December 12, 2025

Via Federal Rulemaking Portal (Regulations.gov)

Acting Director Russell Vought
U.S. Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

RE: **Comment on Notice of Proposed Rulemaking Amending Provisions Related to Disparate Impact and Discouragement of Applications under Regulation B Implementing the Equal Credit Opportunity Act, Docket No. CFPB-2025-0039, RIN 3170-AB54, Document No. 2025-19864, 90 Fed. Reg. 50901 (November 13, 2025)**

Dear Acting Director Vought:

The Attorneys General of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington submit this comment in response to the above-referenced Notice of Proposed Rulemaking ("NPRM") issued by the Consumer Financial Protection Bureau ("Bureau"). The NPRM proposes to amend Regulation B, implementing the Equal Credit Opportunity Act ("ECOA"), by rescinding the regulations authorizing a disparate impact theory of discrimination and amending regulations relating to discouragement of prospective applicants for credit. As explained below, these changes both violate the Administrative Procedure Act and weaken ECOA's protections against unfair treatment in credit markets. Unlike the existing regulations, which help to effectuate ECOA's goal of ensuring that all people have equal access to credit without discrimination on the basis of race, color, religion, national origin, sex, or marital status, and age (among other bases), the proposed changes will lead to more discrimination, undermining Congress's purpose in enacting the statute. The undersigned Attorneys General strongly oppose the changes and urge the Bureau to retain the existing provisions regarding disparate impact and discouragement.

Introduction

ECOA and its 1976 amendments established "as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness."[1] For half a century, consistent with Congress's intent, ECOA's protections have included disparate impact liability to remedy the discriminatory effects of a creditor's policies or practices even where the discrimination may be unintentional.[2] They have also included protections against creditors who discriminate by discouraging consumers from

[1] S. Rep. No. 94-589 at 3 (1976).
[2] 42 Fed. Reg. 1242, 1246, 1255 (Jan. 6, 1977).

even applying for credit.[3] Moreover, "[i]n endowing [regulators] with authority to prevent 'circumvention or evasion,' Congress indicated that the ECOA must be construed broadly to effectuate its purpose of ending discrimination in credit applications."[4] Despite this clear mandate from Congress and 50 years of history, the Bureau now proposes to narrow the scope of ECOA, eliminating anti-discrimination protections that are clearly required by the statute.

The changes to Regulation B proposed in the NPRM must be rejected for several reasons, explained in greater detail below. With respect to disparate impact liability, the NPRM runs afoul of the APA and Congress's intent in three ways:

First, contrary to the position taken by the Bureau in the NPRM, a proper reading of ECOA compels the conclusion that the statute authorizes a disparate impact theory of liability.

Second, the NPRM erroneously and without any factual basis assumes that in the absence of disparate impact liability, consumers will still enjoy the broad protections against discrimination that ECOA was enacted to provide.

Third, disparate impact liability is an entirely lawful mechanism for enforcing anti-discrimination statutes that provide for this theory of liability.

The NPRM's amendments to the discouragement provisions of Regulation B also violate the APA and undermine ECOA, and the changes should be rejected for the following reasons:

First, the proposed changes to the discouragement regulations are contrary to law.

Second, the proposed revisions will harm consumers.

Third, the proposed revisions will harm state enforcement efforts.

Fourth, imposing these harms based on *ipse dixit* and speculation is arbitrary and capricious.

For all these reasons, the Bureau must recognize the harm its proposals will cause and forego these changes to Regulation B.

I. Disparate Impact Liability

The Bureau's proposal to amend ECOA's Regulation B to provide that ECOA does not authorize disparate impact liability is arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act ("APA").[5]

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[3] 40 Fed. Reg. 49298 (Oct. 22, 1975).

[4] *CFPB v. Townstone Financial, Inc.,* 107 F.4th 768, 776 (7th Cir. 2024).

[5] *See* 5 U.S.C. § 706(2)(A). The NPRM offers two erroneous, preliminary conclusions in support of this proposed rule change: first, neither the text nor statutory purpose of ECOA authorizes or is consistent with disparate impact liability; and second, any reliance interests in the existing regulatory interpretation would not outweigh revising Regulation B to eliminate disparate impact liability. The Bureau also suggests, contrary to nearly 50 years of precedent, that disparate

The Bureau's proposal to eliminate disparate impact liability from ECOA's Regulation B does not include any reasoned explanation, as required by the APA, for abruptly departing from the decades-old understanding of creditors' obligations under ECOA to not discriminate on a prohibited basis. The NPRM rejects the Supreme Court's clear holding in *Texas Department of Housing & Community Development v. Inclusive Communities Project Inc*. ("*Inclusive Communities*")[6]; fails to address the continued need for disparate impact liability to fulfill ECOA's mandate to ensure fair and efficient credit markets, and ignores the serious reliance interests of state and local governments in robust federal enforcement in this arena; and grossly misinterprets Supreme Court precedent to suggest that disparate impact standards are unconstitutional.

Because the Bureau's proposed elimination of the provisions enforcing disparate impact liability is both contrary to the text and purpose of ECOA as well as arbitrary and capricious, the Bureau must withdraw the NPRM and maintain the current disparate impact provisions in Regulation B.

A. ECOA "must be construed to encompass disparate impact claims" because its text refers to the consequences of actions and such claims are consistent with ECOA's statutory purpose.

The NPRM's preliminary conclusion that ECOA does not encompass disparate impact liability is contrary to law. The Supreme Court commands that "antidiscrimination laws must be construed to encompass disparate impact claims when the text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with the statutory purpose."[7] ECOA's antidiscrimination provision at 15 U.S.C. § 1691(a) meets both these elements and is materially identically to language in the Fair Housing Act[8] ("FHA") that the Supreme Court has held to provide for disparate impact. Accordingly, ECOA must be construed by the Bureau to encompass disparate impact claims, and the Bureau's failure to do so is contrary to law in violation of the APA.

ECOA's antidiscrimination provision reads: "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.)" as well as other bases.[9]

The Supreme Court has held similar language in other statutes—indeed, identical language in the FHA—to encompass the discriminatory effects of neutral policies, as well as intentional

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impact liability under the regulation implementing ECOA is unconstitutional. *See* 90 Fed. Reg. 50,901, 50,906 (Nov. 13, 2025) (noting "there may be serious concerns" but "mak[ing] no conclusion as to these constitutional questions").

[6] 576 U.S. 519 (2015).

[7] *Id*. at 533. *See also Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) ("'It is emphatically the province and duty of the judicial department,'" not the Executive, "'to say what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

[8] 42 U.S.C. §§ 3601 *et seq.*

[9] 15 U.S.C. § 1691(a) (emphasis added).

discrimination.[10] The Supreme Court affirmed this understanding in *Inclusive Communities*,[11] when it held that 42 U.S.C. § 3605(a), providing that "[i]t shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to *discriminate* . . . because of race, color, religion, sex, handicap, familial status, or national origin," reached disparate impact claims. The Supreme Court held that this language, which mirrors ECOA and does not contain any mention of an "effects" test, provides for disparate impact liability. The analysis ends there. As expected, courts have followed Supreme Court precedent to recognize ECOA authorizes disparate impact claims and to remedy a broad range of discriminatory conduct by creditors, including marketing,[12] credit evaluation,[13] establishment of loan terms,[14] and loan servicing that have a disparate adverse impact on protected classes.[15]

The purpose of ECOA and its 1976 amendments is to establish "as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness."[16] When Congress enacts a new statute it is assumed to be aware of Supreme Court precedent.[17] In this instance, Congress would be assumed to have known that antidiscrimination statutes were being interpreted to encompass disparate impact liability. More significantly, the antidiscrimination provision of ECOA adopted by Congress parallels language directly from *Griggs v. Duke Power Co*.[18] This is because Congress intended ECOA to encompass disparate impact liability. House and Senate Reports on the legislation recognized that disparate impact liability would be available under the language of ECOA.[19] While the House version of the bill originally clarified that statistical disparities in lending standing alone are insufficient to prove disparate impact, the House Report noted: "These provisions are not, however, intended to limit the use of population statistics to establish a *prima facie* case of discrimination in accordance with the 'effects test' established by the Supreme Court in *Griggs v. Duke Power Co*, 401 U.S. 424 (1971), or otherwise to overrule the holding of the case." The Senate concurred in their report, writing:

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[10] *See* Francesa Lina Procaccini, *Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition*, 9 Harv. L. & Pol'y Rev. S44, S53 (2015).
[11] 576 U.S. at 534 (emphasis added).
[12] *Carrol v. Walden Univ.*, 650 F. Supp. 3d 342, 360–61 (D. Md. 2022) (holding that the racial targeting of loans by a for-profit education institution could be pursued under a disparate impact analysis).
[13] *Barrett v. H.R. Block, Inc.*, 652 F. Supp. 2d 104, 108–09 (D. Ma. 2009) (holding that a discretionary pricing policy could be reviewed under a disparate impact theory of liability).
[14] *M&T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 574 (E.D.N.Y. 2010) (holding that the racial targeting of unfavorable home loans terms could be pursued under a disparate impact theory of liability)
[15] *Miller v. Am. Express Co.*, 688 F.2d 1235, 1237–38 (9th Cir. 1982) (holding that a policy to close a credit account on the death of a male spouse may have a disparate impact based on sex). *See generally* Procaccini, *supra* note 10, at S68 n.113 (identifying circuit court cases that have held that ECOA incorporates disparate impact liability).
[16] S. Rep. No. 94-589 at 3.
[17] *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978).
[18] *Compare Griggs*, 401 U.S. 424, 431 (holding disparate impact liability is available under Title VII when "artificial, arbitrary, and unnecessary barriers to employment . . . operate invidiously to discriminate *on the basis of* racial or other impermissible classification" (emphasis added)), *with* 15 U.S.C § 1691(a)(1) ("It shall be unlawful for any creditor to discriminate against any applicant . . . *on the basis of* race, color, religion, national origin, sex or marital status, or age." (emphasis added)). *See Lorillard*, 434 U.S. at 581.
[19] H.R. Rep. No. 94-210 at 5 (1976).

> In determining the existence of discrimination . . . courts or agencies are free to look to the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus judicial construction of antidiscrimination laws in the employment field, in cases such as *Griggs v. Duke Power Company* and *Albemarle Paper Company v. Moody,* (U.S. Supreme Court, June 25, 1975), are intended to serve as guides in the application of the Act, especially with respect to the allocations of proof.[20]

Additionally, not one minority view expressed in the House and Senate Reports objected to the contention that ECOA would encompass disparate impact liability. Consistent with that Congressional intent, the Federal Reserve Board shortly after the enactment of the 1976 amendments promulgated a revised Regulation B recognizing disparate impact liability under ECOA.[21] Since 1977, that recognition has been the consistent position of the Federal Reserve Board and the Bureau, once it became responsible for enforcing ECOA in 2011.[22]

In sum, the Bureau's preliminary conclusion interpreting ECOA to exclude disparate impact liability acknowledges Supreme Court precedent holding the opposite yet inexplicably dismisses it. Congress' delegation of authority to the Bureau to promulgate regulations is not authority to reconstitute the law to achieve this Administration's priorities.[23] Neither the text of ECOA, the Congressional purpose, Supreme Court precedent, nor decisions from lower courts support the Bureau's strained reading of the statute.

B. The NPRM wrongly assumes, without justification, that consumers will continue to be protected from discrimination in the credit market.

In addition to misconstruing the text of ECOA, the Bureau also drastically underestimates how the proposed rule's policy reversal will perpetuate unfairness to consumers and exclude them from opportunities that should be open to all. It acknowledges that the rule will put an end to ECOA disparate impact litigation and government enforcement actions but assumes that "consumers would remain protected under ECOA from disparate treatment."[24] However, the disparate treatment framework is insufficient to address the discrimination present across the consumer lending industry. As federal agencies have acknowledged since the New Deal,[25] there must be a mechanism to combat "practices that are fair in form, but discriminatory in operation."[26]

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[20] S. Rep. No 94-589 at 4–5.
[21] 42 Fed. Reg. 1246, 1255.
[22] *See* 50 Fed. Reg. 48018, 48021 (Nov. 20, 1985) (finalizing a revised version of the disparate impact provision to make non-substantive "structural or editorial" changes); 76 Fed. Reg. 79,442, 79,442 (Dec. 21, 2011) ("The interim final rule substantially duplicates the [Federal Reserve] Board's Regulation B as the Bureau's new Regulation B, 12 CFR Part 1002, making only certain non-substantive, technical, formatting, and stylistic changes.").
[23] *See generally Loper Bright*, 603 U.S. 369.
[24] 90 Fed. Reg. 50906.
[25] Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 Harv. C.R.-C.L. L. Rev. 125, 136 (2014) (discussing history of agency use of disparate impact analysis); Paul D. Moreno, From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972, at 2 (1997).
[26] *Griggs*, 401 U.S. at 431.

The Bureau's cursory analysis of the NPRM's harms to consumers is arbitrary and capricious and must be set aside.

An agency action is arbitrary or capricious where it is not "reasonable and reasonably explained."[27] In reversing the decades-long practice of providing for disparate impact liability, the Bureau is also obligated to grapple with reliance interests and provide a detailed explanation for the change. "When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[28] In these circumstances, too, agencies must "provide a more detailed justification."[29] Further, where a new policy rests on factual or legal determinations that contradict those underlying the agency's prior policy, the agency must provide a more detailed explanation.[30] In particular, the agency is "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[31]

The Bureau's cursory analysis of the proposal's impact on consumers fails under the APA's rigorous standards. The NPRM dismisses, without any analysis whatsoever, the "[c]onsumers who may be affected by creditors' facially neutral policies that have disparate effects," simply because liability for disparate treatment will continue.[32] It fails to acknowledge the wide variety of cases that have proceeded on disparate impact grounds *without* disparate treatment allegations.

The mortgage industry's practices during the subprime mortgage crisis exemplify the perils of a lending landscape without disparate impact liability. In the early 2000s, numerous lenders gave their agents and brokers unfettered discretion to add gratuitous interest rate points and fees to mortgage loan offers. The discretionary pricing policy was facially race-neutral but led to Black and Hispanic borrowers paying higher interest rates and fees for their mortgages than their white counterparts.[33] Affected mortgage borrowers did not have evidence of disparate treatment but were nonetheless able to successfully bring claims for relief pursuant to ECOA's disparate impact regulations.[34] By eliminating disparate impact liability under ECOA, the proposed rule would have mortgage lenders experiment with the same strategies that led not only to pervasive mortgage

[27] *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014).
[28] *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 30 (2020) (internal quotation marks omitted).
[29] *FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009); accord *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996).
[30] *Fox Television Stations*, 556 U.S. at 515–16.
[31] *Regents*, 591 U.S. at 33.
[32] 90 Fed. Reg. 50906.
[33] *See, e.g.*, *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1069 (S.D. Cal. 2008) (denying defendants' motion to dismiss because plaintiffs had adequately plead a disparate impact claim under ECOA, including by pleading that "African Americans [were] 31% to 43% more likely to receive a higher fixed-rate loan than Caucasians").
[34] *See, e.g.*, *Guerra v. GMAC LLC*, No. 2:08-cv-01297-LDD, 2009 WL 449153, at *5 (E.D. Pa. Feb. 20, 2009) (denying defendant's motion to dismiss disparate impact claim under ECOA); *Steele v. GE Money Bank*, No. 08 C 1880, 2009 WL 393860, at *5 (N.D. Ill. Feb. 17, 2009) (same); *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 110 (D. Mass. 2009) (same).

lending discrimination but also to the 2008 financial crisis.[35] The NPRM does not reasonably explain how the proposed rule would justify these economy-wide consequences.

The automobile industry's lending practices also illustrate the importance of disparate impact liability. As background, when a consumer finances a vehicle through a car dealership, the lender sets an annual percentage rate ("APR") based on the consumer's risk profile. The dealership can then add points to the APR and split the profit from the markup with the lender. In 2004, a U.S. District Court certified a class action brought by Black consumers who claimed that General Motors' policy of permitting dealership representatives to add points to the APR "cause[d] black consumers to pay higher average finance charges than similarly-situated white consumers and that this disparate impact violates [ECOA]."[36]

A similar case against Chrysler Financial Company highlights the financial cost of these unchecked policies.[37] In that case, the dealership assessed an APR of 20 percent on a Black couple, which included a non-risk-related markup, resulting in approximately $9,500 in finance charges over two years for a used car worth approximately $16,000.[38] Second to a home, a vehicle is often a consumer's largest and most important purchase as it facilitates transportation to work, school, and medical appointments. In an industry where there are already asymmetrical information and widespread consumer protection challenges, dealerships and auto lenders cannot be left to create lending programs that gouge unwitting consumers on such a vital purchase. The NPRM does not acknowledge the extensive economic harm that would not have been remedied but for disparate impact liability.

The NPRM entirely ignores current statistics about the prevalence of discrimination. For example, Black and Hispanic consumers continue to face significant barriers in the lending market. A 2023 report presented data showing that "[a]pplicants of color . . . are denied home purchase mortgages at higher rates than are white applicants," *regardless of* credit score, income, size of the loan, and other factors. [39] Regulation B's policy has been to address these disparate outcomes, and

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[35] At the same time, the NPRM proposes changes to Regulation B that would severely limit Special Purpose Credit Programs (SPCPs), which had been established at some of the nation's largest mortgage lenders, including Chase Bank and Bank of America. In 2022, the Mortgage Bankers Association released a toolkit in response to the growing interest amongst mortgage lenders in developing SPCPs. Press Release Nat'l Fair Hous. All., *NFHA and MBA Launch Online Toolkit to Help Lenders Develop Special Purpose Credit Programs for Underserved Communities* (June 21, 2022), https://nationalfairhousing.org/nfha-and-mba-launch-online-toolkit-to-help-lenders-develop-special-purpose-credit-programs-for-underserved-communities/.

[36] *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 67–68 (M.D. Tenn. 2004) (denying defendant's motion to dismiss ECOA disparate impact claim based on facially neutral policy).

[37] *Smith v. Chrysler Fin. Co.*, No. Civ.A. 00-6003 (DMC), 2003 WL 328719, at *1 (D.N.J. Jan. 15, 2003).

[38] *Id*.

[39] N.Y. Off. of the Att'y Gen., *Racial Disparities in Homeownership* 2–3 (2023), https://ag.ny.gov/sites/default/files/reports/oag-report-racial-disparities-in-homeownership.pdf. The Bureau invokes a similarly misguided view of ongoing credit discrimination in its justification of proposed changes to Regulation B's SPCP provisions. *See, e.g.*, 90 Fed. Reg. 50909–10 (preliminarily "conclud[ing] that significant changes in the legal landscape and in credit markets mean that such SPCPs based on certain prohibited bases no longer serve the particular social needs envisioned in the 1976 Act" and stating that "[r]egardless of whether instances of credit discrimination continue to occur in the marketplace, the Bureau is not aware of any credit markets in which consumers would be 'effectively denied credit' because of their race, color, national origin, or sex in the absence of SPCPs offered or participated in by for-profit organizations").

the NPRM does not provide any data suggesting that the disparities have been addressed or any explanation of the reason that the Bureau is abandoning these goals.

The NPRM also mistakenly asserts that disparate impact liability may discourage creditors from innovating in lending programs to limit legal exposure. That has not been true historically. As explained in the Senate Report, ECOA is intended to "prevent the kinds of credit discrimination which have occurred in the past, and to anticipate and prevent discriminatory practices in the future."[40] In practice, the existing regulatory regime allows for innovation, while providing guardrails consistent with Congressional intent. Namely, at the time of ECOA's passage, credit markets were shifting from making credit decisions based on the subjective judgment of loan officers to statistically based models that generated grades of creditworthiness.[41] Moreover, innovations in the credit markets have persisted uninterrupted since ECOA's passage.[42] Upstart, the self-described leader in AI lending, entered a private agreement with the NAACP Legal Defense Fund and Student Borrower Protection Center in 2020 to have its machine learning and algorithm analyzed by civil rights experts.[43] The experts identified less discriminatory alternatives during the review, which led to Upstart refining its algorithm to include more relevant factors in evaluating creditworthiness while avoiding discriminatory outcomes. With the rise of artificial intelligence and machine learning, disparate impact liability guards against the very discriminatory outcomes that Congress sought to prevent by passing ECOA.

Finally, the NPRM is arbitrary and capricious because it fails to account for the serious reliance interest of state and local governments in a strong federal enforcement mechanism to address discrimination in the credit market. States have their own authority to enforce ECOA, so by weakening the disparate impact provision, the proposed rule weakens state authority as well.[44] Moreover, States rely on the Bureau's partnership in our shared mission to enforce anti-discrimination and consumer protection statutes. In addition, some States do not have equivalent disparate impact laws and some States' anti-discrimination statutes may not reach all consumer credit transactions.

C. Disparate impact liability is a lawful mechanism for enforcing antidiscrimination statutes.

As a putative basis for its proposed rescission, the Bureau misreads Supreme Court precedent to suggest that disparate impact liability is unconstitutional. Specifically, the NPRM cites *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA*")[45] for the proposition that disparate impact regulations enforcing ECOA may violate the Equal Protection

[40] S. Rep. No. 94-589, at 4.
[41] Bd. of Govs. of the Fed. Rsrv. Sys., *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* 12 (2007), https://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf.
[42] *See generally* Cheryl R. Cooper, Cong. Rsch. Servs., R45813, *An Overview of Consumer Finance and Policy Issues* (2021) and Darryl E. Getter, Cong. Rsch. Serv., R44125, *Consumer and Credit reporting, Scoring, and Related Policy Issues* (2024)
[43] *See* Relman Colfax PLLC, Case Profiles: Fair Lending Monitorship of Upstart Network's Lending Model, https://www.relmanlaw.com/cases-upstart-network-fair-lending-counseling (last visited Dec. 9, 2025).
[44] For a more detailed discussion of state enforcement authority, *see infra*, at II.C.
[45] 600 U.S. 181 (2023).

Clause if interpreted to "functionally require creditors to engage in . . . deliberate balancing of protected class outcomes."[46] This claim misreads and misinterprets Supreme Court precedent and the Bureau's longstanding regulatory regime. To the extent the Bureau relies on this alternative rationale for removing provisions that protect consumers against disparate impact discrimination, it "relie[s] on an erroneous interpretation of the law," meaning its proposed change is unreasonable and therefore arbitrary and capricious under the APA.[47]

First, the Supreme Court's holding in *SFFA* does not apply to disparate impact liability under ECOA because the Supreme Court's analysis was limited to race-based university admissions in a purportedly "zero sum" environment.[48] The Supreme Court in *SFFA* held only that university admission policies that explicitly used race as a "determinative tip" in favor of certain applicants violated the Equal Protection Clause.[49] *SFFA* said nothing about regulations implementing antidiscrimination statutes that seek to root out neutral business practices that have a discriminatory effect on protected classes and lack a legitimate business justification.

Second, even if *SFFA* were directly applicable here, to the extent the NPRM suggests that implementation of the Bureau's disparate impact regulatory provisions would be inconsistent with the Supreme Court's holding, the Bureau is incorrect—both with respect to the operation of disparate impact standards and the scope of permissible government action under the Equal Protection Clause. Disparate impact liability generally and under ECOA's Regulation B specifically are consistent with the principles of equal protection articulated in *SFFA* and other recent precedent. The Bureau suggests that ECOA's disparate impact regulations require a creditor to engage in the "deliberate balancing of protected class outcomes." Not so. The current regulation merely "prohibit[s] a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis . . . unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact."[50] Regulation B's disparate impact provisions do not require a creditor to provide a "determinative tip"—for example, a higher credit score to a female applicant based on their sex, or more favorable loan terms to a Black applicant based on their race—to any individual or class of individuals. Rather, the regulation requires that a creditor identify and eliminate neutral practices that, without legitimate justification, negatively impact the participation of members of a protected class in the credit market; elimination of such practices does not guarantee specific outcomes for the protected class, nor the outcome of any individual application.[51] The constitutional guarantee of equal protection permits the government to require

[46] 90 Fed. Reg. 50906.
[47] *Filazapovich v. Dep't of State*, 560 F. Supp. 3d. 203, 243 (D.D.C. 2021), *rev'd and remanded on other grounds sub nom.*, *Goodluck v. Biden*, 104 F.4th 920 (D.C. Cir. 2024).
[48] *SFFA*, 600 U.S. at 218.
[49] *Id.* at 195.
[50] 12 C.F.R. pt. 1002, supp. I, cmt. 1002.6(a)-2.
[51] *Cf. Inclusive Communities*, 576 U.S. at 540 ("Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." (quoting *Griggs,* 401 U.S. at 431)). In any event, even if Regulation B required a creditor to achieve specific outcomes for a protected class to prevent discriminatory effects in a manner that implicated heighted scrutiny, such a requirement would meet a compelling

regulated parties to eliminate practices that result in discriminatory effects and lack legitimate justification.

Third, the Bureau's proposed *SFFA*-based justification for this proposed rule conflicts with decades of Supreme Court precedent upholding the constitutionality of the disparate impact standard. Disparate impact (or discriminatory effect) regulations, like Regulation B, prohibit practices that have a "disproportionately adverse effect" on protected classes and "are otherwise unjustified by a legitimate rationale."[52] Consequently, in the almost sixty years that the disparate impact standard has existed, no appellate court has ever held that it violates the Constitution.[53] The Bureau lacks the authority to deviate from judicial precedents affirming the constitutionality of disparate impact analysis based on its unsubstantiated view of the law.[54]

The Constitution prohibits discrimination, not agency regulations aimed at ensuring equal opportunity. The equal protection guarantee, as realized through ECOA and Regulation B, requires that creditors consider how their practices may unfairly block consumers' access to credit markets, and if such outcomes are unjustified, implement alternative practices. The NPRM claims that the elimination of disparate impact standards may be required by its erroneous interpretation of the Constitution. It is not. This misapprehension of the law cannot supply the reasoned basis that the APA requires for the Bureau's proposed elimination of disparate impact liability under ECOA's Regulation B.[55]

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interest that has continued to be recognized by the Court. Indeed, the *SFFA* Court maintained its recognition that, where race-based government action must be justified by a compelling interest, that requirement is met where the action is intended to remediate "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207. ECOA and its amendments were passed with the explicit recognition of past credit discrimination. *See, e.g.*, S. Rep. No. 93-278, at 16 (1973) (explaining the Congress enacted ECOA to address "widespread discrimination . . . in the granting of credit to women"); H.R. Rep. No. 94-210, at 3 ("Numerous instances of denial of credit for reasons other than a person's creditworthiness were brought to the Committee's attention during hearings on the legislation."); S. Rep. No. 94-589, at 3 ("[T]he hearing record is replete with examples of refusals to extend or to continue credit arrangements for applicants falling within one or more of the categories addressed by this bill.").

[52] *Inclusive Communities*, 576 U.S. at 524 (quoting *Ricci v. DiStefano*, 557 U.S. 557, 577 (2009)); *see also Lau v. Nichols*, 414 U.S. 563, 568 (1974) (stating that "[d]iscrimination is barred which has that effect even though no purposeful design is present").

[53] *See* Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 Mich. L. Rev. 1668, 1693 (1997) (commenting on the near-universal acceptance of disparate impact theory as a valid part of antidiscrimination law).

[54] *Loper Bright*, 603 U.S. at 385 ("'It is emphatically the province and duty of the judicial department,'" not the Executive, "'to say what the law is.'") (quoting Marbury, 5 U.S. at 177).

[55] The Bureau raises a similarly mistaken view of Equal Protection Clause in its discussion of proposed changes to Regulation B's SPCP provisions. *See, e.g.*, 90 Fed. Reg. 50909 (declining "to reach a conclusion about whether ECOA's SPCP provision permitting discrimination in favor of groups with special social needs . . . is unconstitutional" while invoking "recent Supreme Court decisions highlighting the legal infirmity under the Fifth and Fourteenth Amendments of laws that enable such discrimination"). To the extent the Bureau relies on this misinterpretation of constitutional law, that rationale cannot provide the reasoned basis needed for this proposed change.

II. Discouragement

Regulation B was enacted in 1975.[56] From the start, it has prohibited discriminatory discouragement of prospective applicants; thus, that prohibition has governed the nation's consumer credit industry for half a century.[57] Now, the Bureau proposes to "limit covered persons' liability on discouragement" to prohibit only "expressing to applicants or prospective applicants an intention to discriminate against them on a prohibited basis"[58]—an "intention" that few, if any, creditors are likely to "express[ly]" state.[59] This is contrary to the purpose and meaning of ECOA, and to the only appellate court decision to interpret the discouragement provision. In addition, it will hinder the undersigned Attorneys General in enforcing ECOA and Regulation B, and will strip vulnerable consumers of needed protection. And yet, despite the NPRM's invocation of various "concern[s]" about negative "potential impact[s]" or "potential interpretation[s]" as the purported justification for eviscerating the discouragement provision,[60] the Bureau has not pointed to even one *actual* instance in which those concerns were realized. Nor does it cite any instance in which those "potential interpretation[s]" were actually asserted by any consumer, regulator, or industry participant.[61] This reliance on unsupported speculation in lieu of facts is arbitrary and capricious.[62]

The only citation to facts that appears in the entire NPRM with regard to the discouragement provision is a citation to two academic articles.[63] One is not relevant to the issue of pre-application discouragement.[64] The other, far from supporting the proposed revisions, provides concrete proof[65] of the harms that occur when lenders "discourage or informally reject certain consumers . . . before credit is formally sought"—which the NPRM admits is a likely effect of the proposed revisions.[66] Imposing those significant costs on consumers, and on fellow enforcers like the States, based on the unsupported "concern[s]" that the NPRM raises, is arbitrary and capricious.[67] The

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[56] 40 Fed. Reg. 49298 (Oct. 22, 1975).
[57] 90 Fed. Reg. 50903; 40 Fed. Reg. 49299, 49307.
[58] 90 Fed. Reg. 50917.
[59] *See Marzano v. Comput. Sci. Corp.*, 91 F.3d 497, 507 (3d Cir. 1996) ("For obvious reasons, it is extremely difficult—not to say impossible—to establish directly the motivation of" a defendant charged with discrimination); *Ortiz v. Werner Enters.*, 834 F.3d 760, 765 (7th Cir. 2016) ("[T]he fabled employer who admits to firing an employee because of his race" is a case that "permit[s] easy inferences," but "[f]ew discrimination cases are so straightforward").
[60] 90 Fed. Reg. 50907–08.
[61] 90 Fed. Reg. 50907.
[62] *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1190–91 (D.C. Cir. 2004); *Appalachian Voices v. U. S. Dep't of Interior*, 25 F.4th 259, 274 (4th Cir. 2022) (agency decision based on "pure speculation" was "arbitrary and capricious"); *New York v. U.S. Dep't of Homeland Sec. (DHS)*, 969 F.3d 42, 83 (2d Cir. 2020) ("But what [the agency] may not do is rest its changed interpretation on unsupported speculation.").
[63] 90 Fed. Reg. 50917 n.88 (citing Andrew Hanson et al., *Discrimination in Mortgage Lending: Evidence From a Correspondence Experiment*, 92 J. Urban Econ. 48-65 (2016); Neil Bhutta et al., *How Much Does Racial Bias Affect Mortgage Lending? Evidence From Human and Algorithmic Credit Decisions*, 80(3) J. Fin. 1463–96 (2016)).
[64] *See* Bhutta et al., at 1490-91. This paper studies "discouragement" in the sense of "rejections at the stage of an applicant's initial credit check," not in the Regulation B sense of discouragement before a person takes action to apply.
[65] Hanson et al., *supra* note 63, at 52–58.
[66] 90 Fed. Reg. 50917 ("Consumers would have less protection against discouragement at a pre-application stage," and thus "lenders may be more likely to discourage or informally reject certain consumers.")
[67] *See, e.g.*, *Cigar Ass'n of Am. v. FDA*, 132 F.4th 535, 540 (D.C. Cir. 2025) ("[A]gency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence."); *Am. Radio Relay League,*

discouragement provision has been in place for fifty years. At this point, the absence of evidence of such harms (or, indeed, *any* harms) is evidence of absence.

A. The Proposed Revisions Are Contrary to Law.

1. The Proposed Revisions Contravene the Purpose and Meaning of the Statute.

Congress plainly stated its purpose in originally enacting ECOA: "[T]he purpose of [ECOA is] to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to [prohibited characteristics]."[68] If a creditor could discourage prospective applicants from applying, they could frustrate this critical statutory purpose.[69]

The proposed rule seeks to hollow out the discouragement provisions of Regulation B—and thus the purpose of ECOA—to make it easier for creditors to discriminate against potential applicants under the guise of lowering compliance costs for those creditors. But the proposed rule fails to sufficiently consider and explain how the revised regulation would adequately protect against the type of discrimination in the credit market for which ECOA was enacted: It would allow, for example, a creditor to target (or redline) its advertising to favor a particular group, so long as those advertisements were never meant to be seen by someone in the group to be discriminated against. Such a result would undermine and reverse the generation of progress that has resulted from ECOA's and Regulation B's enactment: Surely Congress never meant to open up the credit market to women without requiring a woman's husband to cosign on the account, only to have a creditor (50 years later) be able to advertise its products only to men, in corners of the country and the internet where women are unlikely to go, and thus sell its products only to men because women were never the intended audience in the first place. Nor did Congress mean to permit creditors to direct advertising only to an economic class of people that definitionally excludes young adults or retirees—and if someone outside that demographic happens upon the advertisement and thus is discouraged from applying for credit, leave them with no remedy because they were not the intended audience of the advertisement. Technology has made this kind of specific targeting possible, but such targeting contravenes the plain purpose and meaning of the statutory language.

When it enacted ECOA, Congress noted that many creditors were discouraging women from applying for credit.[70] The following year, Congress expanded ECOA's reach to prohibit

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Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data . . . .").

[68] Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, § 502, 88 Stat. 1500, 1521 (1974).

[69] *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 366 (1977) (explaining that a person who declines to submit a "formal application solely because of his unwillingness to engage in a futile gesture [ ] is as much a victim of discrimination as is [a person] who goes through the motions of submitting an application").

[70] *See, e.g., Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affs. of the H. Comm. on Banking & Currency*, 93rd Cong. 369 (1974) (quoting representative of Sears Roebuck and Company who admitted that "[w]e discourage married women from opening their own accounts, but if they push us on it, we'll go along").

discrimination on the basis of race, color, religion, national origin, sex or marital status, or age (among other things).[71] The Federal Reserve Board, in turn, expanded Regulation B to prohibit discouragement "on a prohibited basis," defined to include not only sex but also race, color, and national origin (among other things).[72] The resulting provision, which makes it unlawful for a creditor to "discourage on a prohibited basis a reasonable person from making or pursuing an application," has remained the same ever since.[73]

The Board later added (after notice and comment) official staff commentary and interpretations of Regulation B.[74] With respect to the provision prohibiting discouragement, the Board identified specific practices that would violate the provision, including advertising efforts that "express, imply or suggest a discriminatory preference or a policy of exclusion in violation of the act," "statement[s] that the applicant should not bother to apply, after the applicant states that he is retired," and "interview scripts that discourage applications."[75] The Official Interpretations also reiterated that, in "keeping with the purpose of the act—to promote the availability of credit on a nondiscriminatory basis"—this provision "covers acts or practices directed at potential applicants."[76]

In the following decades, Congress revisited ECOA's provisions many times, adding substantive obligations and making technical amendments.[77] Specifically, in 1991, Congress adopted a provision explicitly recognizing that discouragement (on a prohibited basis, like race or sex) violates ECOA's prohibition on discrimination.[78] This provision arose out of Congress's dissatisfaction with the slow pace of federal regulatory agencies' enforcement of ECOA and Regulation B, including the prohibition against "discouraging applications on a prohibited basis *and advertising which implies a discriminatory preference*."[79]

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[71] Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976).
[72] 42 Fed. Reg. at 1253–54.
[73] *Id*. at 1254.
[74] *See* 50 Fed. Reg. 48048.
[75] *Id.* at 48050.
[76] *Id.*
[77] *E.g.*, Pub. L. No. 96-221, § 610, 94 Stat. 132, 174 (1980) (making technical change to date of making annual reports); Pub. L. 100-533, § 301, 102 Stat. 2689, 2692–93 (1988) (amending provision on issuing regulations); Pub. L. No. 104-208, § 2302, 110 Stat. 3009, 3009-420–3009-423 (1996) (adding new incentives for self-testing and self-correction).
[78] FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 223, 105 Stat. 2236, 2306 (1991) (codified at 15 U.S.C. § 1691e(g)).
[79] S. Rep. No. 102-167, 1991 WL 207563, at *86 (Legis. Hist. Oct. 1, 1991) (emphasis added); *see also Mortgage Discrimination; Hearing Before the Subcomm. on Consumer & Regul. Affs. of the S. Comm. on Banking, Housing, & Urban Affs.*, 101st Cong. 2 (1990) (statement of Sen. Dixon) ("[N]o agency has yet seen fit to refer any cases whatsoever to the Justice Department for further investigation or prosecution. The financial regulatory agencies may see, hear and speak no evil, but I believe that the evidence demonstrates that discrimination in mortgage lending does still exist in this country."); *id.* at 142–45 (statement of Allen Fishbein, Gen. Counsel, Ctr. for Cmty. Change) ("[T]he regulators are sleeping and sleeping and sleeping . . . . The examination process that the banking regulatory agencies use, by their own admission, cannot detect the problem of prescreening, of discouragement of potential applicants before they actually submit an application.").

Congress addressed this problem by mandating referrals to the Department of Justice.[80] Specifically, Congress amended ECOA to provide that the agencies enforcing ECOA "shall refer" to the Attorney General any matter involving a suspected "pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title."[81] In doing so, Congress reiterated its intention to correct a market landscaped marred by discrimination against prospective as well as actual applicants.[82]

Civil rights case law has recognized and interpreted the meaning of discouragement over the past 50 years. For example, *Ragin v. New York Times Co.* held that the language of 42 U.S.C. § 3604(c) of the Fair Housing Act barring notices, statements, and advertisements that indicate *any preference* on a protected basis does not violate the First Amendment.[83] In that case, the Second Circuit explained that advertisements for housing that featured thousands of human models of whom virtually none were Black could "discourage [B]lack people from pursuing housing opportunities by conveying a racial message in much the same way that the sex-designated columns in *Pittsburgh Press* furthered illegal employment discrimination."[84] Yet the proposed rule here would allow for such advertisements, so long as the creditor did not direct the advertisement at Black consumers. Similarly, in *International Brotherhood. of Teamsters v. United States*, the Supreme Court explained that a discriminatory message of discouragement can be "communicated to potential applicants more subtly" than a "Whites Only" sign, but just as clearly, "by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of . . . his work force."[85]

The proposed rule seeks to subtly change the language of Regulation B to achieve the explosive impact of hollowing out decades of progress in accessibility to credit, rolling back the protections that ECOA advances. ECOA makes it 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)."[86] And yet in the very set up of that credit transaction, the offering of it, the proposed rule seeks to allow creditors to contravene that language by simply never offering credit to disfavored groups in the first place.

2. The Proposed Revisions Are Unlawfully Irreconcilable with the Only Appellate Decision to Address ECOA's Discouragement Prohibition

As affirmed last year by the Supreme Court's ruling in *Loper Bright*,[87] federal administrative agencies lack authority through rulemaking to alter judicial statutory interpretations that they do

[80] S. Rep. 102-167, at *93.
[81] 15 U.S.C. § 1691e(g).
[82] 15 U.S.C. § 1691e(g).
[83] 923 F.2d 995, 1002–03 (2d Cir. 1991).
[84] *Id.* at 1003 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973)).
[85] 431 U.S. 324, 365 (1977).
[86] 15 U.S.C. § 1691(a).
[87] 603 U.S. 369.

not like.[88] Indeed, the Bureau in explaining the disparate impact aspects of this very same proposed rule acknowledges that "[a]s the Supreme Court made clear in *Loper Bright* . . . , courts are the ultimate arbiters of statutory meaning."[89] Yet such usurpation of judicial power is precisely what the Bureau is attempting through the proposed discouragement rule. Accordingly, the Bureau will be acting contrary to law if it proceeds to finalize it.

The only federal appellate court to have ever addressed ECOA's discouragement prohibition is last year's decision by the Seventh Circuit Court of Appeals in *CFPB v. Townstone Financial, Inc*.[90] In that decision, the Seventh Circuit held that it is "clear that the text [of ECOA] prohibits not only outright discrimination against applicants for credit, but also the discouragement of prospective applicants for credit. . . . In endowing [regulators] with authority to prevent 'circumvention or evasion,' Congress indicated that the ECOA must be construed broadly to effectuate its purpose of ending discrimination in credit applications."[91] And, importantly for purposes of the Bureau's limited rulemaking authority after *Loper Bright*, the Seventh Circuit made clear that it was approaching the "case as presenting a question of statutory interpretation subject to de novo review" by the judiciary, rather than an exercise of engaging in deference to the Bureau's interpretation.[92]

Of particular relevance here, the Seventh Circuit held that "[t]he term 'applicant' cannot be read in a crabbed fashion that frustrates the obvious statutorily articulated purpose of the statute. Indeed, ECOA prohibits discrimination 'with respect to *any aspect of a credit transaction*.'"[93] But the proposed rule runs afoul of those holdings in at least two ways. First, it purports to treat discouragement claims by applicants or prospective applicants "who were not the intended recipients of the statement" in a crabbed fashion by foreclosing them when they involve "encouraging statements directed at [another] group of consumers."[94] Second, it improperly tries to limit discouragement claims only to certain aspects of the credit transaction, namely whether "the creditor would deny, or would grant on less favorable terms, a credit application."[95]

No such restrictions are countenanced anywhere in the Seventh Circuit's opinion. To the contrary, they permit obviously discriminatory conduct the court held Congress was seeking to address in passing ECOA. For example, under the Bureau's proposed rule, married female prospective applicants could not complain of unlawful conduct if a creditor engages in an advertising campaign explicitly proclaiming it desires to make loans to married men, so long as

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[88] *See, e.g., Mazariegos-Rodas v. Garland*, 122 F.4th 655, 672 (6th Cir. 2024) ("And now that *Chevron* is overruled, the [agency] has no legal authority to disregard precedential decisions of [a circuit] court." (citation modified)).
[89] 90 Fed. Reg. 50906.
[90] 107 F.4th 768 (7th Cir. 2024).
[91] *Id*. at 776 (quoting 15 U.S.C. § 1691b(a)).
[92] *Id*. at 775 n.15.
[93] *Id*. at 776 (quoting 15 U.S.C. § 1691(a)).
[94] 90 Fed. Reg. 50922 (proposed Official Interpretation § 1002.4(b)-1); *see also id*. at 50907–08 (explaining proposed changes concerning a "statement to applicants or prospective applicants" (capitalization altered)).
[95] 90 Fed. Reg. at 50920 (proposed 12 C.F.R. § 1002.4(b)); *see also id*. at 50908–09 (explaining proposed changes concerning the "standard for discouragement" (capitalization altered)). The Bureau also explains that it is proposing to eliminate reference in the Official Interpretations to statements that "imply or suggest" a discriminatory preference for the same reason. 90 Fed. Reg. 50908.

married females "were not the intended recipients."[96] Similarly, by limiting discouragement claims to the ultimate approval or terms of the transaction, a creditor could lawfully prolong the application process for or require additional information from married female applicants based on their sex or marital status so long as the creditor did so in such a way that a "reasonable person" did not believe the requests would cause the creditor to deny the loan or alter its terms.[97] But such disparate treatment of married women was precisely the harm that Congress was seeking to eliminate in originally enacting ECOA.[98] Accordingly, the Bureau will be acting contrary to law if it finalizes a discouragement rule that includes these restrictions.

Additionally, the Bureau's proposed rule plainly fails to adhere to the Seventh Circuit's holding that "ECOA must be *construed broadly* to effectuate its purpose of ending discrimination in credit applications."[99] Instead, the Bureau describes its motivations for proposing the revised discouragement rule as eliminating the "*overbroad coverage* of the regulation" that "may constrain . . . commercial activity" and have "unnecessarily chilling effects on creditors' business practices."[100] It also openly acknowledges that "[t]he proposed provisions may result in consumers not applying for credit and facing greater barriers to accessing credit than they otherwise would have under the existing rule. . . . Under a narrower standard of liability, lenders may be more likely to discourage or informally reject certain consumers, among other things, before credit is formally sought. The proposed provisions could lead to some consumers being discouraged in ways not captured by the proposed prohibition."[101] Even assuming this reasoning comports with special requirements imposed by the Dodd-Frank Act on the Bureau's rulemaking,[102] it is fatally inconsistent with the judiciary's controlling statutory interpretation of ECOA.

Specifically, the Bureau observes in its explanation that "elderly [and] minority . . . consumers are more likely to rely on brick-and-mortar branch services instead of online or mobile banking. If covered persons alter their branch location decisions, then these customers may no longer be able to easily access financial services and products."[103] Nevertheless, the Bureau justifies its proposed elimination of references to discriminatory "acts or practices" from its Official

[96] 90 Fed. Reg. 50922 (proposed Official Interpretation § 1002.4(b)-1).
[97] *Id*. at 50920 (proposed 12 C.F.R. § 1002.4(b)).
[98] *Townstone,* 107 F.4th at 774; *see also*, *e.g.*, *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) ("The purpose of the ECOA is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit.").
[99] *Townstone,* 107 F.4th at 776 (emphasis added).
[100] 90 Fed. Reg. at 50,907 (emphasis added). The Bureau's explanation of the proposed rule also hints that the First Amendment might require its narrow interpretation of discouragement. *See id*. ("[T]he Bureau is concerned that the overbroad coverage of the [current] regulation and its potential interpretations may constrain free speech . . . in ways that are unwarranted."). But that reasoning would not justify disregarding the holding in *Townstone* as courts have routinely upheld the constitutionality of civil rights laws that specifically bar commercial statements indicating an unlawful preference. *See, e.g.*, *United States v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) ("Courts have consistently found that commercial speech that violates [the Fair Housing Act] is not protected by the First Amendment.").
[101] *Id*. at 50917–18.
[102] But the proposed discouragement rule is also contrary to law because it fails to provide the "thoughtful quantitative and qualitative weighing of the Rule's costs and benefits" required by 12 U.S.C. § 5512(b)(2). *Paypal, Inc. v. CFPB*, 728 F. Supp. 3d 31, 44 (D.D.C. 2024); *see also id*. ("That is surely not the kind of rigorous assessment that Congress contemplated for Dodd-Frank rulemakings . . . .").
[103] 90 Fed. Reg. 50916–17.

Interpretations because it has "be[en] interpreted overly broadly" to cover "practices includ[ing], for example, business decisions about where to locate branch offices . . . ."[104] This revision, if included in a final rule, will be contrary to law given that it arises from the legally erroneous premise that ECOA should be interpreted narrowly in a way that limits protections, for example, against age or race discrimination in lending.

B. The Proposed Revisions Will Harm Consumers,

In addition to being contrary to law, the Bureau's proposed revisions to the discouragement provisions of Regulation B will inflict harm on people seeking credit in several ways.

1. "Would Deny, Or Would Grant on Less Favorable Terms": Proposed § 1002.4(b) and Official Interpretation Paragraph 4(b)-1

Regulation B bars creditors from making statements "that would discourage on a prohibited basis a reasonable person from making or pursuing an application" for credit.[105] The NPRM, however, now seeks to limit the discouragement provision only to statements that make a reasonable consumer "believe that the creditor would deny them credit or offer them credit on less favorable terms" on a prohibited basis: cabining this provision to formal credit decisions.[106] This change could leave consumers with no remedy for a vast universe of creditor statements mocking, dismissing, or otherwise mistreating prospective applicants on a prohibited basis—as well as statements reasonably suggesting that consumers would suffer such mistreatment later in the process if they *did* apply—as long as those statements did not specifically concern the terms of credit or the decision to extend credit.

For example, scenarios in which a loan officer makes lewd comments about a female prospective applicant's appearance, or makes demeaning jokes about a Muslim or Jewish prospective applicant's head covering, would likely no longer be covered by Regulation B under the proposed revisions. Creditors may believe they are free to make unlimited derogatory statements, in front of or directly *to* consumers from the demeaned group, as long as their insults are not accompanied by an express announcement that they intend to make substantive credit decisions on the basis of the prejudices they have just aired.[107] This is an absurd and pernicious result that would expose consumers across the marketplace to severe and unacceptable costs in their search for credit—costs that the NPRM neither acknowledges nor justifies.[108]

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[104] *Id*. at 50907.
[105] 12 C.F.R. § 1002.4(b).
[106] 90 Fed. Reg. 50920; *see also* 90 Fed. Reg. 50921 (proposed Official Interpretation § 1002.4(b)-1).
[107] *See Ortiz*, 834 F.3d at 765 ("Few discrimination cases are so straightforward.").
[108] *See* 90 Fed. Reg. 50916-17 (saying only that "[t]he proposed provisions could lead to some consumers being discouraged in ways not captured by the proposed prohibition," without discussing what that newly-*permitted* discouragement would consist of).

2. "Express a Discriminatory Preference or Policy of Exclusion": Proposed Official Interpretation Paragraph 4(b)-1.i.B

The NPRM also proposes revising the Official Interpretation to the discouragement provision—which previously explained that Regulation B prohibits statements that "express, imply, or suggest" a discriminatory preference or policy of exclusion—to state only that it prohibits "statements that *express* a discriminatory preference or policy of exclusion," deleting the words "imply, or suggest."[109]

Yet again, this would lead creditors to believe they are free to make demeaning statements on prohibited bases in their advertisements, their offices, and their conversations with prospective applicants, so long as they do not make bald "statements of [their] intent to discriminate in violation of ECOA,"[110] such as "We charge Black customers higher interest rates" or "Our company prefers doing business with men." For example, a loan officer who tells a female prospective applicant, "It's hard for single moms to pay their bills on time," or who tells a Black prospective applicant, "We used to lose a lot of money making loans in those ghetto neighborhoods" could escape liability, despite the very clear discriminatory implications of those statements. Exempting such statements from liability under Regulation B, as the NPRM proposes, would impose serious harm on consumers seeking credit—a cost that the NPRM neither acknowledges nor justifies.[111]

3. "Encouraging Statements Directed at One Group of Consumers" and Deletion of Official Interpretation 4(b)-2: Proposed Official Interpretation Paragraph 4(b)-1 and 4(b)-1(ii)(A)

Regulation B's Official Interpretations state that "[a] creditor may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor."[112] The NPRM proposes deleting this statement, and replacing it with language saying that "encouraging statements directed at one group of consumers cannot discourage other consumers who were not the intended recipients of the statements."[113] This alteration would harm consumers and warp Regulation B from its statutory purpose.

First and foremost, the assertion that the NPRM proposes to add—that encouraging statements directed at one group of consumers cannot discourage other consumers—is absurd on its face. It should be beyond dispute that a sign on a branch office reading, "We Lend to Men," or "Whites

[109] *Compare* 12 C.F.R. pt. 1002, supp. I, cmt. 1002.4(b)-1.ii *with* 90 Fed. Reg. 50922 (proposed Official Interpretation § 1002.4(b)-1.i.B) (emphasis added).
[110] *See* 90 Fed. Reg. 50902 (stating that the revisions to the discouragement provision are meant "to clarify that it prohibits statements of intent to discriminate in violation of ECOA").
[111] 90 Fed. Reg. 50908 (providing no explanation for this change except the vague prefatory phrase "Consistent with the proposed revision").
[112] 12 C.F.R. pt. 1002, supp. I, cmt. 1002.4(b)-2.
[113] 90 Fed. Reg. 50908 (narrative); 90 Fed. Reg. 50922 (proposed Official Interpretation).

Are Encouraged to Apply," will in fact communicate to prospective applicants who are not members of those groups that their business is not wanted.

The justifications the NPRM offers for these changes are equally unconvincing. First, the NPRM argues that a creditor directing encouraging statements to certain consumers is "not an action intended to (or even likely to) discourage other [consumers], who did not receive the statements and might, in fact, have been entirely unaware of them."[114] But the Bureau's proposed "encouragement" language does not require that the encouraging statements be inaccessible to or concealed from consumers who are not part of the "encouraged" group—only that the statements not be "intended" for them.[115] There is thus no reason to believe, for example, that female or Black consumers would be "unaware of" the examples given above, even though those statements may be "directed to" or "intended" for other groups. To the contrary, the proposed rule would allow creditors to make statements like the above examples in full view of consumers who have historically been excluded by them, returning the American credit marketplace to the openly exclusionary and unfair state which ECOA was meant to transform.

Second, the NPRM attempts to support the proposed changes by making factual assertions about how encouragement of certain groups works in practice, including asserting that encouragement of certain applicants or prospective applicants "is not typically an evasion of ECOA's prohibitions."[116] The NPRM contains, however, no data or evidence whatsoever about how this kind of encouragement is used in the marketplace. Without even basic facts such as how creditors make encouraging statements to specific groups, how often they do so, and which groups are so encouraged, the NPRM has no grounds to speak to what is or is not "typical"—much less to then draw a legal conclusion about whether the "typical" case is "an evasion of ECOA's prohibitions" or not.[117]

Finally, the regulatory analysis notes that creditors may respond to the proposed changes "by adjusting marketing to focus on areas where they expect the greatest return on investment," which does indeed seem likely.[118] Of course, creditors rolling out the welcome mat for the groups who have historically amassed the most wealth while ignoring or dismissing members of groups struggling against historical disadvantage is exactly the kind of conduct ECOA and Regulation B are meant to prevent.

Read in this context, the NPRM's statement that "no substantive change is intended" by deleting the existing Official Interpretation providing that creditors may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit (especially groups that might not normally seek credit from that creditor), is clearly pretextual—and thus arbitrary

[114] 90 Fed. Reg. 50908.
[115] *Compare* 90 Fed. Reg. 50908 (narrative) *with* 90 Fed. Reg. 50922 (proposed new Official Interpretation).
[116] 90 Fed. Reg. 50908.
[117] *See United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 565 (D.C. Cir. 2010) ("A naked conclusion, however, is not enough" to make a rule not arbitrary and capricious.); *DHS*, 969 at 83 (vacating rule as arbitrary and capricious where agency "does not provide *any* factual basis for" the asserted justification).
[118] 90 Fed. Reg. 90516.

and capricious.[119] The proposed rule's policy of authorizing encouraging statements across the board while deleting the previous authorization for encouraging statements to traditionally disadvantaged groups makes clear that the Bureau's intent is to unleash creditors' prejudices while hindering creditors who seek to *expand* access to credit—harming consumers and good-faith creditors alike.

4. Removal of Incentive for Self-Testing Regarding Prospective Applicants: Proposed § 1002.15(d)(1)(ii)

The NPRM also proposes removing prospective applicants from a provision that incentivizes creditors to self-test for ECOA and Regulation B violations by preventing the results of such testing from being used as evidence against them by government agencies and private litigants.[120] This will exacerbate the other harms caused by the proposed rule, by *dis*incentivizing creditors from self-testing for Regulation B violations against prospective applicants, as creditors would know that the results of such a test now could be used against them. Thus, the parties ideally positioned for early detection of Regulation B non-compliance—the creditors themselves[121]—will likely be off the beat, and violations will rise.[122] The NPRM calls this deletion a "[t]echnical revision" by which "[n]o substantive change is intended," and offers no reasoning whatsoever to support it.[123] Again, as the effect of this change is thoroughly aligned with the NPRM's overall push to strip consumers of anti-discrimination protections, the classification of this revision as merely "technical" and non-substantive is clearly pretextual.[124]

C. The Proposed Revisions Will Harm State Enforcement

In addition to consumers, states, including the States represented by the undersigned Attorneys General, will be harmed by the Bureau's proposed changes to Regulation B's discouragement provisions. Under the Dodd-Frank Act, States have authority to enforce ECOA and Regulation B.[125] Indeed, at least one circuit has stated that governmental entities are considered the *only* valid

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[119] *Dept. of Comm. v. New York*, 588 U.S. 752, 784 (2019) (agency acts arbitrarily and capriciously when it relies on a justification that "seems to have been contrived").

[120] *Compare* 12 C.F.R. §1002.15(d)(1)(ii) *with* 90 Fed. Reg. 50922 § 1002.15(d)(1)(ii).

[121] *See* CFPB Bulletin 2020-01, Responsible Business Conduct: Self-Assessing, Self-Reporting, Remediating, and Cooperating, 85 Fed. Reg. 15917, 15918 (Mar. 20, 2020) ("self-monitoring or self-auditing . . . will reduce the risk of violations, and it will often facilitate early detection of likely violations, which can limit the size and scope of consumer harm")

[122] *See* 90 Fed. Reg. 50916 (Creditors "may reduce spending related to limiting liability as to prospective applicants by decreasing the amount of time and resources spent monitoring marketing strategies and materials"); *id.* (Creditors may "reallocate resources that were previously spent on oversight of marketing materials and interactions with prospective applicants at call centers and branches to other uses.").

[123] 90 Fed. Reg. 50909.

[124] *Dept. of Comm.*, 588 U.S. at 784.

[125] The Dodd-Frank Act of 2010 provides for State Attorneys General "to enforce provisions of this title [Dodd-Frank Title X] or regulations issued under this title." 12 U.S.C. § 5552(a)(1). Included in this grant of authority are violations of "Federal consumer financial law." *See* 12 U.S.C. § 5536(a)(1)(A). In turn, "Federal consumer financial law" is defined to include ECOA and "any rule or order prescribed by the Bureau" under its authority to implement and enforce ECOA, such as Regulation B. 12 U.S.C. § 5481(14) ("Federal consumer financial law" includes "the enumerated consumer laws" and regulations prescribed by the Bureau thereunder); § 5481(12)(D) (listing ECOA as

enforcers of the discouragement provision.[126] Thus, any revisions that limit liability under Regulation B or make it harder to prove violations thereof—including those discussed above, and additional revisions raised below—prejudice the States in their enforcement role. The NPRM's regulatory analysis acknowledges that "the proposed change[s] would limit potential litigation risks from enforcement actions based on allegations of discouragement of prospective applicants,"[127] but fails to acknowledge or justify the fact that this "limit [on] potential litigation" would limit the power of the *States*. Imposing these harms on the sovereign States without adequate explanation or evidentiary support is arbitrary and capricious.[128]

Moreover, as longstanding enforcers of antidiscrimination and consumer protection laws, the undersigned Attorneys General understand the unique importance of ECOA and Regulation B in protecting consumers in the credit market. The NPRM hypothesizes that "incentives for covered persons to significantly change their policies as a result from the proposed provisions may be limited," because creditors newly freed from liability under the proposed rule would still be subject to other statutes such as the FHA and state laws.[129] The FHA, however, is more limited in scope than ECOA, as it covers only housing transactions: It can do nothing to protect consumers from being discouraged on a prohibited basis from financing a car purchase or taking out a personal loan.[130] State laws, too, may be more limited in scope, with some state antidiscrimination statutes not covering credit transactions, or some state consumer protection laws prohibiting only deceptive (not unfair) practices. Considering their specific strengths as compared to other options, the anti-discouragement provisions of ECOA and Regulation B are an essential tool for the States to combat discrimination in the market for consumer credit, and should not be weakened.

1. "Knows or Should Know": Proposed § 1002.4(b)

It is axiomatic that intent to discriminate is extremely difficult to prove; persons violating the law rarely announce their intention to do so.[131] The discouragement provision of Regulation B thus requires proof only that a creditor's statement "would discourage on a prohibited basis a reasonable person" from seeking credit – it does not require an inquiry into the creditor's state of mind.[132] The proposed rule would change that by requiring anyone seeking to enforce the discouragement provision to prove that "a creditor *knows or should know*" that its statement would

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one of the "enumerated consumer laws"). Further, under 12 U.S.C. § 5552(a)(2)(B), the States can enforce Regulation B against national banks and Federal savings associations.

[126] *See Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 708 & n.11 (5th Cir. 2017) ("[O]nly an aggrieved applicant," not a prospective applicant, "has standing under the ECOA to bring a private cause of action," but "agencies have broader enforcement powers under the ECOA than individuals." (citation modified)).

[127] 90 Fed. Reg. 50916.

[128] *Motor Vehicle Mfr.'s Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) ("[T]he agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." (internal quotation marks omitted)).

[129] 90 Fed. Reg. 50917.

[130] *See* 42 U.S.C. § 3604.

[131] *See Marzano*, 91 F.3d at 507 ("For obvious reasons, it is extremely difficult—not to say impossible—to establish directly the motivation of" a defendant charged with discrimination); *Ortiz*, 834 F.3d at 765 ("[T]he fabled employer who admits to firing an employee because of his race" is a case that "permit[s] easy inferences," but "[f]ew discrimination cases are so straightforward").

[132] 12 C.F.R. § 1002.4(b).

cause a reasonable person to be discouraged (meaning, under other revisions discussed above, that a reasonable person would believe they would receive an unfavorable credit decision on a prohibited basis).[133]

In the judgment of the undersigned Attorneys General, based on our decades of expertise proving violations of state and federal consumer protection and antidiscrimination laws in court, such a requirement would create serious enforcement difficulties even in highly meritorious cases.[134] Defanging state enforcement in this way would impose severe harms on the States and consumers alike. Moreover, the Bureau acknowledges that "[a] well-tailored discouragement provision . . . protects ECOA's purpose of making credit available on a non-discriminatory basis."[135] If the Bureau were to move forward with this revision, it would be undermining a provision that it admits protects ECOA's core purpose—and "[b]ecause [that] decision is internally inconsistent, it is arbitrary and capricious."[136]

2. "Intended Recipients": Proposed Official Interpretation Paragraph 4(b)-1

The NPRM also seeks to import an intent requirement into the issue of encouraging statements made to particular groups of prospective applicants, as discussed above. To the commentary on the discouragement provision, the NPRM proposes adding language saying that "encouraging statements directed at one group of consumers cannot discourage other consumers who were not the *intended* recipients of the statement."[137] In the judgment of the undersigned Attorneys General, again based on our decades of expertise enforcing state and federal consumer protection and antidiscrimination laws, this revision would hinder enforcement for the same reasons laid out above. Although it may be feasible in some instances to introduce evidence of which demographic groups of consumers were subjectively *intended* to receive a creditor's statement (as with, for example, the purchase of targeted advertisements on social media, where the terms of the purchase agreement may contain such information), the same likely would not be true of other statements, such as those posted in physical offices, advertised on public websites or podcasts, or those made during in-person conversations. And although the NPRM's narrative section purports to define "intended recipients" objectively rather than subjectively—to mean "any person whom a creditor could reasonably expect to receive a particular statement"—that definition does not appear in the proposed rule or commentary itself, and so would arguably not cabin the proposed rule.[138] The result would be a new, unnecessary, and hard-to-enforce requirement to prove a creditor's

[133] 90 Fed. Reg. 50920, § 1002.4(b) (emphasis added); *see also* 90 Fed. Reg. 50902 (The CFPB seeks to change the discouragement provision "to clarify that it prohibits statements of intent to discriminate in violation of ECOA.").
[134] *See Marzano*, 91 F.3d at 507 ("[O]ur legal scheme against discrimination would be little more than a toothless tiger if the courts were to require such direct evidence of discrimination.").
[135] 90 Fed. Reg. 50907.
[136] *ANR Storage Co. v. Fed. Energy Reg. Comm'n*, 904 F.3d 1020, 1028 (D.C. Cir. 2018); *see also Evergreen Shipping Agency (Am.) Corp. v. Fed. Maritime Comm'n*, 106 F.4th 1113, 1118 (D.C. Cir. 2024) (same); *Firearms Reg. Accountability Coal., Inc. v. Garland*, 112 F.4th 507, 524 (8th Cir. 2024) (same).
[137] 90 Fed. Reg. 50922 (emphasis added).
[138] *Compare* 90 Fed. Reg. 50908 (narrative, with definition) *with* 90 Fed. Reg. 50921–22 (proposed rule and Official Interpretation, without definition).

subjective intent, which would undermine the States' ability to enforce Regulation B and thus harm consumers and the States alike.

D. Imposing These Harms Based on *Ipse Dixit* and Speculation Is Arbitrary and Capricious.

Agency action is arbitrary and capricious under the APA if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[139] Inherent in that rule is the requirement that the agency base its decision on "data" and "facts found."[140] With the exception of the two academic articles mentioned above—neither of which supports the proposed rule—this NPRM offers none, instead relying solely on *ipse dixit* and speculation. This is arbitrary and capricious.[141] Moreover, given the seriousness of the harms laid out above, only a *robust* evidentiary record of harms caused by the current policy could sustain the proposed changes; even if the Bureau were to issue a final rule with a few new citations, that would not cure the problem.[142] To justify revising the discouragement provision *at all*—as opposed to leaving the current provision in place—the Bureau must "supply a reasoned analysis."[143] It has failed to do so.

The NPRM's sole articulated rationale for altering the existing rule is simply that "the Bureau has preliminarily determined that . . . the provision has been interpreted to prohibit conduct that it is not necessary or proper to prohibit."[144] Similar claims regarding specific subsections of the existing discouragement provision appear throughout the NPRM. For example, regarding the standard for discouragement, it states that "§ 1002.4(b) has been interpreted to apply to [improper] scenarios"[145]; regarding the definition of "oral or written statement," it states that the language "acts or practices . . . has resulted in § 1002.4(b) being interpreted overly broadly"[146]; and regarding the issue of selective encouragement, it states that "Section 1002.4(b) has been interpreted to prohibit the selective encouragement of certain consumers."[147]

In each instance, however, the NPRM cites no legal pleading, policy document, or academic paper in which these purported misinterpretations have actually appeared. Indeed, it offers no

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[139] 463 U.S. 29, 43 (1983) (internal quotation marks omitted).
[140] *See Flyers Rts. Educ. Fund, Inc. v. Fed. Aviation Admin.*, 864 F.3d 738, 744 (D.C. Cir. 2017) (agency action was arbitrary and capricious where agency "failed to provide a plausible evidentiary basis" for its conclusion).
[141] *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006) (agency decision is arbitrary and capricious "where its action is founded on unsupported assertions");*DHS*, 969 F.3d at 83 ("The fundamental flaw of this justification is that while DHS repeatedly contends that the non-citizens using these programs would be unable to provide for their basic necessities without governmental support, it does not provide *any* factual basis for this belief.").
[142] *See, e.g.*, *Cigar Ass'n of Am.* F.4th at 540 ("[A]gency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by *substantial* evidence." (emphasis added)); *Am. Radio Relay League*, 524 F.3d at 237 ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data . . . .").
[143] *State Farm*, 463 U.S. at 41–42.
[144] 90 Fed. Reg. 50907.
[145] 90 Fed. Reg. 50908.
[146] 90 Fed. Reg. 50907.
[147] 90 Fed. Reg. 50908.

evidence whatsoever that any such "interpret[ations]" have actually been asserted by any party at any time.[148] Instead, the NPRM cursorily invokes the Bureau's "expertise" to "preliminarily determine" that the discouragement provision "has been interpreted" in these ways.[149] But an agency may not substitute its alleged expertise for evidence on a question of observable fact.[150] "[A]n agency's declaration of fact that is capable of exact proof but is unsupported by any evidence is insufficient to make the agency's decision non-arbitrary."[151] If these provisions have actually been interpreted in the way that the Bureau asserts, that is a "fact capable of exact proof": it should be reflected in judicial opinions, academic articles, policy papers, or other sources. But the NPRM cites nothing, leaving open the possibility that these purported interpretations may have been isolated aberrations—or may never have existed at all.[152]

On top of this house of cards, the NPRM then attempts to balance one more card: The "concern[]" that these perhaps-nonexistent interpretations have had a "chilling effect" on creditors, and "the Bureau therefore proposes" the revisions discussed above.[153] In a subsequent paragraph, the NPRM repeats this justification in slightly different wording, again raising the "concern[]" that "the regulation['s] *potential* interpretations *may* constrain free speech and commercial activity" and "*may* impose unnecessary constraints in the marketplace."[154] But here, too, the NPRM offers no evidence whatsoever that even a *single* creditor has actually been affected by even a *single* instance of these purported harms during the discouragement provision's fifty-year history—even though such an instance, too, is a "fact that is capable of exact proof."[155] "An unjustified leap of logic or unwarranted assumption . . . can erode any pillar underpinning an agency action, whether constructed from the what-is or the what-may-be."[156] The NPRM's proposed changes to

[148] For example, the aforementioned assertion that "§ 1002.4(b) has been interpreted to apply to scenarios that should not be characterized as prohibited" is not accompanied by any explanation of how, when, or by whom § 1002.4(b) has purportedly been so interpreted, or what "scenarios" those might be, beyond a tautological assertion that they are "scenarios that . . . do not involve statements" that the revised text of the rule would prohibit. 90 Fed. Reg. 50908.
[149] 90 Fed. Reg. 50907.
[150] *See Tripoli Rocketry Ass'n*, 437 F.3d at 82 ("[R]ather than resting on concrete evidence to support its judgment, ATFE simply . . . claims deference on the basis of its presumed technical expertise and experience. The purported evidence cited by the agency does not support its determination in this case, and the cry for deference is hollow."); *McDonnell Douglas*, 375 F.3d at 1186–87 ("[W]e do not defer to the agency's conclusory or unsupported supposition.")
[151] *Safe Extensions, Inc. v. F.A.A.*,509 F.3d 593, 604–05 (D.C. Cir. 2007) (citation modified).
[152] In the absence of any evidence to the contrary, it is also possible that *the Bureau itself* is an entity that has espoused these supposedly "concerning" interpretations of ECOA and Regulation B—and that the NPRM's silence and vagueness on this point are an attempt to conceal this fact. If that is so, and the Bureau has brought actions of the kind that the NPRM now condemns, then the NPRM's claim of relying on the agency's "expertise" is precisely backward: The Bureau's enforcement record instead reflects the agency's expert opinion that these "interpretations" *are* "necessary and proper given the purposes of ECOA and facilitating compliance therewith." *See* 90 Fed. Reg. 50907. For example, the Bureau itself often has used ECOA and Regulation B discouragement claims to combat redlining, including the practice of locating branch offices disproportionately in majority-White neighborhoods.
[153] 90 Fed. Reg. 50907.
[154] *Id.* (emphasis added). (Although the "concern" invoked in this paragraph is simply a rephrasing of the "concern" noted in the previous paragraph, the NRPM presents it as if it is an alternate and independent basis for the rulemaking.)
[155] *Safe Extensions*, 509 F.3d at 604–05.
[156] *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012).

Regulation B cannot be justified by this "mere speculation."[157] When the proposed rule's conflict with the meaning and purpose of ECOA, as well as the serious harms to consumers and the States, outlined above, are taken into account, the arbitrary and capricious nature of the Bureau's decision-making is plain.

Conclusion

The Bureau's proposed changes to the disparate impact and discouragement provisions of Regulation B will increase, not decrease, discrimination in credit markets. This result flies in the face of Congress's intent in enacting the Equal Credit Opportunity Act and potentially harms countless Americans who will not be able to obtain credit on fair, unbiased terms. The Bureau should not make these proposed changes and should instead retain the important anti-discrimination protections of Regulation B.

Sincerely,

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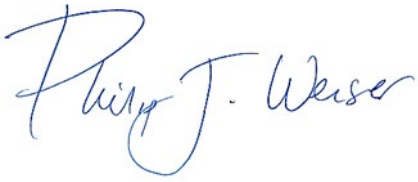

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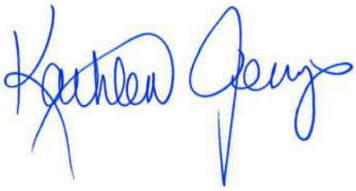
[157] *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018) ("However, this argument is mere speculation. [The agency] has not provided any support for its claim . . . ."); *see also Appalachian Voices*, 25 F.4th at 274.



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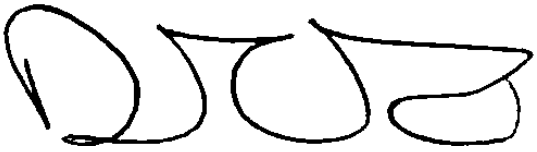

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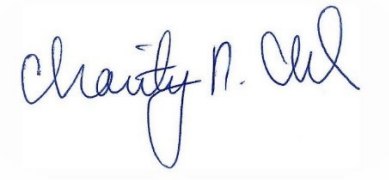

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