

**No. 25-30345**

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No. 25-30345 consolidated with  
No. 25-30418, 25-30659

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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SIXELA INVESTMENT GROUP,

*Plaintiff-Appellant,*

v.

HOPE FEDERAL CREDIT UNION; COMMUNITIES UNLIMITED, INCORPORATED,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the  
Western District of Louisiana

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**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* OF  
CHAMBER OF COMMERCE OF THE UNITED STATES OF  
AMERICA IN SUPPORT OF DEFENDANT-APPELLEE HOPE  
FEDERAL CREDIT UNION**

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Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Fifth Circuit Rules 27.4 and 29.1, the Chamber of Commerce of the United States of America respectfully requests that this Court grant it leave to file the accompanying brief as *amicus curiae* in support of Defendant-Appellee Hope Federal Credit Union. *See* Ex. A (Proposed Brief). *Amicus*, through its counsel, contacted counsel for all parties to request consent to file the accompanying brief, and was informed that not all parties consent to the brief's filing: specifically, Plaintiff-Appellant Sixela Investment Group consents to its filing; Defendant-Appellee Hope Federal Credit Union opposes its filing; and counsel contacted counsel for Defendant-Appellee Communities Unlimited on February 17, 2026, and conferred on February 18 and as of this filing has been unable to obtain Communities Unlimited's position.

*Amicus* urges this Court to affirm in relevant part the District Court's May 29, 2025 order granting summary judgment to Hope on Plaintiff-Appellant's disparate impact claim.

#### **INTEREST OF THE PROPOSED *AMICUS CURIAE***

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000

direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This case raises such an issue. Disparate impact liability, whether pursued by government agencies or private parties, is of significant concern to the Chamber's members and the wider business community. For that reason, the Chamber has regularly filed *amicus* briefs and regulatory challenges about the availability of disparate impact liability under federal law. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* In Support of Appellant and Reversal [Doc. 18], *Property Casualty Insurers Ass'n of Am. v. Todman*, No. 24-1947 (7th Cir. Aug. 21, 2024) (urging court to set aside Department of Housing and Urban Development's disparate impact rule); Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* In Support of Appellant and Reversal [Doc. 21], *Nat'l*

*Ass'n of Mutual Ins. Cos. v. HUD*, No. 23-5275 (D.C. Cir. May 8, 2024) (same); *see also* Petition for Review [Doc. 3], *Chamber of Commerce v. FCC*, No. 24-1354 (8th Cir. Feb. 20, 2024) (industry challenge to Federal Communications Commission's "digital discrimination rule"); Complaint [Doc. 1], *Chamber of Commerce v. CFPB*, No. 22-cv-381 (E.D. Tex. Sept. 28, 2022) (challenge to CFPB's attempt to impose disparate impact liability on banks via supervision and examination manual). In addition, the Chamber recently commented in support of a proposed regulation by the Consumer Financial Protection Bureau (CFPB) clarifying that the Equal Credit Opportunity Act (ECOA)—the statute at issue in this case—does not authorize disparate impact suits.<sup>1</sup>

The Chamber supports fair lending principles and the goals of ECOA. Every consumer should have equal access to the credit that drives the modern economy and Americans' prosperity. Indeed, the Chamber's members are committed to this principle and have invested in robust compliance systems to ensure fairness in American credit

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<sup>1</sup> *See* U.S. Chamber of Commerce Comment Letter on Equal Credit Opportunity Act (Regulation B) (Dec. 15, 2025), *available at* <https://www.regulations.gov/comment/CFPB-2025-0039-0078> (hereinafter "Chamber Comment").

markets, serve their communities and expand access to credit.

The Chamber strongly believes that fair lending goals are best achieved through the articulation of clear rules of the road that adhere to the statutory bounds imposed by Congress. To that end, the Chamber asks this Court to delineate the scope of liability under ECOA. ECOA seeks to establish its purpose by targeting intentional discrimination based on race and other protected characteristics. However, district courts in this Circuit (including the court below) have historically assumed that the statute sweeps more broadly to prohibit policies that have a disparate impact too—a question this Court has not squarely resolved. But that assumption is wrong, as the Chamber explained in its recent comments on the CFPB’s proposed rule to rescind references to disparate impact in Regulation B. Chamber Comment 2-6; *see* 12 C.F.R. § 1002.6(a). The plain text of ECOA precludes liability for disparate impact. A ruling by this Court that disparate impact liability is unavailable best reflects Congress’s statutory intent and thus better serves the statute’s aims.

Pursuant to Rule 29(a)(4)(E), undersigned counsel affirms that no counsel for any party authored this brief in whole or in part and no entity

or person, aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

### **REASONS TO PERMIT THE PROPOSED *AMICUS* BRIEF**

This Court enjoys “broad discretion” to grant leave to file an *amicus* brief under Rule 29, and it generally will do so “unless it is obvious that the proposed brief[] do[es] not meet Rule 29’s criteria as broadly interpreted.” *Lefebure v. D’Aquila*, 15 F.4th 670, 673, 676 (5th Cir. 2021); accord *Richardson v. Flores*, 979 F.3d 1102, 1106 (5th Cir. 2020) (explaining that “granting leave to file an *amici* brief is within [the Court’s] discretion”). Indeed, the Court has previously noted that it “welcome[s] amicus briefs” because “[a]n amicus who makes a strong but responsible presentation in support of a party can truly serve as the court’s friend.” *Lefebure*, 15 F.4th at 675 (quoting *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.)). Federal courts have exercised their discretion to grant leave for amicus participation even when “[t]he parties oppose the . . . motions.” See, e.g., *N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1175-76 (10th Cir. 2021). For instance,

in *N.M. Oncology*, the court accepted amicus briefs arguing that the court should reconsider its jurisprudence in light of subsequent developments even though both parties argued the briefs were “irrelevant to the issues on appeal.” *Id.* at 1175.

*Amicus* seeks to file this brief offering a variation on Appellee’s argument below that Appellant failed to state a claim for disparate impact liability: ECOA does not authorize such claims. The Fifth Circuit has no binding precedent on that purely legal question, and this Court’s precedent makes clear that the Court has discretion to consider this antecedent issue implicit in Appellee’s position. *See, e.g., Doe v. Doe*, 941 F.2d 280, 288 (5th Cir. 1991) (notwithstanding “the parties’ positions” about how the fair reporting defense was applied, “address[ing] an antecedent issue: whether Louisiana law even recognizes the privilege of fair reporting”); *Bridges v. City of Bossier*, 92 F.3d 329, 334 n.8 (5th Cir. 1996) (considering an argument first raised by *amicus curiae* on appeal when it was a “variation on” the legal argument made by party below).

Indeed, in order to understand whether Appellant should have been allowed to conduct additional discovery “to identify any specific test, requirement, practice, or policy that points to disparate impact,” Dist. Ct.

Op. [Doc. 201], at 13, it is helpful to understand what kinds of tests, requirements, practices, or policies could actually make out a claim for liability under the relevant statute. Thus, this Court has the discretion to consider the issue. *See, e.g., FDIC v. Lee*, 130 F.3d 1139, 1142 (5th Cir. 1997) (ordering supplemental briefing on an underlying legal issue).

The Chamber's proposed brief argues that this Court should exercise its discretion to consider this antecedent legal issue implicit in Appellee's position, because the right answer is clear and giving it will prevent ongoing legal uncertainty. *Creel v. Johnson*, 162 F.3d 385, 390 n.3 (5th Cir. 1998). The question whether disparate impact claims are cognizable is a logically antecedent question that "is so fundamental to the claims alleged in the district court" that this Court may address it here. *Wagner v. PennWest Farm Credit, ACA*, 109 F.3d 909, 911 (3d Cir. 1997) (deciding "the non-existence" of a cause of action though this argument was "not raised by the parties first in the district court").<sup>2</sup>

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<sup>2</sup> Indeed, the Supreme Court and other courts of appeals have exercised their discretion to decide whether a cause of action exists even if the question was not passed on below. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 111-14 (2013); *M.F. v. State of N.Y. Exec. Dep't Div. of Parole*, 640 F.3d 491, 494-95 (2d Cir. 2011); *Kalu v. Spaulding*, 113 F.4th 311, 344 n.21 (3d Cir. 2024); *Smith v. Mich. Dep't of Corrections*, 159 F.4th 1067, 1073 (6th Cir. 2025); *City of Reno v.*

Deciding the antecedent question in this case not only provides a straightforward path to affirm dismissal of the disparate impact claims here, it would avoid “legal uncertainty,” *Creel*, 162 F.3d at 390 n.3, by providing a service for district courts and litigants throughout the Circuit. In a since-vacated—and thus not binding—opinion, this Court assumed, after a cursory look at the legislative history, that disparate impact liability was available. *Bhandari v. First Nat’l Bank of Com.*, 808 F.2d 1082, 1101 (5th Cir. 1987), *rehearing granted by* 812 F.2d 936. Earlier, in a case in which the party did “not rely on a disparate impact test,” this Court made passing note that “ECOA regulations endorse[d] use of the disparate impact test to establish discrimination.” *Haynes v. Bank of Wedowee*, 634 F.2d 266, 269 & n.5 (5th Cir. 1981).<sup>3</sup>

In the absence of authoritative precedent from this Court, many

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*Netflix, Inc.*, 52 F.4th 874, 877 n.2 (9th Cir. 2022); *Price v. City of Stockton*, 390 F.3d 1105, 1108 (9th Cir. 2004).

<sup>3</sup> Even if these decisions had squarely held that disparate impact is cognizable under ECOA, they would not be binding now; they have “fallen unequivocally out of step with” the Supreme Court’s “intervening” instructions on how to assess the availability of disparate impact in *Inclusive Communities*, such that they could not bind this panel. *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021) (explaining that a Fifth Circuit case is implicitly overruled “where an intervening Supreme Court decision fundamentally changes the focus of the relevant analysis” (cleaned up)).

district courts in this Circuit (including the court below), have presumed disparate impact's existence under ECOA. *See, e.g., CFPB v. Colony Ridge Dev., LLC*, 2024 WL 5183711, at \*3 (S.D. Tex. Sept. 13, 2024); *Eustice v. JPMorgan Chase & Co.*, 2020 WL 5541084, at \*5 (S.D. Tex. Aug. 10, 2020); *Jones v. Caliber Home Loans, Inc.*, 2019 WL 3366104, at \*5 (M.D. La. July 25, 2019); Dist. Ct. Op. [Doc. 201] at 4 (district court below citing *Jones* for existence of disparate impact under ECOA). Because this Court has never undertaken the textual analysis required by the Supreme Court, the parties here and the court below spent resources on evidentiary and factual issues that should be academic. Ruling in this appeal that ECOA does not include a disparate impact theory would prevent the replay of that situation in future cases within the Fifth Circuit.

Such a ruling would also help clarify the law nationwide. Most other courts of appeals simply have assumed without deciding that ECOA authorizes disparate impact liability. Moreover, because courts, not agencies, “are the ultimate arbiters of statutory meaning.” Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50,901, 50,906 (proposed Nov. 13, 2025) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369

(2024)), the federal government's current consideration of whether to rescind disparate impact from ECOA's implementing regulations cannot resolve this statutory question. And in light of the availability of private enforcement under ECOA, the issue will remain live regardless of whether the CFPB finalizes its proposed rule to eliminate disparate impact from ECOA regulations. By weighing in, this Court would provide important clarity on this oft-overlooked issue, increasing the likelihood that other courts will consider the question and answer it correctly.

### CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court grant it leave to file the attached brief.

February 18, 2026

Respectfully submitted,

*/s/ Alexander V. Maugeri*

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## CERTIFICATE OF COMPLIANCE

I certify that this motion: (1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,009 words, excluding the parts of the motion exempted by Rule 32(f); and (2) complies with the typeface requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

Dated: February 18, 2026

Respectfully submitted,

*/s/ Alexander V. Maugeri*  
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## CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2026, I caused the foregoing motion for leave to file to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the CM/ECF system. I further certify that service on all parties' counsel will be accomplished by the CM/ECF system.

Dated: February 18, 2026

Respectfully submitted,

*/s/ Alexander V. Maugeri*

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## CERTIFICATE OF CONFERENCE

I hereby certify that counsel for *Amicus* conferred with counsel for Appellant and Appellees by electronic mail and/or telephonically, and was informed that not all parties consent to the brief's filing: specifically, Plaintiff-Appellant Sixela Investment Group consents to its filing; Defendant-Appellee Hope Federal Credit Union opposes its filing; and counsel contacted counsel for Defendant-Appellee Communities Unlimited on February 17, 2026, and conferred on February 18 and as of this filing has been unable to obtain Communities Unlimited's position.

Dated: February 18, 2026

Respectfully submitted,

*/s/ Alexander V. Maugeri*  
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**Ex. A**

**No. 25-30345**

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No. 25-30345 consolidated with  
No. 25-30418, 25-30659

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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SIXELA INVESTMENT GROUP,

*Plaintiff-Appellant,*

v.

HOPE FEDERAL CREDIT UNION; COMMUNITIES UNLIMITED, INCORPORATED,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the  
Western District of Louisiana

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**BRIEF OF CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN  
SUPPORT OF DEFENDANT-APPELLEE HOPE FEDERAL  
CREDIT UNION**

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**CERTIFICATE OF INTERESTED PERSONS**

**No. 25-30345 consolidated with No. 25-30418, 25-30659,  
*Sixela Investment Group v. Hope Federal Credit Union, et al.***

The undersigned counsel of record certifies that, in addition to the persons and entities listed in the parties' certificates of interested persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. Undersigned counsel makes these representations to assist the Judges of this Court in evaluating possible disqualification.

1. *Amicus Curiae* Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation and no publicly held company has 10% or greater ownership in the Chamber.

2. The following law firms and counsel have participated in this case on behalf of *Amicus*:

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Dated: February 18, 2026

Respectfully submitted,

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*Counsel of Record for Amicus  
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## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF AUTHORITIES.....	iv
INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION.....	4
ARGUMENT .....	10
I. ECOA Does Not Authorize Disparate Impact Claims.....	10
A. The text of ECOA precludes disparate impact liability.....	10
B. ECOA lacks congressional ratification of a circuit court consensus that the Supreme Court has found significant in recognizing disparate impact. ....	17
C. As the CFPB recently recognized, Regulation B’s outdated position on disparate impact liability contradicts the text of ECOA and merits no deference. ....	19
II. Interpreting ECOA to Address Only Intentional Discrimination Best Advances the Purposes of Federal Law.....	23
A. Disparate impact liability is not necessary to further ECOA’s purpose of eliminating intentional discrimination. ....	23
B. Rejecting disparate impact reduces lenders’ risk of legally tenuous lawsuits. ....	25
C. Properly interpreting ECOA avoids tension with constitutional and statutory prohibitions on disparate treatment. ....	27
CONCLUSION .....	28
CERTIFICATE OF COMPLIANCE.....	30
CERTIFICATE OF SERVICE.....	31

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001) .....	10, 20, 21
<i>Armstrong v. Flowers Hosp., Inc.</i> , 33 F.3d 1308 (11th Cir. 1994) .....	24
<i>Bhandari v. First Nat’l Bank of Com.</i> , 808 F.2d 1082 (5th Cir. 1987) .....	8
<i>Bhandari v. First Nat’l Bank of Com.</i> , 812 F.2d 936 (5th Cir. 1987) .....	8
<i>Bostock v. Clayton Cnty.</i> , 590 U.S. 644 (2020) .....	10, 14
<i>Bridges v. City of Bossier</i> , 92 F.3d 329 (5th Cir. 1996) .....	6
<i>Bruesewitz v. Wyeth LLC</i> , 562 U.S. 223 (2011) .....	19
<i>CFPB v. Colony Ridge Dev., LLC</i> , 2024 WL 5183711 (S.D. Tex. Sept. 13, 2024) .....	8
<i>Chamber of Commerce v. CFPB</i> , 691 F. Supp. 3d 730 (E.D. Tex. 2023) .....	11, 20
<i>Chamber of Commerce v. CFPB</i> , 2025 WL 1304573 (5th Cir. May 1, 2025) .....	11
<i>City of Reno v. Netflix, Inc.</i> , 52 F.4th 874 (9th Cir. 2022) .....	7
<i>Creel v. Johnson</i> , 162 F.3d 385 (5th Cir. 1998) .....	7

*DaVita, Inc. v. Marietta Mem’l Hosp. Emp. Health Benefit Plan*,  
978 F.3d 326 (6th Cir. 2020) ..... 14

*Doe v. BlueCross BlueShield of Tenn., Inc.*,  
926 F.3d 235 (6th Cir. 2019) ..... 13

*Doe v. Doe*,  
941 F.2d 280 (5th Cir. 1991) ..... 6

*EEOC v. Abercrombie & Fitch Stores, Inc.*,  
575 U.S. 768 (2015) ..... 15

*Eustice v. JPMorgan Chase & Co.*,  
2020 WL 5541084 (S.D. Tex. Aug. 10, 2020) ..... 8

*FDIC v. Lee*,  
130 F.3d 1139 (5th Cir. 1997) ..... 6

*Frith v. Whole Foods Mkt., Inc.*,  
38 F.4th 263 (1st Cir. 2022) ..... 23

*Garcia v. Johanns*,  
444 F.3d 625 (D.C. Cir. 2006)..... 18

*Golden v. City of Columbus*,  
404 F.3d 950 (6th Cir. 2005) ..... 18

*Griggs v. Duke Power Co.*,  
401 U.S. 424 (1971) ..... 10

*Haynes v. Bank of Wedowee*,  
634 F.2d 266 (5th Cir. 1981) ..... 8

*In re Bonvillian Marine Serv., Inc.*,  
19 F.4th 787 (5th Cir. 2021)..... 8

*Jennings v. Rodriguez*,  
583 U.S. 281 (2018) ..... 27

*Jones v. Caliber Home Loans, Inc.*,  
2019 WL 3366104 (M.D. La. July 25, 2019) ..... 8

*Kalu v. Spaulding*,  
113 F.4th 311 (3d Cir. 2024) ..... 7

*Kiobel v. Royal Dutch Petroleum Co.*,  
569 U.S. 108 (2013) ..... 7

*Loper Bright Enters. v. Raimondo*,  
603 U.S. 369 (2024) ..... 9, 21, 22

*M.F. v. State of N.Y. Exec. Dep’t Div. of Parole*,  
640 F.3d 491 (2d Cir. 2011)..... 7

*Marietta Mem’l Hosp. Emp. Health Benefit Plan v. DaVita Inc.*,  
596 U.S. 880 (2022) ..... 14

*Martinez v. Mukasey*,  
519 F.3d 532 (5th Cir. 2008) ..... 11

*Midkiff v. Adams Cnty. Reg’l Water Dist.*,  
409 F.3d 758 (6th Cir. 2005) ..... 17

*Miller v. Am. Express Co.*,  
688 F.2d 1235 (9th Cir. 1982) ..... 18

*Price v. City of Stockton*,  
390 F.3d 1105 (9th Cir. 2004) ..... 7

*Rayethon Co. v. Hernandez*,  
540 U.S. 44 (2003) ..... 12

*Ricci v. DeStefano*,  
557 U.S. 557 (2009) ..... 23, 28

*Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty.*,  
6 F.4th 633 (5th Cir. 2021)..... 22, 23, 28

*Skidmore v. Swift & Co.*,  
323 U.S. 134 (1944) ..... 22

*Smith v. City of Jackson*,  
544 U.S. 228 (2005) ..... 10, 11, 13, 17

*Smith v. Mich. Dep’t of Corrections*,  
159 F.4th 1067 (6th Cir. 2025)..... 7

*Sw. Elec. Power Co. v. EPA*,  
920 F.3d 999 (5th Cir. 2019) ..... 27

*Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*,  
576 U.S. 519 (2015) ..... *passim*

*United States v. Munoz-Flores*,  
495 U.S. 385 (1990) ..... 27

*Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*,  
429 U.S. 252 (1977) ..... 24

*Wagner v. PennWest Farm Credit, ACA*,  
109 F.3d 909 (3d Cir. 1997)..... 7

*Watson v. Fort Worth Bank & Tr.*,  
487 U.S. 977 (1988) ..... 11, 13, 25

**STATUTES & REGULATIONS**

12 C.F.R. § 1002.6(a) ..... 4, 21

15 U.S.C. § 1691(a)..... 4, 14, 16

29 U.S.C. § 623(a)..... 13

42 U.S.C. § 12112(b)..... 12

42 U.S.C. § 2000e-2(a) ..... 12, 13, 16

42 U.S.C. § 2000e-2(k)..... 12

42 U.S.C. § 3604(a)..... 13, 14, 16

42 U.S.C. § 3605(a)..... 14

Amendments to Regulation B to Implement the 1976 Amendments to  
the Equal Credit Opportunity Act,  
42 Fed. Reg. 1242 (Jan. 6, 1977) ..... 20

Equal Credit Opportunity Act (Regulation B),  
90 Fed. Reg. 50,901 (proposed Nov. 13, 2025) ..... 9, 14, 20

Pub. L. 93-495, 88 Stat. 1500 (1974)..... 18

Pub. L. No. 115-172, 132 Stat. 1290 (2018) .....26

Rescinding Portions of Department of Justice Title VI Regulations to  
Conform More Closely with the Statutory Text and to Implement  
Executive Order 14281,  
90 Fed. Reg. 57,141 (Dec. 10, 2025) ..... 20

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Call for Judicial Review of the Consumer Financial Protection  
Bureau’s Non-Legislative Rules*,  
35 Rev. Banking & Fin. L. 224 (2015) ..... 26

Office of the Comptroller of Currency, *Comptroller's Handbook: Fair  
Lending* (2023)..... 25

S. Rep. 94-589 (Jan. 21, 1976)..... 19, 20

U.S. Chamber of Commerce Comment Letter on Equal Credit  
Opportunity Act (Regulation B) (Dec. 15, 2025).....2, 4

### INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This case raises such an issue. Disparate impact liability, whether pursued by government agencies or private parties, is of significant concern to the Chamber's members and the wider business community. For that reason, the Chamber has regularly filed *amicus* briefs and regulatory challenges about the availability of disparate impact liability under federal law. *See, e.g.*, Brief of the Chamber of Commerce of the

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<sup>1</sup> Pursuant to Rule 29(a)(4)(E), *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

United States of America as *Amicus Curiae* In Support of Appellant and Reversal [Doc. 18], *Property Casualty Insurers Ass’n of Am. v. Todman*, No. 24-1947 (7th Cir. Aug. 21, 2024) (urging court to set aside Department of Housing and Urban Development’s disparate impact rule); Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* In Support of Appellant and Reversal [Doc. 21], *Nat’l Ass’n of Mutual Ins. Cos. v. HUD*, No. 23-5275 (D.C. Cir. May 8, 2024) (same); *see also* Petition for Review [Doc. 3], *Chamber of Commerce v. FCC*, No. 24-1354 (8th Cir. Feb. 20, 2024) (industry challenge to Federal Communications Commission’s “digital discrimination rule”); Complaint [Doc. 1], *Chamber of Commerce v. CFPB*, No. 22-cv-381 (E.D. Tex. Sept. 28, 2022) (challenge to CFPB’s attempt to impose disparate impact liability on banks via supervision and examination manual). In addition, the Chamber recently commented in support of a proposed regulation by the Consumer Financial Protection Bureau (CFPB) clarifying that the Equal Credit Opportunity Act (ECOA)—the statute at issue in this case—does not authorize disparate impact suits.<sup>2</sup>

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<sup>2</sup> *See* U.S. Chamber of Commerce Comment Letter on Equal Credit Opportunity Act (Regulation B) (Dec. 15, 2025), *available at*

The Chamber supports fair lending principles and the goals of ECOA. Every consumer should have equal access to the credit that drives the modern economy and Americans' prosperity. Indeed, the Chamber's members are committed to this principle and have invested in robust compliance systems to ensure fairness in American credit markets, serve their communities, and expand access to credit.

The Chamber strongly believes that fair lending goals are best achieved through the articulation of clear rules of the road that adhere to the statutory bounds imposed by Congress. To that end, the Chamber asks this Court to delineate the scope of liability under ECOA. The Chamber believes that ECOA seeks to establish its purpose by targeting intentional discrimination based on race and other protected characteristics. However, district courts in this Circuit (including the court below) have historically assumed that the statute sweeps more broadly to prohibit policies that have a disparate impact too—a question this Court has not squarely resolved. But that assumption is wrong, as the Chamber explained in its recent comments on the CFPB's proposed

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<https://www.regulations.gov/comment/CFPB-2025-0039-0078>  
(hereinafter "Chamber Comment").

rule to rescind references to disparate impact in Regulation B. Chamber Comment 2-6; *see* 12 C.F.R. § 1002.6(a). The plain text of ECOA precludes liability for disparate impact. A ruling by this Court that disparate impact liability is unavailable best reflects Congress’s statutory intent and thus better serves the statute’s aims.

### INTRODUCTION

ECOA prohibits “discriminat[ion] against any applicant, with respect to any aspect of a credit transaction” on the basis of protected characteristics. 15 U.S.C. § 1691(a). Three years ago, after Hope Federal Credit Union denied it a loan to open a grocery store, Plaintiff Sixela Investment Group invoked this provision to allege unlawful discrimination. After nearly a year of discovery, the District Court held there was no direct or circumstantial evidence that Hope engaged in intentional race discrimination. Dist. Ct. Op. [Doc. 201] at 14-15. Then, the District Court concluded that “[s]ummary judgment with respect to [Plaintiff’s] disparate impact claims [should be] granted” because the Plaintiff “failed to identify any specific test, requirement, practice, or policy that points to a disparate impact.” *Id.* at 13-14.

Now, Plaintiff asks this Court to reopen discovery and let it trawl

through “Hope’s policies and practices for grocery [store] loans” to find one that, in its view, is “geared toward non-minority owners,” Amend. Discovery Responses [Doc. 148-14] at 12—that is, one that allegedly causes disparate impact based on race. *See* Appellant’s Br. at 15, 24; Plfs.’ Opp. to Summ. J. [Doc. 187-1] at 2 (arguing, in opposition to summary judgment, that “Hope has not complied with discovery requests from [Plaintiff] which [are] likely to show ‘disparate impact’ discrimination” (cleaned up)).

The Court need not wade into the thicket of the parties’ discovery dispute (or any underlying evidentiary questions)—let alone burden Hope with another round of costly litigation. Judgment for Hope was proper on Plaintiff’s disparate impact claim for the simple reason that ECOA does not authorize disparate impact liability. ECOA nowhere references disparate impact and the statute lacks language conveying congressional intent to impose it. Under the Supreme Court’s controlling test to decide whether a statute authorizes disparate impact liability, that text is dispositive. *See Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 533 (2015). Disparate impact claims are not available under ECOA.

The Fifth Circuit has no binding precedent on whether ECOA recognizes disparate impact claims and it has discretion to consider this variation on Hope's argument that Plaintiff has not stated a claim for disparate impact liability. *See, e.g., Doe v. Doe*, 941 F.2d 280, 288 (5th Cir. 1991) (notwithstanding "the parties' positions" about how the fair reporting defense was applied, "address[ing] an antecedent issue: whether Louisiana law even recognizes the privilege of fair reporting"); *Bridges v. City of Bossier*, 92 F.3d 329, 334 n.8 (5th Cir. 1996) (considering an argument first raised by *amicus curiae* on appeal when it was a "variation on" the legal argument made by party below).

Indeed, in order to understand whether Plaintiff should have been allowed to conduct additional discovery "to identify any specific test, requirement, practice, or policy that points to disparate impact," Dist. Ct. Op. [Doc. 201] at 13, it is helpful to understand what kinds of tests, requirements, practices, or policies could actually make out a claim for liability under the relevant statute. Thus, this Court has the discretion to consider the issue. *See, e.g., FDIC v. Lee*, 130 F.3d 1139, 1142 (5th Cir. 1997) (ordering supplemental briefing on an underlying legal issue).

In these circumstances, affirming on an alternative ground to that

relied upon below is appropriate when doing so will prevent ongoing “legal uncertainty.” *Creel v. Johnson*, 162 F.3d 385, 390 n.3 (5th Cir. 1998). The question whether disparate impact claims are cognizable is a logically antecedent question that “is so fundamental to the claims alleged in the district court” that this Court may address it here. *Wagner v. PennWest Farm Credit, ACA*, 109 F.3d 909, 911 (3d Cir. 1997) (deciding “the non-existence” of a cause of action though this argument was “not raised by the parties first in the district court”).<sup>3</sup>

Deciding the antecedent question in this case not only provides a straightforward path to affirm dismissal of the disparate impact claims here, it would avoid “legal uncertainty,” *Creel*, 162 F.3d at 390 n.3, by providing a service for district courts and litigants throughout the Circuit. In a since-vacated—and thus not binding—opinion, this Court assumed, after a cursory look at the legislative history, that disparate

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<sup>3</sup> The Supreme Court and the courts of appeals have exercised their discretion to decide whether a cause of action exists even if the question was not passed on below. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 111-14 (2013); *M.F. v. State of N.Y. Exec. Dep’t Div. of Parole*, 640 F.3d 491, 494-95 (2d Cir. 2011); *Kalu v. Spaulding*, 113 F.4th 311, 344 n.21 (3d Cir. 2024); *Smith v. Mich. Dep’t of Corrections*, 159 F.4th 1067, 1073 (6th Cir. 2025); *City of Reno v. Netflix, Inc.*, 52 F.4th 874, 877 n.2 (9th Cir. 2022); *Price v. City of Stockton*, 390 F.3d 1105, 1108 (9th Cir. 2004).

impact liability was available. *Bhandari v. First Nat'l Bank of Com.*, 808 F.2d 1082, 1101 (5th Cir. 1987), *rehearing granted by* 812 F.2d 936. Earlier, in a case in which the party did “not rely on a disparate impact test,” this Court made passing note that “ECOA regulations endorse[d] use of the disparate impact test to establish discrimination.” *Haynes v. Bank of Wedowee*, 634 F.2d 266, 269 & n.5 (5th Cir. 1981).<sup>4</sup>

In the absence of authoritative precedent from this Court, many district courts in this Circuit (including the court below), have presumed disparate impact’s existence under ECOA.<sup>5</sup> Because this Court has never undertaken the textual analysis required by the Supreme Court, the

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<sup>4</sup> Even if these decisions had squarely held that disparate impact is cognizable under ECOA, they would not be binding now; they have “fallen unequivocally out of step with” the Supreme Court’s “intervening” instructions on how to assess the availability of disparate impact in *Inclusive Communities*, such that they could not bind this panel. *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021) (explaining that a Fifth Circuit case is implicitly overruled “where an intervening Supreme Court decision fundamentally changes the focus of the relevant analysis” (cleaned up)).

<sup>5</sup> See, e.g., *CFPB v. Colony Ridge Dev., LLC*, 2024 WL 5183711, at \*3 (S.D. Tex. Sept. 13, 2024); *Eustice v. JPMorgan Chase & Co.*, 2020 WL 5541084, at \*5 (S.D. Tex. Aug. 10, 2020); *Jones v. Caliber Home Loans, Inc.*, 2019 WL 3366104, at \*4 (M.D. La. July 25, 2019); Dist. Ct. Op. [Doc. 201] at 4 (district court below citing *Jones* for existence of disparate impact under ECOA).

parties here and the court below spent resources on evidentiary and factual issues that should be academic. Ruling in this appeal that ECOA does not include a disparate impact theory will prevent the replay of that situation in future cases within the Fifth Circuit.

Such a ruling will also help clarify the law nationwide. Most other courts of appeals simply have assumed without deciding that ECOA authorizes disparate impact liability. Moreover, because courts, not agencies, “are the ultimate arbiters of statutory meaning.” Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50,901, 50,906 (proposed Nov. 13, 2025) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)), the federal government’s current consideration of whether to rescind disparate impact from ECOA’s implementing regulations cannot resolve this statutory question. And in light of the availability of private enforcement under ECOA, the issue will remain live regardless of whether the CFPB finalizes its proposed rule to eliminate disparate impact from its ECOA regulations. By weighing in, this Court would highlight this oft-overlooked issue, increasing the likelihood that other courts will consider the question and answer it correctly.

This Court should affirm the judgment in relevant part for Hope,

and hold that no disparate impact claims can proceed.

## ARGUMENT

### I. ECOA Does Not Authorize Disparate Impact Claims.

#### A. The text of ECOA precludes disparate impact liability.

1. Numerous federal statutes prohibit discrimination in employment, housing, lending, and federal funding (among other things) on the basis of a protected characteristic. “To ‘discriminate against’ a person ... mean[s] treating that individual worse than others who are similarly situated.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657 (2020). This language focuses on the defendant’s “actions with respect to the targeted individual.” *Smith v. City of Jackson*, 544 U.S. 228, 236 n.6 (2005) (plurality op.). The Supreme Court has held that such antidiscrimination language, without more, “reaches only instances of intentional discrimination.” *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (cleaned up).

In 1971, the Supreme Court construed language in Title VII to forbid certain employment practices that it deemed “discriminatory in operation” even if “fair in form.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Known as disparate impact liability, this framework applies to practices “adopted without a deliberately discriminatory motive.”

*Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 987 (1988) (plurality op.). That can be a blunt tool—often requiring adjudication of “the myriad of innocent causes that may lead to statistical imbalances” and opening the door to “expensive litigation and potentially catastrophic liability.” *Id.* at 992-93.

Unsurprisingly then, “disparate-impact discrimination is something that Congress rarely authorizes.” *Chamber of Commerce v. CFPB*, 691 F. Supp. 3d 730, 741 (E.D. Tex. 2023), *appeal dismissed by* 2025 WL 1304573 (5th Cir. May 1, 2025). In particular, the Supreme Court has found disparate impact liability authorized by a statute only where Congress has enacted statutory “text focus[ing] on the *effects* of the action.”<sup>6</sup> *Smith*, 544 U.S. at 236. That is, it has required the text to “refer[] to the consequences of actions and not just to the mindset of actors.” *Inclusive Cmtys.*, 576 U.S. at 533.

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<sup>6</sup> It is of course possible that even if a statute had this type of language, other indicia of statutory meaning could foreclose disparate impact liability. See *Martinez v. Mukasey*, 519 F.3d 532, 541 (5th Cir. 2008) (explaining that courts must “look[] to the statutory language as a whole, construing each section in harmony with every other part or section,” rather than “as a series of unrelated and isolated provisions” (citation omitted)).

Surveying its disparate impact case law back to *Griggs*, the Supreme Court has ruled that “Congress ... chose words that serve the same purpose and bear the same basic meaning” in those federal statutes that the Court has held to contain disparate impact liability. *Id.* at 535. In the portions of Title VII, the Age Discrimination in Employment Act (ADEA), and the Fair Housing Act (FHA) that the Supreme Court has held authorize disparate impact claims, “the operative text looks to results.” *Id.* at 534. The provisions each open with “lengthy sentences that begin with prohibitions on disparate treatment,” before the word “‘otherwise’ ... signal[s] a shift in emphasis from an actor’s intent to the consequences of his actions.”<sup>7</sup> *Id.* at 534-35.

For example, provisions of Title VII and the ADEA prohibit employers not simply from intentionally “limit[ing], segregat[ing], or classify[ing]” employees but also from “otherwise adversely affect[ing]” their employees because of such employee’s protected status. 42 U.S.C.

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<sup>7</sup> Congress knows how to speak even more explicitly too: Title VII (as amended) sketches out the “[b]urden of proof in disparate impact cases.” 42 U.S.C. § 2000e-2(k). And the Americans with Disabilities Act expressly defines discrimination to include several neutral practices that “have the effect of” denying opportunities to individuals with disabilities. See 42 U.S.C. § 12112(b)(1), (2), (3)(A), (6); *Rayethon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

§ 2000e-2(a)(2); 29 U.S.C. § 623(a). An “adverse effect” is not just another way of saying “disparate impact” according to the Supreme Court; it is “the very definition.” *Smith*, 544 U.S. at 236 n.6. It focuses “on the *effects* of the action on the employee rather than the motivation for the action of the employer.” *Id.* at 235-36; *see also Watson*, 487 U.S. at 991.

Likewise, the FHA prohibits defendants from *both* intentionally “refus[ing] to sell or rent” *and* “otherwise mak[ing] unavailable or deny[ing], a dwelling to any person because of” their protected status. 42 U.S.C. § 3604(a). “[T]he word ‘make’ has many meanings, among them ‘to cause to exist, appear or occur.’” *Inclusive Cmtys.*, 576 U.S. at 534 (cleaned up). The Supreme Court has held that this is “results-oriented language,” and this language “serve[s] the same purpose and bear[s] the same basic meaning” as the references to “adverse effects” in Title VII and the ADEA. *Id.* at 534-35.

In sum, “when the [Supreme] Court has found a statute prohibits disparate-impact discrimination, it has relied on language like ‘otherwise adversely affect’ or ‘otherwise make unavailable,’ which refers to the consequences of an action rather than the actor’s intent.” *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 242 (6th Cir. 2019);

see also *Marietta Mem'l Hosp. Emp. Health Benefit Plan v. DaVita Inc.*, 596 U.S. 880, 886 (2022) (rejecting disparate impact where “[t]he text does not ask about ‘the effects of non-differentiating plan terms that treat all individuals equally’”) (quoting *DaVita, Inc. v. Marietta Mem'l Hosp. Emp. Health Benefit Plan*, 978 F.3d 326, 363 (6th Cir. 2020) (Murphy, J., concurring)).<sup>8</sup>

2. Here, ECOA wholly lacks any results-oriented language. The statute instead solely provides that it is “unlawful for any creditor to *discriminate against* any applicant, with respect to any aspect of a credit transaction—on the basis of” several protected characteristics. 15 U.S.C. § 1691(a) (emphasis added). The words “discriminate against” reveal that ECOA targets a lender’s motivations. See *Bostock*, 590 U.S. at 657 (explaining that “discriminate” means “[t]o make a difference in

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<sup>8</sup> *Marietta* confirms that this language was critical to the Supreme Court’s holding about the FHA in *Inclusive Communities*, notwithstanding that *Inclusive Communities* addressed both 42 U.S.C. § 3604(a)—which included results-oriented language—and § 3605(a)—which did not. See *Marietta*, 978 F.3d at 363 (Murphy, J., concurring) (explaining that *Inclusive Communities* holds disparate impact liability is not cognizable when the text “contains no similar ‘results-oriented’ verb”); see also 90 Fed. Reg. at 50,905 (addressing *Inclusive Communities*’ interpretation of § 3605(a) in light of the FHA’s statutory structure and prior precedent).

treatment or favor (of one as compared with others)”). But the statute ends there without shifting focus. It contains no language referencing effects or consequences, and it does not even contain a broad catchall phrase like “otherwise” suggesting other, non-intentional forms of liability are cognizable. Instead, ECOA closely parallels “the ‘disparate treatment’ ... provision” of statutes like Title VII. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015).

A comparison between the relevant provisions of Title VII, the FHA, and ECOA, below, illustrates the point.

<b><i>Disparate Treatment</i></b>	<b>TITLE VII</b> <i>42 U.S.C. § 2000e-2(a)</i>	<b>ECOA</b> <i>15 U.S.C. § 1691(a)</i>
	It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to <b><i>discriminate against</i></b> any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin;	It shall be unlawful for any creditor to <b><i>discriminate against</i></b> 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); (2) because all or part of the applicant’s income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under this chapter.
<b><i>Disparate Treatment &amp; Disparate Impact</i></b>	<b>TITLE VII</b> <i>42 U.S.C. § 2000e-2(a)</i>	<b>FHA</b> <i>42 U.S.C. § 3604(a)</i>
	(2) to <b><i>limit, segregate, or classify</i></b> his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or <b><u>otherwise adversely affect</u></b> his status as an employee, because of such individual’s race, color, religion, sex, or national origin.	[I]t shall be unlawful— (a) <b><i>To refuse to sell or rent</i></b> after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or <b><u>otherwise make unavailable</u></b> or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

**B. ECOA lacks congressional ratification of a circuit court consensus that the Supreme Court has found significant in recognizing disparate impact.**

In *Inclusive Communities*, the Supreme Court judged as important to its holding that the FHA codified disparate impact liability that “Congress accepted and ratified the unanimous holdings of [nine] Courts of Appeals finding disparate-impact liability.” 576 U.S. at 536. It made a similar observation under the ADEA. *See Smith*, 544 U.S. at 236-37 (noting that “for over two decades after ... *Griggs*, the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a ‘disparate-impact’ theory in appropriate cases”). The Court reasoned that “[i]f a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.” *Inclusive Cmty.*, 576 U.S. at 536 (cleaned up).

No comparable circuit consensus exists with regards to ECOA. The Sixth Circuit and D.C. Circuits have simply assumed without deciding that disparate impact is cognizable, though the D.C. Circuit pointedly observed in a footnote that ECOA lacks the required results-oriented language. *See Midkiff v. Adams Cnty. Reg’l Water Dist.*, 409 F.3d 758,

772 (6th Cir. 2005) (assuming that disparate impact claims exist without resolving the “statutory questions that th[is] issue[] present[s]”); *Golden v. City of Columbus*, 404 F.3d 950, 963 & n.11 (6th Cir. 2005) (similar); *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) (explaining that “ECOA contains no [results-oriented] language” required under Supreme Court precedent). Only the Ninth Circuit has squarely answered the question, and it did so based on a cursory analysis of ECOA’s legislative history—not the required textual analysis. *Miller v. Am. Express Co.*, 688 F.2d 1235, 1240 (9th Cir. 1982) (“Read in full, the Senate Report allows but does not limit proof of credit discrimination to the two traditional Title VII tests for employment discrimination.”). And the legislative history relied upon concerned amendments to ECOA made by a later Congress; it was not legislative history of the enacting Congress relating to the operative statutory language.<sup>9</sup>

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<sup>9</sup> Specifically, in 1974, Congress adopted the first iteration of ECOA “to insure that the various financial institutions and other firms engaged in extensions of credit exercise[d] their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status.” See Pub. L. 93-495 § 502, 88 Stat. 1500 (1974). Two years later, a subsequent Congress broadened ECOA to add race, color, religion, national origin, age, and public assistance income to the list of protected characteristics, but it did not amend the antidiscrimination framework the original statute set forth. See S. Rep.

If Congress had decided to enact disparate impact liability under ECOA, the statutory text would reflect it.

**C. As the CFPB recently recognized, Regulation B’s outdated position on disparate impact liability contradicts the text of ECOA and merits no deference.**

As described above, the federal government previously interpreted ECOA to permit disparate impact suits. *See* Amendments to Regulation B to Implement the 1976 Amendments to the Equal Credit Opportunity

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94-589, at 16 (Jan. 21, 1976) (“Subsection (a) adds the following new categories of prohibited discrimination.... These are in addition to the existing prohibitions against discrimination on the grounds of sex or marital status.”). It was this later Congress that opined on the availability of disparate impact liability.

None of this legislative history alters or illuminates the meaning of the text. As the Supreme Court has reiterated, a congressional statement or proposal made after the relevant text’s adoption is “not a legitimate tool of statutory interpretation.” *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). “Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law.” *Id.* By contrast, “[p]ost-enactment legislative history (a contradiction in terms)” can provide no insight into congressional understandings. *Id.* “Those who voted on the relevant statutory language”—here, the prohibitions on discrimination against any applicant—“were not necessarily the same persons who crafted the statements in the later Committee Report; or if they were did not necessarily have the same views at that earlier time; and no one voting at that earlier time could have possibly been informed by those later statements.” *Id.*

Act, 42 Fed. Reg. 1242, 1255 n.7 (Jan. 6, 1977). But in November 2025, the CFPB, which enforces ECOA, proposed bringing Regulation B into line with ECOA's text by "provid[ing] that ECOA does not authorize disparate impact claims." 90 Fed. Reg. at, 50,902. In its proposed rule, the CFPB preliminarily agrees that "ECOA's statutory language does not authorize disparate-impact liability" and further expresses concern "that the application of disparate impact liability in the credit context may undermine ECOA's purposes." *Id.* at 50,904.

As the Chamber explained in its comment on the rule, the prior ECOA regulations are unsupported, and the CFPB's proposed revision is appropriate. In fact, courts have concluded that the federal government has not always heeded the statutory text when purporting to authorize disparate impact liability. *See, e.g., Sandoval*, 532 U.S. at 281-82 (describing now-rescinded<sup>10</sup> Title VI regulations "in considerable tension" with the statutory text); *Chamber*, 691 F. Supp. 3d at 746 (vacating CFPB

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<sup>10</sup> *See* Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281, 90 Fed. Reg. 57,141, 57,143 (Dec. 10, 2025) (noting that *Loper Bright* "made clear that the Department cannot extend Title VI beyond its original public meaning," which "is that it prohibits only intentional discrimination").

examination manual update imposing disparate impact liability as part of “unfair, deceptive, or abusive acts or practices” without authorization in Dodd-Frank). Regulation B’s recognition of disparate impact liability is of a piece, resting exclusively on legislative history and involving no discussion of ECOA’s text. 12 C.F.R. § 1002.6(a).

Even if the CFPB were to retain its disparate impact language—or revert back to it in the future—this Court could not give effect to that language. As the Supreme Court recently confirmed, “[c]ourts must exercise their independent judgment” in interpreting a statute and may not simply defer to an agency’s interpretation. *Loper Bright*, 603 U.S. at 412. The “best meaning” of a statute, “discern[ed] by a court deploying its full interpretive toolkit,” is the law, and that is true whether or not “an agency happens to be involved.” *Id.* at 408-09.

Deference to ECOA’s outdated regulation is doubly inappropriate here in a case involving a private cause of action. “Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.” *Sandoval*, 532 U.S. at 286. Put differently, the cause of action to enforce a statute must always reflect “the authoritative interpretation of the statute.” *Id.* at 284. As such, “[i]f disparate impact

theory is going to be incorporated into federal law, it [must] be done by Congress—not agency regulators.” *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty.*, 6 F.4th 633, 650 (5th Cir. 2021) (Ho, J., concurring in part and concurring in judgment); *accord id.* at 647 (Jones, J., concurring in the judgment) (“[S]tatutes prohibiting on their face intentional discrimination should not be extended by ... administrative fiat to encompass disparate impact theories.”).

To be sure, this Court may consult agency interpretations to the extent they are “useful in determining the statute’s meaning.” *Loper*, 603 U.S. at 394. But Regulation B is not among those. Interpreting and applying an antidiscrimination statute “fall more naturally into a judge’s bailiwick’ than an agency’s.” *Id.* at 401. Thus, Regulation B’s probative value depends upon “the thoroughness evident in its consideration, the validity of its reasoning,” and “all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). An interpretation based solely on legislative history—and post-enactment history, at that—has no “power to persuade.”

## **II. Interpreting ECOA to Address Only Intentional Discrimination Best Advances the Purposes of Federal Law.**

Rejecting disparate impact liability under ECOA not only reflects the best reading of the text but also harmonizes the Act with the purposes of federal antidiscrimination law and the Constitution. *See Inclusive Cmtys.*, 576 U.S. at 533 (confirming that its “interpretation is consistent with statutory purpose”). Vigorously enforcing ECOA’s disparate treatment provisions will do more to ensure borrowers can access credit on a nondiscriminatory basis, without countervailing risks, than disparate impact liability.

### **A. Disparate impact liability is not necessary to further ECOA’s purpose of eliminating intentional discrimination.**

Appropriate enforcement of ECOA’s disparate treatment provisions will well-protect consumers. Disparate impact arose as a tool to “‘smoke out,’ as it were, disparate treatment” behind facially neutral policies. *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); *see also Rollerson*, 6 F.4th at 648 (Ho, J., concurring). But disparate treatment provisions themselves contain mechanisms to accomplish similar ends. *See, e.g., Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263, 271 (1st Cir. 2022) (explaining that a plaintiff can prove disparate treatment

by showing that a “facially neutral policy” has been used “as a pretext to engage in intentional discrimination”); *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1313 (11th Cir. 1994) (same). Plaintiffs can proffer evidence that the supposedly neutral policy was adopted because of a protected characteristic or that it is inconsistently applied to the detriment of a protected class.

For example, plaintiffs can still bring disparate treatment claims when a lending policy or practice is used as a pretext for intentional discrimination. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977). Thus, a disparate treatment plaintiff could show circumstantial evidence of pretext if the rationale offered for particular treatment lacks any meaningful justification.

Likewise, the unequal application of a neutral policy may evidence disparate treatment. *Armstrong*, 33 F.3d at 1314. Banks also cannot engage in redlining—a type of “disparate treatment in which a bank provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other protected characteristic(s) of the residents of the area where the credit seeker resides ... or based on where

the residential property to be mortgaged is located.” Office of the Comptroller of Currency, *Comptroller’s Handbook: Fair Lending* 8 (2023). Proper enforcement of the tools Congress authorized, rather than the recognition of unauthorized disparate impact claims, is the most sound way to prevent unlawful discrimination and to achieve Congress’s aims of eliminating intentional discrimination.

**B. Rejecting disparate impact reduces lenders’ risk of legally tenuous lawsuits.**

Honoring congressional intent manifested in ECOA’s text by recognizing that the statute prohibits intentional, not effects-based, discrimination, also eases the practical burdens on lenders that come with disparate impact liability. *Watson*, 487 U.S. at 992-93. Any credit-related policy—including those adopted for neutral reasons—can become a target for a plaintiff seeking to press a disparate impact claim. Given their nature, even non-meritorious disparate impact claims can be difficult to dismiss at early stages of a case, and the price of defending against such claims through years of litigation is high—to say nothing of the reputational and other harms that flow from unfounded charges of discrimination. And defendants who lose are subject to civil liability for damages.

Federal court dockets are replete with examples of costly suits brought on tenuous legal theories. For example, in 2013, the CFPB adopted perhaps its “most controversial guidance document,” which addressed indirect auto lending. Kevin M. McDonald, *Who’s Policing the Financial Cop on the Beat? A Call for Judicial Review of the Consumer Financial Protection Bureau’s Non-Legislative Rules*, 35 Rev. Banking & Fin. L. 224, 243 (2015). Though car dealers typically sell on an installment sales contract, they need immediate liquidity, so they typically assign their contracts to a bank or finance company that services the contract. *Id.* at 244. The CFPB’s 2013 guidance informed these indirect auto lenders that they could face disparate impact liability for disparities resulting from the *dealer’s* markup policies, even if they themselves had no knowledge of discrimination. *Id.* at 246. Congress eventually adopted a CRA resolution disapproving of the guidance and prohibiting the CFPB from ever issuing another like it. *See* Pub. L. No. 115-172, 132 Stat. 1290 (2018). But that was not until the CFPB had extracted hefty penalties from indirect auto lenders.

Confirming that ECOA does not authorize disparate impact liability would best further the laudable purpose underlying the statute of ensuring non-discriminatory equal access to credit opportunity.

**C. Properly interpreting ECOA avoids tension with constitutional and statutory prohibitions on disparate treatment.**

Finally, correctly interpreting ECOA not to recognize disparate impact prevents courts from wading into the difficult questions about how to reconcile that theory with ECOA's and the Constitution's prohibitions on disparate treatment—providing yet another reason to adopt this reading. “Because Congress is bound by the Constitution,” courts presume that a law is constitutional until proven otherwise. *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990). Thus, courts may “shun an interpretation that raises serious constitutional doubts” if there is “an alternative that avoids those problems.” *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). Likewise, courts treat statutes as a “harmonious whole” and will not adopt an interpretation that places the statute at war with itself. *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1023 (5th Cir. 2019) (cleaned up).

Here, a reading that respects ECOA's focus on intentional discrimination furthers both principles. The Supreme Court has recognized a "tension" between disparate impact and the prohibition on disparate treatment embodied in both federal statutes and the Equal Protection Clause. *Ricci*, 557 U.S. at 580-83; *see also Inclusive Cmty.*, 576 U.S. at 540 (flagging "serious constitutional questions"). To illustrate, disparate impact can require defendants to be cognizant of "the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring); *Rollerson*, 6 F.4th at 648 (Ho, J., concurring) (arguing that disparate impact leads regulated parties "to look at race—to check for racial imbalance" and act accordingly). In the most extreme cases, concerns about disparate impact liability can lead businesses to adopt a "quota system" or engaging in "racial balancing" to avoid liability. *Ricci*, 557 U.S. at 581-82. The Court should affirm and confirm that disparate impact suits are not cognizable under ECOA.

### CONCLUSION

The Court should affirm in relevant part for Hope, and should confirm that disparate impact suits are not cognizable under ECOA.

February 18, 2026

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)–(5) and 32(g)(1), I certify that the foregoing brief contains 5,744 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as counted using the word-count function on Microsoft Word 365 software.

This brief further complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because this brief has been prepared in a proportionately spaced typeface, 14-point Century Schoolbook.

Dated: February 18, 2026

Respectfully submitted,

*/s/ Alexander V. Maugeri*

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Alexander V. Maugeri

## CERTIFICATE OF SERVICE

I hereby certify that on February 18, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the CM/ECF system. I further certify that service on all parties' counsel will be accomplished by the CM/ECF system.

Dated: February 18, 2026

Respectfully submitted,

*/s/ Alexander V. Maugeri*

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