IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

THE MONTICELLO BANKING CO., *et al.*,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*,

Defendants.

Case No. 6:23-cv-00148-KKC

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

A section of the Dodd-Frank Act aims to help small businesses by requiring creditors to compile and report data about their small business lending, in accordance with rules issued by the Consumer Financial Protection Bureau. The Bureau issued those rules in March 2023.

Several banks and a trade group representing banks filed this suit challenging the Bureau's regulation, seeking to avoid—or at least delay—their obligations under the statute and the regulation to gather data for the benefit of small businesses. Plaintiffs have moved for preliminary relief, asking the Court to toll the time before they must begin complying with the rule based on their counterintuitive claim that Congress violated the Appropriations Clause when it passed a law appropriating money for the Bureau's operations.

This Court should deny Plaintiffs' motion because Plaintiffs have not satisfied any of the factors necessary for preliminary relief. First, Plaintiffs do not come close to showing that their novel funding claim is likely to succeed. The claim is contrary to Supreme Court precedent, the text of the Constitution, and long historical practice. It has been rejected by every court but one to have ever considered it, and the Supreme Court has granted the Bureau's request that it review the one outlier decision. This factor alone warrants denying Plaintiffs' motion.

Second, Plaintiffs fail to establish that they face imminent irreparable harm. It is unclear which, if any, Plaintiffs are even subject to the rule. And none provide specific evidence documenting that they are required to spend money *now* to prepare for the rule, as opposed to years down the road. For example, covered entities that make the fewest covered credit transactions are not required to begin complying for well over two years, in January 2026. Finally, the equities weigh heavily against the undue delay that Plaintiffs seek to the Rule's important requirements—and the statutory requirements that they implement—taking effect.

BACKGROUND

A. The Consumer Financial Protection Bureau

Congress established the Bureau in the Consumer Financial Protection Act of 2010 (CFPA)—Title X of the Dodd-Frank Act. *See* Pub. L. 111-203, 124 Stat. 1955. The CFPA generally tasks the Bureau with implementing and enforcing "Federal consumer financial law," a category that includes the Equal Credit Opportunity Act (ECOA). 12 U.S.C. § 5511(a)-(b); *id.* § 5481(14), (12)(D). The Bureau does so by, among other things, prescribing rules and issuing guidance to administer and carry out the purposes of these laws. *Id.* § 5512(b).

As it has long done for numerous other agencies and programs, *see infra* at 11-12, Congress chose to fund the Bureau through the Bureau's organic statute rather than through annual spending bills. The Bureau's funds come from the receipts of the Federal Reserve System, of which the Bureau is a part. 12 U.S.C. §§ 5491(a), 5497. For fiscal years 2013 and later, Congress set the cap on the amount the Bureau can draw at approximately $597.6 million, which is 12% of the operating expenses of the Federal Reserve System as they were reported in 2009. *Id.* § 5497(a)(2)(A). The capped amount is adjusted annually only for inflation. *Id.* § 5497(a)(2)(B). In fiscal year 2022, the inflation-adjusted cap was approximately $734 million.

B. Section 1071 of the Consumer Financial Protection Act of 2010

Small businesses play a key role in fostering community development and fueling economic growth. Access to credit in turn is critical for helping small businesses get off the ground and prosper. However, data on loans to small businesses have historically been limited, making it difficult to answer even basic questions about the state of small business lending, such as whether small businesses are able to access the loans they need on terms that accurately reflect their credit risk.

To address this issue, Congress amended ECOA through Section 1071 of the CFPA in order to set up a system for collecting and sharing information about lending to small businesses. Pub. L. 111-203, § 1071, 124 Stat. 1955, 2056-59 (codified at 15 U.S.C. § 1691c-2). Section 1071's express purposes are to enable communities, governments, and creditors "to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses" and "to facilitate enforcement of fair lending laws." 15 U.S.C. § 1691c-2(a).

As amended by Section 1071, ECOA requires financial institutions to gather certain information about their small business lending. *Id.* § 1691c-2(b), (e). Specifically, it directs them to compile, "in accordance with regulations of the Bureau," certain enumerated data points such as the amount of credit applied for, the action taken on the application, the business's annual revenue, and (unless the applicant chooses not to provide this information) the race, sex, and ethnicity of the principal owners of the business. *Id.* § 1691c-2(b)(e)(1)-(2), (c). It further requires that they collect "any additional data that the Bureau determines would aid in fulfilling the purposes of this section." *Id.* § 1691c-2(e)(2)(H). Financial institutions must submit the data they gather to the Bureau each year. *Id.* § 1691c-2(f)(1). The Bureau must make public the data obtained, subject to deletions or modifications for privacy. *Id.* § 1691c-2(f)(2), (e)(4).

Section 1071 requires the Bureau to "prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to [Section 1071]." *Id.* § 1691c-2(g)(1). It further provides that the Bureau "may" issue rules "adopt[ing] exceptions to any requirement of [Section 1071]" or "exempt[ing] any financial institution or class of financial institutions from [those] requirements …, as the Bureau deems necessary or appropriate to carry out the purposes of [Section 1071]." *Id.* § 1691c-2(g)(2).

C. The Bureau is sued for not having issued rules to implement Section 1071.

By 2019, the Bureau had undertaken a number of pre-rule outreach efforts, including publishing a request for information about the small business lending market. *See* 82 Fed. Reg. 22318 (May 15, 2017). But the Bureau had not yet proposed rules to implement Section 1071.

Several nonprofit organizations and individuals sued the Bureau, seeking an order compelling the Bureau to issue the regulations. *See Calif. Reinvestment Coalition v. CFPB*, No. 4:19-cv-02572 (N.D. Cal. filed June 27, 2019) ("*CRC*"). That litigation resulted in a settlement under which the court ultimately directed the Bureau to issue a final rule by March 31, 2023. *See* Stipulated Settlement Agreement and Order, *CRC* (N.D. Cal. Feb. 20, 2020), ECF No. 53; Stipulation and Order, *CRC* (N.D. Cal. July 11, 2022), ECF No. 68.

D. The Bureau issues the Small Business Lending Rule implementing Section 1071.

The Bureau issued the Small Business Lending Rule on March 30, 2023 via publication on its website. *See* 12 C.F.R. § 1074.1(a). The Rule appeared in the Federal Register on May 31. *See* 88 Fed. Reg. 35150.

The Rule clarifies the requirements under Section 1071 for financial institutions to compile and report data regarding covered applications for credit for small businesses, including those that are owned by women and minorities.[1] Congress enumerated certain data points that must be compiled and reported, *see* 15 U.S.C. § 1691c-2(b)(1), (e)(2)(A)-(G), and further required financial institutions to gather "any additional data that the Bureau determines would aid in fulfilling the purposes of this section," *id.* § 1691c-2(e)(2)(H). The Rule sets out several

[1] The Rule does not require financial institutions to collect and report data regarding applications for women-owned and minority-owned businesses that are *not* small. Because more than 99 percent of women-owned and minority-owned businesses are small businesses, covering small businesses necessarily means nearly all women-owned and minority-owned businesses will also be covered. 88 Fed. Reg. at 35150.

additional data points (not all of which apply to every covered application) that the Bureau determined would aid in fulfilling the purposes of Section 1071. These include: the means by which the application was submitted; pricing information for credit transactions that are originated or approved but not accepted; and, for applications that are denied, the principal reasons for the denial. 88 Fed. Reg. at 35530 (codified at 12 C.F.R. § 1002.107(a)).[2]

The Rule has an effective date of August 29, 2023. *See id.* at 35533. That date determined when the Rule was published in the Code of Federal Regulations, but not when covered financial institutions must begin complying with the Rule. *That* question depends on the number of covered credit transactions that an institution originates to small businesses, which places institutions into one of three tiers. As set forth in the rule, covered financial institutions that originated at least 2,500 covered transactions in 2022 and again in 2023 begin compliance on October 1, 2024 ("Tier 1"). *Id.* Institutions that originated at least 500 covered transactions in each of those two years but are not in Tier 1 begin compliance on April 1, 2025 ("Tier 2"). *Id.* Institutions that originated at least 100 covered transactions in each of those years and are not in

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[2] Plaintiffs attempt to inflate the compliance burden of the Rule by comparing the 13 data points listed in Section 1691c-2(e)(2)(A)-(G) with the "81 data points" they claim the Rule requires. Mem. at 2, 4 (quotation marks omitted). That is apples to oranges. The latter figure represents not the number of different categories of information that institutions need to gather but the number of *data fields* they will use when reporting that information to the Bureau. *Cf.* CFPB, Small Business Lending Rule: Data Points Chart, https://files.consumerfinance.gov/f/documents/cfpb_small-business-lending-data-points-chart.pdf (listing these fields). In order to transmit the information in a clear and usable format, institutions will in some cases use multiple data fields to report a single data point. For example, institutions will report the amount of credit applied for (1 data point) via 2 data fields: one indicating whether the applicant applied for a specific amount and a second reporting that amount. *See id.* at 6-7. Similarly, Section 1071 requires institutions to compile information about the race, sex, and ethnicity of the principal owners of an applicant-business (3 data points). Institutions will have 36 data fields they can use (as relevant) to transmit that information for up to four different principal owners. *See id.* at 34-35. The use of multiple fields to ensure data integrity is a technical feature of the reporting system and does not increase the substantive burden on institutions to gather additional information.

Tiers 1 or 2 begin compliance on January 1, 2026 ("Tier 3"). *Id.* An institution is not covered by the Rule if it did not originate at least 100 covered transactions in each of the two preceding calendar years. *Id.* at 35529.

E. Other plaintiffs sue in Texas to challenge the Rule.

Two banking trade groups and one individual bank filed suit in federal district court in Texas to challenge the Small Business Lending Rule. *See Texas Bankers Ass'n v. CFPB*, No. 7:23-cv-00144 (S.D. Tex.) ("*Texas Bankers*"). They argue primarily that the Rule is invalid in light of a recent Fifth Circuit decision that is currently binding in that district court, *Community Financial Services Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022) ("*CFSA*"), *cert. granted*, No. 22-448 (oral argument scheduled for Oct. 3, 2023). In *CFSA*, the Fifth Circuit held that the statutory provisions by which Congress funded the Bureau violate the Appropriations Clause and, on that basis, vacated a regulation that the Bureau had issued (but that had not yet gone into effect) while it was receiving such funding. *Id.* at 635-43. In doing so, the Fifth Circuit recognized that "every court to consider [the Bureau's] funding structure has deemed it constitutionally sound." *Id.* at 641 & n.15 (citing, among many others, *PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc), *abrogated on other grounds by Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)); *see also CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 181-83 (2d Cir. 2023) (upholding validity of Bureau's funding and finding "no support" for the Fifth Circuit's holding "in Supreme Court precedent," "the Constitution's text," or "the history of the Appropriations Clause").

The plaintiffs moved for preliminary relief that would delay their obligation to begin complying with the Rule by staying the Rule's compliance dates until the Supreme Court issues a decision in *CFSA*. The district court granted the motion in part and denied it in part. *See Texas*

Bankers, 2023 WL 4872398, at *8 (S.D. Tex. July 31, 2023). It concluded that the plaintiffs had shown they were likely to succeed on their claim that the Bureau's funding violates the Appropriations Clause and that the Rule is therefore invalid, citing the Fifth Circuit's relevant—and, for that district court, binding—holdings in *CFSA*. *Id.* at *6. (Because the plaintiffs in that case did not raise any other merits argument in their motion, the court's analysis was limited solely to the funding claim that they did raise.) On irreparable injury, the court found that the plaintiffs had satisfied their burden under Fifth Circuit precedent by showing that the "likely costs of compliance under the Final Rule are more than de minimis." *Id.* at *6-7 (citing *Rest. Law Ctr. v. Dep't of Labor*, 66 F.4th 593, 600 (5th Cir. 2023)).

The court thus concluded that preliminary relief was appropriate. But it specifically rejected the plaintiffs' request to order preliminary relief as to all covered financial institutions, "find[ing] a limited injunction appropriate." *Id.* at *8; *see generally L. W. by & through Williams v. Skrmetti*, 73 F.4th 408, 415 (6th Cir. 2023) ("A court order that goes beyond the injuries of a particular plaintiff to enjoin government action against nonparties exceeds the norms of judicial power."). The court therefore stayed the Rule's compliance dates and enjoined the Bureau from enforcing the Rule, but only as to the plaintiffs and their member banks, and only "until after the Supreme Court's final decision in [*CFSA*]." *Texas Bankers*, 2023 WL 4872398, at *8.

Following the court's decision, several other trade associations representing banks and credit unions intervened in the case. They filed their own motion for preliminary relief, asking the court to expand its order to apply to their members or, in the alternative, to reconsider its prior refusal to grant universal relief that would stay the Rule's compliance dates as to all covered financial institutions. *See* Intervenors' Mot. for Prelim. Injunction, *Texas Bankers*,

No. 7:23-cv-00144 (S.D. Tex. Aug. 15, 2023), ECF No. 44. That motion remains pending. Other parties have since intervened and sought similar relief.

F. Plaintiff banks and banking associations file this suit to challenge the Rule.

Plaintiffs the Kentucky Bankers Association ("KBA") and eight individual banks filed this suit to challenge the Rule and delay their obligations under the Rule and statute to compile and report small business lending data.

Plaintiffs have moved for preliminary relief. They seek an order that would enjoin Defendants from "implementing and enforcing the Final Rule against Plaintiffs and the members of the KBA" and staying "all deadlines for compliance with the requirements of the Final Rule … for Plaintiffs and the members of the KBA." Pls.' Proposed Order at 4-5, ECF No. 15-14. The practical effect of that relief, as the Bureau understands it, would be to give Plaintiffs and KBA member banks additional time before they must comply with the Rule and to preliminarily bar the Bureau from taking action to compel compliance with the Rule by a Plaintiff bank or a bank the Bureau knows or should know is a KBA member.

Plaintiffs' requested relief appears to be broader than the relief in *Texas Bankers* in one key respect: Plaintiffs seek preliminary relief that would not terminate upon a decision by the Supreme Court in *CFSA* affirming the validity of the Bureau's funding. *Compare Texas Bankers*, 2023 WL 4872398, at *8 (granting preliminary relief only "until after the Supreme Court's final decision in [*CFSA*]"), *with* Pls.' Proposed Order at 4-5 (including no such limitation).

LEGAL STANDARD

"[A] preliminary injunction is an extraordinary and drastic remedy," *Enchant Christmas Light Maze & Market, Ltd. v. Glowco, LLC*, 958 F.3d 532, 539 (6th Cir. 2020), "never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). The moving party "must establish [1]

that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* To show irreparable harm, the party must demonstrate that the injury is "imminent." *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019).

While courts balance these factors, *id.*, a likelihood of success on the merits is required for a preliminary injunction to issue. *See Sunless, Inc. v. Palm Beach Tan, Inc.*, 33 F.4th 866 (6th Cir. 2022) ("[F]ailure to establish a likelihood of success on the merits is usually fatal to a plaintiff's quest for a preliminary injunction.") (quotation marks omitted). Likewise, "even the strongest showing on the other three factors cannot eliminate the irreparable harm requirement." *D.T.*, 942 F.3d at 326-27 (quotation marks omitted). "That factor is indispensable: If the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." *Id*. at 327.

The same standard governs a request to stay agency action under 5 U.S.C. § 705. *See Ohio ex rel. Celebrezze v. Nuclear Regul. Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987).

ARGUMENT

I. Plaintiffs would be entitled to preliminary relief only if they could satisfy the controlling legal standard for such relief.

Plaintiffs appear to suggest at the outset that they are entitled to preliminary relief because a different court, applying the law of a different circuit, granted preliminary relief to a different set of plaintiffs in a different case. *See* Mem. at 11-12. Preliminary relief, however, "is … never awarded as of right." *Winter*, 555 U.S. at 24. Instead, it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22. That showing requires Plaintiffs to meet their burden under the controlling four-factor test. *Id.* at 20. Whether Plaintiffs have done so is something the Court evaluates "in light of the factual circumstances of the

particular case." *McDanel v. Rees*, No. 05-cv-218, 2006 WL 13031, at *3 (E.D. Ky. Jan. 3, 2006); *cf. Nken v. Holder*, 556 U.S. 418, 433 (2009) (emphasizing that the propriety of a stay pending appeal "is dependent upon the circumstances of the particular case").

Thus, while Plaintiffs may claim that the reasoning of the *Texas Bankers* decision is persuasive and supports their entitlement to preliminary relief here, the mere fact that the plaintiffs in that case were granted an injunction—based on an outlier ruling of the Fifth Circuit that does not control here and that no other court has agreed with—does not itself demonstrate that Plaintiffs are entitled to the preliminary relief they seek in this case.

II. Plaintiffs cannot satisfy the controlling standard for preliminary relief.

None of the four factors support Plaintiffs' request for preliminary relief.

A. Plaintiffs are not likely to succeed on the only claim they have properly raised here.

"When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021) (quotation marks omitted). The sole merits argument that Plaintiffs articulate in their motion is the claim that the Bureau's statutory funding mechanism violates the Appropriations Clause and that the Rule is thus invalid. *See* Mem. at 2-3, 13 (citing *CFSA*). But that argument is contradicted by Supreme Court precedent, the text of the Constitution, and centuries of historical practice. It has been rejected by every court—bar the one decision that Plaintiffs cite—that has ever considered it. And it would appear to call into question the validity of how numerous other federal agencies and programs have long been funded. Plaintiffs therefore have fallen far short of showing at this point that they are "likely" to succeed on the merits. For that reason alone, the Court should deny the motion. *See, e.g.*, *Hargett*, 2 F.4th at 554; *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir.

2020) (vacating preliminary injunction and explaining that "petitioners' failure to demonstrate a likelihood of success on the merits is dispositive").

The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, cl. 7. As the Supreme Court has long emphasized, the "command of the Appropriations Clause" is "straightforward and explicit": "'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress.'" *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). "[I]n other words, the payment of money from the Treasury must be authorized by a statute." *Id.* The Bureau's funding is so authorized. *See* 12 U.S.C. § 5497. It thus complies with the Appropriations Clause's "straightforward and explicit command." *Richmond*, 496 U.S. at 424; *see also Law Offices of Crystal Moroney*, 63 F.4th at 181 ("Because the CFPB's funding structure was authorized by Congress and bound by specific statutory provisions, we find that [it] does not offend the Appropriations Clause.").

While the Bureau's funding is not set through annual spending bills, the Constitution does not require annual appropriations. *Cf.* U.S. Const. Art. I, § 8, cl. 12 (limiting appropriations for the Army—but not for any other purpose—to no more than two years). Indeed, since the Founding Era, Congress has chosen to fund important agencies and programs through sources other than annual spending bills. *See, e.g.*, 1 Stat. 232 (1792) (establishing the Post Office and funding it through postage rates rather than annual spending bills); 1 Stat. 246, 249 (1792) (establishing a National Mint and funding it in part through its collection of fees rather than annual spending bills); 2 Stat. 45, 52-53 (1800) (funding "the payment of pensions and half pay" to sailors through proceeds from captured enemy vessels rather than annual spending bills).

Today, there are numerous agencies and programs that, like the Bureau, are funded through appropriations set by statutory law rather than annual spending bills. *See, e.g.*, 12 U.S.C. § 16 (Office of the Comptroller of the Currency); *id.* § 243 (Federal Reserve Board); *id.* § 1755 (National Credit Union Administration); *id.* §§ 1815(d), 1820(e) (FDIC); *id.* § 2250 (Farm Credit Administration); 31 U.S.C. § 1304(a) (Judgment Fund); *id.* § 1305(b) (interest payments on the national debt); 42 U.S.C. §§ 301, 401(a)-(b) (Social Security payments). Indeed, the Federal Reserve Board—like the Bureau, a part of the Federal Reserve System—draws its funds from the same source as the Bureau: the "earnings of the Federal Reserve System." 12 U.S.C. 5497(a)(1). Plaintiffs' vaguely defined theory of the Appropriations Clause would seem to call into doubt the validity of all of these statutory provisions as well as others.

Consistent with history, Courts have recognized that "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *PHH Corp.*, 881 F.3d at 95; *accord Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004) (recognizing that Congress may create entities funded not from annual appropriations but "primarily from their own activities, services, and product sales" (brackets omitted)).

Indeed, every court other than the Fifth Circuit that has ever considered the issue has upheld the Bureau's funding. *See Law Offices of Crystal Moroney*, 63 F.4th at 181-84 (holding that "the CFPB's funding structure does not offend the Appropriations Clause" and rejecting reasoning of *CFSA*); *PHH Corp.*, 881 F.3d at 95-96 ("The way the CFPB is funded fits within the tradition of independent financial regulators."); *CFPB v. Nexus Servs., Inc.*, No. 5:21-cv-00016, 2023 WL 5019529, at *6 (W.D. Va. Aug. 7, 2023) (denying as moot a motion asserting the Fifth Circuit's reasoning in *CFSA*, but further explaining that, were the court to reach the

merits, it "would follow the line of cases concluding that the CFPB's funding structure does not violate the separation of powers principles contained in the Appropriations Clause"); *CFPB v. Consumer Advoc. Ctr., Inc.*, No. 19-cv-1998, 2023 WL 5162392, at *6-7 (C.D. Cal. July 7, 2023) ("the Bureau's funding scheme does not violate the Appropriations Clause"); *CFPB v. CashCall, Inc.*, No. 2:15-cv-7522, 2023 WL 2009938, at *3 (C.D. Cal. Feb. 10, 2023) ("the CFPB's funding structure does not violate … the Appropriations Clause"); *CFPB v. TransUnion*, No. 1:22-cv-1880, 2022 WL 17082529, at *5 (N.D. Ill. Nov. 18, 2022) ("agree[ing] with the conclusion reached by this substantial majority of courts" and upholding Bureau's funding).[3]

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[3] *See also CFPB v. Center for Excellence in Higher Education*, No. 2:19-cv-00877, 2022 WL 4182301, at *6 (D. Utah Sept. 13, 2022) ("the court does not find the Bureau's appropriations structure unconstitutional"); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 558 F. Supp. 3d 350, 364 (W.D. Tex. 2021) ("if a statute authorizes an agency to receive funds up to a certain cap, as the CFPA authorizes the Bureau to do, there is no Appropriations Clause issue"), *rev'd in relevant part*, 51 F.4th 616 (5th Cir. 2022); *CFPB v. Citizens Bank, N.A.*, 504 F. Supp. 3d 39, 56-57 (D.R.I. 2020) (rejecting claim that "the CFPB's funding structure is unconstitutional"); *CFPB v. Fair Collections & Outsourcing, Inc.*, No. 19-cv-2817, 2020 WL 7043847, at *9 (D. Md. Nov. 30, 2020) ("the CFPB's funding structure complies with the Appropriations Clause's mandate"); *CFPB v. Think Finance LLC*, No. 17-cv-127, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018) (rejecting claim that Bureau's funding "unconstitutionally interferes with Congress's power to direct federal spending pursuant to the Appropriations Clause"); *CFPB v. Navient Corp.*, 3:17-cv-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017) (holding that the Bureau's funding is not "constitutionally concerning"); *CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 WL 7188792, at *21 (S.D.N.Y. Dec. 2, 2016) (rejecting claim that Bureau action was invalid merely "because [the Bureau] may seek funding from outside the ordinary appropriations process"); *CFPB v. D & D Mktg.*, No. 15-cv-9692, 2016 WL 8849698, at *5 (C.D. Cal. Nov. 17, 2016) (holding that Bureau's funding "does not violate the Appropriations Clause because it was still Congress … that made the decision about how the CFPB should be funded"); *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 896 (S.D. Ind. 2015) ("the Constitution does not prohibit Congress from enacting funding structures for agencies that differ from the procedures prescribed by the ordinary appropriations process"); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014) ("the structure of the CFPB does not violate the Appropriations Clause").

Courts, including in this Circuit, have likewise rejected similar attacks on analogously funded agencies. *See Rop v. Fed. Hous. Fin. Agency*, 485 F. Supp. 3d 900, 939-40 (W.D. Mich. 2020) (rejecting "the notion that an independent source of funding creates a separation-of-powers problem"), *rev'd in part on other grounds and remanded*, 50 F.4th 562 (6th Cir. 2022); *Bhatti v.*

Plaintiffs do not mention a single one of these cases, let alone attempt to explain why that overwhelming weight of authority is wrong. They do nothing more than cite the Fifth Circuit's outlier ruling in *CFSA* and the *Texas Bankers* litigation in which *CFSA* is, unlike here, binding precedent. Mem. at 13. But no court has endorsed the reasoning in *CFSA*, which the Supreme Court is set to review in its coming term. As the Second Circuit explained, that reasoning is without support "in Supreme Court precedent," "the Constitution's text," or "the history of the Appropriations Clause." *Law Offices of Crystal Moroney*, 63 F.4th at 181-83. Like Plaintiffs, the Fifth Circuit in *CFSA* failed to grapple with the long historical practice contradicting its view of the Appropriations Clause, provided no persuasive grounds for distinguishing the many other agencies and programs that also are not funded via annual spending bills, and did not base its reasoning in constitutional text, among other shortcomings. *See generally* Br. for Pet'rs at 27-38, *CFSA*, No. 22-448 (U.S. filed May 8, 2023), 2023 WL 3385418.

Plaintiffs cannot meet their burden to show that they are likely to succeed by pointing to a single erroneous decision and ignoring every other case to have ever addressed the issue. *Cf. Commonwealth v. Biden*, 57 F.4th 545, 554 (6th Cir. 2023) (That a party "can muster up (at most) two cases … reveals the weakness in its … argument."). Nor do Plaintiffs try to overcome the Supreme Court precedent, constitutional text, and historical practice discussed above, all of which cut squarely against their claim. *See Haaland v. Brackeen*, 143 S. Ct. 1609, 1630-31 (2023) (rejecting a constitutional challenge to a federal statute because the challengers' "arguments fail[ed] to grapple with [the Court's] precedent"). And even if they could have shown a likelihood that the Bureau's statutory funding mechanism is invalid, Plaintiffs would

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Fed. Hous. Fin. Agency, 332 F. Supp. 3d 1206, 1217 (D. Minn. 2018) (holding that Congress's choice to fund agency via its organic statute "does not violate the principle of separation of powers"), *rev'd in part on other grounds and remanded*, 15 F.4th 848 (8th Cir. 2021).

still need to demonstrate that the invalidity of that funding somehow renders the Rule itself invalid. Thus, while Plaintiffs may believe that they will eventually succeed on this argument, they have fallen well short of establishing at this point that such an outcome is "likely."[4]

In addition to their funding argument, Plaintiffs state in passing that "the Final Rule's expansion of the data collection from the 13 data points in the statute to the scores of additional data points is a violation of the APA." Mem. at 13. But Plaintiffs fail to explain why this would be so and thus have waived any such argument for purposes of this motion. *See El-Moussa v. Holder*, 569 F.3d 250, 257 (6th Cir. 2009) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in [a] skeletal way, leaving the court to put flesh on its bones.").

Even if the Court were to consider Plaintiffs' bare assertion, the Court should hold that it does not suffice to demonstrate a likelihood of success. First, Plaintiffs are simply wrong as a factual matter that the Rule requires lenders to compile "*scores* of additional data points" about their small business loans. *Compare* 15 U.S.C. § 1691c-2(b), (e)(2) (data points included in the statute), *with* 88 Fed. Reg. at 35530 (data points included in the rule) (codified at 12 C.F.R. § 1002.107(a)); *see also supra* note 2. Second, although the Rule requires the compiling of some additional data, Plaintiffs themselves acknowledge that Congress expressly authorized the Bureau to identify "additional data that the Bureau determines would aid in fulfilling the purposes of [the statute]." 15 U.S.C. § 1691c-2(e)(2)(H) (quoted in Mem. at 4). Third, to the

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[4] Because the funding argument is the only claim Plaintiffs have actually articulated in support of their request for preliminary relief, if the Court were inclined to grant that request, it should make clear that the preliminary relief will terminate upon a decision by the Supreme Court in *CFSA* reversing the Fifth Circuit's funding analysis. *Cf. Texas Bankers*, 2023 WL 4872398, at *8 (granting preliminary relief only "until after the Supreme Court's final decision in [*CFSA*]").

extent that Plaintiffs mean to attack any specific requirement in the Rule as arbitrary and capricious, they have failed to articulate any such argument. Nor would such an argument be likely to succeed. The additional data that the Rule will require lenders to compile will aid in fulfilling the purposes of the statute, were well explained in the Rule's preamble, and are consistent with the rulemaking record.[5]

B. Plaintiffs have not shown an imminent likelihood of irreparable injury.

To secure preliminary relief, Plaintiffs must show that they are likely to suffer imminent irreparable injury without it. Such injury must be "certain and immediate"—not "speculative or theoretical." *D.T. v. Sumner Cnty. Schools,* 942 F.3d 324, 327 (6th Cir. 2019) (internal citation omitted). "[E]ven the strongest showing on the other factors cannot justify a preliminary injunction if there is no imminent and irreparable injury." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (quotation marks omitted).

None of the Plaintiffs have provided specific evidence establishing a likelihood that they will be imminently harmed without preliminary relief.

<u>Plaintiff Banks – Alleged Irreparable Compliance Costs</u>

First, it is not clear that all of the Plaintiff banks will even be subject to the Rule—at least at any point in the imminent future. The Small Business Lending Rule would require that at least 100 of the loans a bank made in 2022 were covered transactions and that the bank also make at

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[5] 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 purposes of the statute: "to identify business and community development needs and opportunities" and "to facilitate enforcement of fair lending laws." 15 U.S.C. § 1691c-2(a). As the Rule's preamble explains in depth, "[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." 88 Fed. Reg. at 35309-11.

least 100 covered transactions in 2023. *See* 88 Fed. Reg. at 35533. Declarations from the Plaintiff banks state that the institutions "anticipate" that they would fall within the categories of covered institutions. *See, e.g.*, Jones Decl. ¶ 6. But those allegations are too speculative to support a claim of imminent, irreparable injury, especially given the explicit admission of one of the Plaintiff banks that "it is possible [they] do[] not reach the 100 covered credit transaction threshold initially [*i.e.*, in 2022 or 2023]." Hertz Decl. ¶ 6.

Even assuming the banks will be subject to the Rule, the banks bear the burden to identify a specific irreparable injury that is "imminent" without preliminary relief. But the bank declarations fail to do so. To the extent they allege (as described above) that, in advance of the compliance dates, the banks "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," *see, e.g.*, Ramsey Decl. ¶ 6 (*i.e.*, that the banks will need to expend resources to determine whether their compliance is required), there is "no authority for the notion that an unspecified amount of costs incurred in determining whether compliance is necessary constitutes a certainly impending injury," *Kentucky v. EPA*, No. 3:23-cv-0007, 2023 WL 2733383, at *6-7 (E.D. Ky. Mar. 31, 2023). If such costs were enough to constitute certainly impending injury, every rule could be preliminarily enjoined just because an entity spent a minimal amount assessing whether it is required to comply with the rule. That would make a mockery of the "irreparable harm" requirement.

With respect to other "compliance costs" that Plaintiffs allege they will incur in connection with the Rule, Plaintiffs fail to meet their burden to identify any specific costs that the bank is actually required to incur imminently. Under the Rule's three-tiered compliance regime, four of the banks would not be required to begin compliance until April 1, 2025 at the

earliest, and the other four would not be required to begin compliance until January 1, 2026. *See* 88 Fed. Reg. at 35533 (codified at 12 C.F.R. § 1002.114(b)(3)). None of the Plaintiff banks allege that they would be in the first tier of institutions required to begin compliance (*i.e.*, those that begin compliance in October 2024). And Plaintiffs offer no timelines or other evidence to support the idea that they must begin compliance efforts imminently in order to comply with the Rule.[6] This matters because it is fundamental that "self-inflicted harm is not the type that injunctions are meant to prevent." *Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*, 399 F. App'x 97, 104 (6th Cir. 2010) (internal citations omitted); *accord* Wright & Miller, 11A Fed. Prac. & Proc. § 2948.1 (3d ed.) ("Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted").

Finally, even if the compliance costs Plaintiffs alleged were sufficiently imminent, they are too vague and speculative to warrant a preliminary injunction. To "constitute irreparable harm, an injury must be certain, great, and actual." *Saidak v. Schmidt*, 501 F. Supp. 3d 577, 598 (E.D. Tenn. 2020). Where plaintiffs rely on costs they allegedly will incur in complying with a new government regulation, an injunction is warranted only where the "peculiarity and size" of those costs is sufficient in light of the other factors.[7] *Commonwealth v. Biden*, 57 F.4th at 556.

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[6] In his declaration, the KBA's deputy general counsel notes that "[c]onsumer compliance experts … advised their bank customers to commence compliance preparation steps immediately after the Final Rule was announced." Schenk Decl. ¶ 7. However, the only "expert" he names is the Compliance Alliance, which he concedes "is owned and endorsed by 30 state banking associations, including the KBA." *Id.* That an entity owned by the KBA advised KBA members to commence compliance "immediately" cannot demonstrate that the KBA members are actually required at this point to incur compliance costs.

[7] Notably, in some circuits, these compliance costs categorically "do not [even] qualify as irreparable harm because they commonly result from new government regulation." *Commonwealth v. Biden*, 57 F.4th at 556.

For example, the Sixth Circuit has referred to "billions of dollars" in compliance costs as appropriately being included in a court's assessment of equities. *Id.*

Plaintiffs offer no evidence that the costs they would incur complying with the Rule are of such "peculiarity and size." Their only attempt to come close to an allegation of injury on this scale relies on "[t]he [Texas Bankers Association] declaration filed in the Texas CFPB Lawsuit." Mem. at 14. This is obviously insufficient to establish that the Plaintiff banks *in this case*, who all explicitly state that they are not members of the TBA, *see* Ramsey Decl. ¶ 4; Beyer Decl. ¶ 4; Kimbell Decl. ¶ 4; Mahoney Decl. ¶ 4; Jones Decl. ¶ 4; Hertz Decl. ¶ 4; Bunnell Decl. ¶ 5; Hunt Decl. ¶ 4, will be irreparably harmed. Moreover, the Plaintiff banks' allegations about the costs they specifically will incur are not the type of large, unique costs that warrant an injunction. Here, Plaintiffs indicate that at least some of their costs could be absorbed as part of "general overhead costs." *See* Jones Decl. ¶ 13; Hertz Decl. ¶ 16; Bunnell Decl. ¶ 18; Hunt Decl. ¶ 13. This "possibility of mitigating these harms …underscores that they remain speculative." *Bilyeu v. UT-Battelle, LLC*, No. 3:21-cv-352, 2021 WL 6338400, at *6 (E.D. Tenn. Oct. 29, 2021).

<u>Plaintiff Banks – Other Arguments</u>

Perhaps recognizing their alleged compliance costs are insufficiently "certain and immediate," Plaintiffs offer two alternative theories of "irreparable harm." Neither warrants granting the injunction. First, they claim harm just because this case implicates a constitutional claim: Plaintiffs note that "one portion of the Plaintiff Bank's constitutional challenge is before the Supreme Court" and "[c]ourts have held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of constitutional rights." Mem. at 15. Plaintiffs fail to acknowledge, however, that, contrary to the cases they cite, which involved deprivations of *individual* constitutional rights (*i.e.*, losses of First Amendment

Rights or rights to privacy), the instant case involves a constitutional question about the appropriate separation of powers between branches of the federal government. And, notably, the "cases finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the branches of government." *Leachcho, Inc. v. Consumer Prod. Safety Comm'n*, No. 22-CV-232-RAW, 2022 WL 17327494, at *2-3 (E.D. Okla. Nov. 29, 2022). "A separation of powers violation does not establish irreparable harm." *Id*.

Plaintiffs' final argument—that "the competitive disadvantage facing the Kentucky Plaintiffs," is "an additional factor of irreparable harm exists in this case," Mem. at 15—is similarly unavailing. Plaintiffs do not cite a single case supporting this claim. And they offer no specific allegations about how they will be specifically harmed by this putative "competitive disadvantage." Their "abstract" argument about a putative competitive disadvantage fails to demonstrate any injury that is sufficiently "certain, immediate" and "irreparable" to warrant an injunction. *Ohio v. Becerra*, No. 21-4235, 2022 WL 413680 (6th Cir. Feb. 8, 2022).[8]

<u>KBA</u>

KBA's claim of irreparable injury fares no better than that of the Plaintiff banks. KBA alleges that its member banks are "currently taking steps to implement the Final Rule" and "already incurring . . . direct economic injury caused by the Final Rule." Schenk Decl. ¶ 13. KBA's generalized and conclusory assertions do not satisfy its burden to establish imminent irreparable injury. KBA does not identify any particular member bank that it believes is facing

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[8] It is also worth noting that Plaintiffs did not bring their case for many months after the Rule was published, and courts have found that "delay in bringing [a] lawsuit lessens the importance of the irreparable harm factor." *B&S Transp., Inc. v. Bridgestone Americas Tire Operations, LLC*, No. 5:13-cv-2793, 2014 WL 804771, at *8 (N.D. Ohio Feb. 27, 2014).

irreparable harm. *Cf. Summers*, 555 U.S. at 498. It does not identify any specific costs that a member bank is incurring. It does not attempt to quantify the amount of such currently incurred costs. It does not attempt to establish that it is necessary for a bank to incur those costs now, as opposed to at some point in the future. *See supra* note 6.

KBA comes closest to offering specifics when it lists some categories of "start up processes" that banks may need to prepare for the rule. Schenk Decl. ¶ 7. But even here, KBA falls short. The "processes" it lists are simply generic nouns offered without explanation (*e.g.*, "forms," "videos," and "matrices"). KBA, again, does not tie these "processes" to any specific requirements in the Rule or attempt to estimate their costs. KBA does not even directly aver that its members will need to incur these costs; it merely notes that "compliance experts" (only one of which KBA even identifies, and which KBA concedes "is owned and endorsed by 30 state banking associations, including the KBA") have listed these items as part of their "standard recommendations" (which KBA does not provide) to "their bank customers" (none of which KBA identifies). *Id*. These kinds of "vague and conclusory" allegations are not sufficient to show entitlement to injunctive relief. *O'Bannon v. Louisville Metro Gov't*, No. 3:22-CV-P382, 2022 WL 17342917, at *2 (W.D. Ky. Nov. 30, 2022).

To the extent KBA is also alleging that it itself will be irreparably harmed by the Rule, this allegation fares no better than KBA's allegations on behalf of its members. KBA merely notes that it has "itself extended staff time and money … in answering questions … about the Small Business Lending Rule and providing training materials about it, and otherwise addressing the impacts of the" Rule. Schenk Decl. ¶ 14. KBA does not identify any specific harm it is suffering, and does not identify any specific costs it is incurring. Nor does it attempt to quantify the amount of any such costs. If its claim is that it has been forced to reallocate resources to

helping its members ensure they are compliant with the Rule, its failure to put forth specific facts about what, if any, "particular resources it has reallocated to ensure compliance" is insufficient to show that KBA has standing in this case, much less to warrant a preliminary injunction. *See Ohio v. Yellen*, 53 F.4th 983, 994 (6th Cir. 2022) (finding plaintiff lacked standing because it had not put forth specific facts about what particular resources it has reallocated to ensure compliance); *Polyweave Packaging, Inc. v. Buttigieg*, 51 F.4th 675, 679 (6th Cir. 2022) (noting "the same reasons that doomed [plaintiff's] standing arguments" also led the district court to conclude that plaintiff would "not suffer irreparable harm without a preliminary injunction").

C. The balance of equities weighs against preliminary relief.

The remaining two factors—"harm to the opposing party and the public interest"—"merge when the Government is the opposing party." *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020). These factors weigh against preliminary relief here.

The unwarranted delay that Plaintiffs seek would harm the public interest by needlessly delaying a congressionally mandated Rule that will produce significant benefits for small businesses, the communities they serve, and lenders themselves. "As envisioned by Congress, the [Rule] will create our nation's first consistent and comprehensive database regarding lending to small businesses." 88 Fed. Reg. at 35150. "These data will provide important insight into lending patterns in the small business lending market" that will advance the statutory goals of identifying community development needs and opportunities and facilitating equal access to credit. *Id.* at 35503. Among other benefits described in the Rule's preamble, small-business owners will benefit from "increased access to credit" as well as "remediation in the event that lenders … are found to have violated fair lending laws." *Id.* at 35504. "Communities may use these data to identify gaps in access to credit for small businesses," which they can then take

steps to address. *Id.* Creditors will be able to "understand small business lending market conditions more effectively" and "identify potentially profitable opportunities to extend credit" that may not be apparent now due to the present lack of transparency in this market. *Id.* And the data will allow for "a more efficient use of government resources in enforcing fair lending laws." *Id.* The public interest does not favor the delay Plaintiffs seek to these and other important benefits of the Rule.

Moreover, the requested relief would not just postpone implementation of the Rule; it would also delay *statutory* requirements that Congress enacted more than a decade ago—in the wake of a financial crisis that hit small businesses and small business lending particularly hard, *see id.* at 35153—to help small businesses. *See* 15 U.S.C. § 1691c-2. The Rule implements those statutory requirements and allows financial institutions to understand and meet them. Delaying the Rule means delaying requirements that Congress itself mandated by law. The public interest weighs heavily against Plaintiffs' efforts to frustrate that duly enacted law from taking effect. *See L. W. by & through Williams v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023) ("If the injunction remains in place during the appeal, Tennessee will suffer irreparable harm from its inability to enforce the will of its legislature"); *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) ("[G]iving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest.").

Plaintiffs' arguments to the contrary are unavailing. They claim the Bureau would not be harmed by an injunction because "Defendants are already subject to the Texas Preliminary Injunction." Mem. at 15. That does not follow. The relief Plaintiffs request here would delay implementation of the Rule as to additional entities beyond the plaintiffs in *Texas Bankers* and thus would cause additional harm to the public interest and the Bureau. Plaintiffs say that an

injunction would "maintain[] our constitutional structure." *Id.* at 16. But their constitutional argument is meritless. They say that, because the Supreme Court will review the Fifth Circuit's decision in *CFSA*, "the interests of judicial efficiency also weigh heavily in favor of a stay." *Id.* But Plaintiffs fail to explain how granting a preliminary injunction would conserve judicial resources. It would not. Finally, Plaintiffs claim that the handful of additional data points that the Bureau determined would aid in fulfilling the purposes of Section 1071 "risk[] harming the public by [their] macroeconomic effects," including "higher loan costs." *Id.* at 17. But the public interest can be evaluated only by considering both the benefits and costs of the Rule. The Bureau did that—at length—when it issued the Rule. *See* 88 Fed. Reg. at 35490-526. Plaintiffs, in contrast, simply ignore the Rule's benefits.

CONCLUSION

For all these reasons, the Court should deny Plaintiffs' motion.

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Respectfully submitted,

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