant has, at minimum, shown serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399–400 (6th Cir. 1997) (internal quotations omitted). *See also American Federation of Musicians v. Stein*, 213 F.2d 679, 683 (6th Cir. 1954) ("When the nature of the questions which arise upon a suit make them a proper subject for deliberate examination, and if a stay of proceedings will not result in too great injury to the defendants, it is proper to preserve the existing state of things until the rights of the parties can be fairly and fully investigate and determined."). That said, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.' " *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)).

VI. Argument.

1. The Texas Preliminary Injunction Should Be Extended To Kentucky Banks Who Are Not TBA Or ABA Members.

This is an unusual, but also easy, situation because the Defendants are already subject to an injunction against enforcing the Final Rule because of the Texas Preliminary Injunction. The CFPB has received requests from the American Bankers Association, the Independent Community Bankers Association, the Texas Bankers Association, the KBA, among others, to

agree to refrain from implementing and enforcing the Final Rule against any banks pending judicial review of its legality, but, to date, it has refused to do so.

All of the Declarations from the Plaintiff Bank contain the same, and obvious, statement equivalent from the one given by lead Plaintiff, Monticello Bank:

> 20. I believe Monticello Bank will be at a competitive disadvantage if it does not obtain the same injunctive relief against the Final Rule that has been granted by the Texas Preliminary Injunctions. Banks doing business in Kentucky that are members of the American Bankers Association or the Texas Bankers Association will be able to allocate staff and resources to their business operations when the Texas Preliminary Injunction is in place while Monticello Bank will have to allocate staff and resources to the work of complying with the Small Business Lending Rule. This will distract Monticello Bank's staff from other activities in a way that is a competitive disadvantage.

See Monticello Bank Decl ¶20. *See also* Citizens Deposit Decl. ¶16; First Community Decl. ¶16; First Southern Decl. ¶14; Morgantown Bank Decl. ¶16; Farmers Bank Decl. ¶20; Peoples Bank Decl. ¶21; Sacramento Bank Decl. ¶16; KBA Decl. ¶15.

All of the Declarations from the Plaintiffs explain the irreparable harm being suffered by them because of the Final Rule.

Other than being located in Kentucky instead of Texas, the Plaintiff Banks are, for purposes of evaluating the appropriateness of an injunction staying application of the Final Rule, no different than Rio Bank being protected by the Texas Preliminary Injunction. Similarly, the KBA is no different from the TBA.

This Court should grant the Kentucky Plaintiffs the same injunctive relief that was granted by the Texas Preliminary Injunction – staying implementation and enforcement of the Final Rule.

2. A Preliminary Injunction Is Warranted Under The Standard Application Of The Well-Recognized Rules For Granting Preliminary Injunctive Relief.

Regardless of the Texas Preliminary Injunction, the four factors to be considered when evaluating the Plaintiffs' motion all support granting them preliminary injunctive relief.

A. Likelihood Of Success On The Merits.

There are two major aspects of the "merits" challenge by the Plaintiff. Count 1 of the Complaint is a challenge based upon the unconstitutional funding of the CFPB. Counts 2, 3 and 4 raise challenges to the entire Final Rule under the Administrative Procedure Act, 5 U.S.C. §706.[3]

On the merits of Count 1, it cannot be denied that the Plaintiffs likelihood of success on the merits is strong as the Fifth Circuit has already declared the funding to be unconstitutional. *Community Fin. Servs. Ass'n of Am., Ltd v. Consumer Financial Protection Bureau*, 51 F.4th 616, 638 (5th Cir. 2021), *cert. granted*, 215 L.Ed.2d 104, 143 S. Ct. 978 (Feb. 27, 2023). In fact, the Texas Preliminary Injunction states on page 12 that "Here, the parties do not dispute Plaintiffs' likelihood of success on the merits of their claim."

On the merits of the APA challenges to Counts 2, 3 and 4, the Plaintiffs' Complaint explains how the Final Rule's expansion of the data collection from the 13 data points in the statute to the scores of additional data points is a violation of the APA. While this aspect of the dispute was not discussed in the Texas Preliminary Injunction, these additional problems further strengthen the Plaintiffs' showing of a sufficient likelihood of success on the merits on these

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[3]Count 5 is a challenge to a specific part of the Final Rule that would penalize financial institutions from discussing with their loan applicants the applicant's statutory right under 15 U.S.C. §1691c-2(c) to refuse to provide any information to the CFPB. While the Plaintiffs expect to seek remedies specifically addressed to this, including injunctive relief, the current relief enjoining all of the Final Rule makes it unnecessary, at this stage, to discuss this more narrow improper aspect of the Final Rule.

claims to justify preliminary injunctive relief. *See* generally 5 U.S.C. §705 (authorizing a "reviewing court" to "issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.").

B. Plaintiffs' Irreparable Injury Absent An Injunction.

The next factor that the Court must balance is whether Plaintiffs would suffer irreparable injury absent an injunction. *See Southern Glazer's Distributors of Ohio, LLC*, 860 F.3d at p. 849.

Part IV of this memo discusses the unrecoverable compliance costs that Plaintiffs are incurring because of the Final Rule. The Texas Preliminary Injunction discussed extensively how "comping with a [rule] later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *See* Texas Preliminary Injunction at p. 13 (quoting *Texas v. EPA*, 829 F.3d 405, 333 (5th Cir. 2016) (court's emphasis)).

In *Commonwealth v. Biden*, 57 F.4th 545 (6th Cir. 2023), the Sixth Circuit discussed unrecoverable compliance costs as a type of irreparable injury. The court expressly rejected the argument that unrecoverable compliance costs are not a type of irreparable injury. *Id.* at p. 556. Rather, the court held that such costs are more appropriately assessed in the "weight of the equitable balance[ing]" applied in evaluating the four factors to be considered in a preliminary injunction motion. *Id.* The Sixth Circuit in *Biden* cited favorably to Justice Scalia's concurrence in *Thunder Basin Coal Co. v. Reisch*, 510 U.S. 200, 220-221 (1994), that unrecoverable compliance costs are "almost always … irreparable harm." It also favorably cited the reference in *NFIB v. OHSA*, 595 U.S. __, 142 S.Ct. 661,211 L.Ed.2 448 (2022), to "billions of dollars in unrecoverable compliance costs." The TBA's declaration filed in the Texas CFPB Lawsuit estimated its members unrecoverable compliance costs at $40 million, and the KBA's

declaration in this case discusses an unrecoverable compliance cost of "$100,000 per community bank." *See* KBA Decl. at ¶10.

Another consideration is the contention of the Plaintiffs that the Final Rule was generated using an unconstitutional funding mechanism. Courts have held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of constitutional rights. *See, e.g., Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm) (citations omitted); *Covino v. Patrissi,* 967 F.2d 73, 77 (2d Cir.1992) (holding that plaintiffs may establish irreparable harm based on an alleged violation of their Fourth Amendment rights); *McDonell v. Hunter,* 746 F.2d 785, 787 (8th Cir.1984) (finding that a violation of privacy constitutes an irreparable harm). This is a factor that supports Plaintiffs, and it is buttressed by the fact that one portion of the Plaintiff Banks' constitutional challenge is current before the Supreme Court.

An additional factor of irreparable harm exists in this case that was not discussed in the Texas Preliminary Injunction – the competitive disadvantage facing the Kentucky Plaintiffs if they do not receive the same injunctive protection already granted to ABA member banks that are located in Kentucky or do business in Kentucky. These competing banks are able to focus their time and resources on competing with the Plaintiffs while Plaintiffs must continue to use staff time and resources on compliance with the Final Rule. This is plainly irreparable injury.

C. An Injunction Would Not Cause Others Substantial Harm.

The Defendants are already subject to the Texas Preliminary Injunction so it is not possible for them to argue that they would suffer substantial harm by issuance to the requested preliminary injunction.

Also, preserving the status quo is a factor that weighs in favor of issuing a preliminary injunction. *See Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978); *J.P. Morgan Securities, LLC v. Kittell*, 554 F.Supp.3d 895, 896-897 (W.D.Ky. 2021) ("Courts may and do grant injunctive relief to prevent harm and preserve the status quo….").

D. The Public Interest Is Served By Issuance Of A Preliminary Injunction.

This case involves aspects of the funding scheme for the CFPB that involve important constitutional questions about the structure of the federal government and the administrative state. As was noted in *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021), the public interest is clearly "served by maintaining our constitutional structure." Moreover, given the pending resolution of the CFPB's funding question by the Supreme Court's review of the *Community Financial* decision, the interests of judicial efficiency also weigh heavily in favor of a stay.

In considering the interest of the public, the Plaintiffs' Complaint discusses how the CFPB was repeatedly advised during the comment period on the proposed rule that the overly burdensome data collection requirements that exceeded the Congressional statutory mandated data would result in a reduction of available credit, thus having the opposite effect of what Congress intended. *See* Complaint ¶27-¶35. The organization that represents the Plaintiffs' own state regulators, the Conference Of State Bank Supervisors, urged the CFPB to limit reportable data to the statutorily mandated data points and that the extreme expansion of reporting obligations "will likely hinder the ability of community banks to continue to serve as an important source of small business credit in communities across the country." *See* Complaint ¶28.

KBA's declaration filed with this motion confirms this potential: "I believe that the KBA Comment Letter accurately reflects the impact of the Final Rule on community banks, including as described in Section 1 and the statement therein that 'Increased regulatory burden only furthers the

equity gap between small banks and large banks, forcing small banks to face unabsorbable compliance costs, forcing mergers and acquisitions, and ultimately deceasing services to smaller communities contrary to the Purpose.'" *See* KBA Decl. at ¶5 and **Exhibit 17**. In sum, not enjoining the Final Rule risks harming the public by its macroeconomic effects.

The specific effects on a loan-by-loan basis also show the harm to the public of not issuing the preliminary injunction. Specifically, the public will also be harmed since the CFPB concedes that the Rule's 600% expansion in data reporting requirements will increase compliance costs and, more importantly, the CFPB has stated that "the most likely response to the compliance costs of the final rule will be an increase in interest rates or fees to pass on financial institutions' ongoing variable costs to small business credit applicants." *See* Final Rule, 88 Fed. Reg. at p. 35,515 (column 1). In other words, the borrowers from the Plaintiff banks are subject to the harm of higher loan costs if the preliminary injunction is not granted.

In sum, the public interest factor supports issuance of the requested preliminary injunction.

VI. Conclusion.

For all the foregoing reasons, the Plaintiffs' motion for a preliminary injunction should be granted and implementation and enforcement of the Final rule against the Plaintiff banks and the KBA member financial institutions KBA should be granted.

Respectfully submitted,

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