IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 23-1654
CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellant,

v.

TOWNSTONE FINANCIAL, INC., and BARRY STURNER,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois,
No. 1:20-cv-4176
The Honorable Franklin U. Valderrama

BRIEF OF *AMICUS CURIAE* HAMILTON LINCOLN LAW INSTITUTE IN SUPPORT OF APPELLEES AND AFFIRMANCE FILED WITH CONSENT OF ALL PARTIES

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1654

Short Caption: Consumer Financial Protection Bureau v. Townstone Financial, Inc.

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Attorney's Signature: /s/ Theodore H. Frank Date: 15 August 2023

Attorney's Printed Name: Theodore H. Frank

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: N S Hedley Date: August 21, 2023

Attorney's Printed Name: Neville S Hedley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☑

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Interest of Amici Curiae

Hamilton Lincoln Law Institute ("HLLI") is a public interest organization dedicated to protecting free markets, free speech, limited government, and separation of powers against regulatory abuse and rent-seeking. HLLI, which is independent of the parties, litigates subjects particularly relevant here, including First Amendment issues and challenges to government overreach and regulatory abuse. *See, e.g.*,, *Couris v. Lawson*, No. 23-55069 (9th Cir., argued July 17, 2023) (challenging state law restricting free speech of physicians); *Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020).

HLLI files this amicus brief in support of affirmance of the district court's decision.

Federal Rule of Appellate Procedure 29 Statement

As Federal Rule of Appellate Procedure 29(a)(2) requires, HLLI states that all parties to this appeal have consented to its filing.

As Federal Rule of Appellate Procedure 29(a)(4)(E) requires, HLLI affirms that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Summary of the Argument

Appellant CFPB alleged in a complaint that Townstone Financial and its owner, Barry Sturner, violated Regulation B—putatively enacted under § 1691(a) of the Equal Credit Opportunity Act—by "discouraging prospective African-American applicants in the Chicago Metropolitan area from applying for mortgages." A001. The lower court,

applying the *Chevron* framework, held for Townstone and dismissed the complaint. We offer two independent reasons to affirm.

First, Regulation B, as CFPB wishes to apply it, discriminates on the basis of the viewpoints that Townstone expresses in its podcast to the public. Regulation B itself, by vesting CFPB unbridled discretion over the permissibility of expression, facilitates that viewpoint discrimination. Relatedly, the regulation distorts the marketplace of ideas by punishing the dissemination of truthful information, which is never a legitimate governmental aim.

Second, the Amended Complaint falls short of the *Twombly/Iqbal* plausibility standard, even accepting the viability of CFPB's "discouragement" theory of liability. Worse yet, in a naked attempt to coerce settlement, CFPB seeks to promulgate "inclusive" social policy far removed from its statutory mandate. Alarmingly, this is part of a growing trend, all the reason more for this Court to be especially vigilant in safeguarding against agency overreach.

Argument

I. Regulation B unconstitutionally chills legitimate, truthful speech.

At its core, this case is about offense—not the offense of any actual credit applicants, or prospective credit applicants, or even the three dozen or so individuals who subscribe to Townstone's YouTube channel. Rather, Townstone's radio and podcast content offended CFPB's bureaucratic sensibilities. Dkt. 32 at 18. "In its haste to join the tedious chorus of disapproval against whatever disfavored view has most recently appeared somewhere on the internet," CFPB tramples bedrock First Amendment principles. *FDRLST Media, LLC v. NLRB*, 35 F.4th 108, 127 (3d Cir. 2022) (Matey, C.J., concurring).

Congress has not deputized CFPB as the "Tasteful Joke Police," nor would the First Amendment permit that delegation. No, CFPB's charge is effecting the ECOA's prohibition on lenders discriminating against applicants. 15 U.S.C. § 1691(a). Regulation B itself deviates from that charge because discouragement is simply not discrimination. Most troubling, though, is how CFPB has expanded the malleable "discouragement" standard to punish silly banter on a radio show. This reveals the "open-ended" character of Regulation B, an "opportunity for abuse" that the First Amendment cannot abide. *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (internal quotation omitted).

A. The Court should construe the ECOA narrowly as applied.

To begin with, this Court should narrowly construe the ECOA as applied to pure speech like Townstone's. On this point, *FDRLST Media, LLC v. NLRB* is instructive. 35 F.4th at 126. In *FDRLST*, the publisher wrote a plainly satirical tweet "threatening" to send union-organizing employees to the salt mines (as 19th-century Russian czars did to dissidents)[1] and, without any employee complaining, the NLRB sought to punish this as an "unfair labor practice." The Third Circuit, "[t]o give effect to Congress's intent and avoid conflict with the First Amendment," construed the NLRA narrowly as applied to an unfair labor practice that "consist[ed] of the Employer's words alone," and overturned a Board order and finding. *Id.* Similarly, this action alleges a statutory violation that consists of "words alone."[2] That is, CFPB does not allege Townstone

[1] Henry Lansdell, *Russian convicts in the salt mines of Iletsk*, HARPER'S (May 1888).

[2] CFPB's Amended Complaint and opening brief also reference Townstone's failures to "direct marketing efforts toward African Americans or to hire a single African-American loan officer who could build client relationships." Dkt. 27 ¶¶ 40, 51-52, OB at 8. Putting aside the noxious insinuation that loan officers can only build client relationships if they share the same race as the applicant, CFPB only references these

discriminated against any specific applicants on a prohibited basis. Rather, it theorizes that Townstone's broadcasts discouraged black listeners from applying for mortgages.

Consistent with the principle that more rigorous scrutiny applies whenever fundamental rights—like speech—are implicated, the Court must construe the Act narrowly as applied and afford no deference to Regulation B or CFPB's corresponding interpretation of the ECOA. *See U.S. W., Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) (citing cases); *see generally* Henry Paul Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) (First Amendment "due process" requires certain judicial, as opposed to administrative, determinations). In short, "regulatory policies … cannot justify stretching, let alone breaching the Constitution," and their "alleged value … cannot be assumed when they … threaten … the freedom of speech." PHILLIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 255 (2021) ("*Purchasing Submission*").

B. Regulation B vests impermissibly unbridled discretion that CFPB uses to discriminate against viewpoints.

This action implicates a heated public debate about race and racism in America. It should not escape the Court's attention that CFPB has recently committed itself to "dismantling systems of oppression, racial bias, and discrimination in legal, sociopolitical, workplace, and cultural contexts." Diversity, Equity, Inclusion, and

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facts in passing; the cornerstone of the allegation is the public-facing commentary on Townstone's podcast. To the extent that failures to engage in affirmative marketing or hiring (in reality, "failures to encourage") can reasonably constitute "discouragement," that would only further show how much limitless power the agency has arrogated to itself through Regulation B.

Accessibility (DEIA) Strategic Plan, CFPB (May 2022).[3] Nor should it escape the Court's attention that CFPB's stated commitments, while lauded in some corners, are controversial and politically polarizing in others,[4] as is the premise that American society is systemically racist. "[N]ot all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race." *Students for Fair Admissions, Inc. v. Harvard*, 143 S. Ct. 2141, 2023 U.S. Dist. LEXIS 2791, at *138 (2023) (Thomas, J., concurring) (describing racial determinism as "irrational," "insult[ing]," and "cancerous"); *accord* Glenn Loury, *Unspeakable Truths about Racial Inequality in America*, QUILLETTE (Feb. 10, 2021). "[M]ore than 40% of Americans are unconvinced that systemic racism exists." Steven Ross Johnson, *U.S. News–Harris Poll Survey: As America Aims for Equity, Many Believe Systemic Racism Doesn't Exist*, U.S. NEWS & WORLD REPORT (Nov. 16, 2022). The administration's controversial commitment to the "equity" and "antiracism" of Ibram X. Kendi necessarily requires the sort of unconstitutional "future discrimination" that the Supreme Court rejected in *Students for Fair Admissions*. Noah Rothman, *Searching for the 'Anti' in 'Antiracism,'* COMMENTARY (Dec. 21, 2020) (quoting IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019)); *see also* Hans Bader, *Is the Cure for Racism Really More Racism?*, WALL ST. J. (Oct. 12, 2020).

This is important, because while CFPB cloaks its argument in objective non-controversial precepts of antidiscrimination, that argument ultimately hinges on the

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[3] Available at https://files.consumerfinance.gov/f/documents/cfpb_deia-strategic-plan_report_2022-06.pdf.

[4] *See* Rachel Minkin, *Diversity, Equity and Inclusion in the Workplace*, PEW RESEARCH CENTER (May 17, 2023), https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace/ ("There are wide partisan differences in views of workplace DEI. Most Democratic and Democratic-leaning workers (78%) say focusing on DEI at work is a good thing, compared with 30% of Republicans and Republican leaners.").

perceived offensiveness of Townstone's speech. Properly understood, CFPB argues: (1) that Townstone's speech would discourage a reasonable prospective African-American applicant, because (2) in the agency's estimation, Townstone's speech disparaging certain neighborhoods is racially insensitive. The constitutional deficiencies of that line of reasoning are apparent: using (2) to justify (1) is impossible without "forbidden" discrimination on the basis of viewpoint. *Matal v. Tam*, 582 U.S. 218, 243 (2017). "Giving offense is a viewpoint." *Id*. And disapproval based on offensiveness is the "essence of viewpoint discrimination." *Id.* at 249 (Kennedy, J., concurring). CFPB, through this action, seeks to manipulate the public debate over crime, race, racism, and the appropriate use of language. CFPB may engage in its own speech on such matters; but the First Amendment does not permit the agency to impede private speech to advance its own bureaucratic sensibilities. "Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780-81 (2007) (Thomas, J., concurring).

"At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal*, 582 U.S. at 248 (Kennedy, J., concurring). The entire thrust of CFPB's theory does just that, accusing Townstone of using "racially inflammatory symbols" and "disparag[ing] majority-African-American areas." Dkt. 35 at 24; Dkt. 27 ¶38. While a fair, contextual reading of Townstone's speech cannot sustain such a charge of racial inflammation, its facial implausibility suggests CFPB has unconstitutionally deployed its own, ad hoc "discouragement" standard, arrogating "unbridled discretion" over the permissibility of expression. *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750 (1988). "The requirement of viewpoint neutrality includes a mandate that a decisionmaker not possess unbridled discretion." *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 595 (7th Cir. 2002). Regulation B "permits [CFPB] too much

discretion in determining when addressing ["discouragement"] permits quieting protected expression and when it does not." *Bell v. Keating*, 697 F.3d 445, 463 (7th Cir. *2012).* Three examples suffice to make both points.

First, CFPB takes offense to Mr. Sturner's "Jungle Jewel" comment. Dkt. 27 ¶ 36. Using a local nickname to refer to a Jewel-Osco grocery is not by itself a "racially inflammatory symbol[]," no matter how offended CFPB might be. A simple Google search returns a Reddit post discussing the closure of one such store, with one commentor stating: "Ah yes, the famous ***Jungle Jewel*** finally gets closed down."[5] On another site, a local blogger uses the moniker to refer to a Jewel on the Near North Side at Clark and Division.[6] Despite CFPB's intimation, "Jungle Jewel" is not some depraved, spontaneous epithet; it's a humorous alliteration used by Chicagoans of all colors to describe supermarkets across racial lines. *See* Aaron Sibarium, *A Small Business Complained About Crime in Chicago. Then the Feds Came After It.*, THE WASHINGTON FREE BEACON (Jun. 20, 2023). CFPB cannot—consistently with the First Amendment—stilt the local lexicon to advance its preferred views. The perceived offense of the agency is still concerning, for it suggests a disregard of context and rush to judgment. Unfortunately, as the next two examples demonstrate, this is a reoccurring theme.

Second, CFPB objects to Townstone's candid discussion of local crime. Dkt. 27 ¶¶ 37-38. But CFPB speciously conflates a discussion of Chicago's unprecedentedly high crime rate with the disparagement of Black neighborhoods. Simply put, one does not

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[5] @ Cyrus_The_G, *Jewel-Osco store on Near West Side shut after inspectors find rodents*, Reddit, https://www.reddit.com/r/chicago/comments/9fcsj0/jewelosco_store_on_near_west_side_shut_after/.

[6] *See* Gina B., *Grocery Store Rant*, THE GINA SPOT BLOG (Dec. 1, 2012), http://theginaspot.com/?m=20121201 ("a socioeconomic nightmare and a haven for street crazies").

follow from the other. Construing "hoodlum weekend," "jungle," and "scary" to carry racist connotation reflects an unbridled interpretative discretion, not an objective standard. Dkt. 27 ¶ 38. These words might be less than diplomatic, but they are neither discriminatory nor inseparable from the relevant proscribable conduct. And they don't inherently discourage credit applicants of any protected class either. This renders any comparison to a "White Applicants Only Sign" —which we agree constitutes speech "swept up incidentally within the reach of a statute directed at conduct"[7]—hopelessly inapposite. *Compare Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) *with* OB at 14, 34; 1A Scholars Amicus Brief at 10. While proscribing discriminatory employment solicitations is "incidental" to prohibiting discriminatory hiring,[8] the same cannot be said where, as here, the expression is a free-ranging podcast opining on matters of social and political concern, far attenuated from the regulable commercial activity. Indeed, CFPB has seemingly flipped the applicable standard on its head. Regulation B, as applied, is mainly directed toward Townstone's *speech*, with the corresponding proscribable conduct—discriminatory lending—taking a backseat. Dkt. 35 at 23. This looks to be by design, however. By expanding the reach of the ECOA to include "prospective applicants," Regulation B swallows far more speech than that merely incidental to a real estate transaction. Put another way, CFPB has artificially expanded the scope of the relevant transaction to encompass the Townstone Financial Show, and any expression which might thereby be broadcasted. While "applicants" are at least minimally invested in the mortgage application process, having taken affirmative steps toward a final transaction, "prospective applicants" might include any marginally interested listener.

[7] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).

[8] *Cf. Pittsburgh Press v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 378 (1973) (involving "Jobs--Male Interest" and "Jobs--Female Interest" signs).

This suit makes that clear: tuning into to the Townstone Financial Show hardly bears any relation to the actual mortgage application process. Receiving employers' solicitations, on the other hand, is typically the first step in finding a job. And a solicitation itself conveys no more than a position's availability. In short, the notion that Townstone's speech "is no more protected than [a] 'Whites Only'" sign is farcical. OB at 14, 34.

Third and finally, CFPB challenges Townstone's jest that sellers remove Confederate flags. Dkt. 27 ¶ 38. Why that would discourage a reasonable African-American prospective credit applicant is unclear, and CFPB never bothers to explain its theory. The message is the opposite: symbols that can be construed as racist are not tolerated in the real-estate market, because one must not alienate African-American buyers. Before the assertedly problematic reference, Townstone claimed "[i]t's a great time to buy," before recommending "chang[ing] your light fixtures and paint[ing your house]," among other aesthetic recommendations that make it easier to sell one's home. *See* January 2014 Townstone Financial Show, YouTube (May 8, 2023), https://www.youtube.com/watch?v=-tmGkuqZhN0. The larger context makes plain that no reasonable person could infer disparagement or discouragement. Yet CFPB's naked attempt to seize on an isolated reference to concoct a false racial narrative shows "an evil eye and an unequal hand" in the application of Regulation B. *Collin v. Chicago Park Dist.*, 460 F.2d 746, 752 (7th Cir. 1972) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)). This undercuts CFPB's contention that Regulation B fashions an objective standard, instead once again suggesting an "unbridled discretion" to determine "discouragement" ad hoc, which impermissibly furnishes opportunity for "discriminatory or arbitrary enforcement." *Bell*, 697 F.3d at 462.

Taken together, these examples show that Regulation B empowers its enforcer to use isolated references divorced from their context as proof of racial discrimination. Yet CFPB's consistent misconstruction of Townstone's comments is not at all surprising.

After all, "government agencies are run by, and more generally aligned with, the knowledge class—the class of Americans who are more attached to the authority of their academic-style knowledge than to their localities and the authority of local representative choices." *Purchasing Submission* at 265. CFPB's conclusion that Townstone's speech "contain[s] discouraging and discriminatory content that would have a distinct effect on prospective applicants" rests on the notion that Townstone's speech was racially insensitive. Dkt. 35 at 25. But "it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971).

CFPB's tendency to construe even contextually unoffensive statements in the worst possible light proves Justice Harlan's point. Because "one man's vulgarity is another man's lyric," the First Amendment does not allow CFPB to so liberally police the contours of public discourse, even though some "discouragement" may relate to mortgage applications. *Cohen*, 403 U.S. at 25. Consistent with the principle that "viewpoint discrimination is forbidden," Regulation B cannot be sustained. *Matal*, 582 U.S. at 243.

C. Regulation B distorts the marketplace of ideas by punishing truth.

A robust freedom of speech is essential "to the discovery and spread of political truth," whose "best test … is the power … to get itself accepted in the competition of the market." Such is the free marketplace of ideas, an enduring lodestar of First Amendment jurisprudence. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams v. U.S.*, 250 U.S. 616, 630 (1919). Accepting that "a reasonable prospective applicant would consider … [a] neighborhoods' safety or dangerousness, when making decisions about a property or seeking credit," CFPB seeks to punish Townstone for telling the truth about local crime. Dkt. 27 ¶ 39. As Justice Marshall

explains, the First Amendment does not permit such informational paternalism. The content to which CFPB would paternalistically deny listeners "is of vital interest to [Chicago] residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families." *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). "If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally.'" *Id.* Government does not possess "such sweeping powers." *Id.* at 96-97.

No one can gainsay that Chicagoans currently face an unprecedented public safety crisis. ABC 7, *Chicago Crime*, https://abc7chicago.com/tag/chicago-crime/ (updated daily). A cursory glance at the City's Gun Crimes Heat Map reveals a municipality riddled with gun violence. Gun Crimes Heat Map, Chicago Data Portal, https://data.cityofchicago.org/Public-Safety/Gun-Crimes-Heat-Map/iinq-m3rg. CFPB's complaint, then, boils down to a distaste for Townstone's presentation of the truth, or worse, a preference that Townstone not discuss the truth at all. But it is never a legitimate state interest to keep listeners "ignorant in order to manipulate their choices in the marketplace." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part). By conflating candid discussions of crime with the disparagement of African-American communities, CFPB seeks to do just that. Under the First Amendment, it cannot.

II. The Amended Complaint represents an effort to compel racial consciousness and wealth transfers rather than combat discrimination. It lacks plausibility and is unmoored from the statutory language and purpose of ECOA, thus the district court did not err when it dismissed the complaint.

The Congress that enacted the ECOA found "a need to insure that the various … firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of [protected class] status." Equal Credit Opportunity Act, Findings and Purpose, Pub. L. No. 93-495, § 502, 88 Stat. 1500, 1521 (Oct. 28, 1974). It was therefore "the purpose of th[e] Act to require [such] financial institutions … [to] make [] credit equally available to all creditworthy customers without regard to" such status as race. *Id.* Put simply, Congress sought to level the playing field by rooting out invidious lending practices that excluded protected classes from obtaining credit for which they qualified. But that is not the aim of CFPB here, which instead seeks to target a comparatively small business with superficial and speculative allegations of discrimination hoping to extract a settlement or court order compelling Townstone to be more affirmatively "inclusive" in its business practices.[9] The factually deficient Amended Complaint conveys CFPB's regulatory overreach. This is an independent reason to uphold the district court's grant of the motion to dismiss.

[9] That the Amended Complaint and CFPB's Opening Brief emphasize that Townstone neither specifically targeted marketing efforts to African-Americans nor employed an African-American loan officer suggests that CFPB's aim was not to punish and deter discrimination, but to compel race consciousness and racial wealth transfers. Dkt. 27 ¶¶ 40, 51-52; OB at 8; *see* note 1 above. "It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C. J., concurring). History teaches the same.

A. The Amended Complaint does not satisfy the plausibility standard.

The Amended Complaint lacks any factual assertions that, even if taken as true, could survive a Rule 12(b)(6) motion to dismiss. The Amended Complaint simply cites a handful provocative comments made during radio shows. Dkt. 27 ¶¶ 33-39. CFPB alleges that these statements "disparage[ed]" African Americans and "discourag[ed]" them from applying to Townstone for mortgage loans. But these mere "[t]hreadbafre recitals" are but "legal conclusions . . . insufficient to survive a Rule 12(b)(6) motion." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 885 (7th Cir. 2012). Without more, the Amended Complaint fails to satisfy the plausibility standard in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (holding that a complaint pleading facts "merely consistent with" a defendant's liability "stops short of the line between possibility and plausibility").

Completely absent from the Amended Complaint is any allegation that someone—anyone—listened to the Townstone Financial Show and was thereby dissuaded from applying for a mortgage with Townstone. There is no allegation that *any* member of *any* protected class *anywhere* (let alone in the Chicago MSA) even heard one or more of Townstone's comments (let alone was thereby excluded, dissuaded, or even discouraged from obtaining credit). Indeed, the only person offended appears to be the CPPB investigator who waded through hours of audio and was only able to cherry-pick a handful of remarks that could be taken out of context.

McReynolds is instructive because its complaint also alleged racial discrimination. This Court affirmed dismissal because the complaint made only "conclusory allegations" of racial discrimination. 694 F.3d at 886. Similarly, the Amended Complaint here offers only conclusory allegations and, like the complaint in *McReynolds*, lacks the necessary factual allegations— that Townstone intended to discriminate on the basis of race or otherwise discouraged any prospective borrower from seeking a mortgage. *Id.* at 886-87.

This case and *McReynolds* differ from cases where the complaints included basic factual allegations that an actual member of a protected class suffered discrimination. For instance, in *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403, 405 (7th Cir. 2010), the complaint alleged that a lender had engaged in real, discernable discriminatory acts and had thereby denied an actual protected class member a loan. Similarly, in *Huri v. Off. of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 833-34 (7th Cir. 2015), this Court allowed a discrimination suit to proceed because the complaint alleged specific conduct directed at a particular plaintiff that could, if taken as true, constitute unlawful discrimination.

While the *Volling* plaintiffs had not applied for a position with the defendant contractor, the complaint alleged that the plaintiffs had been intentionally excluded from applying for jobs because they had engaged in statutorily protected activities related to their prior employment. *Volling v. Kurtz Paramedic Servs.*, 840 F.3d 378, 383 (7th Cir. 2016). This was sufficient to establish a plausible employment discrimination and retaliation claim under the *Twombly/Iqbal* framework. *Id.* at 382. Unlike here, it was not left to speculation whether plaintiffs were excluded from applying for jobs because of the defendant's discriminatory conduct. It was a factual allegation entitled to a presumption of truth under Rule 12(b)(6). But here, there is no factual allegation that the radio show comments discouraged or dissuaded any prospective mortgage applicant, just conclusory allegations by CFPB that the comments would have that effect. The Amended Complaint is thus mere bureaucratic speculation peppered with legal conclusions.[10]

[10] The statistical evidence in the Amended Complaint at best supports a disparate impact claim, but it is questionable whether such a claim is permissible under the ECOA. The Supreme Court has recognized disparate impact claims under the Fair Housing Act, but that statute has different language and a narrower scope. *Texas Dep't of Hous. and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

After excising legal conclusions from the Amended Complaint, all that remains is allegedly provocative radio show commentary. That these statements discouraged a prospective African American borrower and thereby violated the ECOA is merely speculation insufficient to sustain a valid complaint. *See McCauley v. City of Chicago*, 671 F.3d 611, 616-17 (7th Cir. 2011) (affirming dismissal of complaint in which legal conclusions predominated); *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.").

B. This Court should reject CFPB's sweeping statutory interpretation and curb coercive settlements that go beyond the purpose of ECOA.

Is it *possible* that one or more African-Americans heard the statements contained in the complaint, was offended and then refrained from seeking a mortgage from Townstone? Sure. But the standard is *plausibility*, and the Amended Complaint doesn't

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Inclusive Communities placed weight on the presence of the phrase "otherwise make unavailable" in the FHA. *Id.* at 2518. That "otherwise" language is absent from the ECOA. *Compare* 42 U.S.C. § 3604 *with* 15 U.S.C. § 1691(a). *Accord Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006). But even if the ECOA contemplates disparate impact claims, the complaint must "identify a specific policy or practice which the defendant has used to discriminate" in addition to any statistical evidence that the "practice or policy has an adverse effect on the protected group." *Powell v. Am. Gen. Fin. Inc.*, 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004). A handful of provocative comments on a radio show hardly qualify as a "specific policy or practice." *Id.* Thus, even if the ECOA permits disparate impact claims, the Amended Complaint here is flawed despite the statistics CFPB cites. Moreover, if CFPB's claim depends solely on disparate treatment (and as it appears from the pleadings themselves), a lack of testimony from individual victims of the alleged discrimination indicates deficiencies in statistical evidence. *See EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988).

meet that threshold—the allegations are no more than conclusory speculation. *Id.* at 555, 570.[11] So what was the point of CFPB's enforcement action?

The recent history of government redlining settlements provides an answer. Those settlements show that CFPB's goal has not been to target lenders engaged in the discriminatory exclusion of protected class members, but to punish and make examples of lenders who, in the eyes of regulatory bureaucrats, are insufficiently "inclusive" in the extension of credit, regardless of discriminatory intent (or lack thereof). The point appears to be to induce quotas lest the regulator find an institution lagging behind its peers in giveaways to preferred racial groups. Indeed, an outspoken advocate of the Biden Administration's approach gave away the game—the way to "avoid redlining settlements [is] '**through inclusion** . . . [y]ou'll avoid the protests, you'll avoid the pain.'" Max Abelson, *Why Some Bankers are Rushing to Settle U.S. Redlining Probes*, Bloomberg (Oct. 27, 2021) (quoting Brookings Institute Senior Fellow Andre Perry) (emphasis added). CFPB has thus put the "obscene reality of agency power" on full display. *Purchasing Submission* at 264.

[11] The *Twombly* and *Iqbal* plausibility standard addresses the concerns of asymmetrical burdens associated with discovery *ex post* surviving a motion to dismiss. *See Swanson*, 614 F.3d at 411 (Posner, J., dissenting in part). Those concerns are less relevant in the context of an enforcement action such as this case since CFPB has already had a chance to investigate and obtain documents and information from Townstone; CFPB has already imposed the asymmetrical burden of discovery. But this emphasizes the implausibility of the CPBP's Amended Complaint. Had the investigation uncovered any prospective borrowers or applicants who had been offended by the broadcasts or other indicia of discriminatory conduct, CFPB would have included such allegations in the Amended Complaint or entered it into evidence opposing the motion to dismiss. This confirms that the allegations are at most bureaucratic overreach.

CFPB might advance the Administration's "equitable" housing goals by forcing lenders to unfairly favor racial minorities to meet *de facto* quotas. *Compare* FEDERAL HOUSING FINANCE AGENCY, *FHFA Announces Updated Equitable Housing Finance Plans for Fannie Mae and Freddie Mac* (April 5, 2023). But that is not Congress's charge in the ECOA. CFPB cannot deploy enforcement actions, unmoored from the ECOA's mandate of rooting out intentionally invidious discrimination, to coerce settlements that further inclusivity in the abstract.[12] The ECOA, "enacted to protect consumers from discrimination by financial institutions," simply does not contemplate this coercive exercise of agency power. *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 699 (3d Cir. 1995); *accord Treadway v. Gateway Oldsmobile Inc.*, 362 F.3d 971, 975 (7th Cir. 2004).

Generally, courts are reluctant to allow agencies unbounded authority to pursue objectives beyond their substantive jurisdiction, as contemplated by Congress and the express statutory language. *See, e.g.*, *City of Chicago v. Barr*, 961 F.3d 882, 905-07 (7th Cir. 2020) (rejecting statutory interpretation that would have granted Attorney General "unbounded" authority that carried "potential for abuse"); *Merck & Co., Inc. v. U.S. HHS*, 962 F.3d 531, 540-41 (D.C. Cir. 2020) (holding that agency rule granting it "unbridled power" exceeded statutory authority and purpose of the legislation); *Loan*

[12] CFPB's improper use of an ECOA enforcement action to compel race conscious inclusivity (rather than punish actual discrimination) is further evidenced in its Opposition to the Motion to Dismiss. There, CFPB cataloged a series of complaints filed by the government asserting that various defendants, like Townstone, were insufficiently inclusive in marketing or hiring practices. Dkt. 35 at 15 n.68 & 69. CFPB apparently believes those complaints should be taken as persuasive authority and evidence of Townstone's guilt. If so, then CFPB has truly lost the plot. The agency's pattern of complaints suggests its aim is not to punish and deter discrimination, as contemplated by the ECOA, but to coerce a broader form of racial wealth transfers by credit providers like Townstone.

Syndications & Trading Ass'n v. SEC, 882 F.3d 220, 224-25 (D.C. Cir. 2018) ("That the agencies' interpretation sweeps so far beyond any reasonable estimate of the congressional purpose confirms our view that the interpretation is beyond the statutory language."). Agencies like CFPB are particularly prone to overreach by consent decree, for in "settling enforcement actions, agencies sometimes manage to extract concessions from the companies suspected of violating statutory requirements . . . that they could not impose directly on a regulated entity." Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 892-93 (1997). For example, in *CEI v. FCC*, the agency attempted to use its merger approval authority to impose conditions unrelated to specific transaction. 970 F.3d 372 (D.C. Cir. 2020). The D.C. Circuit suggested that imposing "such non-germane conditions" through the backdoor of a consent decree amounted to "an out-and-out plan of extortion." *Id.* at 388 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 824, 837 (1987)). Overaggressive theories of liability lay the groundwork for *in terrorem* settlements with provisions that exceed any relief available under a given statute. Agencies use their near infinite resources "as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon Enter. v. FTC*, 143 S. Ct. 890, 918 (2023) (Gorsuch, J., concurring in the judgment). Thus, Phillip Hamburger has observed that "the Federal Trade Commission (FTC) often brings administrative proceedings against telecommunications firms for breaches of data security—even when the firms are not in violation of any statutory or common law standard for data security." *Purchasing Submission* at 222. Like FTC, CFPB launches meritless crusades, "[r]elying on the [mere] threat of [] proceedings," to compel vulnerable litigants "to [] consent to additional regulatory conditions, which are not required by law." *Id.* at 222-23. "Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could obtain in litigation" Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlement: The Culture of Consent*, in 1 WILLIAM E. KOVACIC, AN ANTITRUST TRIBUTE 177

(N. Charbit et al. eds. 2013). This approach imperils equal protection of the law by giving agencies the leeway "to impose different standards on different companies, depending on what it thinks it can get away with and what it thinks of the companies." *Id.* at 223. Worse yet, there's no countervailing government interest, for the "alleged value" of "regulatory policies" "cannot be assumed when they … enable regulatory extortion." *Id.* at 255.

Although "few can outlast or outspend the federal government,"[13] when defendants choose to resist the coercive pressure, they win. *FTC v. Shire Viropharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), is a case with striking similarities to this one. The Third Circuit affirmed the dismissal of an FTC complaint alleging an anti-competitive business practice from several years prior and that was arguably protected by the First Amendment. Much akin to CFPB's Amended Complaint, the *Shire* complaint relied on a tortured interpretation of a statute authorizing the FTC to seek an injunction against a company that "is violating, or is about to violate" the FTC Act. *Id.* at 156 (citing 15 U.S.C. § 52(a)(1)). The Third Circuit rejected the FTC's interpretation, finding that the statute unambiguously did not empower the FTC to pursue an enforcement action for historic conduct. *Id.* at 156, 159. The Court thus ruled that "vague" and nonspecific allegations that the defendant might engage in similarly anti-competitive conduct in the future failed to satisfy the plausibility standard given the unambiguous statutory text. *Id.* at 160.

Akin to the FTC's tortured *Shire* interpretation, CFPB's unbounded and expansive construction of Regulation B conflicts with the unambiguous statutory language of the ECOA. CFPB seeks to penalize Townstone for violating that statute, despite its failure to allege that *any* single "prospective applicant" tuned into the

[13] *Axon Enter. v. FTC*, 143 S. Ct. 890, 918 (2023) (Gorsuch, J., concurring in the judgment).

Townstone Financial Show, heard the comments at issue, and was thereby discouraged from seeking a mortgage. This Court should follow the Third Circuit's example in *Shire* and affirm the district court's order dismissing the complaint.

Conclusion

CFPB is an agency with "enormous power over American business." *PHH Corp. v. CFPB*, 839 F.3d 1, 7 (D.C. Cir. 2016) *aff'd in part, rev'd in part on other grounds*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). But that power is not limitless. CFPB has exceeded its authority under the ECOA for two independent reasons. *First*, Regulation B, particularly as applied, patently discriminates on the basis of viewpoint, violating the First Amendment's proscription of viewpoint discrimination. *Second*, given the statute's unambiguous text and practical statutory context, the Amended Complaint fails to assert a violation under the ECOA, which contemplates actual discrimination against actual applicants, not mere offense to D.C. bureaucrats and their racial sensitivities.

HLLI thus asks the Court to affirm the district court's order dismissing the case.

Dated: August 21, 2023

Respectfully submitted,

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3. All materials required by Cir. R. 30(a) & (b) are included in the appendix.

Executed on August 21, 2023.

/s/ Theodore H. Frank

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I hereby certify that on August 21, 2023, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

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