No. 21-50826

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED; CONSUMER SERVICE ALLIANCE OF TEXAS,

Plaintiffs-Appellants,

v.

CONSUMER FINANCIAL PROTECTION BUREAU; ROHIT CHOPRA, IN HIS OFFICIAL CAPACITY AS DIRECTOR, CONSUMER FINANCIAL PROTECTION BUREAU,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas (Yeakel, J.)

APPELLANTS' OPPOSED MOTION FOR CLARIFICATION OF STAY PENDING APPEAL

Christian G. Vergonis
Brinton Lucas
Harry S. Graver
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
cvergonis@jonesday.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS

Community Financial Services Association of America, Ltd. et al. v. Consumer Financial Protection Bureau et al.,
No. 21-50826

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Plaintiff-Appellant **Community Financial Services Association of America, Ltd.** (CFSA), which has no parent corporation. No publicly held company owns 10% or more of its stock.
2. Plaintiff-Appellant **Consumer Service Alliance of Texas** (CSAT), which has no parent corporation. No publicly held company owns 10% or more of its stock.
3. Defendant-Appellees **Consumer Financial Protection Bureau** (CFPB or Bureau); **Rohit Chopra, in his official capacity as Director, Consumer Financial Protection Bureau**.
4. Former Defendants-Appellees **David Uejio, in his official capacity as Acting Director, Consumer Financial Protection Bureau; John Michael Mulvaney, in his official capacity as Acting Director, Consumer Financial**

Protection Bureau; Kathleen Kraninger, in her official capacity as Director, Consumer Financial Protection Bureau.

5. The following law firms and counsel have participated in the case, at any stage of the litigation:

Plaintiffs-Appellants	**Counsel**
Community Financial Services Association of America, Ltd.; Consumer Service Alliance of Texas	Michael A. Carvin Christian G. Vergonis Brinton Lucas H. Hunter Bruton Harry S. Graver Alexis Zhang JONES DAY 51 Louisiana Ave., N.W. Washington, DC 20001 Laura Jane Durfee JONES DAY 2727 North Harwood St., Suite 500 Dallas, TX 75201
Defendants-Appellees	**Counsel**
Consumer Financial Protection Bureau; David Uejio, in his official capacity as Director, Consumer Financial Protection Bureau Terminated: 10/12/2021; Rohit Chopra, in his official capacity as Director, Consumer Financial Protection Bureau; Kathleen Kraninger, in her official capacity as Director, Consumer Financial Protection Bureau Terminated: 09/15/2021	Stephen Van Meter *Acting General Counsel* Steven Y. Bressler *Acting Deputy General Counsel* Mary McLeod *Former General Counsel* John R. Coleman *Former Deputy General Counsel* Kevin E. Friedl Kristin Bateman Karen S. Bloom Nandan M. Joshi CONSUMER FINANCIAL PROTECTION BUREAU

	1700 G Street, N.W. Washington, DC 20552
Amici Curiae Public Citizen, Inc.; Americans for Financial Reform Education Fund; Center for Responsible Lending; National Consumer Law Center	**Counsel** Aaron Michael Johnson EQUAL JUSTICE CENTER 510 S. Congress Avenue, Suite 206 Austin, TX 78704 Rebecca Smullin PUBLIC CITIZEN LITIGATION GROUP 1600 20th Street NW Washington, DC 20009
Third Party Payment Processors Association	Keith J. Barnett Timothy A. Butler Elizabeth P. Waldbeser TROUTMAN PEPPER HAMILTON SANDERS, LLP 600 Peachtree Street, N.E., Suite 3000 Atlanta, GA 30308-2216
Movant Cooperative Baptist Fellowship	**Counsel** Rebecca Smullin PUBLIC CITIZEN LITIGATION GROUP 1600 20th Street NW Washington, DC 20009 Aaron Michael Johnson EQUAL JUSTICE CENTER 510 S. Congress Avenue, Suite 206 Austin, Texas 78704
Petitioner (No. 22-448) Consumer Financial Protection Bureau, et al.	**Counsel** Elizabeth B. Prelogar Brian M. Boynton Brian H. Fletcher Benjamin W. Snyder Ephraim A. McDowell

	UNITED STATES DEPARTMENT OF JUSTICE 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 Seth Frotman Steven Y. Bressler Kristin Bateman Christopher Deal Kevin E. Friedl Justin M. Sandberg Stephanie Garlock CONSUMER FINANCIAL PROTECTION BUREAU Washington, DC 20552
Respondents (No. 22-448) Community Financial Services Association of America, Limited, et al.,	**Counsel** Noel J. Francisco Christian G. Vergonis Hashim M. Mooppan Yaakov M. Roth Brinton Lucas Thomas Hopson Alexis Zhang JONES DAY 51 Louisiana Ave., NW Washington, DC 20001
***Amici Curiae* (No. 22-448)** States of West Virginia and 15 Other States	**Counsel** Lindsay Sara See Patrick Morrisey Michael R. Williams Grant A. Newman OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL State Capitol Complex Building 1, Room E-26 Charleston, WV 25305

Steven Marshall
Attorney General, State of Alabama

Kris Kobach
Attorney General, State of Kansas

Treg Taylor
Attorney General, State of Alaska

Daniel Cameron
Attorney General, Commonwealth of Kentucky

Tim Griffin
Attorney General, State of Arkansas

Jeff Landry
Attorney General, State of Louisiana

Ashley Moody
Attorney General, State of Florida

Lynn Fitch
Attorney General, State of Mississippi

Chris Carr
Attorney General, State of Georgia

Andrew Bailey
Attorney General, State of Missouri

Raúl Labrador
Attorney General, State of Idaho

Austin Knudsen
Attorney General, State of Montana

Todd Rokita
Attorney General, State of Indiana

Michael T. Hilgers
Attorney General, State of Nebraska

Brenna Bird
Attorney General, State of Iowa

John M. Formella
Attorney General, State of New Hampshire

Drew Wrigley
Attorney General, State of North Dakota

Jason Miyares
Attorney General, Commonwealth of Virginia

Dave Yost
Attorney General, State of Ohio

Bridget Hill
Attorney General, State of Wyoming

Gentner Drummond
Attorney General, State of Oklahoma

Alan Wilson
Attorney General, State of South Carolina

Marty Jackley
Attorney General, State of South Dakota

Jonathan Skrmetti
Attorney General and Reporter, State of Tennessee

	John Scott *Provisional Attorney General, State of Texas* Sean D. Reyes *Attorney General, State of Utah*
States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin, and the District of Columbia	Letitia James *Attorney General, State of New York* Barbara D. Underwood *Solicitor General* Ester Murdukhayeva *Deputy Solicitor General* Dennis Fan *Senior Assistant Solicitor General* 28 Liberty Street New York, NY 10005 Kris Mayes *Attorney General, State of Arizona* 2005 N. Central Ave. Phoenix, AZ 85004 Rob Bonta *Attorney General, State of California* 1300 I St. Sacramento, CA 95814 Aaron M. Frey *Attorney General, State of Maine* 6 State House Station Augusta, ME 04333 Philip J. Weiser *Attorney General, State of Colorado* 1300 Broadway, 10th Fl. Denver, CO 80203 Anthony G. Brown *Attorney General, State of Maryland*

Brain E. Frosh
Attorney General, State of Maryland
200 Saint Paul Pl.
Baltimore, MD 21202

William Tong
Attorney General, State of Connecticut
165 Capital Ave.
Hartford, CT 06106

Andrea Joy Campbell
Attorney General, Commonwealth of Massachusetts
Maura Healey
Attorney General, Commonwealth of Massachusetts
One Ashburton Pl.
Boston, MA 02108

Kathleen Jennings
Attorney General, State of Delaware
820 N. French St.
Wilmington, DE 1980

Dana Nessel
Attorney General, State of Michigan
P.O. Box 30212
Lansing, MI 48909

Anne E. Lopez
Attorney General, State of Hawaii
Holly T. Shikada
Attorney General, State of Hawaii
425 Queen St.
Honolulu, HI 96813

Keith Ellison
Attorney General, State of Minnesota
75 Rev. Dr. Martin Luther King Jr. Blvd.

St. Paul, MN 55155

Kwame Raoul
Attorney General, State of Illinois
100 West Randolph St.
Chicago, IL 60601

Aaron D. Ford
Attorney General, State of Nevada
100 North Carson St.
Carson City, NV 89701

Matthew J. Platkin
Attorney General, State of New Jersey
25 Market St.
Trenton, NJ 08625

Peter F. Neronha
Attorney General, State of Rhode Island
150 S. Main St.
Providence, RI 02903

Raúl Torrez
Attorney General, State of New Mexico
Hector Balderas
Attorney General, State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

Robert W. Ferguson
Attorney General, State of Washington
P.O. Box 40100
Olympia, WA 98504

Josh Stein
Attorney General, State of North Carolina
114 W. Edenton St.
Raleigh, NC 27603

	Josh Kaul *Attorney General, State of Wisconsin* 17 W. Main Street Madison, WI 53703 Ellen F. Rosenblum *Attorney General, State of Oregon* 1162 Court St. NE Salem, OR 97301 Brian L. Schwalb *Attorney General, District of Columbia* Karl A. Racine *Attorney General, District of Columbia* 400 6th St., NW Washington, DC 20001 Michelle A. Henry *Attorney General, Commonwealth of Pennsylvania* Josh Shapiro *Attorney General, Commonwealth of Pennsylvania* Strawberry Sq. Harrisburg, PA 17120 Charity R. Clark *Attorney General, State of Vermont* 109 State St. Montpelier, VT 05609
Community Development Financial Institutions and Credit Unions including Self-Help Credit Union, The Center for Responsible Lending, and National Association of Latino Community Asset Builders	Richard A. Koffman Emmy L. Levens Zachary I. Krowitz Trent M. Rehusch COHEN MILSTEIN SELLERS & TOLL PLLC 1100 New York Ave. NW Washington, DC 20005

	Claire L. Torchiana COHEN MILSTEIN SELLERS & TOLL PLLC 88 Pine Street New York, NY 10005
Professors of History and Constitutional Law	Elizabeth B. Wydra Brianne J. Gorod Brian R. Frazelle J. Alexander Rowell CONSTITUTIONAL ACCOUNTABILITY CENTER 1200 18th Street NW, Suite 501 Washington, DC 20036
Lawyers Committee for Civil Rights under Law, Housing Clinic of Jerome N. Frank Legal Services of Organization at Yale Law School, Leadership Conference on Civil and Human Rights, National Fair Housing Alliance, Unidosus, et al.	Damon Hewitt Jon Greenbaum Thomas Silverstein Malcolm Peyton-Cook Sophia Jayanty LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW 1500 K Street, NW Suite 900 Washington, DC 20005 Jeffrey Gentes JEROME N. FRANK LEGAL SERVICES ORGANIZATION Yale Law School 127 Wall Street New Haven, CT 06511
Military and Veterans Organizations	Carolyn E. Shapiro John Paul Schnapper-Casteras Rachael R. Yocum SCHNAPPER-CASTERAS PLLC 1717 K Street NW, Suite 900 Washington, DC 20006

National Treasury Employees Union	Julie M. Wilson Paras N. Shah Allison C. Giles NATIONAL TREASURY EMPLOYEES UNION 800 K St., N.W., Suite 1000 Washington, DC 20001
Current and Former Members of Congress	Hyland Hunt Ruthanne M. Deutsch DEUTSCH HUNT PLLC 300 New Jersey Ave. NW, Suite 900 Washington, DC 20001
Farm Action, HEAL Food Alliance, Institute for Agriculture and Trade Policy, Rural Coalition, Partners for Rural Transformation	Rachel L. Fried Jeffrey B. Dubner Orlando Economos DEMOCRACY FORWARD FOUNDATION P.O. Box 34553 Washington, DC 20043
The Mortgage Bankers Association, The National Association of Home Builders, and The National Association of Realtors®	Robert M. Loeb Jeffrey P. Naimon Lauren A. Weber ORRICK, HERRINGTON & SUTCLIFFE LLP 1152 15th Street, NW Washington, DC 20005
90 State and Local Nonprofit Organizations	Seth E. Mermin David S. Nahmias Ayesha K. Rasheed CENTER FOR CONSUMER LAW & ECONOMIC JUSTICE, UC BERKELEY SCHOOL OF LAW 308 Law Building Berkeley, CA 94720-7200

AARP and AARP Foundation	Maame Gyamfi William Alvarado Rivera Dean Graybill Julie Nepveu AARP FOUNDATION 601 E Street, N.W. Washington, DC 20004
Ten Consumer Advocacy Organizations	Scott L. Nelson Allison M. Zieve PUBLIC CITIZEN LITIGATION GROUP 1600 20th Street NW Washington, DC 20009
Financial Regulation Scholars	Gregory M. Lipper Rebecca S. Legrand LEGRAND LAW PLLC 1100 H Street NW, Suite 1220 Washington, DC 20005 Adam J. Levitin GEORGETOWN UNIVERSITY LAW CENTER 600 New Jersey Avenue NW Washington, DC 20001 Patricia A. McCoy BOSTON COLLEGE LAW SCHOOL 885 Centre Street Newton Centre, MA 02459
Center for Constitutional Jurisprudence	John C. Eastman Anthony T. Caso CONSTITUTIONAL COUNSEL GROUP 174 W. Lincoln Ave. #620 Anaheim, CA 92805
Atlantic Legal Foundation	Lawrence S. Ebner ATLANTIC LEGAL FOUNDATION 1701 Pennsylvania Ave NW,

	Suite 200 Washington, DC 20006 Herbert L. Fenster 3800 Fox Ridge Longmont, CO 80503
Americans for Prosperity Foundation	Michael Pepson AMERICANS FOR PROSPERITY FOUNDATION 1310 N. Courthouse Road, Ste. 700 Arlington, VA 22201
Landmark Legal Foundation	Matthew C. Forys Michael J. O'Neill LANDMARK LEGAL FOUNDATION 19415 Deerfield Ave., Suite 312 Leesburg, VA 20176 Richard P. Hutchison LANDMARK LEGAL FOUNDATION 3100 Broadway, Suite 1210 Kansas City, MO 64111
Former Members of Congress	Helgi C. Walker Lucas C. Townsend Russell Balikian Lochlan F. Shelfer Nathaniel J. Tisa Hadhy H. Ayaz GIBSON, DUNN & CRUTCHER LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036
Credit Union National Association, Inc., National Association of Federally-Insured Credit Unions, and American Association of Credit Union Leagues	Julian R. Ellis, Jr. Robert P. Bacaj BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15th Street, Suite 2900 Denver, CO 80202

	Leah C. Dempsey BROWNSTEIN HYATT FARBER SCHRECK, LLP 1155 F Street N.W. Washington, DC 20004
New England Legal Foundation	Mark A. Perry Joshua M. Wesneski WEIL, GOTSHAL & MANGES LLP 2001 M Street NW Washington, DC 20036 Mark I. Pinkert WEIL, GOTSHAL & MANGES LLP 1395 Brickell Ave. Miami, FL 33131 Daniel B. Winslow NEW ENGLAND LEGAL FOUNDATION 333 Washington Street, Suite 850 Boston, MA 02108
ACA International	Christopher O. Murray BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15th Street, Suite 2900 Denver, CO 80202
The New Civil Liberties Alliance, The Buckeye Institute, The Manhattan Institute for Policy Research, and Law Offices of Crystal Moroney, P.C.	Richard A. Samp Margaret A. Little Mark S. Chenoweth NEW CIVIL LIBERTIES ALLIANCE 1225 19th St. NW, Suite 450 Washington, DC 20036
Third Party Payment Processors Association	Misha Tseytlin Kevin M. LeRoy

	TROUTMAN PEPPER HAMILTON SANDERS LLP 227 West Monroe Suite 3900 Chicago, IL 60606 Keith Jerrod Barnett Elizabeth P. Waldbeser TROUTMAN PEPPER HAMILTON SANDERS LLP 600 Peachtreet St., N.E. Suite 3000 Atlanta, GA 30308
132 Members of Congress	Jennifer L. Mascott R. Trent McCotter SEPARATION OF POWERS CLINIC, GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE, ANTONIN SCALIA LAW SCHOOL 3301 Fairfax Dr. Arlington, VA 22201
Chamber of Commerce of the United States of America et al.	Cameron Thomas Norris David L. Rosenthal CONSOVOY MCCARTHY PLLC 1600 Wilson Blvd., Ste 700 Arlington, VA 22209 Jennifer B. Dickey Jordan L. Von Bokern U.S. CHAMBER LITIGATION CENTER 1615 H Street, NW Washington, DC 20062
John Michael "Mick" Mulvaney	Brunn Wall Roysden III FUSION LAW, PLLC 7600 N. 15th St., Suite 150 Phoenix, AZ 85020

	Eric Blankenstein LAW OFFICES OF ERIC BLANKENSTEIN PLLC 1701 Pennsylvania Ave., NW, #200 Washington, DC 20006
The Foundation for Government Accountability	Stewart Lee Whitson David Craig Sofia DeVito Caroline M. B. Miller Ryan Young FOUNDATION FOR GOVERNMENT ACCOUNTABILITY 15275 Collier Blvd Naples, FL 34119
America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund	William Jeffrey Olson Jeremiah L. Morgan WILLIAM J. OLSON, P.C. 370 Maple Ave. W., Suite 4 Vienna, VA 22180 Rick Boyer INTEGRITY LAW FIRM P.O. Box 10953 Lynchburg, VA 24506
Washington Legal Foundation	John M. Masslon II Cory L. Andrews WASHINGTON LEGAL FOUNDATION 2009 Massachusetts Ave. NW Washington, DC 20036
Cross-Petitioners (No. 22-663)	**Counsel**
Community Financial Services Association of America, Limited, et al.	Noel J. Francisco Christian G. Vergonis Hashim M. Mooppan Yaakov M. Roth Brinton Lucas JONES DAY

	51 Louisiana Ave., N.W. Washington, DC 20001
***Amicus Curiae* (No. 22-663)** Third Party Payment Processors Association	**Counsel** Misha Tseytlin Kevin M. LeRoy TROUTMAN PEPPER HAMILTON SANDERS LLP 227 West Monroe Suite 3900 Chicago, IL 60606 Keith J. Barnett Elizabeth P. Waldbeser TROUTMAN PEPPER HAMILTON SANDERS LLP 600 Peachtreet St., N.E. Suite 3000 Atlanta, GA 30308
Cross-Respondents (No. 22-663) Consumer Financial Protection Bureau, et al.	**Counsel** Elizabeth B. Prelogar UNITED STATES DEPARTMENT OF JUSTICE 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 Seth Frotman Steven Y. Bressler Kristin Bateman Christopher Deal Kevin E. Friedl Justin M. Sandberg Stephanie Garlock CONSUMER FINANCIAL PROTECTION BUREAU Washington, D.C. 20552

/s/ Christian G. Vergonis
Christian G. Vergonis
Counsel for Plaintiffs-Appellants

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Pursuant to Federal Rule of Appellate Procedure 27(a)(1), Appellants (the Lenders) respectfully move for an order clarifying the operation of this Court's October 14, 2021 order staying the compliance date of the Rule. The Bureau opposes this motion and may file a response.

INTRODUCTION

At the start of this appeal, this Court stayed the compliance date of the rule under review "until 286 days after resolution of the appeal." 10/14/21 Order. A stay was necessary because, without one, the Lenders would need to undertake the costly, months-long process of preparing for compliance with the Rule before their challenge was fully resolved. 10/1/21 Stay Mot. 10-12.

Although an appeal is obviously not "resolved" so long as it is ongoing, the Bureau nevertheless asserted on its website last June that the stay would expire 286 days after the Supreme Court issued its judgment on June 17, 2024. *See* Z. Martinez, CFPB, *New Protections for Payday and Installment Loans Slated To Take Effect Next Year* (June 14, 2024), https://tinyurl.com/3kzu23su. The Bureau was relying on the premise that the appeal would be fully "resolved" once the Supreme Court acted to reverse the 2022 judgment of this Court, which is why the Bureau told this Court that it did not even have to issue a new judgment at all. 6/14/24 CFPB Resp. 2.

The Bureau's assertion proved untenable. On remand from the Supreme Court, the appeal continued. This Court issued a *new* judgment, entertained the Lenders' petition for rehearing on their non-Appropriations Clause claims, withheld issuance of the mandate, and directed the Bureau to respond to the petition, which remained pending for approximately three months before this Court denied the petition and issued its mandate on November 12, 2024.

And because the Lenders plan to seek Supreme Court review of this Court's new and most recent judgment, the appeal is *still* not resolved: If the Lenders succeed, the Supreme Court will hold that the Rule must be set aside; only then will the "appeal" of the district court's rejection of their challenge to that Rule be "resolved." At a minimum, the appeal was not "resolved" before November 12, 2024, because the appeal in this Court was still ongoing until that date.

Before filing this motion, the Lenders conferred with the Bureau, which indicated that it opposes this motion and continues to maintain that compliance with the Rule will be required no later than 286 days after the Supreme Court issued its judgment on June 17, 2024.[1]

[1] This Court has jurisdiction to clarify the scope of the 2021 stay order without recalling the mandate, for "[a]n appellate court … has continuing power to accept and pass upon a petition to clarify" its own rulings. *Greater Bos. Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971); *see* 16 C. Wright & A. Miller, Fed. Prac. & Proc. Juris. § 3937.1 (3d ed. 2024) ("[T]he courts of appeals retain

ARGUMENT

In 2021, this Court ordered that the compliance date of the Bureau's Rule be stayed "until 286 days after resolution of the appeal." 10/14/21 Order. That stay extends through any post-judgment proceedings in this Court, including the filing and resolution of a rehearing petition, as well as any Supreme Court proceedings in the case—including those resolving a petition regarding this Court's most recent judgment upholding the Rule. 6/19/24 Op.; *see also* 11/12/24 Order (denying rehearing); Sup. Ct. R. 13.3 (time to petition for certiorari "runs from the date of the denial of rehearing").

Indeed, it is impossible to read this Court's order as saying anything else. After all, an appeal is not *resolved* in any sense of the word, so long as the possibility of future appellate proceedings remains. To resolve means "to settle"—*i.e.*, to finish. *Oxford English Dictionary*, "Resolve" (Mar. 2024). And an appeal is not finished when the possibility or rehearing still exists or when there is still another appellate court to go. That is why a "judgment" is not "final"

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all power necessary to control enforcement of their own orders."). But in all events, this Court can recall its mandate ahead of clarifying the stay order, should it wish to do so in an abundance of caution. *See Dilley v. Alexander*, 627 F.2d 407, 412 (D.C. Cir. 1980) ("recall[ing] … mandate" to grant "motion for … clarification" and "approv[ing]" of the decision to file such a motion to bring a "misconstruction" of the court's order "to [its] attention"); *Meredith v. Fair*, 306 F.2d 374, 378-79 (5th Cir. 1962) (Wisdom, J.) (recalling mandate to clarify it).

until at least "the time expires for filing a petition for certiorari." *Clay v. United States*, 537 U.S. 522, 524-25 (2003) (review of appellate court's "affirmation of [a] conviction"); *see also, e.g.*, *VirnetX Inc. v. Apple Inc.*, 931 F.3d 1363, 1375 (Fed. Cir. 2019) (a "final decision" under Patent Act occurs "when the invalidity challenge is decided on appeal and the time for petitioning for certiorari has passed"); *Castaneda-Castillo v. Holder*, 723 F.3d 48, 66 (1st Cir. 2013) (judgment "final" for Equal Access to Justice Act only "once the period for seeking certiorari … [has] expired").

In fact, when this Court wishes to key a stay to the resolution of proceedings *in this Court*, it knows how to do so. *SEC v. Barton*, 79 F.4th 573, 581 (5th Cir. 2023) (granting stay that remains in effect "90 days from the issuance of this court's mandate"). Here, by contrast, this Court chose to start the 286-day clock on the "resolution of the appeal," thereby permitting the Lenders to exhaust their appellate options before undertaking the costly, months-long process necessary to prepare for compliance with the Rule. 10/14/21 Order.

That means that this Court's stay remained in effect during the pendency of the recent proceedings on remand, and remains in effect still, up to and until the Supreme Court's final disposition of the Lenders' certiorari petition seeking review of this Court's most recent judgment on remand. To put a finer point on it, on June 19, this Court "reinstate[d]" its holdings as to the non-funding

"alternative arguments" here, and then "render[ed]" the *opposite* judgment in favor of the Bureau. 6/19/24 Op. 2. That disposition was a new and distinct judgment—one over which the Lenders had a right to seek rehearing, and one over which they still have the right to seek Supreme Court review. *See* Fed. R. App. P. 35; Sup. Ct. R. 13.3. Only after those avenues for relief are exhausted will this appeal be "resolved."

The Bureau, however, sees things differently. It publicly took the position, and continues to maintain, that this appeal was "resolved" on the day that the Supreme Court formally handed down its judgment (June 17, 2024), and that the Rule would therefore go into effect 286 days later (March 30, 2025). *See* Martinez, *supra*. That reading of this Court's order was flawed from the start—but it is especially untenable following this Court's actions on remand. The relevant premise of the Bureau's position was that the Lenders' "non-funding claims" were fully "resolved" by this Court's 2022 judgment and the Supreme Court's denial of the Lender's cross-petition in 2023. 6/14/24 Resp. 1-2. For that reason, the Bureau argued that this Court did not even need to issue a new judgment *at all*—and if it did, any judgment should be limited to the funding issue addressed by the Supreme Court. *Id.*

But this Court rejected that course five days later—specifically issuing a new decision that "reinstat[ed]" its *other* holdings, "render[ed]" a formal

judgment in favor of the Bureau, and set a time limit for the Lenders to seek rehearing. 6/19/24 Op. 2. After the Lenders filed their rehearing petition, the Court directed the Bureau to file a response and issued an order withholding issuance of the mandate. The Court then deliberated for months before denying the petition. If the Bureau were correct—*i.e.*, if the Supreme Court had resolved the non-funding issues in 2023—this Court would have lacked the power to *reopen* those issues, and then put them up for potential *en banc* review.

This Court had it right. Because the Lenders had obtained full relief from this Court's original judgment—*i.e.*, vacatur of the Rule (based on the Appropriations Clause)—they could not have sought rehearing as to any other (non-outcome-altering) issue in 2022. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) ("A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."); *see also, e.g.*, 15A C. Wright & A. Miller, Fed. Prac. & Proc. Juris. § 3902 (3d ed. 2024) ("standing to appeal" turns on "an adverse effect of the judgment").[2]

[2] The two decades-old, out-of-circuit cases in the Bureau's prior submission do not say otherwise. *See* 6/14/24 Resp. 2. In one, the court *denied* review, with several judges concurring separately to "reject the unprecedented proposal for *en banc* hearing suggested by a prevailing party dissatisfied with certain nondispositive language in the panel majority opinion." *New Era Publ'ns Int'l, APS v. Henry Holt, Co.*, 884 F.2d 659, 660 (2d Cir. 1989) (Miner, J., concurring in denial of rehearing en banc). And in the other, the court corrected a plain mistake as to the specific legal issue it addressed; it did not reach out to decide

In turn, in order for the Lenders to be able to seek this Court's *en banc* review of the non-funding issues, it was necessary for this Court—as it did—to issue a new judgment regarding those issues. The Lenders had a right to seek rehearing on those issues. And now that this Court has denied rehearing over that new judgment, the Lenders have the right to seek review of that decision at the Supreme Court through a new cert petition.[3]

The upshot is this: An appeal is not "resolved" until the appeal is over; and an appeal is not over until a party has had an opportunity to seek rehearing in the Court of Appeals and the Supreme Court has had the opportunity to review. Here, this Court has issued a new judgment regarding the non-funding issues in this case; has declined to rehear that new judgment; and the Lenders intend to seek review of that new judgment in a cert petition. In so many words, this appeal is not done: the Lenders' challenge to the Rule, and its appeal

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other non-dispositive issues within the original judgment. *See Taylor v. Norris*, 401 F.3d 883, 884 (8th Cir. 2005).

[3] The Lenders filed their original conditional cross-petition for certiorari in an "abundance of caution," but aware that none of their requested (added) relief would likely make any real-world difference in light of this Court's holding based on the Appropriations Clause. *See* Cross-Pet. 11-12, *CFSA v. CFPB*, 143 S. Ct. 981 (2023) (No. 22-663) (Cross Pet.). This time, however, a cert petition will be outcome-determinative, because if the Lenders are successful, the Rule will be set aside. *See also infra* Part II.

regarding it, is very much alive. And for that reason, by its plain terms, this Court's stay order remains in effect, with its 286-day clock not yet running.

At a minimum, the Bureau is wrong to say that the order's clock started to run when the Supreme Court handed down its judgment on June 17, 2024. Indeed, that position is irreconcilable with this case's subsequent procedural history. After the Court issued that judgment in June 2024, this Court then issued a *new* judgment, entertained the Lenders' petition for rehearing regarding the claims not addressed by the Supreme Court, withheld its issuance of the mandate, and directed the Bureau to respond to that petition, which remained pending for roughly three months before this Court denied the petition and issued its mandate. Those substantive appellate proceedings make very clear that this "appeal" was very much not "resolved" back in June 2024. Instead, at the very least, even if the stay order's clock does not start until any Supreme Court proceedings have concluded, it starts with the issuance of this Court's mandate. Under no circumstances has it been running for the last five months.

CONCLUSION

The Court should clarify that its existing stay extends until the time for filing a petition for certiorari of has expired or, if the petition has been filed, until the Supreme Court's final disposition of the case, whichever comes later. In the alternative and at a minimum, the Court should clarify that its existing stay expires 286 days after the Court's recent issuance of its mandate.

November 18, 2024

Respectfully submitted,

/s/ Christian G. Vergonis
Christian G. Vergonis
Brinton Lucas
Harry S. Graver
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
cvergonis@jonesday.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d) because it contains 2,092 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as counted using the word-count function on Microsoft Word 2016 software.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016, in Calisto MT style, 14-point font.

November 18, 2024

/s/ Christian G. Vergonis
Christian G. Vergonis

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, I electronically filed the original of the foregoing brief with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Christian G. Vergonis
Christian G. Vergonis

CERTIFICATE OF CONFERENCE

On November 14 and 15, 2024, counsel for Plaintiffs-Appellants conferred with counsel for Defendants-Appellees, who advised that the Defendant-Appellees will oppose this motion.

/s/ *Christian G. Vergonis*
Christian G. Vergonis