No. 23-1654

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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
Hon. Franklin U. Valderrama
Case No. 1:20-cv-4176

BRIEF FOR THE FEDERAL TRADE COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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INTRODUCTION AND SUMMARY

The Equal Credit Opportunity Act ("ECOA") prohibits creditors from discriminating against credit applicants on the basis of race, religion, sex, or other protected characteristics. In the statute, Congress expressly directed regulators to promulgate rules to further ECOA's "purpose" (*i.e.*, making credit available on a non-discriminatory basis) and to prevent the "evasion thereof." 15 U.S.C. § 1691b(a). The relevant portion of Regulation B—first issued nearly fifty years ago—does precisely that, prohibiting creditors from "discourag[ing]" credit applications from the exact classes protected by the statute (the "Anti-Discouragement Rule"). 12 C.F.R. § 1002.4(b). By outlawing discriminatory discouragement, the rule furthers the statute's purpose and prevents what would be a devastating evasion of ECOA: Congress's aim of equal access to credit would be a nullity if creditors could blatantly broadcast to protected classes that their applications were not welcome. The Anti-Discouragement Rule thus lies at the very core of the power vested in the CFPB by Congress.

In holding the Anti-Discouragement Rule invalid and upending almost fifty years of law, the district court ignored Congress's plain language directing regulators to further ECOA's "purpose" and prevent its "evasion." The court instead stated that, because ECOA reaches only

"applicant[s]," the CFPB cannot proscribe any misconduct that occurs before "the filing of an application." *See* Mem. Opinion and Order ("Order"), ECF No. 110, at 16. This was clear error. As Supreme Court precedent confirms, the scope of an *express* grant of regulatory authority is defined by the plain terms of the grant, not by (as the district court held) a supposed tacit limitation from an unrelated part of the statute. The court also conspicuously ignored that Congress affirmed decades ago that discouraging applications for credit violates ECOA. *See* 15 U.S.C. § 1691e(g). The district court's holding thus violated the most basic principles of statutory construction.

If affirmed, the lower court's decision would have profoundly negative consequences. Creditors would be emboldened to engage in flagrant forms of discrimination so long as that conduct occurred prior to the filing of an application—such as hanging a "Whites only" sign in a creditor's window, or adopting an official policy of turning away on sight every Black customer to walk in the door. Sadly, these fears cannot be dismissed as merely hypothetical. The Federal Trade Commission receives thousands of complaints about credit discrimination each year, and the problem will only worsen if the prophylactic measures of the Anti-Discouragement Rule are

set aside. Fortunately, Congress granted the CFPB the authority to avoid this result. The decision below should be reversed.

INTEREST OF THE AMICUS CURIAE

The Federal Trade Commission is responsible for protecting consumers from deceptive or unfair trade practices across broad sectors of the economy. Since its enactment nearly 50 years ago, ECOA has authorized the FTC to enforce the statute and its implementing rule, Regulation B (including the Anti-Discouragement Rule), using all of the Commission's powers under the FTC Act. *See* 15 U.S.C. § 1691c(c). The Commission therefore has decades of experience in monitoring credit markets for violations of ECOA and Regulation B and bringing law enforcement actions against violators. Given its longstanding role in enforcing ECOA and Regulation B, the Commission has a strong interest in their proper application and respectfully submits this brief under Fed. R. Civ. P. 29(a).

STATEMENT

In enacting ECOA, Congress provided that the Board of Governors of the Federal Reserve System (the "Board") "*shall prescribe regulations* to carry out the purposes" of the statute. Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, § 503, 88 Stat. 1500, 1522 (1974) (emphasis

added). And ECOA's "purpose," as inscribed in the statute by Congress, was to make "credit equally available to all creditworthy customers without regard" to protected characteristics. *See id.* § 502; 88 Stat. at 1521.

Congress's directive also specified several (non-exhaustive) categories of appropriate regulations, including rules that "*in the judgment of the Board are necessary and proper to effectuate the purposes of [ECOA], [or] to prevent circumvention or evasion thereof . . . .*" *Id.* § 503; 88 Stat. at 1522. In sum, Congress commanded the Board to draft rules to further ECOA's purpose—the Board "*shall* prescribe regulations"—and specifically invited the Board to issue rules to prevent statutory "evasion."

At the time ECOA was enacted, the Supreme Court had repeatedly held that substantially identical language authorized the type of rulemaking challenged here. Specifically, the Court held that a regulator tasked with furthering Congressional "purpose" and preventing statutory "evasion" may prohibit practices beyond those barred by the statute. *See Mourning v. Fam. Publ'ns Serv., Inc.*, 411 U.S. 356, 369-72 (1973) (prohibition not covered by statute upheld as a valid exercise of anti-evasion authority); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 255 (1945) (same).

Shortly after ECOA's passage, and in accordance with its explicit Congressional mandate, the Board issued Regulation B, which in relevant

part prohibited creditors from "mak[ing] any statements to applicants or prospective applicants which would, on the basis of sex or marital status, discourage a reasonable person from applying for credit or pursuing an application for credit." *See* 40 Fed. Reg. 49298, 49307 (Oct. 22, 1975) (the "Anti-Discouragement Rule").[1] Both ECOA and the Anti-Discouragement Rule went into effect on the same day in 1975. *Id.* at 49310; 88 Stat. at 1525. For as long as federal law has prohibited discrimination in credit transactions, then, it has prohibited creditors from dissuading members of protected classes from applying for credit in the first place. (In 2010, Congress transferred primary rulemaking authority from the Board to the CFPB, which issued the (materially identical) version of the Anti-Discouragement Rule that is the subject of the current dispute. *See* Pub. L. No. 111-203, § 1085, 124 Stat. 1376, 2083–84 (2010).)

In nearly fifty years, through multiple revisions to ECOA (*see, e.g.*, *supra* n.1), Congress has never expressed the slightest disagreement with the Anti-Discouragement Rule. To the contrary, Congress has affirmed that

[1] While ECOA (and Regulation B) originally prohibited discrimination only on the basis of sex or marital status, Congress amended the statute in 1976 to bar discrimination based on (among other things) race, color, religion, or national origin. A conforming version of the Anti-Discouragement Rule, barring discouragement on "any prohibited basis," was issued shortly thereafter. *See* 42 Fed. Reg. 1242, 1253-54 (Jan. 6, 1977).

discriminatory discouragement violates ECOA. Specifically, after the Anti-Discouragement Rule took effect, Congress authorized the FTC and other agencies with ECOA enforcement authority to refer certain discouragement-related cases to the Attorney General. *See* 15 U.S.C. § 1691e(g) (agencies "shall" refer cases where creditor has engaged in a "pattern or practice of *discouraging* or denying applications for credit in violation of [ECOA]") (emphasis added). At the time, the Anti-Discouragement Rule contained ECOA's only express prohibition on discriminatory discouragement. *See* S. Rep. 102-167, at *86 & n.8 (Oct. 1, 1991) (Senate Report on amendment stating, "[d]iscouraging applications on a prohibited basis . . . [is] prohibited," citing Regulation B).

ARGUMENT

A. The Anti-Discouragement Rule Is Authorized by ECOA's Text and Was Approved by Congress

ECOA expressly directs regulators to issue rules furthering the statute's "purpose[]" of "mak[ing] credit equally available" to protected classes. And the Anti-Discouragement Rule directly advances this objective by prohibiting creditors from dissuading credit applications from the exact classes protected by the statute. The rule recognizes that Congress's aim of "equally available" credit would come to nothing if creditors could, through

discriminatory discouragement, actively dissuade qualified individuals from applying for credit in the first place.

Further, Congress expressly invited the CFPB to issue rules to prevent ECOA's evasion (*see supra* p. 4), and the Anti-Discouragement Rule is an obvious and essential method of accomplishing this end. If, as the district court held, ECOA and Regulation B apply only after an individual formally submits an application, creditors could bypass the statute's fair lending requirements entirely by preventing protected classes from applying for credit (through flagrantly discriminatory advertising, for example). The anti-evasion clause vests the CFPB with authority to avert this ill.

This plain-text reading of the statute is confirmed by Supreme Court precedent and Congressional action. First, at the time of ECOA's passage, it was well established that enabling language of the type at issue here authorized an agency to regulate conduct beyond that expressly barred under the statute. *See Mourning*, 411 U.S. at 369 (under substantially identical enabling language, regulation properly outlawed conduct beyond that covered by statute); *Gemsco*, 324 U.S. at 255 (same, under similar enabling language). *Cf. United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) ("A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited."). As these cases

recognize, to hold instead that a regulator could prohibit only the same conduct barred by the statute would debilitate Congress's anti-evasion language. Because Congress is "presumed to be aware" of judicial interpretations of its acts, this Court must interpret ECOA's enabling provision consistent with *Mourning* and *Gemsco*. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir. 2017).

Second, the Supreme Court (and this Court) have endorsed the exact rationale animating the Anti-Discouragement Rule. Under Title VII, people who decline to submit "formal application[s] . . . because of [their] unwillingness to engage in a futile gesture" may bring a claim for employment discrimination because they are "as much a victim of discrimination as is he who goes through the motions of submitting an application." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 366 (1977). As the Supreme Court explained, "[i]f an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs." *Id.* at 365. Likewise, this Court has recognized that "logic dictates that discrimination *preventing* applicants from applying also constitutes an adverse employment action."

Volling v. Kurtz Paramedic Servs., Inc., 840 F.3d 378, 384 (7th Cir. 2016) (emphasis in original); *see also Loyd v. Phillips Bros.*, 25 F.3d 518, 523 (7th Cir. 1994) (claim permitted where plaintiff "is deterred from applying by the very discriminatory practices he is protesting"). For the same reasons, discouragement works a discriminatory harm in the credit context, one that ECOA empowers the CFPB to prevent.

Third, Congress has—through express statutory amendment—affirmed that discouragement violates ECOA. *See* Brief of the Consumer Financial Protection Bureau, at 22 (explaining that Congress has "endorsed" the Anti-Discouragement Rule). As discussed (*see supra* p. 6), Congress amended ECOA to require enforcement authorities to refer to the Attorney General cases where creditors "discourag[e] . . . applications" in violation of ECOA. 15 U.S.C. § 1691e(g). Because an application can be "discouraged" only *before* it is filed, the amendment confirms that the conduct covered by the Anti-Discouragement Rule violates the law. And as noted, the amendment's legislative history states that discouragement is illegal under ECOA, citing Regulation B. *See supra* p. 6. Both the text and history of the amendment thus provide strong evidence that Congress was both aware of the Anti-Discouragement Rule and approved of it.

Against this overwhelming authority—the plain text of the statute, canonical principles of statutory construction, Supreme Court precedent, and Congressional approval—the district court held that the CFPB lacked the authority to issue the Anti-Discouragement Rule. Ignoring Congress's express grant of regulatory authority, the district court held that this case turns on ECOA's definition of the word "applicant." ECOA bars discrimination against "applicant[s]," the court reasoned, and because—in the court's view—"applicant" includes only those who have actually filed an application for credit, the CFPB cannot proscribe conduct that reaches more broadly. *See* Order at 15-16.

As the above discussion makes clear, this analysis is flatly incorrect. Among other errors, the Court: (1) failed to address the dispositive issue of whether the Anti-Discouragement Rule falls within the CFPB's mandate to further ECOA's "purpose" and prevent its "evasion";[2] (2) held that the

[2] *See* Order at 24-25 (declining to "assess . . . whether [the Anti-Discouragement Rule] is reasonably related to [] ECOA's objectives"). As this Court has emphasized, when assessing whether a regulation is valid under a regulatory grant of the type at issue here, the "scope of review is narrow." *Jones v. Illinois Cent. Gulf R.R.*, 846 F.2d 1099, 1101 (7th Cir. 1988); *see also Muro v. Target Corp.*, 580 F.3d 485, 493 n.9 (7th Cir. 2009) (under enabling language substantially identical to ECOA's, regulations upheld unless "demonstrably irrational") (citation omitted); *Echevarria v. Chicago Title & Tr. Co.*, 256 F.3d 623, 627 (7th Cir. 2001) (courts must give effect to regulations that are "reasonably related to the purpose of the enabling regulation") (citation omitted).

CFPB's express mandate is trumped by a supposed tacit limitation from an unrelated part of the statute; (3) held that the CFPB can bar only the same conduct already proscribed under ECOA; and (4) neglected even to mention Congress's explicit affirmation that discouragement violates ECOA.[3] These errors compel reversal.

B. The District Court's Holding Would License Flagrant Discrimination

In addition to contravening both ECOA's plain text and binding precedent, the district court's holding would greenlight egregious forms of discrimination so long as they occurred "prior to the filing of an application." *See* Order at 16. For example, though ECOA's stated purpose is to make credit "equally available" to qualified members of protected groups, the district court's holding would invite creditors to:

- explicitly advertise that they seek applications only from White, English-speaking, or married applicants, or applicants not receiving public assistance;[4]

[3] This case is thus the reverse of *Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986), where the Supreme Court found that Congress had narrowed the definition of the relevant statutory word ("bank") in multiple amendments. *See id.* at 366-68.

[4] In addition to the prohibited categories of discrimination listed above (*see supra* p. 5 & n.1), ECOA outlaws discrimination against applicants on the ground that their "income derives from public assistance programs." 15 U.S.C. § 1691(a)(2).

- turn away at first sight any prospective walk-in customer who appears to be a member of a protected class;

- adopt an official customer service script that tells members of protected classes that they will not be permitted to submit applications; and

- employ a 70-page application only for members of protected classes to discourage them from applying.

In short, under the district court's view, an infinite variety of discrimination, blatant or subtle, is available to creditors so long as it occurs before an application is filed. To say that this would frustrate ECOA's purpose would be a profound understatement. The lower court's opinion would cripple ECOA by enabling creditor misconduct so long as it was shifted to an earlier phase. Congress's explicit grant of authority empowers the CFPB to craft rules to avoid that result.[5]

The concern that the district court's ruling would license the most potent forms of credit discrimination is not theoretical. Discrimination in the credit space remains all too common. The Commission estimates that,

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[5] *See, e.g.*, *Gemsco*, 324 U.S. at 255 (rejecting interpretation of enabling provision that would make statute a "dead letter"); *Tyson v. Sterling Rental, Inc.*, 836 F.3d 571, 580 (6th Cir. 2016) (rejecting interpretation of ECOA that would make statute "a paper tiger"); *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 (7th Cir. 2004) (interpreting ECOA so as to avoid an "absurd result[]"); *cf. Howard v. City of Springfield, Ill.*, 274 F.3d 1141, 1148-49 (7th Cir. 2001) (rejecting interpretation that would "eviscerate" the statute at issue).

in the last year alone, it has received thousands of credit-related discrimination complaints. (And the FTC's study of consumer complaints suggests that Black and Latino consumers are substantially more likely to be the victim of harmful financing practices.[6]) These numbers are strikingly high; even where consumers know they have been injured, the vast majority do not file formal reports. As a general matter, then, complaints represent only the "tip of the iceberg" of consumer harm. *See, e.g.*, *United States v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374-75 (9th Cir. 1983) (quoting *United States v. Brien*, 617 F.2d 299, 308 (1st Cir. 1980)). This is all the more true in the ECOA context, given that most discriminatory injuries are by their nature difficult to detect. For example, consumers often have no way of knowing if they were offered a worse interest rate on account of their membership in a protected class. The fact that consumer complaints persist, even with discrimination confined

[6] *See* "Serving Communities of Color: A Staff Report on the Federal Trade Commission's Efforts to Address Fraud and Consumer Issues Affecting Communities of Color," *available at* https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf. The study found that people living in majority Black and Latino communities filed a higher share of reports regarding problems across a range of industries, including lending and auto financing. *See id.* at 45 & 46 Fig. B.

mostly to surreptitious forms, suggests that the problem would worsen dramatically if the district court were right and naked discrimination were permitted before an application is formally filed.

The FTC's recent enforcement activity confirms the ongoing problem of discrimination in the provision of credit. In the last several years alone, for example, the FTC has brought multiple enforcement actions to vindicate the rights of Black and Latino customers under ECOA.[7] Each case alleged that members of protected classes were systematically charged more for financing than similarly situated White customers. *See id.* The FTC has also alleged in several cases that the discrimination was intentional. In *Liberty Chevrolet*, for example, the Complaint alleged that the defendants instructed their representatives to charge Black and Latino customers higher fees and used "derogatory terms" to refer to such customers.[8] These cases demonstrate the need for enforcement of ECOA as Congress intended, and they illustrate that the grim scenarios recounted above (*see*

[7] *See FTC v. Passport Auto. Grp., Inc.*, No. 22-cv-02670 (D. Md. filed Oct. 18, 2022); *FTC & Illinois v. N. Am. Auto. Servs., Inc.*, No. 22-cv-01690 (N.D. Ill. filed Mar. 31, 2022); *FTC v. Liberty Chevrolet, Inc.*, No. 20-cv-03945 (S.D.N.Y. filed May 21, 2020).

[8] *See* Complaint, *FTC v. Liberty Chevrolet, Inc.*, No. 20-cv-03945 (S.D.N.Y. May 21, 2020), ECF No. 1, ¶ 26.

supra pp. 11-12) cannot be dismissed as mere hypotheticals should the district court's holding stand.

The Anti-Discouragement Rule has stood as a prophylactic measure for nearly fifty years, helping prevent the type of open discrimination discussed above. Without the rule, enforcement would shift from clearcut, easy-to-establish cases where the Anti-Discouragement Rule is flagrantly violated, to more challenging, intricate, fact-intensive matters. (The type of ECOA cases handled by the courts would shift accordingly.) The far more consequential effect, though, would be felt by consumers, who would—after decades of protection—be stripped of a pillar of Congress's promise of discrimination-free credit markets. Because that result directly contravenes Congress's intent as expressed in the statute, the district court's holding should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling below and reinstate the Complaint.

Dated: June 21, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 29 and Circuit Rule 29. It contains 3217 words, excluding the portions exempted by Federal Rule 32(f).

/s/ James Doty
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