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' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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On September 12, 2023, I electronically filed this document through the Court's ECF filing which will send a notice of electronic filing to all counsel of record.

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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, submit the following reply memorandum in further 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 "Final Rule").

I. Introduction.

The CFPB admits there is already a nationwide preliminary injunction staying implementation and enforcement of the Final Rule as to all members of the Texas Bankers Association and the American Bankers Association (the "ABA"), including those ABA member banks located or doing business in Kentucky. The CFPB further admits that "[f]ollowing the [Texas] court's decision [to issue its injunction], several other trade associations representing banks and credit unions intervened in the case" to obtain injunctive relief. *See* Defendants' Opposition To Motion For Preliminary Injunction (DK#17) (hereinafter the "CFPB Opposing Memo") at p. 7. Instead of seeking to intervene hundreds of miles away in Texas to obtain equivalent injunctive relief, the Plaintiffs have filed their lawsuit in the state where they are all headquartered and where venue is indisputably proper under 28 U.S.C. §1391(e)(1) – Kentucky.

In their motion, the Plaintiffs point out the seriousness of their funding and APA claims challenging the Final Rule. They point out that the legality of the CFPB's funding structure is currently pending before the United States Supreme Court. Plaintiffs prove, through declarations submitted by every single Plaintiff, the specific and significant compliance costs they are

currently incurring and will continue to incur. They show, also through their declarations, how there is an uneven playing field in Kentucky created by the Texas preliminary injunction applicable to a subset of Kentucky banks.[1] They have shown irreparable harm. They show how the balance of harms and the public interest decidedly favors a preliminary injunction.

The CFPB's opposing memorandum reflects a stubborn bureaucratic persistence that ignores these undisputed realities. The CFPB has made it apparent it intends to plow forward with implementing the Final Rule in Kentucky despite the cloud of doubts over it, the Texas preliminary injunction that is already in force in Kentucky protecting members of the ABA, and the irreparable harm being experienced by the KBA and its members which are not ABA members. However, the CFPB has not rebutted the strong showing by the Plaintiffs that they are entitled to preliminary injunctive relief staying the Final Rule against them.

II. Plaintiffs Have Shown A Substantial Likelihood Of Success Despite The CFPB's Efforts To Characterize A Fifth Circuit Court Of Appeals Decision As Being An "Outlier" And To Ignore The Plaintiffs' APA Claims.

At a preliminary injunction stage, the Plaintiffs are not required to completely prove their case. The CFPB cites, on page 9 of its memorandum, to *Ohio ex rel. Celebrezze v. Nuclear Regulatory Com.*, 812 F.2d 288 (6th Cir. 1987), where the Court wrote:

> The determination of whether a stay of an agency's order is warranted must be based on a balancing of four factors. These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Cuomo v. United States Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985). These factors are the same ones considered in evaluating the granting of a preliminary injunction. *See Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 225 U.S.P.Q. (BNA) 1169 (6th Cir. 1985); *In re DeLorean Motor Company*, 755 F.2d 1223 (6th Cir. 1985); *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256 (6th Cir. 1977).

[1]While the KBA does not officially track the information, the KBA's best estimate is that less half of its 150 member banks are also members of the ABA.

Celebrezze, 812 F.2d at p. 289. On the factor of "likelihood of success", the Court noted "[a]t a minimum the movant must show serious questions going to the merits and irreparable harm which decidedly out-weighs any potential harm to the defendant if a stay is issued." *Id*. at p. 290.

The CFPB acknowledges that the United States Court Of Appeals for the Fifth Circuit in *Community Fin. Servs. Ass'n of Am., Ltd v. Consumer Financial Protection Bureau*, 51 F.4th 616 (5th Cir. 2021), *cert. granted*, 215 L.Ed.2d 104, 143 S. Ct. 978 (Feb. 27, 2023), has found that the CFPB's funding mechanism is unconstitutional, but labels the decision an "outlier ruling." *See* CFPB's Opposing Memo at p. 14. While the CFPB may not agree with the ruling, the Supreme Court has not reversed it, and the reasoned opinion of a United States Court of Appeals is plainly legal authority creating "serious questions going to the merits." 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."

In addition to Supreme Court having taken review of the Fifth Circuit's *CFSA* decision, the Second Circuit's decision upholding the CFPB's funding mechanism is also pending before the Supreme Court based upon a petition for writ of certiorari docketed on June 23, 2023. *See Law Offices Of Crystal Moroney, P.C. v. Consumer Financial Protection Bureau*, U.S. Supreme Court Case No. 22-1233. The CFPB filed a memorandum in that case on July 24, 2023, stating that it agrees that "the petition in this case should be held pending the decision in *Community Financial Services Association* and then disposed of as appropriate in light of that decision."[2]

The significance of the Supreme Court's pending review of the CFPB's funding mechanism has not been lost on courts beyond the Southern District of Texas. On August 7, 2023, the United States District Court for the Southern District Of New York stayed a CFPB

[2] A copy of the CFPB's memorandum is available at: https://www.supremecourt.gov/DocketPDF/22/22-1233/272748/20230724153506154_22-233%20Law%20Offices%20of%20Crystal%20Moroney.pdf

enforcement proceeding pending the Supreme Court's decision in *CFSA*. Memorandum Opinion & Order, DK#64, *Consumer Financial Protection Bureau, et al. v. Credit Acceptance Corp.*, Case 1:23-cv-00038-JHR (S.D.N.Y. 8/7/23) (copy attached as **Exhibit 19**). Plaintiffs' unconstitutional funding claims are sufficient "serious questions" by themselves.

In addition to minimizing the CFPB's funding structure problem, the CFPB further argues that the Plaintiffs have not sufficiently articulated why there is a "serious question" that the Final Rule violates the Administrative Procedure Act, 5 U.S.C. §551 *et seq*. (the "APA"). *See* CFPB's Opposing Memo at pp. 15-16. The Plaintiffs' Complaint makes specific APA violation allegations with case citations in Counts 2 through 4, and the Plaintiffs' supporting memorandum expressly referred the Court to them. *See* Plaintiffs' Supporting Memo at pp. 13-14.[3] 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 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.").

The CFPB's own discussion of only a small part of the Final Rule disproves its own argument. In its Footnote 5, the CFPB writes:

> To give just one example, the Rule adds a requirement that financial institutions record the price of certain credit transactions. 88 Fed Reg, at 35530 (codified at 12 C.F.R. § 1002.107(a)(12)). There is a direct and obvious connection between credit prices and the purpose of the statute: "to identify business and community development needs and opportunities" and "to facilitate enforcement of fair lending laws." 15 US.C. § 1691c-2(a). As the Rule's preamble explains in depth,

[3]The CFPB cites to the asylum case of *El-Moussa v. Holder*, 569 F.3d 250, 257 (6th Cir. 2009), as demonstrating that this Court should not consider Plaintiffs' APA claims. *See* CFPB Opposing Memo at p. 15. That case simply holds that Ms. El-Mousa did not effectively argue on appeal a tangential issue about possible defects her administrative hearing transcript. The situation there is hardly comparable to the procedural posture of Plaintiffs' motion.

> "[b]ecause price-setting is integral to the functioning of any market, any analysis of the small business lending market – including to enforce fair lending laws or identify community and business development opportunities – would be less meaningful without this information."

CFPB Opposing Memo at p. 16 n.5.

This footnote grossly understates the data just about pricing that the Final Rule requires be assembled and reported: (i) interest rate, (ii) total origination charges, (iii) broker fees; (iv) initial annual charges, (v) additional cost for merchant cash advances or other sales-based financing, and (vi) prepayment penalties. *See* 12 C.F.R. §1002.107(a)(12)(i) to (vi).[4]

Yet the Dodd-Frank legislation that is the basis for the Final Rule says absolutely nothing about pricing data. Had pricing data been so essential to carrying out the statute, one would expect Congress to include pricing as either (i) one the items to be inquired about in 15 U.S.C. §1691c-2(b) or (ii) one of the specific items of information to be "itemized" as specified in 15 U.S.C. §1691c-2(e). Instead, the statute directs in §1691c-2(e)(1) that the information that is to be "compiled and maintained" is only the "information provided by any loan applicant pursuant to a request under subsection (b)." Yet the only information a financial institution is directed to request is to "inquire whether the business is a women-owned, minority owned, or small business". There is no statutory requirement or directive to inquire about pricing.

The CFPB is certain to argue that §1691c-2(e)(2)(H) specifies that "information compiled and maintained under paragraph (1)" be "itemized in order to clearly and conspicuously disclose-

[4]The CFPB spends a half page of its memo with a single-spaced footnote attempting to distinguish between "data points" and "data fields" that financial institutions have to capture and report. *See* CFPB Opposing Memo at p. 5, n. 2. It writes that "institutions will in some cases use multiple data fields to report a single data point." It further "explains" that "Institutions will have 36 data fields they can use (as relevant) to transmit that information for up to four different principle owners." This complexity has resulted in the CFPB's 40-page Data Points Chart (Complaint Exh. 3) and a 123-page Filing Instructions Guide (Complaint Exh. 4) on top of a 421-page Final Rule. Whether they are data points or data fields, what is uncontroverted are the Plaintiffs' declarations that they all are now incurring significant time and expense to create the systems needed to satisfy this incredibly complex data collection and reporting regime.

-…(H) any additional data that that Bureau determines would aid in fulfilling the purposes of this section." The key, however, is that the information must first be "the information provided by any loan applicant pursuant to a request under subsection (b)." To repeat, the only information that is to be requested under subsection (b) is "whether the business is a women-owned, minority-owned, or small business".[5] The Plaintiffs have sufficiently alleged that the CFPB has improperly expanded the data collection requirements of Section 1071.

This is not the first time the federal courts have ruled against the CFPB's attempts to grossly expand its regulatory authority. In 2014, the CFPB unilaterally reversed years of statutory interpretation about affiliated business arrangements under the Real Estate Settlement Procedures Act ("RESPA") and attempted to impose a $103 million fine on a mortgage lender for conduct that previously had been understood to comply with RESPA when administered by the federal Department Of Housing and Urban Development. The D.C. Circuit ruled that the CFPB's new statutory interpretation was erroneous, and its misinterpretation was "not a close call." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 41 (D.C. Cir. 2016), *aff'd* 881 F.3d 75, 82 (D..C. Cir. 2018) (en banc). The CFPB entered an Order Dismissing The Notice Of Charges on June 7, 2018 (CFPB Case #2014-CFPB-0002).[6]

Most recently, on September 8, 2023, after Plaintiffs filed their motion for preliminary injunction herein, the United States District Court for the Eastern District of Texas[7] struck down the CFPB's effort to amend its Supervision And Examination Manual to provide that its examiners would investigate whether businesses were adequately testing for discrimination in

[5]The only numerical information Congress specified in §1691c-2(e)(2) is "the amount of the credit or credit limit applied for and the amount of the credit transaction or the credit limit approved" (Clause C) or the "gross annual revenue of the business" (Clause F).

[6]A copy of the dismissal order is available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2014-CFPB-0002_Document_236_06072018.pdf

[7]This is not the same district as issued the Texas Preliminary Injunction. The Final Rule is being challenged in the United States District Court for Southern District of Texas.

their advertising, pricing and other activities because "discrimination" would be an unfair, deceptive or abusive practice. *See* Opinion And Order, DK#41, *Chamber Of Commerce Of The United States of America, et al. v. Con. Fin. Prot. Bur., et al.*, Case 6:22-cv-00381-JCB (E.D. Tex. 09/08/23) (copy attached as **Exhibit 20**). In a sharp rebuke of the agency, the court noted that Congress had extensively and specifically regulated discrimination under the Equal Credit Opportunity Act in ways that were contrary to the "new" expanded authority that the CFPB attempted to claim. *See* Opinion and Order at pp. 14-16.

In reaching its decision, the court extensively discussed and rejected CFPB's arguments under the APA. *See* Opinion And Order at pp. 5-9. The court granted additional protection to the plaintiffs' members by issuing a final judgment prohibiting the CFPB from "pursuing any examination, supervision, or enforcement action against any member of a plaintiff organization based on the CFPB's interpretation of its UDAAP authority." *See* Final Judgment, DK#42.[8]

The APA aspects of this case raise the core issue decided adversely to the CFPB in the *PHH Corp.* and the *Chamber of Commerce* decisions– has the CFPB's expansion of its delegated authority in its Final Rule gone too far by demanding the reporting of data far in excess of what the statute contemplates or permits? Such excess reporting demands would plainly violate the APA, and this claim is squarely within the scope of the Plaintiffs' Count 2.[9] Plaintiffs have demonstrated a sufficient likelihood of success on the merits under both the CFPB's funding and the APA to warrant their requested preliminary injunction.

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[8]This is viewed as additional protection to the plaintiffs in *Chamber of Commerce* based upon concerns that the CFPB would attempt to improperly apply its claimed UDAAP authority even with its formal examination manual being invalidated, a point that underscores the Plaintiffs' concerns about improper enforcement of the Final Rule.

[9]Count 3 and Count 4 involve failures to consider and respond to comments on the proposed rule and a defective cost-benefit analysis. The two counts sufficiently discuss the failures, including case citations, to further support a finding that the Plaintiffs have raised sufficient questions under the APA.

III. The Plaintiffs Have Shown Irreparable Harm.

The CFPB's audacity in opposing preliminary injunctive relief is demonstrated by its statement on page 16 of the CFPB Opposing Memo claiming that "None of the Plaintiffs have provided specific evidence establishing a likelihood that they will be imminently harmed without preliminary relief." The CFPB makes this bold assertion despite every one of the Plaintiff banks submitting a sworn declaration from its President (or First Southern's Vice President For Loan Compliance) advising that it "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.

These statements are amplified by the KBA's declaration that 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. The KBA's declaration notes that 32 bank representatives paid $195 each to attend a seminar on the necessary compliance work on March 29, 2023. KBA Decl. ¶8. 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.

The Plaintiffs' declarations all give specific and significant dollar amounts to their compliance costs just to set up the systems to comply with the Final Rule. What is uncontroverted is that the categories of expenses and amounts are entirely consistent with the CFPB's own extensive discussion of the tens of millions of dollars of set-up costs that its own Final Rule discusses as having to be incurred by financial institutions dealing with the Final Rule. *See* 88 Fed. Reg. at pp. 35,507 to 35,510. In fact, the KBA's declaration states that the "amount for initial compliance costs" are "approximately $100,000 per community bank". *See* KBA Decl. ¶10. The specifics discussed in each of the Plaintiff banks' declarations easily exceed this amount.

Attempting to distract the Court from this evidence, the CFPB desperately latches on the candid declaration of The Farmers Bank of Milton, Kentucky that "it is possible that [it] may not reach the 100 covered credit threshold initially." Farmers Bank Decl. ¶6. *See* CFPB Opposing Memo at p. 17.10 Yet even that declaration states that it "will need to develop and put in place additional internal reporting systems to determine exactly the number of covered credit transactions it had and will have in 2022 and 2023." Farmers Bank Decl. ¶6. Its declaration states that it "has already begun working on how it will need to change its operations in order to comply with the Small Business Lending Rule." *Id.* at ¶7. It notes that it "has already had three employees attend multiple trainings" and "employee costs have already been incurred and will continue". *Id.* It estimates the FTE costs of its initial compliance team "will easily be in excess of $75,000.00 per year." Id. at ¶8. This does not include software upgrade costs (¶11), training costs of $5,000 (¶12), and time spent by the bank's President (the Declarant, David Hertz), and its Compliance Officer, Jennifer Lippy, which "is already affecting [their] work."

[10]The other banks explicitly and reasonably expect to reach either the 100 or 500 covered transaction thresholds.

The CFPB further impugns the integrity of the Plaintiffs by arguing that because Compliance Alliance is partially owned and endorsed by the KBA, its recommendation to "commence compliance preparation steps immediately" is suspect. *See* CFPB Opposing Memo at p. 18, n. 6. The CFPB presents no declaration from any compliance expert recommending a bank delay working on Final Rule compliance. Nor does the CFPB present to the Court any guidance bulletin or other statements by it concerning the Final Rule recommending delay. Rather, when it promulgated the Final Rule, the CFPB expressly stated that the "final rule broadly permits financial institutions to work with third parties, including industry consortia, to develop services and technologies to aid in collecting and exporting data." *See* 88 Fed. Reg. at p. 35,153. Yet, when these "industry consortia" advise financial institutions to start working now, and the Plaintiffs incur the costs of doing so, the CFPB attacks the recommendation as a basis to urge this court to deny justified injunctive relief.

The CFPB's audacity is amplified by its assertion that the Plaintiffs' work to comply with the Final Rulle is a "self-inflicted harm". *See* CFPB Opposing Memo at p. 18. The harm arises from the CFPB's excessive Final Rule. *See Commonwealth v. Biden*, 57 F.4th 545, 555 (6th Cir. 2022) (observing that an unwanted Covid-19 vaccination clause in a government contract mandated by the President Biden's executive order was attributable to "the challenged executive action" not the contractor's compliance with the order).

The CFPB is also disingenuous when its only citation to *Commonwealth v. Biden*, 57 F.4th 545 (6th Cir. 2023), is its contention that the decision requires a showing of "billions of dollars" of compliance costs to support a preliminary injunction. *See* CFPB Opposing Memo at pp. 18-19. 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." While 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 actual opinion in *Biden* did not require compliance costs of such magnitude. The Sixth Circuit did not even state an amount. It noted, rather, that the compliance costs were "designating individuals to distribute information about the vaccination mandate and to collect documentation for the purpose of insuring compliance." *Id.* at p. 556. These costs are similar to the types of compliance costs facing the Plaintiffs under the Final Rule. Moreover, if significant amounts need to be shown, 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.

The CFPB also improperly discounts the declarations from the Plaintiff explaining the competitive disadvantages they face if ABA-member banks are protected by the Texas Preliminary Injunction while they do not receive protection. *See* CFPB Memo at p. 20. All of the Declarations from the Plaintiff banks contain the same, and obvious, statement equivalent to the Declaration 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.

The CFPB begins its argument by contending that "Plaintiffs do not cite a single case supporting this claim. *See* CFPB Opposing Memo at p. 20. This is a straw man. The damage is obvious, common sense, and supported by sworn declarations. There is no need to cite another court's opinion. *Cf. Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1169 (10th Cir. 2022) ("there need not be a case directly on point for a right to be clearly established").

Moreover, how a competitor or competition is affected is regularly considered in awarding injunctive relief. The federal government regularly presents evidence of effects on competition to obtain an injunction to prevent transactions it considers anti-competitive. *See United States v. Tribune Publishing Co.*, No. 2:16-cv-01822, 2016 U.S. Dist. LEXIS 54494 (C.D. Cal. 03/18/16) (granting restraining order enjoining Tribune Publishing Co. from acquiring Freedom Communications because of anticompetitive impacts). In the civil area, preliminary injunctions are regularly entered when unfair competition is shown in violation of a non-compete agreement. *See Hall v. Edgewood Partners Ins. Center, Inc.*, 878 F.2d 524 (6th Cir. 2017). The adverse competitive effects and harm to the Plaintiffs of not being protected by an injunction against the Final Rule that is protecting their competitors is irreparable harm that the Plaintiffs have established.

In its Footnote 8, the CFPB argues that this Court should penalize the Plaintiffs for not filing their lawsuit sooner. *See* CFPB Memo at p. 20 n.8. Yet, the Plaintiffs filed their lawsuit on August 21, 2023, which was before the Final Rule's effective date of August 29, 2023. *See*

12 C.F.R. §1002.14(a). There is nothing prejudicial about the Kentucky plaintiffs waiting to see if the Texas Preliminary Injunction, issued on July 23, 2023, would apply to protect all covered financial institutions or just the parties before the Southern District of Texas. When plaintiffs learned that it would not, they filed their Complaint in less than a month. The CFPB presents no argument that it has been somehow prejudiced by the timing of either the Texas or Kentucky litigation.

The court in the Texas Preliminary Injunction ruling easily dismissed the CFPB's argument of insufficient injury, and the Court in the *Chamber of Commerce* decision did likewise.

> [P]laintiffs' declarations establish that multiple members of each association, right now, are regulated by the CFPB and are spending money now because of the agency's new examination directives. Plaintiffs rely, not on what an unidentified member might do in the future, but on what specific members are doing right now. Nothing more is required.

See Chamber of Commerce, Opinion And Order at p. 11. The KBA and the Plaintiff banks are no different, and they have all demonstrated irreparable harm.

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

The CFPB argues that the public will benefit from the excessive and unauthorized data it wants to collect. On page 22, it cites to its own Federal Register notice as "proof" of those benefits. *See* CFPB Opposing Memo at pp. 22-23. As a preliminary matter, such citation is not proof of the type required to be submitted to a court deciding a preliminary injunction motion. The CFPB's *ipse dixit*[11] statements do not prove claimed public benefits of the Final Rule, particularly when Final Rule dramatically exceeds the statutory factors to be reported, and when Plaintiffs have submitted declarations showing the underestimated costs, adverse economic effects, and overstated claimed

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[11] "Ipse dixit" is Latin for "he himself said it" and is nothing more than "a bare assertion resting on the authority of" the speaker." *See* Blacks Law Dictionary, "Ipse Dixit" p. 743 (5th ed. 1979).

benefits of the CFPB's gross expansion of the scope of small business lending data collection. *Cf. Phoenix Process Equip. Co. v. Capital Equip & Trading Corp.*, 624 F.Supp.3d 808, 816 (W.D.Ky. 2022) ("Court is not required to admit expert testimony that is connected to existing data only by the *ipse dixit* of the expert.").

The sworn Declaration of Tim Schenk of the KBA filed with the Plaintiffs' motion satisfies the requirements of 28 U.S.C. §1746 and expressly states his view that that the adverse consequences of the Final Rule described in the KBA's 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* Declaration Of Timothy A. Schenk at ¶5 (motion Exhibit 15).

There is a related point. If the Texas Preliminary Injunction is in force but there is not an injunction protecting those KBA-member banks which are not members of the ABA, the data that the CFPB will be collecting will be geographically constrained and not encompassing the broader financial marketplace. Setting public policy based on skewed data is, at best, questionable. Avoiding this bias and inaccuracy further supports issuance of the requested preliminary injunction.

Another public interest aspect that the CFPB acknowledges are the specific effects on a loan-by-loan basis which also show the harm to the public of not issuing the preliminary injunction. In their supporting memorandum, the Plaintiffs note that the public would 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 states 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* Plaintiffs' Supporting Memo at p. 17 (citing

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. The CFPB acknowledges on page 24 of its memo the appropriateness of considering "higher loan costs."

Another key "balancing" aspect is that Equal Credit Opportunity Act already declares that it "shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction --- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);". *See* 15 U.S.C. §1691(a)(1). A private right of action is created by 15 U.S.C. §1691e, and administrative enforcement is provided for by 15 U.S.C. §1691c. Nothing in the Plaintiffs' tendered injunction restricts these enforcement mechanisms for specific credit applicants that may be illegally discriminated against based on these protected classifications. The public interest in preventing specific lending discrimination is sufficiently protected by the ECOA during the tendered preliminary injunction.

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 should be granted.

Respectfully submitted,

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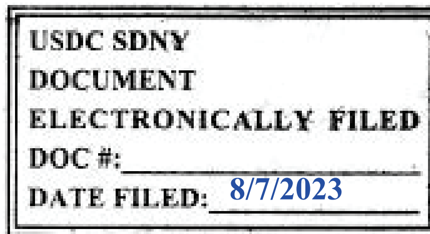

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER FINANCIAL PROTECTION BUREAU and THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiffs,

-v.-

CREDIT ACCEPTANCE CORPORATION,

Defendant.

23 Civ. 00038 (JHR)

MEMORANDUM OPINION & ORDER

JENNIFER H. REARDEN, District Judge:

On January 13, 2023, Defendant Credit Acceptance Corporation moved to stay this action pending the U.S. Supreme Court's decision in *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.*, No. 22-448 ("*CFSA*"). ECF No. 18 (Mot.). Plaintiffs Consumer Financial Protection Bureau (the "CFPB") and the New York State Attorney General (the "OAG") oppose Defendant's Motion. ECF No. 20 (Opp.). For the reasons set forth below, Defendant's motion is GRANTED.

I. BACKGROUND

The CFPB and the OAG filed this action on January 4, 2023 pursuant to the Consumer Financial Protection Act of 2010 ("CFPA") and New York law. ECF No. 1 (Compl.). The CFPB and the OAG bring three of eight causes of action jointly under the CFPA, with the OAG solely alleging the remaining five causes of action under New York consumer protection laws and the Martin Act, N.Y. Gen. Bus. Law § 352 *et seq.* *Id.* ¶¶ 171-226. Underlying all eight claims are allegations that Defendant makes predatory auto loans to vulnerable consumers throughout the United States, including in New York, by, *inter alia*, saddling them with exorbitant interest rates

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and add-on products they cannot afford, while incentivizing auto dealers to sell cars at inflated prices. *See*, *e.g.*, *id.* ¶¶ 1-13.

Defendant argues that "[t]he constitutional questions raised in *CFSA* go directly to whether the CFPB may prosecute this action and, if the Fifth Circuit decision at issue in *CFSA* is affirmed, the CFPB's claims" in the instant case should be dismissed. Mot. 1. The essential question in *CFSA* is whether the Fifth Circuit correctly held that the CFPB's statutory funding mechanism violates the Constitution's Appropriations Clause, U.S. Const. art. I, § 9, cl. 7. *See* Petition for Writ of Certiorari ("Petition") at 10, *CFSA*, 143 S. Ct. 978 (2023) (No. 22-448) (mem.). The Petition filed by the CFPB, which was granted on February 27, 2023, asserts that the Fifth Circuit's decision "calls into question virtually every action the CFPB has taken in the 12 years since it was created" and will "frustrate[]" the CFPB's ability to "administer[ ] and enforc[e] consumer financial protection laws." *Id.* at 10, 29.

On March 14, 2023, Defendant moved to dismiss the CFPB's claims on the basis that, *inter alia*, the CFPB's funding mechanism is unconstitutional under the Appropriations Clause. ECF No. 35 (Def.'s Br.) at 16-17.[1] That motion is now fully briefed, and amicus briefs have been filed in support of Defendant's motion and Plaintiffs' opposition, respectively. *See* ECF Nos. 52, 53, 57, 58.[2] Defendant argues that a stay would avoid unnecessary litigation concerning "soon-to-be-settled constitutional issues" before the Supreme Court in *CFSA*. Mot. 4. Defendant also

[1] Defendant also seeks dismissal of the OAG's claims, including claims raised jointly by the OAG and the CFPB. Def.'s Br. 17-50.

[2] On March 13, 2023, the Court granted the parties' joint request, submitted while the motion to stay was pending, to approve the parties' proposed schedule for briefing the motion to dismiss and to file excess pages. ECF No. 32. Even though Defendant's motion to dismiss is now fully submitted, "a court has inherent authority to stay an action, and that authority may be exercised at any appropriate stage of the proceedings." *Readick v. Avis Budget Grp.*, No. 12-CV-3988 (PGG), 2014 WL 1683799, at *6 (S.D.N.Y. Apr. 28, 2014). "Given that this case is in its initial stages, and that no discovery has taken place," this "is an appropriate point to grant a stay." *Id.*

maintains that continued litigation would create uncertainty as to whether, and how, discovery (among other aspects of the case) could be limited to claims asserted by the OAG. *Id.* at 5. Finally, Defendant contends that proceeding with this lawsuit under current circumstances would lead to "duplication" and "extreme inefficiencies" due to the substantial overlap between the CFPB's and the OAG's claims. *Id.*; *see* ECF No. 25 (Def.'s Reply) at 2. Defendant points to *CFPB v. Moneygram International, Inc.*, an action in this District brought by the CFPB and the OAG—the same plaintiffs as here—that has been stayed pending the Supreme Court's decision in *CFSA*. *See* Mot. 4 (citing No. 22-CV-03256 (KPF), 2022 WL 17547438 (S.D.N.Y. Dec. 9, 2022) (staying action pending ruling on the Petition in *CFSA*)); No. 22-CV-03256, ECF No. 54 (S.D.N.Y. Mar. 2, 2023) (extending stay following the Supreme Court's grant of the Petition).

Plaintiffs oppose a stay on the ground that the CFPB's funding does not bear on the OAG's ability to pursue all eight causes of action—which, according to Plaintiffs, distinguishes the instant case from *Moneygram*. Opp. 1, 3. Moreover, Plaintiffs dispute Defendant's judicial efficiency concerns on the basis that the scope of the alleged CFPA violations "are the same inside and outside [of] New York," and "[a]ny concern about discovery specific to non-New York consumers . . . could easily be addressed by the parties" without a stay. *Id.* at 3-4. Plaintiffs also maintain that a stay would harm the public's interest in "vigorous enforcement of consumer protection laws." *Id.* at 4 (quoting *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 205 (D.D.C. 2017)). Finally, Plaintiffs assert that Defendant will not be harmed absent a stay, as it will only incur the "normal costs of litigation." *Id.* at 5.

The parties have filed several letters on developments relating to *CFSA* and other decisions addressing the constitutional challenge therein. *See* ECF Nos. 28, 29, 30, 42, 43, 46, 49, 50, 60, 61. On March 23, 2023, the Second Circuit rejected a challenge to the constitutionality

of the CFPB's funding structure under the Appropriations Clause. *See CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 181-83 (2d Cir. 2023). On April 7, 2023, in light of the Second Circuit's decision in *Crystal Moroney* and the Supreme Court's grant of certiorari in *CFSA*, the *Moneygram* court denied Plaintiffs' request to lift the stay in that case. *See* No. 22-CV-03256, ECF No. 57 at 4-5 (S.D.N.Y. Apr. 7, 2023) ("Because the Supreme Court is now guaranteed to hear *CFSA* and may resolve the case early in its term, the Court still believes that the interests of the parties, the public, and the courts favor maintaining the stay in this case."). On June 28, 2023, the Second Circuit stayed its mandate in *Crystal Moroney* pending the filing of a petition of a writ of certiorari. *See* No. 20-3471, ECF No. 165 (2d Cir. June 28, 2023). Argument is being heard on October 3, 2023, and the Supreme Court is expected to issue a decision in its 2024 term. *See CFSA*, No. 22-448; *see also* ECF No. 29; *Moneygram*, No. 22-CV-03256, ECF No. 57 at 4.

II. LEGAL STANDARD

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 96 (2d Cir. 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). In determining whether to enter a stay, "courts in this [D]istrict consider five factors: '(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.'" *Loftus v. Signpost Inc.*, 464 F. Supp. 3d 524, 526 (S.D.N.Y. 2020) (quoting *Kappel v. Comfort*, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996)). "These factors are to be balanced, with the principal objective being

the avoidance of unfair prejudice." *Am. Steamship Owners Mut. Prot. & Indem. Ass'n v. Lafarge N. Am., Inc.*, 474 F. Supp. 2d 474, 482 (S.D.N.Y. 2007), *aff'd in part, vacated in part sub nom. N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102 (2d Cir. 2010). "In addition, a court may also properly exercise its staying power when a higher court is close to settling an important issue of law bearing on the action." *Sikhs for Just. v. Nath*, 893 F. Supp. 2d 598, 622 (S.D.N.Y. 2012). This includes cases where "the issues . . . are [not] necessarily controlling on the action before the court." *Id.* (quoting *Goldstein v. Time Warner N.Y.C. Cable Grp.*, 3 F. Supp. 2d 423, 438 (S.D.N.Y. 1998)).

III. DISCUSSION

The aforementioned factors favor staying this action pending resolution of the Supreme Court's decision in *CFSA*. First, although a stay will delay Plaintiffs' litigation, it will not "unduly prejudice" Plaintiffs and may, in fact, "advance [their] interest[s] by providing the Court with guidance as to the quality, nature, and validity of their claims." *In re MPM Silicones, L.L.C.*, No. 15-CV-2280 (NSR), 2017 WL 4386378, at *2 (S.D.N.Y. Oct. 2, 2017). As to the second factor, Defendant persuasively argues that its "interests" are met by a stay. *Loftus*, 464 F. Supp. 3d at 526; *see* Mot. 4-5. Awaiting the Supreme Court's resolution in *CFSA* will clarify the legal issues here and may help Defendant avoid unnecessary litigation costs. *See*, *e.g.*, *In re MPM Silicones*, 2017 WL 4386378, at *2; *see also*, *e.g.*, *Readick*, 2014 WL 1683799, at *5 (finding defendant would be prejudiced by continued litigation of action, where failure to grant a stay would result in "potentially duplicative and costly discovery").

Third, a stay is "in the interests of the court[]." *Loftus*, 464 F. Supp. 3d at 526. "Postponing the final disposition of a case pending an upcoming decision by the United States Supreme Court is a practice exercised by the Second Circuit in the interest of judicial economy."

Jugmohan v. Zola, No. 98-CV-1509 (DAB), 2000 WL 222186, at *5 (S.D.N.Y. Feb. 25, 2000). A stay will "best serve the interests of the courts by promoting judicial efficiency" and will "minimize[e] the possibility of conflicts between different courts." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, 630 F. Supp. 2d 295, 304 (S.D.N.Y. 2009) (quoting *N.Y. Power Auth. v. United States*, 42 Fed. Cl. 795, 799 (Fed. Cl. 1999)). A stay is also warranted because the Supreme Court's decision "could contain guidance that would allow this litigation to proceed on a reasonable and efficient basis." *Loftus*, 464 F. Supp. 3d at 527; *see Sikhs*, 893 F. Supp. 2d at 622 ("[I]t 'would be an inefficient use of time and resources of the court and the parties to proceed in light of a pending U.S. Supreme Court decision,' particularly where that decision "'may not settle every question of fact and law' before this Court, 'but in all likelihood it will settle many and simplify them all.'" (quoting *In re Literary Works in Elec. Databases Copyright Litig.*, No. 00-CV-6049 (GBD), 2001 WL 204212, at *3 (S.D.N.Y. Mar. 1, 2001))).

If the Court denied Defendant's request for a stay and adjudicated the pending motion to dismiss, it would need to decide Defendant's constitutional challenge to the CFPB's authority to pass and enforce the laws directly implicated by the three federal claims in this case.[3] Plaintiffs state that the Court "could choose to defer ruling on that issue to await further developments" in the Supreme Court case, "while allowing the rest of this case," including discovery, "to proceed." Opp. 4. However, where, as here, a forthcoming decision in another action may dispose of at

[3] The Second Circuit's decision in *Crystal Moroney*, 63 F.4th at 181-83, does not change this analysis, as the Supreme Court ultimately will decide whether the CFPB's funding mechanism is unconstitutional. *See Kennedy v. Aegis Media Ams., Inc.*, No. 20-CV-3624 (GHW), 2021 WL 4077946, at *2 (S.D.N.Y. Sept. 7, 2021) (finding stay was warranted where the impact of a Second Circuit decision "may be temporary," as it was the Supreme Court "that [would] ultimately 'settl[e] an important issue of law bearing on the action'" (quoting *Sikhs*, 893 F. Supp. 2d at 622)).

least some of Plaintiffs' claims, proceeding with "discovery . . . will serve little or no purpose" and will not advance interests of judicial economy. *Readick*, 2014 WL 1683799, at *5; *see Loftus*, 464 F. Supp. 3d at 527 ("A stay . . . conserves judicial resources and avoids unnecessary expense for a cause of action that may ultimately be rendered moot.").

Although Plaintiffs suggest, without elaborating, that "[a]ny concern about discovery specific to non-New York consumers" implicating federal issues "could easily be addressed by the parties," Opp. 4, premature discovery potentially would be "duplicative and costly" in this case, *Readick*, 2014 WL 1683799, at *5. Plaintiffs concede that there is substantial factual and legal overlap among the New York and non-New York-specific causes of action (*see* Opp. at 3-4), each of which alleges that Defendant engaged in the same core deceptive auto lending practices, employed throughout the United States, in violating consumer protection laws. *Compare* Compl. ¶¶ 11, 171-187, 213-223 (Plaintiffs' federal consumer protection law claims), *with id.* ¶¶ 12, 188-212 (OAG's claims under N.Y. Exec. Law § 63(12) and N.Y. Gen. Bus. Law § 349), *and id.* ¶¶ 13, 224-226 (OAG's claim under the Martin Act, N.Y. Gen. Bus. Law § 352 *et seq.*).

Plaintiffs' argument that a stay would "needlessly postpone" this action "without benefit to judicial economy" because the question before the Supreme Court solely implicates the CFPB's authority and "has no bearing on [the OAG's] ability to pursue . . . its claims"—and, therefore, is distinguishable from *Moneygram*, 2022 WL 17547438—is misplaced. Opp. 3. As *Moneygram* and numerous other decisions in this Circuit make clear, a stay may be warranted even if all of "the issues in [a separate] proceeding[] are [not] necessarily controlling on the action before the court." *Moneygram*, 2022 WL 17547438, at *2 (quoting *Sikhs*, 893 F. Supp. 2d at 622). Instead, as in *Moneygram*, "the interests of the court[] and judicial efficiency would be served" by a stay

of this case, as "a potential Supreme Court decision may resolve or otherwise bear on important issues" implicated by Defendant's motion to dismiss. *Id.*; *see* No. 22-CV-03256, ECF No. 57 at 4 (finding that a "continued stay," rather than deciding defendants' motion to dismiss and allowing discovery to continue, was "the most efficient use of both the parties' and the Court's resources").

Finally, a stay is in "the interests of persons not parties to the civil litigation" and in "the public interest." *Loftus*, 464 F. Supp. 3d at 526. Proceeding with this case "could well lead to unnecessary litigation that is time-consuming for this court, as well as for any third parties" who might be impacted by it, including through unnecessary or inefficient discovery. *In re MPM Silicones*, 2017 WL 4386378, at *2; *see Heiser v. Deutsche Bank Tr. Co. Ams.*, No. 11-CV-1608 (AJN) (MHD), 2012 WL 2865485, at *5 (S.D.N.Y. July 10), *aff'd*, 2012 WL 5039065 (S.D.N.Y. Oct. 17, 2012) ("[C]onsiderations of judicial economy are frequently viewed as relevant to the public interest, and . . . they weigh against the investment of court resources that may prove to have been unnecessary."); *see*, *e.g.*, *Loftus*, 464 F. Supp. 3d at 527 (holding that stay was in the interests of third parties and the public, as it would avoid unnecessary litigation, including discovery). Plaintiffs' concern that a stay could impact consumers by creating the risk that "evidence will become stale" is mitigated by the parties' obligations to preserve potentially relevant documents and the likelihood that the stay will be of a relatively short duration. Opp. 5 (quoting *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr.*, 490 F.3d 718, 724 (9th Cir. 2007)); *see Loftus*, 464 F. Supp. 3d at 527.[4]

[4] Plaintiffs' cases purportedly supporting the proposition that a stay would harm the public are unavailing. *See* Opp. at 4-5. In *John Doe Co.*, the court held that "the public would *not* be significantly affected" by a stay. 235 F. Supp. 3d at 206 (emphasis added). Meanwhile, in *Blue Cross & Blue Shield*, the stays challenged on appeal were "indefinite and expected to be lengthy," and "could easily last as long as" five or six years, or "even longer." 490 F.3d at 724.

Although Plaintiffs correctly note that the public has an interest in enforcement of consumer protection laws, Opp. 4, they do not deny that the Supreme Court's ruling could substantially impact their ability to proceed with this action. *See* Petition at 29, *CFSA*, 143 S. Ct. 978 (No. 22-448) (citing requests for dismissal and similar relief in enforcement cases) (asserting that holding the CFPB's funding mechanism unconstitutional would have "immense legal and practical significance," and "frustrate[]" the CFPB's ability to "administer[ ] and enforc[e] consumer financial protection laws"); Brief for New York et al. as Amici Curiae in Support of Petitioners at 16-17, *CFSA*, 143 S. Ct. 978 (No. 22-448) (citing *Moneygram*, 2022 WL 17547438) (contending that "[t]he States and their residents could stand to lose the benefit of the CFPB's critical enforcement, regulatory, and informational functions if the decision below stands"). Any potential harm to the public caused by delaying this action is outweighed by the benefit to consumers in proceeding in a streamlined fashion. *See*, *e.g.*, *Heiser*, 2012 WL 2865485, at *5 (holding that a stay "would not amount to a denial" of the rights of terrorism victims and of the public's interest in deterring future attacks but would instead "facilitate the streamlining of th[e] case, effectively advancing justice for . . . victims").

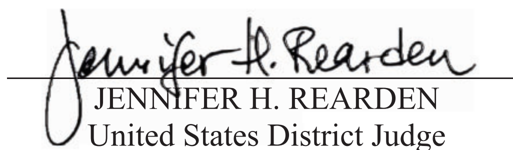
Here, Plaintiffs assert that any stay likely will last, at the latest, until the end of the Supreme Court's 2024 term. *See* ECF No. 29.

IV. CONCLUSION

The Clerk of Court is directed to mark this case as STAYED and to terminate ECF No. 18. By the earlier of November 3, 2023 or one week after a major development in the *CFSA* case, the parties shall file a joint letter updating the Court.

SO ORDERED.

Dated: August 7, 2023
New York, New York



JENNIFER H. REARDEN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

No. 6:22-cv-00381

Chamber of Commerce of the United States of America et al.,
Plaintiffs,

v.

Consumer Financial Protection Bureau et al.,
Defendants.

OPINION AND ORDER

Plaintiffs sue the Consumer Financial Protection Bureau and its director, Rohit Chopra, seeking relief from the agency's direction that its examiners must scrutinize companies for discrimination against unspecified protected classes and for how well companies introspect about statistical disparities in data concerning their business practices. Plaintiffs allege that the new examination directive must be vacated because the agency's funding structure violates the Appropriations Clause of the Constitution, because it exceeds the agency's statutory authority, and because it violates the Administrative Procedure Act substantively and procedurally.

Plaintiffs move for summary judgment in their favor on all claims.[1] Defendants move to dismiss the case or, alternatively, for summary judgment in their favor on the non-constitutional claims.[2] For the reasons given below, plaintiffs' motion for summary judgment is granted, and defendants' motions are denied.

Background

1. On the heels of the 2008 financial crisis, Congress passed the Dodd–Frank Act.[3] It created the Consumer Financial Protection Bureau—an independent agency charged with ensuring that

[1] Doc. 17. In this opinion, citations to pages of docket entries are to the ECF-assigned page numbering, not the parties' assigned page numbering.

[2] Doc. 22.

[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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consumer-debt products are safe and transparent.[4] Congress tasked the Bureau with administering 19 existing federal statutes, covering everything from credit cards to car payments to student loans.[5] Congress also banned regulated companies from engaging in "unfair, deceptive, or abusive acts or practices."[6] That conduct is commonly referred to as "UDAAP."

The Bureau has authority to name specific acts or practices in the consumer-finance sector as unfair, deceptive, or abusive.[7] The Bureau also has authority to issue "requirements for the purpose of preventing such acts or practices."[8] And the Bureau has authority to compel reports and examine companies on how their procedures guard against prohibited conduct.[9] Congress did not define what makes conduct "deceptive" but did define factors governing what makes conduct "unfair" or "abusive."[10]

2. The Bureau's examination practices are spelled out in its Supervision and Examination Manual. As the agency states: "The manual describes how we supervise and examine these companies and gives our examiners direction on how to assess compliance with federal consumer financial laws."[11]

The manual first lays out the agency's general process for examining a company and its internal compliance systems.[12] That examination can be far-reaching. Agency examiners can request internal company data, interview a company's managers and employees, and observe operations at company facilities.[13]

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[4] *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020).
[5] *Id.* at 2200.
[6] 12 U.S.C. § 5536(a)(1)(B).
[7] *Id.* § 5531(b).
[8] *Id.*
[9] *Id.* §§ 5514(b)(1), 5515(b)(1).
[10] *Id.* § 5531(c), (d).
[11] CFPB, Supervision & Examinations, https://www.consumerfinance.gov/compliance/supervision-examinations (last visited Sept. 8, 2023).
[12] CFPB Supervision & Examination Manual, Part I.A, Supervision and Examination Process: Overview (Mar. 2017), Doc. 1-4.
[13] *Id.* at 11.

The manual next directs examiners on particular provisions of law. As relevant here, the manual directs officials on how to examine a company's compliance with, and procedures surrounding, the UDAAP prohibition.[14] Examiners are allowed to obtain and review a company's training manuals, written policies, procedure manuals, internal-audit materials, agreements with affiliates, records regarding software development and algorithms, and customer-demographics information.[15] When agency examiners believe they have found a violation—or inadequate internal monitoring to catch violations—the Bureau can pursue enforcement through administrative process, lawsuits, and referrals to other regulators.[16]

3. Last year, the Bureau announced that it considers discrimination to be a UDAAP and will begin examining for discrimination itself and for whether companies are adequately "testing for" discrimination in their advertising, pricing, and other activities.[17] A press release summarized the change: examiners must now "require supervised companies to show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups."[18]

The manual now directs examination of whether a company regularly analyzes all of its decision-making processes and data for discrimination. Examiners must now determine whether:

> i. The entity has a process to prevent discrimination in relation to all aspects of consumer financial products or services the entity offers or provides, which includes the evaluation of all policies, procedures and processes for

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[14] CFPB Supervision & Examination Manual, Part II.C, Unfair, Deceptive, or Abusive Acts or Practices (Mar. 2022), Doc. 1-2 ("UDAAP Manual").

[15] *Id.* at 11–12.

[16] CFPB Supervision & Examination Manual, Part I.A, Examinations and Targeted Reviews, at 17 (Feb. 2019), Doc. 1-5; 12 U.S.C. §§ 5515(e)(1)(C), 5563, 5564, 5565.

[17] Doc. 17-11 at 2.

[18] *Id.* at 2; *see* Doc. 1 at 12–13 ¶¶ 48–52 (reviewing the challenged manual revisions).

discrimination prior to implementation or making changes, and continued monitoring for discrimination after implementation.

j. The entity's compliance program includes an established process for periodic analysis and monitoring of all decision-making processes used in connection with consumer financial products or services, and a process to take corrective action to address any potential UDAAP concerns related to their use, including discrimination.

2. . . .

k. The entity has established policies and procedures to mitigate potential UDAAP concerns arising from the use of its decision-making processes, including discrimination.[19]

Examiners will review not only a company's internal controls but also its controls on third-party contractors and service providers.[20] Those third-party vendors, too, must not engage in practices "that lead to . . . disproportionately adverse impacts on a discriminatory basis."[21] To this end, examiners are directed to obtain companies' algorithms and customer demographics.[22] So agency examiners now have a UDAAP mandate to review for both purposeful discrimination and whether a company is sufficiently introspective about the impacts of business practices on certain groups relative to other groups.

4. Plaintiffs are trade associations that object to the new examination mandate. They allege that, to come into compliance with the new directives, their members must update their internal policies and programs at significant cost.[23] The new directives are alleged to be invalid because the agency's funding violates the Appropriations Clause, because they exceed the agency's statutory

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[19] UDAAP Manual, Doc. 1-2, at 13–14.
[20] *Id.* at 17.
[21] *Id.* at 18.
[22] *Id.* at 11–12.
[23] Doc. 1 at 15.

authority, because their substance is arbitrary and capricious, and because they issued without required notice-and-comment procedure.[24]

The parties conferred and agreed that "no discovery is needed prior to this Court's resolution of the parties' respective dispositive motions"[25] and that "judicial review is based solely on the administrative record."[26] For that reason, the parties sought to be excused from the requirement that motions for summary judgment list undisputed facts. Based on their concession, the court excused that requirement.[27] Any factual statements in this opinion are thus taken from uncontradicted representations in the briefing and the attached exhibits.

Defendants move to dismiss the case, arguing that the court lacks jurisdiction because of the sovereign's immunity from suit, that plaintiffs lack standing, and that venue has been improperly laid here. In the alternative, defendants move for summary judgment on the non-constitutional claims while stipulating that plaintiffs would prevail on the merits of their Appropriations Clause claim under Fifth Circuit precedent.[28] Plaintiffs, in turn, move for summary judgment in their favor on all claims.[29]

Analysis

1. Sovereign immunity from suit

Defendants move to dismiss the case as barred by the federal government's sovereign immunity from suit. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."[30] Defendants argue that the waiver of sovereign immunity in 5 U.S.C. § 702 does not apply to any of plaintiffs'

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[24] *Id.* at 17–20.
[25] Doc. 15 at 3.
[26] *Id.* at 3 (quoting D.D.C. Local Civ. R. 7(h)(2)).
[27] Doc. 16.
[28] Doc. 22.
[29] Doc. 17.
[30] *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

claims, whether they arise from the APA or not, because there is no "final agency action" within the meaning of 5 U.S.C. § 704.[31]

That position assumes that § 704's "final agency action" requirement limits the immunity waiver in the first place. But some tension exists in Fifth Circuit case law about precisely what language in § 702 waives sovereign immunity and whether that waiver includes limits imported from elsewhere. The circuit's 1980 decision in *Sheehan v. Army & Air Force Exchange Service* joined the Third Circuit's view that § 702's second sentence waives sovereign immunity broadly, without atextual limits such as an implied exclusion of common-law claims.[32] That apparently became the uniform circuit view by 2013.[33] In 2014, however, the Fifth Circuit in *Alabama–Coushatta Tribe of Texas v. United States* held that the "agency action" standard from § 702's first sentence and the "final agency action" standard from § 704 are "requirements for establishing a waiver of sovereign immunity."[34] For that proposition, the Fifth Circuit cited the Supreme Court's *Lujan* decision even though *Lujan* nowhere mentions sovereign immunity.[35]

It may be that, under the rule of orderliness, the circuit's earlier *Sheehan* position controls over its later *Alabama–Coushatta* position. But the parties do not brief the rule of orderliness or press the issue whether the "agency action" standard goes to jurisdiction or the merits. So the court will not rule on that issue.

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[31] Doc. 22 at 19–27.

[32] 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982).

[33] *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013) ("we now join all of our sister circuits who have [addressed the issue] in holding that § 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of 'agency action' or 'final agency action' as set forth in § 704").

[34] 757 F.3d 484, 486 (5th Cir. 2014).

[35] *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 885 (1990). *See generally Bowen v. Massachusetts*, 487 U.S. 879, 896, 899 (1988) (reviewing the amendment that added § 702's second sentence, including an "especially convincing" summary by Judge Bork); *Amin v. Mayorkas*, 24 F.4th 383, 389 n.2 (5th Cir. 2022) (suggesting that the court's view treating the finality requirement as jurisdictional is out of step with Supreme Court rulings).

Plaintiffs do note that, even under *Alabama–Coushatta*'s more restrictive view of the waiver, "final" agency action within the meaning of § 704 is required only for a claim created by the APA.[36] In contrast to a claim under the APA for judicial review, courts need no statute creating a cause of action when asked to enjoin a federal official's actions as unconstitutional or beyond statutory authority.[37] That describes plaintiffs' claims seeking to enjoin Director Chopra from enforcing directives alleged to exceed his statutory authority and to be void due to unconstitutional funding. Insofar as those two claims seek an injunction and a declaratory judgment, those claims need only challenge "agency action" to fall within § 702's immunity waiver as interpreted in *Alabama–Coushatta* when brought by a qualifying plaintiff.

Defendants do not dispute that plaintiffs are adversely affected and aggrieved by the agency action here. The court agrees that they are. And the manual update qualifies as "agency action" because it meets at least the definition of a "rule"—a general agency statement of future effect, designed to prescribe law, policy, or agency procedure.[38] As the Fifth Circuit notes, "[t]he APA defines the term 'rule' broadly enough to include virtually every statement an agency may make."[39] The term includes both substantive rules, which must be issued with notice-and-comment

[36] *Ala.–Coushatta*, 757 F.3d at 489 (stating that, when a party seeks equitable relief from agency action "that arises completely apart from the general provisions of the APA," there is "no requirement of 'finality'"); *Apter v. HHS*, 2023 WL 5664191, at *6 (5th Cir. Sept. 1, 2023).

[37] *See, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (holding that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity" and does not rest upon a right of action implied from some positive text); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984) ("It is well-established that sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of the officials are alleged to be unconstitutional or beyond statutory authority.") (citing *Dugan v. Rank*, 372 U.S. 609, 621–23 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 646–48 (1962); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689–91 (1949)).

[38] 5 U.S.C. § 551(4).

[39] *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983).

procedure,[40] and non-substantive rules, which concern topics such as "internal agency organization or procedures; non-binding agency policy statements; and guidance documents interpreting existing rules."[41] The challenged manual provisions here, at a minimum, specify agency policy on examination of regulated companies. They are thus a "rule" and therefore "agency action."

Defendants do not dispute that the manual update is "agency action."[42] But they do dispute the finality of that agency action. Two conditions generally must be met for action to be "final":

> First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.[43]

The agency action here meets the first condition. It is not merely a proposed or interim measure. It marks the consummation of the agency's decisionmaking process and was issued to "guide our supervision of covered financial institutions."[44] Defendants do not dispute that point. They rely only on *Bennett*'s second prong.

The manual update also meets that second prong because it obligates agency personnel to act on a particular understanding of an "unfair . . . act or practice" in examining and supervising companies. As the Fifth Circuit explained in *Texas v. EEOC*, "Courts consistently hold that an agency's guidance documents binding it and its staff to a legal position produce legal consequences or determine rights and obligations, thus meeting the second prong of *Bennett*."[45] Here, the agency admits that it made changes to "the

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[40] *DOL v. Kast Metals Corp.*, 744 F.2d 1145, 1152–53 (5th Cir. 1984).

[41] *Apter*, 2023 WL 5664191, at *6 (quotation marks omitted).

[42] *See* Doc. 30 at 21 n.9.

[43] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up).

[44] Doc. 17-13 at 2; *see Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (holding that guidance is final if an agency intends to bind its staff to a particular legal position).

[45] *EEOC*, 934 F.3d at 441.

way in which examiners will look for violations" of the UDAAP prohibition.[46] For example, the revised manual "instruct[s] the examiner" to examine whether a company "engages in targeted advertising or marketing in a discriminatory way."[47] So the update limits examiner discretion and interprets a legal norm, satisfying the second prong as interpreted in *EEOC*.[48]

Defendants unsuccessfully attempt to analogize this case to *Amin v. Mayorkas* which decided, not whether a policy memo was "final" agency action, but what type of "rule" it was, legislative or interpretive.[49] The policy memo there "merely clarifie[d] the order in which agency adjudicators evaluate the evidence" and did not specify "new criteria" for any agency decision.[50] In contrast, the manual update here adopts a new "legal position" on the breadth of the UDAAP prohibition, binding agency officials to that position in deciding how to examine companies. It is like the action in *EEOC*, not in *Amin*.

Because the manual updates here are final agency action, they fall within § 702's waiver of sovereign immunity from the APA claims as interpreted in *Alabama-Coushatta*. And, as explained above, plaintiffs' equitable-relief claims asserting a lack of constitutional and statutory authority need not challenge agency action that is "final" to fall within that waiver. For those reasons, the motion to dismiss for lack of subject-matter jurisdiction is denied.

2. Article III's case-or-controversy requirement

Defendants next move to dismiss the case, or alternatively for summary judgment in their favor, because plaintiffs allegedly lack standing.[51] Defendants also move to dismiss the case for improper venue on the view that no plaintiff with standing resides in this

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[46] Doc. 22 at 8.
[47] *Id.* at 14.
[48] *EEOC*, 933 F.3d at 442.
[49] 24 F.4th at 392.
[50] *Id.*
[51] Doc. 22 at 16–19.

district.[52] Plaintiffs, in turn, move for summary judgment on all of their claims, including on their proof of standing.[53]

Only plaintiff needs to have standing for the court to issue relief to all plaintiffs against same defendant on the same legal theory—what the Fifth Circuit calls the same "claim."[54] When an association sues on behalf of its members, the association inherits the standing of any single member with standing, provided the lawsuit is germane to the organization's mission and the member's participation is unnecessary.[55] The latter showings are apparent and undisputed. Standing here thus requires showing that some particular member of any plaintiff association "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[56]

Plaintiffs make that showing through declarations establishing that their members are incurring costs to comply with the manual's new UDAAP provisions.[57] Defendants do not dispute that these costs count as injury in fact, that defendants caused them, or that the relief sought would remedy them.

Instead, defendants make only one argument about standing: Relying on the Supreme Court's decision in *Summers v. Earth Island Institute*,[58] defendants argue that no plaintiff has shown that an "identified member" suffers harm because some plaintiffs have used pseudonyms or common nouns to describe those members.[59] That argument fails. To start, at least one plaintiff has publicly named its harmed members.[60] In any event, defendants

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[52] *Id.* at 18–19.

[53] Doc. 29 at 12–18.

[54] *See R.J. Reynolds Tobacco Co. v. FDA*, 2022 WL 17489170, at *8 (E.D. Tex. 2022).

[55] *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

[56] *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019).

[57] Doc. 17-1 at 7–9 ¶¶ 14–22.

[58] 555 U.S. 488 (2009).

[59] Doc. 22 at 17.

[60] Doc. 17-3 at 25 (listing regulated members of the Consumer Bankers Association).

misunderstand *Summers*. It rejected the idea that an organization could show standing by a mere probability that some unidentified member would visit some unidentified small parcel of a large National Forest and be affected there by the Forest Service's decisions about the parcel.[61]

In contrast, plaintiffs here do not allege that some unidentified member of theirs might someday start offering financial services bringing it within CFPB oversight and then incur costs due to the manual provisions at issue. Rather, plaintiffs' declarations establish that multiple members of each association, right now, are regulated by the CFPB and are spending money because of the agency's new examination directives. Plaintiffs rely, not on what an unidentified member might do in the future, but on what specific members are doing right now. Nothing more is required.[62]

If defendants wanted to dispute the veracity of those declarations, defendants needed to either submit controverting evidence[63] or give specific reasons why they could not marshal such evidence in response to plaintiffs' motion for summary judgment.[64] But defendants did neither. So the evidence of plaintiffs' standing is uncontested.

If defendants had disputed the point and had served discovery requests seeking the names of plaintiffs' members who are suffering costs from the new manual provisions, the court might have compelled plaintiffs to disclose those members' names to defendants, perhaps under a protective order limiting those names to attorneys' eyes only. But the court itself does not need those members' names to find that the uncontradicted declarations credibly show that plaintiffs have identified members that are currently suffering cognizable harm from the agency action challenged here.

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[61] *Summers*, 555 U.S. at 497–98.

[62] *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982) (holding that a plaintiff must show "facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury").

[63] Fed. R. Civ. P. 56(c)(1)(A).

[64] Fed. R. Civ. P. 56(d).

The court thus denies defendants' motions to dismiss and for summary judgment premised on a lack of standing and holds that plaintiffs have standing. The court also denies defendants' motion to dismiss for improper venue because plaintiff Longview Chamber of Commerce is a resident of this district, plausibly alleged (and has now shown) standing, and sues a federal officer in a dispute not involving real property. In such a case, venue is proper in any district where the plaintiff resides.[65]

3. Appropriations Clause

Defendants concede that, if the court reaches the merits of the Appropriations Clause claim, it must enter summary judgment for plaintiffs given the binding force of the Fifth Circuit's decision in *Community Financial Services Association of America, Ltd. v. CFPB*.[66] Defendants have preserved their argument that the Fifth Circuit's decision there is wrong. But that decision controls in this court. The court thus grants summary judgment to plaintiffs on their Appropriations Clause claim.

4. Statutory authority

In the March 2022 manual update, the agency announced that UDAAPs "include[e] discrimination."[67] Plaintiffs challenge that update as exceeding the agency's statutory authority under the Dodd–Frank Act. The court agrees.

A few interpretive principles at the outset. First, the court interprets the Act without deference to the agency's position because defendants never request deference. As the Supreme Court has held, *Chevron* deference is forfeitable.[68] It is forfeited here.

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[65] 28 U.S.C. § 1391(e)(1).

[66] 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023) (No. 22-448).

[67] UDAAP Manual, Doc. 1-2, at 11, 13, 14, 17.

[68] *See, e.g.*, *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) ("[T]he government is not invoking *Chevron*. We therefore decline to consider whether any deference might be due its regulation.") (cleaned up).

Second, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[69] That inquiry is "shaped, at least in some measure, by the nature of the question presented"—here, whether Congress meant to confer the power the agency asserts.[70] Even if an agency's "regulatory assertions had a colorable textual basis," a court must consider "common sense as to the manner" in which Congress would likely delegate the power claimed in light of the law's history, the breadth of the regulatory assertion, and the economic and political significance of the assertion.[71]

Based on those principles, the Supreme Court recognizes that sweeping grants of regulatory authority are rarely accomplished through "vague terms" or "subtle device[s]."[72] Courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[73] If that major-questions canon applies, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims."[74]

The major-questions canon applies here. The choice whether the CFPB has authority to police the financial-services industry for discrimination against any group that the agency deems protected, or for lack of introspection about statistical disparities concerning any such group, is a question of major economic and political significance. As to economic impact, such an authority would have large implications for the financial-services industry. That is shown by the millions of dollars per year spent by companies attempting to comply with the UDAAP rule at issue here.[75]

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[69] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[70] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

[71] *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022).

[72] *Id.* at 2609 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

[73] *Id.* (quotation marks omitted).

[74] *Id.* (quotation marks omitted).

[75] *See* Doc. 17 at 31 (collecting citations).

And such agency authority would have significant political implications as to both state and federal power. The States can and do guard against discrimination, protect consumers, and regulate financial-services companies.[76] In doing so, the States make meaningful choices about what classes are protected or not, what conduct is prohibited or allowed, and what defenses and remedies are available or not. The broad authority staked out by the CFPB, however, would allow the agency to displace the balances struck by the States on those matters. That might be something Congress can authorize. But when the executive branch invokes authority that would "significantly alter the balance between federal and state power," Congress must grant that authority with "exceedingly clear language."[77]

The federal-powers implications of the agency's position are just as profound. Federal nondiscrimination statutes typically define what classes are protected, what outcomes or actions are prohibited, and defenses to liability.[78] Those decisions are often part of delicate negotiations requiring compromises or tradeoffs. So courts should expect a clear statement before finding that Congress assigned all of those major questions to an agency, especially one with an "anomalous," "self-actualizing," and "perpetual" funding mechanism.[79]

In addition, the CFPB's claimed authority to prohibit disparate-impact discrimination is something that Congress rarely authorizes.[80] When it does, Congress authorizes disparate-impact

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[76] *See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1491.20; Ark. Code Ann. §§ 4-87-104, 16-123-107(a)(4); Ind. Code Ann. § 24-9-3-9; Ga. Code Ann. § 7-6-1(a); La. Stat. Ann. § 51:2255; Miss. Code Ann. § 43-33-723; Ohio Rev. Code Ann. § 4112.021; S.C. Code Ann. § 31-21-60(B)(1); Tenn. Code Ann. § 47-18-802; Tex. Prop. Code Ann. § 301.026; Utah Code Ann. § 57-21-6(1)(b)(i).

[77] *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)).

[78] *E.g.*, 15 U.S.C. § 1691(a), (b); 42 U.S.C. § 2000e-2(a)(2), (e), (k); *id.* § 3604(a), (f)(7).

[79] *Comm'y Fin.*, 51 F.3d at 638.

[80] *See* Richard A. Primus, Bolling *Alone*, 104 Colum. L. Rev. 975, 1027 n.187 (2004) ("[D]isparate impact is actionable under only a subset of federal antidiscrimination legislation.").

liability only in narrow circumstances, with limits that exist to avoid "serious constitutional questions."[81] So one would naturally expect a clear statement for Congress to authorize a version of discrimination liability that even explicit nondiscrimination statutes usually do not cover and that can raise serious constitutional questions.[82]

Given that context, the CFPB faces a high burden in arguing that Congress conferred a sweeping antidiscrimination authority without defining protected classes or defenses, without using the words "discrimination" or "disparate impact," and while separately giving the agency authority to police "discrimination" only in specific areas.

The agency cannot clear that high bar. As always, the court begins with the statute's text. And the Dodd–Frank Act treats discrimination and unfairness as distinct concepts. For instance, in setting forth its objectives for the agency, Congress directs the CFPB to exercise its authorities to ensure that, with respect to financial products and services, "consumers are protected [1] from unfair, deceptive or abusive acts and practices and [2] from discrimination."[83] Congress did not say "including discrimination" or "such as discrimination." It used the word "and" to conjoin two distinct concepts—UDAAP and discrimination. And only the agency's UDAAP authority is invoked in the manual provisions at issue here.

Similarly, Congress authorized a CFPB office to provide oversight and enforcement of federal laws "intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau."[84] As an

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[81] *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2015).

[82] *See, e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989) (noting that without adequate safeguards, disparate-impact liability can lead to "numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past").

[83] 12 U.S.C. § 5511(b)(2) (numbering added in brackets).

[84] *Id.* § 5493(c)(2)(A).

example of such a law, Congress cited the Equal Credit Opportunity Act, which explicitly prohibits "discrimination" and goes on to define protected classes, the elements of a plaintiff's case, and exclusions from liability.[85] The statutory text thus illustrates that Congress knew how to clearly add nondiscrimination to the CFPB's portfolio when it meant to do so.

But the statutory definition of "unfairness" makes no mention of discrimination.[86] The statute's "unfairness" section instead refers to whether an act or practice will cause consumers substantial injury that they cannot avoid and is not outweighed by countervailing benefits to consumers or competition.[87] Defendants' primary argument is that discrimination can cause such injury and can therefore meet the statutory definition. That argument has a certain appeal given the facial breadth of that section's language. But the court must also consider the structure of the Act. The "unfairness" section appears separately from other, explicit discrimination authorities. And the "unfairness" section forgoes any mention of discrimination, any mention of protected classes, and any mention of disparate-impact standards. The text and structure of the Act thus make its definition of "unfairness" at least vague as to the topic of discrimination.

The agency resists the conclusion that the statute is vague on this matter by noting that the Dodd–Frank Act's unfairness definition was drawn from the Federal Trade Commission Act, which uses the same language to limit the FTC's ability to police unfair or deceptive acts or practices ("UDAP").[88] The court accepts that the Dodd–Frank Act's definition can be understood with reference to the FTC Act's definition.

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[85] 15 U.S.C. § 1691(a)–(b).

[86] 12 U.S.C. § 5531(c).

[87] *Id.*

[88] 15 U.S.C. § 45(n) (allowing the FTC to deem an act or practice unfair only based on "substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition").

But even legal views on the FTC Act's "unfairness" definition have changed over the decades, leaving it unclear that Congress meant to adopt a broad view on that major question in the Dodd–Frank Act. Former FTC official J. Howard Beales has published a useful summary of historic interpretations of that agency's UDAP authority.[89] At times, the FTC has relied on an individual-choice view, including in efforts to win congressional reapproval, stating that "the principal focus of our unfairness policy is on the maintenance of consumer choice or consumer sovereignty, an economic concept."[90]

On the other hand, FTC officials and practitioners have in recent years construed that agency's "unfairness" authority more broadly, extending it to issues like the use of computer systems that yield "unfair" results based on endemic conditions that affect data sets.[91] Proponents of that view argue that "[t]hinking about discrimination as unfairness confers several advantages that have so far been overlooked," such as allowing the FTC to regulate "practices that existing discrimination laws are unlikely to reach."[92]

As even those proponents recognize, however, that legal position "may not be obvious because we typically think of discrimination as a separate problem from consumer protection."[93] And that is the salient feature here for purposes of the major-questions

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[89] J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection.

[90] *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1061 n.47 (Dec. 21, 1984); *accord id.* at 1071, *reprinting* Wendell H. Ford, Letter to Senators Ford and Danforth (Dec. 17, 1980).

[91] FTC, *Big Data: A Tool for Inclusion or Exclusion?*, at 27–28 (Jan. 2016), www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf ("it is important to consider the digital divide and other issues of underrepresentation and overrepresentation in data inputs before launching a product or service in order to avoid skewed and potentially unfair ramifications").

[92] Andrew D. Selbst & Solon Barocas, *Unfair Artificial Intelligence: How FTC Intervention Can Overcome the Limitations of Discrimination*, 171 U. Pa. L. Rev. 1, 6 (2023).

[93] *Id.*

doctrine. Although the "unfairness" language in the Dodd–Frank Act or the FTC Act might be viewed broadly to embody protection against discrimination or disparate impact according to unspecified, immutable characteristics, that language has also been viewed as more narrowly limited to vindicating the sovereignty of individual consumer choice. The history of the legal provision at issue thus does not refute its ambiguity.

Given the statutory text, structure, and history just discussed, the Dodd–Frank Act's language authorizing the CFPB to regulate unfair acts or practices is not the sort of "exceedingly clear language" that the major-questions doctrine demands before finding a conferral of agency authority to regulate discrimination across the financial-services industry, independently of the CFPB's separately conferred antidiscrimination power in specific areas.[94] For that reason, the court grants summary judgment to plaintiffs on their statutory-authority claim.

Finally, a word on why the court reaches this claim. The Fifth Circuit recognizes a "sound judicial practice of refusing to decide or address issues whose resolution is not necessary to dispose of a case, unless there are compelling reasons to do otherwise."[95] Plaintiffs' Appropriations Clause claim would, under circuit precedent, justify the same relief granted on their statutory-authority claim. But the court sees fit to reach the latter claim because the Appropriations Clause issue is on review in the Supreme Court in *Community Financial*.[96] Indeed, one remedial issue in that case is whether to allow vacatur of challenged agency rules in other cases, such as this one, in which plaintiffs challenge the constitutionality of the CFPB's funding mechanism.[97] That review is a "compelling reason" to reach at least one alternative ground for the same relief sought on Appropriations Clause grounds. And the statutory-authority issue is logically antecedent to the issues of

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[94] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

[95] *United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988).

[96] No. 22-448 (S. Ct.).

[97] *See* Br. of Amici Curiae the Chamber of Commerce of the United States of America et al. in Support of Respondents at 29 (July 10, 2023), *id.*

substantive and procedural propriety. So the court reaches that claim as well as the Appropriations Clause claim.

At the same time, the court does not see a "compelling reason" to reach plaintiffs' claims of substantive and procedural impropriety. A court of appeals can affirm a district court's judgment on any basis evident from the record, and those claims present purely legal questions. The parties thus agreed that this case can be resolved on the administrative record. So no judicial efficiency is gained by this court reaching those alternative grounds.

5. Remedy

The Fifth Circuit's decision in *Community Financial* controls here as to both merits and remedy on the Appropriations Clause claim. As to remedy, it requires a "judgment holding unlawful, enjoining[,] and setting aside" the challenged agency action.[98] Even apart from that decision's binding force, the remedies of a declaration, an injunction, and vacatur are appropriate.

First, the Declaratory Judgment Act allows a reviewing court to "declare the rights and other legal relations of any interested party seeking such declaration."[99] Defendants offer no argument against declaratory relief and concede that "declaratory relief would be an appropriate remedy" if the court credits any of plaintiffs' claims.[100] The court finds it proper to exercise its discretion to issue such relief here.[101]

But the court disagrees with the parties' assumption that a declaratory judgment is simply a bare declaration that a disputed agency action is unauthorized or invalid. By statute, a declaratory judgment declares the rights or legal relations "of any interested party."[102] It is party-specific relief, not merely a statement of legal conclusions. So the court will issue a final judgment declaring that pursuing any examination, supervision, or enforcement action

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[98] *Comm'y Fin.*, 51 F.4th at 643 (cleaned up).
[99] 28 U.S.C. § 2201(a).
[100] Doc. 22 at 43.
[101] *See Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 388 (5th Cir. 2003).
[102] 28 U.S.C. § 2201(a).

against any member of a plaintiff organization based on the CFPB's interpretation of its UDAAP authority announced in the March 2022 manual update would be unlawful as exceeding statutory authority and as based on unconstitutional funding.

Secondly, defendants concede that plaintiffs' showing on the well-established test for a permanent injunction "is fine as far as it goes."[103] Specifically, defendants do not controvert plaintiffs' showing that their members' harms from the challenged UDAAP revisions are irreparable (they are financial costs that the members cannot recover from the government in damages), that any harm to defendants from an injunction does not tilt the balance of the equities their way (the injunction simply governs future conduct), and that the public interest does not disfavor an injunction. The court agrees that plaintiffs make that showing.

Defendants oppose injunctive relief, however, arguing that vacatur of the agency action is a less restrictive remedy.[104] Vacatur of agency action is indeed different than an injunction. As I have explained elsewhere,[105] vacatur gives relief to even non-parties affected by agency action, whereas an injunction must "be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*."[106] So the principle of minimalism can cut exactly opposite to defendants' suggestion. Enjoining an agency from acting as to only the plaintiffs, rather than vacating agency action as to even non-plaintiffs, would be the narrower path assuming all other things about the scope of relief are equal.

But that *ceteris paribus* assumption does not always hold. A court might craft an injunction that does more than simply apply to the plaintiffs in a given case the necessary effects of a vacatur of agency action. Those are the facts of the Supreme Court case

[103] Doc. 22 at 45.

[104] *Id.*

[105] *R.J. Reynolds*, 2022 WL 17489170, at *18–*21; *see also United States v. Texas*, 143 S. Ct. 1964, 1980–86 (2023) (Gorsuch, J., concurring) (discussion of the same topic).

[106] *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added).

on which defendants rely, *Monsanto Co. v. Geertson Seed Farms*.[107] The district court there, holding that an agency should have followed a different process before acting, vacated the agency's decision clearing a crop for planting.[108] But the district court also prohibited every farmer in the United States from almost all future plantings of the crop, even though the agency could still have partially deregulated the crop as to allow some such plantings.[109] Because a less drastic remedy—there, a vacatur that could allow some planting in future years under a partial deregulation—"was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted." In other words, the *ceteris paribus* assumption about the two remedies did not hold.

That reasoning does not apply here. This court's injunction will not restrict the ability to pursue examination or supervision of acts or practices that qualify as "unfair" independently of the position announced in the agency's March 2022 update to the manual's UDAAP provisions. In contrast to *Monsanto*, the injunction here will not restrain agency officials from anything more than conduct based on the disputed agency rule. Under those circumstances, the Fifth Circuit routinely affirms injunctions that track (and are thus no broader in scope than) vacatur of challenged agency action.[110] And the court's injunction will be limited to plaintiffs' members, who can disclose their membership to the

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[107] 561 U.S. 139 (2010).

[108] *Id.* at 148.

[109] *Id.* at 146–48, 165.

[110] *Franciscan Alliance, Inc. v. Becerra*, 553 F. Supp. 3d 361, 377 (N.D. Tex. 2021) (rejecting the government's argument that a permanent injunction was duplicative with vacatur), *aff'd in relevant part*, 47 F.4th 368, 377–80 (5th Cir. 2022); *Texas v. United States*, 50 F.4th 498, 530–31 (5th Cir. 2022) (affirming the district court's grant of both vacatur and an injunction); *Shell Offshore, Inc. v. Babbitt*, 61 F. Supp. 2d 520, 529 (W.D. La. 1999) (both setting aside an order and enjoining the agency from enforcing it), *aff'd in relevant part*, 238 F.3d 622, 630–31 (5th Cir. 2011); *Nat'l Ass'n of Manuf. v. SEC*, 2022 WL 16727731, at *5 (W.D. Tex. Sept. 28, 2022) (following "the ordinary practice" of granting both vacatur and an injunction).

agency to stop prohibited conduct.[111] Defendants' argument against an injunction is thus unavailing.

Finally, defendants concede that vacatur of the March 2022 revisions "would be an appropriate remedy" if the court rules for plaintiffs on the merits.[112] I have previously explained my view that, under Fifth Circuit precedent independent of *Community Financial*, the APA's direction to "set aside" agency action held unlawful means vacating that agency action.[113] Defendants appear to share that reading of circuit precedent.[114] So the court's judgment will include vacatur of the agency action.

Conclusion

Plaintiffs seek relief from the CFPB's March 2022 update to the UDAAP portion of its Supervision and Examination Manual, which directs examiners to use the agency's UDAAP authority to access companies' data, algorithms, operations, premises, and personnel for evidence of "discrimination," including "disproportionately adverse impacts on a discriminatory basis," or evidence of insufficient internal monitoring for those outcomes.[115] For the reasons given above, the court holds that the CFPB's adoption of that position in the March 2022 manual update is beyond the agency's constitutional authority based on an Appropriations Clause violation and beyond the agency's statutory authority to regulate "unfair" acts or practices under the Dodd–Frank Act. Plaintiffs' motion for summary judgment in their favor is thus granted,[116] and defendants' motion to dismiss the case or for summary judgment in their favor is denied.[117] The court will issue a final judgment forthwith.

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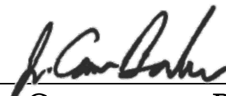
[111] *See, e.g.*, *Franciscan Alliance*, 2021 WL 6774686, at *1.
[112] Doc. 22 at 43.
[113] *R.J. Reynolds*, 2022 WL 17489170, at *18–*21.
[114] Doc. 22 at 44.
[115] Doc. 1 at 12–13 ¶¶ 48–52; UDAAP Manual, Doc. 1-2, at 13–17.
[116] *See* Doc. 17.
[117] *See* Doc. 22.

So ordered by the court on September 8, 2023.



J. CAMPBELL BARKER
United States District Judge