No. 24-10367

In the

United States Court of Appeals for the Fifth Circuit

Texas Bankers Association; Amarillo Chamber of Commerce; American Bankers Association; Chamber of Commerce of the United States of America; Longview Chamber of Commerce; Independent Community Bankers of America; Independent Bankers Association of Texas,

Plaintiffs-Appellees,

v.

Board of Governors of the Federal Reserve System; Jerome Powell, Chairman; Federal Deposit Insurance Corporation; Martin Gruenberg, Chairman; Office of the Comptroller of the Currency; Michael J. Hsu, Acting Comptroller,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas, Amarillo Division
Case No. 2:24-cv-00025
(Honorable Matthew J. Kacsmaryk)

BRIEF OF THE BANK POLICY INSTITUTE, CONSUMER BANKERS ASSOCIATION, AND MID-SIZE BANK COALITION OF AMERICA AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLEES

(*counsel listed on following page*)

Paige P. Paridon
Gregg L. Rozansky
THE BANK POLICY INSTITUTE
600 13th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 289-4322

Of Counsel

H. Rodgin Cohen
Matthew A. Schwartz
James J. Browne
Emily E. Stronski
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Amici Curiae

David Pommerehn
CONSUMER BANKERS ASSOCIATION
1225 New York Ave., N.W.
Suite 1100
Washington, D.C. 20005
(202) 207-5161

Of Counsel

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, the Bank Policy Institute ("BPI"), the Consumer Bankers Association ("CBA"), and the Mid-Size Bank Coalition of America ("MBCA") state that they are not subsidiaries of any other corporation. *Amici* are non-profit trade groups and have no shares or securities that are publicly traded.*

* Under Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state: (i) no party's counsel authored this brief in whole or in part; (ii) no party or its counsel contributed money intended to fund the preparation or submission of this brief; and (iii) no person other than *Amici*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. Under Federal Rule of Appellate Procedure 29(a)(2), each party to this action, by counsel, has consented to the filing of this *amicus* brief.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

BPI is a nonpartisan policy, research, and advocacy group. BPI's members include universal banks, regional banks, and major foreign banks doing business in the United States. BPI produces academic research and analysis on regulatory and monetary policy topics and analyzes and comments on proposed regulations. Issues of focus include capital and liquidity regulation, anti-money laundering, payment systems, consumer protection, bank powers, bank examination, the ability of banks to best serve their communities, broad access to banking services, and competition in the financial sector. An important function of BPI is to represent its members in the courts. To that end, BPI regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's banking industry.

CBA is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as

regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Across the country, mid-size banks are providing financial solutions to entrepreneurs, professionals, their businesses and their families. Mid-size banks fuel their growth and build stronger connections to the communities in which they operate. The MBCA is proud to be their voice and their self-help community. The MBCA's member banks number more than 100, average less than $20 billion in size and serve customers and communities through more than 10,000 branches in all 50 states, the District of Columbia, and three U.S. territories.

Amici have an interest in this case because they represent members that are subject to regulations implementing the Community Reinvestment Act of 1977 ("CRA"). *Amici* and their members are deeply committed to the purpose of the CRA, which is to encourage investment in low- and moderate-income ("LMI") communities. However, the recently promulgated regulations issued jointly by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency

(collectively, "Agencies") do not comport with the CRA and actually undermine its purpose.

INTRODUCTION

In the CRA, Congress instructed the Agencies to assess a financial institution's "record of meeting the credit needs of its entire community, including [LMI] neighborhoods." 12 U.S.C. § 2903(a)(1). Congress also directed the Agencies to publish regulations to carry out the CRA's purposes. *Id.* § 2905. Since the CRA's enactment in 1977, Congress and the Agencies consistently have understood a bank's "entire community" to be the geographic areas surrounding that bank's physical locations that take deposits.

Now the Agencies have published new regulations ("Final Rules"), *see* 89 Fed. Reg. 6574 (Feb. 1, 2024), that abruptly depart from this half-century-old understanding. The Agencies raise an incorrect concern that the rise of online banking has made the use of geographic areas surrounding a bank's physical location obsolete for purposes of assessing whether a bank is making sufficient loans in its "entire community" under the CRA. They therefore now propose to use a so-called "Retail Lending Test," which would assess a bank's CRA

performance based on geographic areas in which the bank undertakes certain amounts of lending, even if those areas lack "any connection whatsoever to 'a bank's physical, deposit-taking footprint.'" *See* ROA.588 (citing ROA.256).[1] The District Court found the CRA's text defines "a bank's community . . . in relation to . . . a bank's physical location," ROA.594, and so granted Appellees' motion for a preliminary injunction and enjoined the Final Rules. ROA.608.

On appeal, the Agencies and their *Amici* continued to argue that the Final Rules are valid because, among other things, the Retail Lending Test is necessary to "modernize" the CRA in light of increased online banking. As the District Court and Appellees have aptly explained, no policy preference on behalf of the Agencies can justify their departure from the plain meaning of the CRA. This Court can affirm the

[1] Specifically, the Retail Lending Test creates the potential for two new types of assessment areas that have no connection to a bank's physical, deposit-taking presence. First, for any large bank that does not conduct more than 80% of its retail lending inside areas where it accepts deposits, the Retail Lending Test adds one or more "Retail Lending Assessment Areas" consisting of areas in which the bank originated at least 150 home mortgages or at least 400 small business loans in each of the preceding two years. 89 Fed. Reg. at 6577. Second, for all large banks and certain intermediate-sized banks, the Retail Lending Test adds an "Outside Retail Lending Area," consisting of the nationwide area outside the bank's other assessment areas. *Id*. A bank's assessment areas therefore will depend on whether the bank is "large" (assets over $2 billion), "intermediate" (assets of $600 million to $2 billion), or "small" (assets under $600 million). *See* Appellees' Br. at 12-14.

decision below on that ground alone. *Amici* write, however, to explain to the Court that the Final Rules should not be upheld even beyond their violation of Congress's statutory command.

First, the CRA's legislative history and nearly five decades of consistent regulatory interpretation provide further confirmation that a bank's "entire community" means its physical, deposit-taking footprint. *See* Appellees' Br. at 4-10, 34-40. To the extent this Court gives any weight to the Agencies' interpretation of "entire community," that weight should be afforded to the Agencies' contemporaneous and consistent interpretation, not the Agencies' newest aberrant one. *See Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2262 (2024).

Second, contrary to the Agencies' position, the Final Rules will actually undermine the CRA's goals. It is undisputed in this case that the CRA, as currently implemented, is effective; the Agencies' *Amici* agree that the CRA successfully has increased lending in LMI neighborhoods. Numerous studies have shown that changes in consumer and market behavior since the CRA's enactment, including the rise of online banking, have not diminished the CRA's effectiveness. *Amici*'s disagreement with the Agencies is not about whether the CRA should be

made even more effective; it is about whether, in addition to the underlying authority, the Final Rules' sharp departures in focus and substance will impede achievement of that goal. The Agencies' push for banks to offer CRA loans outside their physical communities is likely to undermine successful CRA programs by discouraging banks from making loans in certain geographies where they do not have a physical presence if those loans will trigger CRA obligations there. The Final Rules also devalue the types of wealth-building loans to small businesses that are central to the CRA by, for example, devaluing the relative significance of small business loans.

Third, the Final Rules, if left in place during this legal challenge, will impose undue, significant, and imminent costs on banks. Development and implementation of effective CRA programs require significant investments of time and money, and banks will be required to start work toward meeting the new requirements of the Final Rules soon, if they have not done so already.

This Court should affirm the district court's injunction of the Final Rules during the pendency of this legal challenge.

DISCUSSION

I. THE LEGISLATIVE HISTORY AND REGULATORY INTERPRETATION OF THE CRA CONFIRM THE DISTRICT COURT'S INTERPRETATION OF THE PLAIN MEANING OF "ENTIRE COMMUNITY."

A. The Legislative History Makes Clear That the CRA's Assessments Must Be Tied to Banks' Physical, Deposit-Taking Presence.

At the time of the CRA's enactment in 1977, Congress was concerned that certain banks had been ignoring the needs of LMI communities through a practice known as "redlining." As defined by Senator William Proxmire, the primary architect of the CRA, "redlining" was when certain "banks and savings and loans [took] their deposits from a community and instead of reinvesting them in that community . . . actually or figuratively [drew] a red line on a map around the areas of their city." *See* 123 Cong. Rec. 17630 (1977). There was also a concern that certain "smalltown banks . . . ship[ped] their funds to the major money markets in search of higher interest rates, to the detriment of local housing, to the detriment of small business, and farm credit needs." *Id.* Senator Sarbanes, in support of the CRA's enactment, argued that financial institutions "have a responsibility to meet the credit needs of

the local communities in which they are located, in the very communities from which they are drawing their sustenance." *Id.* at 17633.

Accordingly, Congress passed the CRA to encourage banks to make "local investment[s] in local communities." *Id.* at 31887 (statement of Sen. Proxmire). Investment in the form of credit—namely, mortgages and small business loans—helps communities build and maintain wealth. *See* Raphael W. Bostic & Hyojung Lee, *Small Business Lending Under the Community Reinvestment Act*, 19 Cityscape 63, 63-64 (2017). As the Agencies have explained, a primary focus of Congress in the CRA was thus increasing "the availability of home mortgage loans and small business loans," 58 Fed. Reg. 67466, 67473 (Dec. 21, 1993), rather than other types of retail loans.

Congress recognized that local investments to address localized issues require local guidance. Senator Proxmire explained that the problem of these struggling communities had to be solved by "the people who are there, people who understand the city, live in the city, who know the economy, loan officials who understand the value of the property." *See* Community Credit Needs: Hearings on S. 406 Before the S. Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 323

(1977). The physical presence of banks, as members of those communities, has thus been a foundational part of the CRA from its inception. *See* 123 Cong. Rec. at 17630 (statement of Sen. Proxmire) (CRA intended "to encourage bankers to get out of the office and walk around the block and find loan opportunities here at home").

Congress therefore designed the CRA to incentivize banks' reinvestment in the LMI communities in which they operate physical, deposit-taking facilities. The purpose of the CRA, in Congress's own words, is "to encourage [financial] institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions." 12 U.S.C. § 2901(b). To that end, the key operative provision of the CRA—unchanged since the statute's enactment in 1977—instructs the Agencies to "assess [a financial] institution's record of meeting the credit needs of its entire community, including [LMI] neighborhoods." *Id.* § 2903(a)(1). The Agencies consider a bank's CRA rating when deciding whether a bank can undertake certain important activities, including mergers and opening new branches. *Id.* §§ 2902(3), 2903(a)(2), (c)(1)(A); *see id.* § 1843(*l*)(2).

Since 1977, Congress consistently has reaffirmed its vision of the CRA. In 1978, Congress added a special provision allowing a bank that primarily serves military personnel "who are not located within a defined geographic area" to "define its 'entire community' to include its entire deposit customer base without regard to geographic proximity." *Id.* § 2902(4). As the Agencies acknowledge, *see* Agencies' Br. at 35-36, enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal Act") brought significant changes to the financial services industry by removing many of the restrictions on banks' ability to offer service through a physical depository presence across state lines. *See* Pub. L. No. 103-328, 108 Stat. 2338 (1994). As part of these changes, Congress also reinforced the CRA's model by amending the CRA to require consideration of a bank's CRA rating as part of its application for interstate banking facilities and to establish requirements for the written CRA evaluations of banks with physical interstate branches. Specifically, as amended, the CRA requires a separate written evaluation of a financial institution for each state in which it maintains any physical "branch office or other facility . . . that accepts deposits." *See id.* § 110. Such state-level evaluation must provide

an assessment "separately for each metropolitan area" in which the bank maintains a branch office and "for the remainder of [any] nonmetropolitan area" in which the institution maintains any "branch office or other facility . . . that accepts deposits." *See id.* Taking it a step further, the Riegle-Neal Act separately required the Agencies to calculate banks' state loan-to-deposit ratios "to ensure that interstate branches would not take deposits from a community without the bank's reasonably helping to meet the credit needs of that community." *See* Bd. of Governors of the Fed. Reserve Sys., *Regulation H: Section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act*, Supervision Manual, https://tinyurl.com/3v8mz34z.

Despite the changes in banking during the 30 years following the Riegle-Neal Act, Congress has chosen to keep the CRA's definition of a bank's "entire community" as its physical, deposit-taking footprint. Indeed, Congress considered and declined to enact (four times) a statute titled the "Community Reinvestment Modernization Act," which would have shifted assessment areas from those areas surrounding deposit-taking facilities to areas where banks make loans. *See* H.R. 4893, 106th Cong. § 102 (2000); H.R. 865, 107th Cong. § 102 (2001); H.R. 1289, 110th

Cong. § 103 (2007); H.R. 1479, 111th Cong. § 103 (2009). Now, the Agencies claim the authority to amend the CRA by regulation following Congress's decision not to do so by legislation.

B. Consistent Regulatory Interpretation Also Confirms the District Court's Decision.

Per recent Supreme Court guidance, to the extent that a court gives an agency's interpretation of a statutory term any weight, it is "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, [that] may be especially useful in determining the statute's meaning." *Loper Bright Enters.*, 144 S. Ct. at 2262. Here, the Agencies' prior interpretation of "entire community"—adopted contemporaneously with the statute and in unchallenged practice for decades—is a prototypical example.

In the first CRA regulations, promulgated only a year after Congress enacted the CRA, the Agencies noted that, to the extent there was any "confusion about the relationship between an institution's 'entire' community and its 'local' community or communities," a financial institution's "entire community" "consist[ed] of one or more local communities," which, in turn, were "the contiguous areas surrounding each office or group of offices, including any [LMI] neighborhoods in those

areas." 43 Fed. Reg. 47144, 47147 (Oct. 12, 1978).[2] A bank's "offices" included any "off-premises electronic depository facilities" that were not shared with another bank. *Id.* at 47145, 47147. The regulations provided three methods by which a bank could delineate its "local community": (1) "[e]xisting boundaries such as those of standard metropolitan statistical areas (SMSA's) or counties in which the bank's office or offices [were] located"; (2) the "local area or areas around each office or group of offices" where a bank made "a substantial portion of its loans and all other areas equidistant from its offices as those areas"; and (3) "any other reasonably delineated local area that [met] the purposes of the Community Reinvestment Act (CRA) and [did] not exclude low- and moderate- income neighborhoods." *Id.* at 47147.

For decades thereafter, the Agencies evaluated banks in accordance with Congress's design. Following the original 1978 regulations, the next major revision of the CRA regulatory system occurred with the promulgation of new final regulations in 1995. *See* 60

[2] The Agencies incorrectly claim that the Final Rules are consistent with the 1978 regulations. *See* Agencies' Br. at 38. As Appellees explain, *see* Appellees' Br. at 5-6, the 1978 regulations only included assessment areas surrounding physical, deposit-taking facilities, not any area where a bank made a substantial portion of its loans. 43 Fed. Reg. at 47147.

Fed. Reg. 22156 (May 4, 1995). These regulations replaced the old regulations' 12 CRA assessment factors for large retail banks and thrifts with three performance tests: a lending test, a service test, and an investment test. *See id.* at 22180-82. CRA performance was assessed within designated "assessment areas," referred to as "Facility-Based Assessment Areas," which consisted of "the geographies in which the bank ha[d] its main office, its branches, and its deposit-taking ATMs, as well as the surrounding geographies in which the bank ha[d] originated or purchased a substantial portion of its loans." *See id.* at 22184. It is within these areas—tied geographically to where banks physically accept deposits—that the Agencies have evaluated a bank's "record of helping to meet the credit needs of its community" since 1995. *See* 12 C.F.R. app. G §§ 25.41(a), 228.41(a).

Loper Bright explains that regulatory history, not an agency's policy goals of the day—however well intentioned—may help provide interpretative guidance. 144 S. Ct. at 2262. Decades of consistent interpretation by the Agencies undercuts their new position that the definition of "entire community" means something different today than it did in 1977. By leaving the Agencies' statutory interpretation intact

since 1978—and creating a special exception allowing banks primarily serving military personnel to define their "entire community" "without regard to geographic proximity"—Congress also implicitly has ratified the Agencies' long-standing interpretation that a bank's "entire community" is defined by the geographical areas surrounding its deposit-taking facilities. *See CFTC* v. *Schor*, 478 U.S. 833, 845-46 (1986).

II. THE CRA, AS CURRENTLY IMPLEMENTED, IS EFFECTIVE, AND THE FINAL RULES ARE THE WRONG WAY TO "MODERNIZE" IT.

The Agencies and their *Amici* suggest that the Final Rules' departure from the CRA's text and purpose—so-called "modernization"—is justified because it will usher increased credit access into new areas.[3] They are misguided: not only is there no evidence that the CRA is no

[3] *See* Agencies' Br. at 35 ("[T]he changing nature of banking since the last comprehensive update to the CRA regulations in 1995 supports the FBAs' decision to add more geographic areas" to banks' evaluations.); California's Br. at 5-6 ("[I]ncentiviz[ing] banks to provide full and equal access to loans in neighborhoods lacking a physical branch . . . will be critical to help vulnerable communities gain access in a modern banking landscape. . . ."); Lawyers' Committee for Civil Rights Under Law ("CCR")'s Br. at 3-4 ("In order for CRA evaluations of insured depository institutions to remain a vital tool in efforts to remedy redlining and increase access to financial services, the implementation of the CRA's requirements must be in dialogue with current market realities, particularly those relating to the use of technology").

longer effective because of changes in bank and consumer behavior, but the evidence contradicts the Agencies' and *Amici's* position.

Amici agree with the Agencies' *Amici* that the CRA successfully has incentivized banks to "meet[] the credit needs of [their] entire communit[ies]" by encouraging reinvestment in banks' local LMI neighborhoods. *See* California's Br. at 13 ("The overwhelming majority of studies find that the CRA has succeeded in increasing lending in [LMI] neighborhoods."); Beneficial State Bank's Br. at 10 (same); CCR's Br. at 3 ("Over the nearly half century since, the CRA has meaningfully contributed to efforts to redress the legacy of redlining and to promote access to credit and deposit services on fair terms."). As Federal Reserve Governor Michelle Bowman stated in response to the Agencies' publication of the Final Rules, "there is no evidence" to support the premise that "banks are not doing enough to meet the credit needs of their communities." Michelle W. Bowman, Governor, Fed. Rsrv., *Statement on the Community Reinvestment Act Final Rule* (Oct. 24, 2023), https://tinyurl.com/5n6csd94.

Where *Amici* part ways strongly with the Agencies and their *Amici* is their suggestion that the CRA, as designed by Congress, will lose

its "function" due to recent changes in market and consumer behavior. *See* California's Br. at 9. For example, the Agencies suggest that "the rise in online and mobile banking changed the business of banking," justifying rewriting (through rulemaking) the CRA because recent data show that online and mobile banking are popular. Agencies' Br. at 36. Online banking, however, has been publicly available and growing since the 1990s. *See, e.g.*, Wells Fargo, First in Online Banking, https://tinyurl.com/yc62f7xr ("In 1999, one million customers used Wells Fargo's web platform to manage their finances, about 10% of all online banking accounts nationwide."). Indeed, by 2013, 51% of U.S. consumers banked online, and 32% banked using mobile applications. Susannah Fox, *51% of U.S. Adults Bank Online*, Pew Rsch. Ctr. (Aug. 7, 2013), https://tinyurl.com/2c24cys7. And by 2021, the balance flipped—43.5% of U.S. consumers banked using mobile applications, and 22% banked online. Fed. Deposit Ins. Corp., 2021 FDIC National Survey of Unbanked and Underbanked Households 25 (2022), https://tinyurl.com/5a8j3nta.[4]

[4] While banks that operate primarily or exclusively online "may not engage in certain business lines that the Agencies typically review for CRA," they already engage in CRA lending "by focusing on the areas where [they] have expertise, such as community development investing and lending." Comment Letter of Nontraditional

Yet, the Agencies and their *Amici* have not cited any studies suggesting the CRA has become less effective over the past two decades, and the studies cited by the Agencies' *Amici* concluding that the CRA has been effective evaluated data from the 2010s.[5] *See* California's Br. at 13-15.

Similarly, California incorrectly contends that bank branch closures (caused by the rise of online banking) will lead to the end of a functional CRA if banks are assessed based on lending in the local communities surrounding those branches. *First*, California overstates the so-called "uninterrupted march toward fewer branches." *See* California's Br. at 6. FDIC data show that the number of commercial bank branches in the U.S. has stabilized with a smaller drop between 2021 and 2022 than any other one-year decline since 2015; in fact, there was a slight increase in the number of branches between 2022 and 2023. *Number of FDIC-insured commercial bank branches in the United States from 2000 to 2023*, Statista (Apr. 3, 2024), https://tinyurl.com/3wbewxk3.

Banks, at 2 (Aug. 5, 2022), https://tinyurl.com/yer59ajc. For some banks, this includes "approved strategic plans that emphasize [their] primary activities." *Id.*

[5] In the same vein, the Agencies claim that the Riegle-Neal Act has profoundly changed "the ways that banks conduct business," but cites no study during the 30 years since the Riegle-Neal Act's enactment suggesting that the CRA, as currently implemented, has lost efficacy as a result. *See* Agencies' Br. at 36.

Bank branches will persist because, "even . . . in the face of improving information technology . . . depositors and small businesses continue to value local bank branches." Elliot Anenberg et al., *The Branch Puzzle: Why Are There Still Bank Branches?*, Fed. Res. Bd. (Aug. 20, 2018), https://tinyurl.com/5hejxu25. Indeed, local lenders remain important enough to small business lending that a recent study found that "expanding . . . geographic lending areas" would *not* "ensure that local lenders were meeting the credit needs of their communities." Robert M. Adams et al., *Is Lending Distance Really Changing? Distance Dynamics and Loan Composition in Small Business Lending* 3 (Fed. Res. Bd., Working Paper No. 2021-011, 2021).

Second, studies show that branch closings have not resulted in loss of convenient access to branches for consumers. For example, the Federal Reserve Bank of Cleveland recently reported that there has been little change to bank branch accessibility—as defined by the number of branches per institution, number of branches per 10,000 people, and the average distance to the nearest branch—over the past two decades. *See* Kyle Fee & Erik Tiersten-Nyman, Fed. Rsrv. Bank of Cleveland, *Has Bank Consolidation Changed People's Access to a Full-Service Bank*

Branch? 3-4 (2021). BPI's own research has shown that consumers' average distance to the nearest bank branch has remained virtually unchanged since 2013. Paul Calem & Yasmeen Abdul-Razeq, Bank Pol'y Inst., *What Drives Household Financial Inclusion? Analysis of Data Exposes Myths and Identifies Opportunities* (May 3, 2022), https://tinyurl.com/yc6cevt8. And another study found that the CRA was associated with a *reduced* risk of branch closure between 2009 and 2017, which the authors found "consistent with the notion that the CRA helps banks meet the credit needs of underserved communities and populations by ensuring the continued presence of brick-and-mortar branches." Lei Ding & Carolina K. Reid, *The Community Reinvestment Act (CRA) and Bank Branching Patterns* 3 (Fed. Rsrv. Bank of Phila., Working Paper No. 19-36, 2019).

Finally, branch closings have not led to a reduction in banks' lending to LMI communities. For example, a study from the Penn Institute for Urban Research found that the share of banks' mortgages originating in CRA-qualifying census tracts increased steadily between 2011 and 2017. *See* Paul Calem et al., *Is the CRA Still Relevant to Mortgage Lending?* 13 (Penn Inst. for Urb. Rsch., Working Paper, 2019).

And according to data from the Federal Financial Institutions Examination Council, there has been virtually no change year to year in the share of small business loans from banks originated in LMI areas. *See* Fed. Fin. Insts. Examination Council, Findings from Analysis of Nationwide Summary Statistics for 2022 Community Reinvestment Act Data Fact Sheet (2023), https://tinyurl.com/dfer3bd5.

The Agencies' *Amici* also cite statistics pointing to racial disparities in credit across the United States. *See* CCR's Br. at 6-11. The CRA, however, is not aimed at racial discrimination, which is instead addressed by two other landmark statutes. The Fair Housing Act of 1968, as originally enacted, prohibited discrimination in the sale, rental and financing of housing based on race, religion, national origin or sex; as amended in 1988, it also protects against discrimination based on disability and family status. *See* 42 U.S.C. § 3601 *et seq*. The Equal Credit Opportunity Act of 1974 (amended in 1976) additionally prohibits discrimination in credit transactions on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or good-faith exercise of any right under the Consumer Credit Protection Act. *See* 15 U.S.C. § 1691 *et seq*. Cases challenging discriminatory

lending are brought under the Fair Housing Act and the Equal Credit Opportunity Act, as the *Amici* themselves note. *See* CCR's Br. at 9. *Amici*'s members are fully committed to the goals of those statutes.

III. THE FINAL RULES UNDERMINE THE PURPOSE OF THE CRA.

Despite (or possibly, because of) their incredible length and complexity, the Final Rules will actually be counterproductive to the goals of the CRA. Covering 649 pages, the Final Rules are "by far the longest rulemaking the FDIC has ever issued." Travis Hill, Vice Chairman, FDIC Bd. of Dirs. *Statement on the Final Rule on Community Reinvestment Act Regulations* (Oct. 24, 2023), https://tinyurl.com/32khmyx6. They create four complex performance tests that "contain[] more than 40 benchmarks and 20 metrics[,] . . . enough to preclude anyone from comprehending the rule as a whole." Jonathan McKernan, Dir., FDIC Bd. of Dirs., *Statement on the Final Rule Implementing the Community Reinvestment Act* (Oct. 24, 2023), https://tinyurl.com/mrxkatze. In addition to the new "Retail Lending Test," which evaluates the performance of certain banks in "Retail Lending Assessment Areas" and "Outside Retail Lending Areas," they devalue the relative significance of small business loans—historically a

key product type under the CRA. The Final Rules thus shift the CRA away from what has made it successful in the past and may impede, rather than support, investment in LMI communities.

First, the Final Rules' push for banks to make CRA loans outside of their communities may undermine existing CRA programs. As foreseen by Congress, a successful CRA initiative should be tailored to address the unique needs of the specific community; developing and implementing a successful CRA infrastructure thus requires a deep understanding of the local community. To gain this understanding, banks, as instructed by the Agencies, often conduct detailed assessments and engage extensively with "local governments, businesses, and community members and organizations." *See* Statement of the Federal Financial Supervisory Agencies Regarding the Community Reinvestment Act, 54 Fed. Reg. 13742, 13743 (Apr. 5, 1989).

As a practical matter, the physical presence of a bank in a particular community facilitates its implementation of programs intended to help meet the community's needs. Bank personnel will have firsthand knowledge of the local communities and will be able to communicate and coordinate with local stakeholders. *See* Comment

Letter of PNC Bank, at 9 (Aug. 5, 2022), https://tinyurl.com/58zcp2rz. Bank personnel and facilities also can be leveraged for certain CRA initiatives, such as marketing efforts or in-person loan clinics targeting a specific LMI neighborhood. *See* Comment Letter of BPI, at 19 (Aug. 5, 2022), https://tinyurl.com/mr3m2c97. And ultimately, banks are naturally committed to the well-being of the local communities in which they stake a presence, as their own local or regional success is linked to that of the local or regional economy.

Research studies in fact show that small business lending in general tends to be locally oriented because of informational efficiencies associated with a physical presence, person-to-person contact, and pre-existing deposit account or other relationships with local businesses. For example, a study of the market for loans to small firms found that "both borrower proximity and pre-existing business ties act as complements in information production because they facilitate the collection and interpretation of local subjective intelligence" and that "firm-bank distance is an excellent proxy for a lender's informational advantage, which it uses to create adverse-selection problems for its nearby competitors, to carve out local captive markets, and to partially fend off

competition for its core market." *See, e.g.,* Sumit Agarwal & Robert Hauswald, *Distance and Private Information in Lending*, 23 Rev. Fin. Stud. 2757, 2783 (2010). Knowledge of local economic and business conditions and access to checking account and other information from pre-existing relationships help support lending decisions and mitigate credit risk, and financial guidance to small businesses can be provided through person-to-person contact. *See, e.g.,* Loretta J. Mester et al., *Transactions Accounts and Loan Monitoring*, 20 Rev. Fin. Stud. 529 (2007) (demonstrating role of transaction account information in mitigating credit risk of small business borrowers).

These informational advantages continue to exist despite advances in information technology. A study analyzing 20 years of CRA data found that, while average lending distances have increased due to the growth in the share of small business lending by "a small group of lenders specializing in high-volume, small-loan lending nationwide," lending distances at individual banks have remained unchanged; the findings "imply that small businesses continue to depend on local banks." *See* Adams et al., *supra*, at 1. The Final Rules undermine banks that rely on relationships by forcing them to make loans in areas where they

do not have a physical presence, injecting inefficiencies and credit risk into the market. And in an ironic twist, pushing lending outside of areas where banks physically accept deposits may recreate the harm that Congress designed the CRA to cure. *See supra* pp. 6-7.

Second, the Final Rule's Retail Lending Test materially devalues small business lending, which Congress recognized to be among the most important credit needs of LMI communities, *see supra* pp. 7-8, by favoring loan dollar volume over loan count. Dollar volume of eligible loans is considered under both the first step of the Retail Lending Test, the so-called "Retail Lending Volume Screen," and the second step, which analyzes a bank's lending performance with respect to "major product lines." *See* 89 Fed. Reg. at 6789-90. However, small business loans are typically smaller in size than mortgage loans. *See* Comment Letter of BPI, *supra*, at 25-26. Therefore, using loan dollar volume will devalue small business lending when compared to mortgage lending in assessing banks' CRA performance.[6]

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[6] The Final Rules also will require evaluation of some banks' deposit products and services, despite the CRA's focus on encouraging banks to meet the "credit needs" of the communities from which they take deposits. *See* Appellees' Br. at 46-54.

Third, the Final Rules will introduce disincentives for banks to expand credit in LMI communities and cause banks to shrink their geographic footprints. Evaluating a bank's lending activities in areas where banks make a threshold number of loans could lead banks to limit credit in LMI communities where they are about to hit that threshold in order to avoid being subject to CRA assessment in those areas. The Retail Lending Test is particularly likely to discourage banks with traditional branch networks from engaging in CRA activities outside of their facility-based assessment areas. *See* Comment Letter of Regional Banks, at 7 (Aug. 5, 2022), https://tinyurl.com/bdeaztw3. The Agencies do not seem to appreciate that lending in general, and CRA-eligible lending in particular, is basically a "zero-sum" game. Capital, liquidity and other regulatory requirements cabin the aggregate amount of loans that banks make. If they are forced to make loans in a different geography or with different products, their loans in traditional geographies and products will be diminished.

IV. BANKS WILL INCUR SIGNIFICANT AND IMMINENT COSTS AS A RESULT OF THE FINAL RULES.

The district court properly recognized the substantial compliance efforts, and the associated costs, that banks must shoulder as

a result of the Final Rules. Adjusting systems and infrastructure to comply with the new requirements of the Final Rules is a time-intensive and costly undertaking, and one that many banks will need to begin imminently if they have not done so already. Any suggestion to the contrary by the Agencies or their supporting *Amici* either misunderstands or misconstrues the nature and scope of investment required to orchestrate a successful CRA program. *Amici*'s member banks would be prepared to bear these costs if the new regulations actually promoted lending that enhanced the CRA's objective, but the imposition of such costs absent such enhancement is wasteful and detracts from CRA performance.

The Final Rules will require a significant increase in CRA-related staffing and costs for banks, including many of *Amici*'s member banks. Comment Letter of BPI, *supra*, at 57 ("[I]ndividual BPI members . . . polled anticipate incurring, on average, a cost of $4,834,424 for the first 12 months of compliance."). The Agencies attempt to poke holes in various data demonstrating these compliance costs on which the district court relied, *see* Agencies' Brief at 46-47, 53, but even the Agencies concede that banks must undertake significant expenditures as a result

of the Final Rules. The Agencies estimate that, if full compliance were required within the first 12 months of the transition period, compliance expenditures would be approximately $91.8 million—an estimate that covers only OCC-regulated banks. *See* Community Reinvestment Act; Supplemental Rule, 89 Fed. Reg. 22060, 22066 (Mar. 29, 2024); Appellees' Br. at 16-17. The compliance cost estimate made by regulated banks—over $566 million in the first year for large banks alone—is likely more accurate. *See* Appellees' Br. at 16.

That the compliance costs incurred by banks will be significant is not surprising. The Final Rules span nearly 650 pages in the Federal Register. Banks are facing the need to collect data, develop and implement programs, and report results for new, broad assessment areas across the country; some banks could have more than 100 new assessment areas that they must accommodate. *See* 89 Fed. Reg. at 6740, 6754. The new data collection and reporting requirements will require developing, updating, and testing information technology infrastructures and other systems as well as increasing staffing to support these efforts. Designing, developing, and implementing initiatives to serve the new assessment areas will require intense and strategic planning and

coordination with community stakeholders and will involve almost every line of business, finance, risk, legal, and compliance.

Banks already have begun to incur these costs. The Agencies emphasize that they extended the implementation period in the Final Rule—making January 1, 2026 the operational start date—and suggest that banks' current compliance efforts are therefore premature. *See* Agencies' Br. at 48-49. But successful CRA programs often require years of development, as even the Agencies' *Amicus* recognizes. *See* Beneficial State Bank's Br. at 12 ("Because Beneficial State Bank is subject to CRA examinations, it must plan its CRA activities in advance of those examinations to ensure successful outcomes."). The Agencies focus on a statement by one of the Appellees that compliance costs "will increase as we approach the effective date for implementation of the rule." Agencies' Br. at 49. That is likely true for some banks, but it does not change the fact that—as that Appellee also stated—the compliance costs are present and ongoing. And the increasing nature of these costs for banks makes it all the more important for the Final Rules to be enjoined during the pendency of this legal challenge.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's decision.

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Respectfully submitted,

/s/ Matthew A. Schwartz

H. Rodgin Cohen
Matthew A. Schwartz
James J. Browne
Emily E. Stronski
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically on September 25, 2024 and will therefore be served electronically on all counsel of record.

September 25, 2024

/s/ Matthew A. Schwartz

Matthew A. Schwartz
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
Telephone: (212) 558-4000

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,060 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook font.

September 25, 2024

/s/ Matthew A. Schwartz

Matthew A. Schwartz
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
Telephone: (212) 558-4000

Counsel for Amici Curiae