No. 24-10367

United States Court of Appeals
for the
Fifth Circuit

TEXAS BANKERS ASSOCIATION; AMARILLO CHAMBER OF COMMERCE; AMERICAN BANKERS ASSOCATION; 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 in his official capacity as Chairman of the Board of Governors of the Federal Reserve System; FEDERAL DEPOSIT INSURANCE CORPORATION; MARTIN GRUENBERG in his official capacity as Chairman of the Federal Deposit Insurance Corporation; OFFICE OF THE COMPTROLLER OF THE CURRENCY; MICHAEL J. HSU in his official capacity as Acting Comptroller of the Currency,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS (AMARILLO)
NO. 2:24-CV-25

BRIEF FOR *AMICUS CURIAE* KENNETH H. THOMAS, PH.D. IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that—in addition to the persons and entities listed in the Appellees' Certificate 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. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees

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

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Defendants-Appellants

Board of Governors of the Federal Reserve System and Jerome Powell in his official capacity as Chairman of the Board of Governors of the Federal Reserve System

Office of the Comptroller of the Currency and Michael J. Hsu in his official capacity as Acting Comptroller of the Currency

Federal Deposit Insurance Corporation and Martin Gruenberg in his official capacity as Chairman of the Federal Deposit Insurance Corporation

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Dr. Kenneth H. Thomas is a banking economist who has focused his scholarship and professional activities on the Community Reinvestment Act ("CRA") since its enactment in 1977. Dr. Thomas is dedicated to ensuring that CRA regulations advance the statute's purpose of encouraging banks to reinvest in low- and moderate-income neighborhoods, like the Detroit inner city neighborhood where he was born and raised.[2]

Dr. Thomas has testified to Congress three times regarding the CRA and banking policy, trained CRA examiners of the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Board of Governors of the Federal Reserve System (the "Federal Reserve"), and authored two books[3] and many articles regarding the CRA, including the only CRA

[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. This brief was not authored in whole or part by counsel for any party, no party or party's counsel contributed money to fund this brief, and no person other than *Amicus* and his counsel contributed money to fund this brief.

[2] Dr. Thomas' views represent his personal views and not those of any university, financial institution, company, or other organization with which he is or previously has been associated.

[3] KENNETH H. THOMAS, PH.D., COMMUNITY REINVESTMENT PERFORMANCE – MAKING CRA WORK FOR BANKS, COMMUNITIES AND REGULATORS (Probus Publishing Company 1993) [hereinafter COMMUNITY REINVESTMENT PERFORMANCE]; KENNETH H. THOMAS, PH.D., THE CRA HANDBOOK (McGraw-Hill 1998).

publication to be endorsed by Senator Edward William Proxmire of the State of Wisconsin, the sponsor and "Father" of the CRA ("Senator Proxmire"). Senator Proxmire stated:

> Dr. Thomas' book, Community Reinvestment Performance, is far and away the best analysis of government regulation that I have seen in any field. He spotlights the regulatory problems that continue in CRA and points out precisely how they are being overcome. CRA will benefit enormously from this superlative examination and report.[4]

Dr. Thomas has had extensive discussions with Senator Proxmire regarding the CRA and its existing regulations promulgated in 1995, which Senator Proxmire supported.

Dr. Thomas's second book, *The CRA Handbook*, was endorsed by John Taylor, the founder of the National Community Reinvestment Coalition ("NCRC"), an *amicus curiae* supporting Defendants-Appellants in this appeal. *See* Amicus Br. NCRC. Dr. Thomas also received one of the first "Awards of Excellence" from the NCRC in 1995. He has provided hundreds of hours of pro bono consulting time to community groups and nongovernment organizations on CRA issues since 1977.

Dr. Thomas co-founded two CRA mutual funds in 1999 and 2016 that have resulted in over five billion dollars of community development activities throughout the nation's low- and moderate-income communities. In 1999, he co-founded and was the first chair of the CRA Qualified Investment Fund (since renamed CCM

[4] COMMUNITY REINVESTMENT HANDBOOK, *Endorsements*, http://crahandbook.com/crpendin.htm (last visited Sept. 24, 2024).

Community Impact Bond Fund). Dr. Thomas is the founder and chair of The Community Development Fund, which launched in 2016. He is the owner and CEO of Community Development Fund Advisors, an advisory entity that manages The Community Development Fund, which is only available to institutional investors and focuses exclusively on providing affordable housing for low- and moderate-income borrowers and renters, including those in majority minority census tracts.

In addition, Dr. Thomas has served on the boards of directors of several financial institutions, including over twenty years with a community bank that received ten Outstanding ratings on CRA performance evaluations.

Dr. Thomas has a Ph.D. and M.A. in Finance from The Wharton School of the University of Pennsylvania, where he taught banking and finance for forty-two years. Dr. Thomas also has an M.B.A. from the Miami Herbert Business School of the University of Miami and a B.S.B.A. from the University of Florida.

Dr. Thomas has served as a consultant on CRA issues to banks, the federal banking agencies, and community groups, and he has extensively engaged with the CRA's sponsor Senator Proxmire. Dr. Thomas is uniquely positioned to address the impacts of the final regulations under the CRA because of his background, personal interactions with Senator Proxmire, and broad range of experience with private and public CRA stakeholders, and he has a strong interest in ensuring that CRA

regulations align with the intent, purpose, and goals of the CRA.[5]

SUMMARY OF ARGUMENT

Plaintiffs-Appellees have convincingly demonstrated that the district court properly granted a preliminary injunction to enjoin the Final Rule promulgated by Defendants-Appellants, the federal banking agencies ("FBAs"), which radically rewrites the CRA and displaces the intent of Congress. Dr. Thomas provides additional context and data to support Plaintiffs-Appellees' arguments regarding the Final Rule's historic overreach and contradiction of congressional intent, its substantial adverse economic impacts on banks and the communities they serve, and the practical consequences of replacing the well-functioning existing regulations that have been in place since 1995 with the overly complex Final Rule.

First, the Final Rule departs from the CRA and the intended meaning of the word "entire" as used to modify the word "community" by establishing a Retail Lending Test to evaluate bank CRA performance in areas geographically removed from the local communities where banks maintain facilities and accept deposits. As the district court summated, in "modifying 'community,' the word 'entire' merely clarifies that the *whole* community must be served—it does not change what a 'community' *is*." ROA.594 (original emphasis). The CRA's legislative history

[5] Community Reinvestment Act Final Rule, 89 Fed. Reg. 6574 (Feb. 1, 2024) (to be codified at 12 C.F.R. pts. 25, 228, 345) ("Final Rule").

demonstrates that the phrase "entire" as applied to "community" was intended as a demographic directive for banks to help meet the credit needs of all income-level segments within the bank's community as a whole. The FBA's 1978 CRA regulations and 1993 CRA guidance confirm this meaning. The CRA's well-documented intent cannot be displaced by a claimed need to address changes in the geographic scope of lending activities. The CRA's legislative history establishes that Congress understood in 1977 that banks engaged in lending away from the local communities where they maintained facilities. The Final Rule would be legislating nationwide credit allocation through agency rulemaking by requiring examiners to evaluate and rate lending outside a bank's local community—a requirement that Congress never intended and purposely avoided in enacting the CRA.

Second, data published by the FBAs projects that the Final Rule will unnecessarily and arbitrarily deflate bank ratings on CRA performance evaluations under the new Retail Lending Test by significantly increasing the percentage of "failing" (i.e., Substantial Noncompliance and Needs to Improve) ratings and greatly decreasing the percentage of Outstanding ratings for larger banks. The projected ratings deflation on the Retail Lending Test implicates matters of economic significance relating to bank business because that test drives the bank's overall CRA rating, and the FBAs generally restrict banks that receive Substantial Noncompliance or Needs to Improve ratings from opening new branches or

participating in mergers and acquisitions. Conversely, the remarkable reduction of Outstanding ratings for larger banks with the greatest ability to move the needle in low- and moderate-income communities may negatively impact an incentive to implement aggressive community reinvestment and development strategies. These, and other harmful effects, including reputational damage, would be artificially imposed because the ratings reductions would not necessarily reflect lower levels of community reinvestment.

Third, the complexity of the Final Rule and inevitable compliance costs support injunctive relief. The public interest is not served by overly complicated rulemaking spanning 649 pages of triple-column text and 60,000 words, particularly given that the existing regulations are generally working well and are only in need of simple modernization. The overcomplexity raises serious concerns regarding the consistent application of the rewritten standards, undercutting a primary purpose of rulemaking to achieve an increase in efficiency and predictability. Any need to address the CRA obligations of "a subset" of online banks could have been accomplished through targeted amendments to the existing regulations, and the modernization rationale functioned as a Trojan Horse. Appellants' Br. 2, 9-10.

The Final Rule is irreconcilable with the documented intent of the CRA, and it will create unintended and serious economic consequences for banks and low- and moderate-income communities. Importantly, based on their extensive personal

discussions regarding the existing regulations, Dr. Thomas believes that Senator Proxmire would oppose the Final Rule.

ARGUMENT

I. The CRA's Usage of the Phrase "Entire" to Modify "Community" Requires Banks to Serve All Income-Level Segments Within the Bank's Delineated Local Community, Not All Geographies in the Nation

The CRA recognizes that banks have an "affirmative obligation to help meet the credit needs of the local communities in which they are chartered" and requires the FBAs to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution." 12 U.S.C. §§ 2901(a)(3), 2903(a)(1). The FBAs wrongly argue that the CRA's usage of the phrase "entire community" authorizes the Final Rule to establish tests for assessing bank CRA performance in a "nationwide area" that extends beyond the communities in which banks have a physical presence and accept deposits to reach "other geographic areas where the bank conducts retail lending." Appellants' Br. 11, 19, 22. Rejecting this strained interpretation, the district court found that "[i]n modifying 'community,' the word 'entire' merely clarifies that the *whole* community must be served — it does not change what a 'community' *is*." ROA.594 (original emphasis).

The term "entire" does not geographically expand what a community *is*. Rather, the CRA's usage of the word "entire" to modify the word "community"

underscores a *demographic* mandate requiring banks to help meet the credit needs of *all income-level segments* contained within their delineated local communities and restricts them from serving the credit needs of middle- and upper-income segments to the exclusion of any low- and moderate-income segments that comprise the community as a whole.

The legislative history of the CRA provides strong evidence of this meaning. During three days of hearings in 1977 before the Senate Committee on Banking, Housing, & Urban Affairs on the proposed CRA, the Chairman and sponsor of the bill, Senator Proxmire, repeatedly explained that the basis for the bill derives from data demonstrating a lack of credit services and investments in lower income, less affluent, and minority neighborhoods:

> You have a situation here in the District of Columbia, for instance, where the loans by banks and savings and loan instiutions [sic] in the District are very light and they make big investments outside the District in the suburbs in mortgages, and where they do invest in the District it's by and large in the northwest section and the white section and they don't invest in the inner-city. They don't invest in the black neighborhoods, with some exceptions where one or two banks have done it and done extremely well.
>
> ***
>
> My problem is the flow has been the other way. It has been from the depressed communities. You get deposits there and then you invest in the outside thriving communities.
>
> ***
>
> We have a record establishing the fact that there is a market here, a need. You can see that there is a need. It isn't being met now. [. . .] The testimony of the banking commissioner of Massachusetts was that a great deal of loans for low income census tract areas were made with private mortgage lenders at much higher rates on terms which required

> much higher monthly payments because the term was shorter, much higher down payments in spite of the fact she said her experience was that the default rate was the same in all of the census tracks regardless of income."

Community Credit Needs: Hearings on S. 406 Before the Sen. Comm. On Banking, Hous. & Urban Affs., 95th Cong. 1st Sess. 157, 324, 399 (1977) (statements of Chairman Proxmire).

This understanding was then reflected in the first regulation implementing the CRA promulgated in 1978, one year after the aforementioned hearings, where the FBAs addressed:

> [. . .] confusion about the relationship between an institution's "entire" community and its "local" community or communities. Both terms are used in the statute. The section has been revised to clarify the delineation process. Each institution's entire community will consist of one or more local communities, and guidelines are given on how to define the local community or communities.

Community Reinvestment Act Regulations, 43 Fed. Reg. 47144, 47144 (Oct. 12, 1978). The 1978 CRA regulation focused on the treatment of low- and moderate-income demographic segments in community delineations: A "bank shall prepare [. . .] a delineation of the local community or communities that comprise its entire community, without excluding low- and moderate-income neighborhoods. [. . .] A local community consists of the contiguous areas surrounding each office or group

of offices, including any low- and moderate-income neighborhoods in those areas."[6] *Id.* at 47147, 47149, 47151, 47153. Further demonstrating the demographic focus of the modifier "entire" as applied to "community", the 1978 CRA regulation "lists the types of loans the Agencies believe are most directly related to the purposes of the CRA" and states that the FBAs will evaluate a bank's "record of providing these types of credit to *all segments of its community* consistent with safe and sound operation [. . .]." *Id.* at 47146 (emphasis added). This interpretation also finds support in guidance published by the FBAs sixteen years after the passage of the CRA in 1993 ("1993 Q&A"), which explains that a "conclusion that performance is satisfactory or better generally requires … that lending activity reflects a reasonable penetration of all segments of the community, including its low- and moderate-

[6] The FBAs stated in the 1978 regulation that income-level definitions would be based on "the Department of Housing and Urban Development definition of low- and moderate-income[.]" 43 Fed. Reg. at 47144. Consistent with the existing regulations, the Final Rule defines four demographic segments by income level: (1) "Low-income," meaning "individual income that is less than 50 percent of the area median income" or, "for a census tract, median family income that is less than 50 percent of the area median income"; (2) "Moderate-income," meaning "individual income that is at least 50 percent and less than 80 percent of the area median income" or, "for a census tract, median family income that is at least 50 percent and less than 80 percent of the area median income"; (3) "Middle-income," meaning "individual income that is at least 80 percent and less than 120 percent of the area median income" or, "for a census tract, median family income that is at least 80 percent and less than 120 percent of the area median income"; and (4) "Upper-income," meaning "individual income that is 120 percent or more of the area median income" or, "for a census tract, median family income that is 120 percent or more of the area median income." Final Rule at 6610 ("income levels" in the Final Rule "mirror the income levels in the current definition").

income neighborhoods." Community Reinvestment Act Interagency Questions and Answers, 58 Fed. Reg 9176, 9181 (Feb. 19, 1993).

The CRA's use of the term "safe and sound operation" serves as another powerful indicator of this intent. During the 1977 legislative hearings, Senator Proxmire addressed concerns regarding the perceived credit quality of loans in low-income neighborhoods and the bill's provisions for lending in those neighborhoods:

> This bill says where there is a local credit need, where the need is sound, that it should be provided for. We had [. . .] the commissioner of banking in Massachusetts, and she found in the lowest income census tracts there was no worse record of delinquency than in the highest income census tracts.

Community Credit Needs: Hearings on S. 406 Before the Sen. Comm. On Banking, Hous. & Urban Affs., 95th Cong. 1st Sess. 321 (1977) (statement of Chairman Proxmire). Senator Proxmire emphasized that the CRA would not "require that you make loans that aren't sound. Every loan should be sound. We are not saying that you should make a loan that has any greater prospect of default in the community." *Id.* at 323. Echoing the congressional hearings and Senator Proxmire's assurances, the FBAs observed in the 1978 CRA regulation that "[s]ome commenters believed that institutions attempting to comply with the CRA would be forced to make imprudent credit decisions. However, the Agencies will always conduct their assessments giving consideration to the safety and soundness of the institution." 43 Fed. Reg. at 47145. The CRA's usage of the term "safe and sound operation" serves

no purpose other than to mitigate concerns that requiring banks to lend in low- and moderate-income segments of the "entire community" would impose unacceptable levels of credit risk. 12 U.S.C. § 2903(a)(1).

Perhaps most persuasively, the 1993 Q&A undermines the argument that the word "entire" can been read as geographically expanding what a community is. It states:

> [Q:] What do the financial supervisory agencies expect from institutions that have voluntarily limited or specialized their services to target particular markets?
>
> [A:] Such an institution has the same continuing and affirmative obligation as a 'full service' institution to help meet the credit needs of its *entire local community, consistent with safe and sound operations*. An institution's self-imposed service or market limitations *may not be used as a justification for the failure to define its local community or to help, directly or indirectly, meet the credit needs within that community, including low- and moderate-income neighborhoods*.

58 Fed. Reg. at 9182 (emphasis added). This confirms that the FBAs understood the statutory directive: to evaluate whether banks adequately helped meet the credit needs of low- and moderate-income segments falling within the "entire local community."

The FBAs cannot override congressional intent by arguing that, "since the last comprehensive update to the regulations in 1995, a subset of banks, such as primarily online banks, are *now* conducting substantial shares of their retail lending away from these physical facilities." Appellees' Br. 2 (emphasis added). Banks engaged in

nationwide lending away from their physical facilities long before technological advancements permitted online banking. The CRA's legislative history confirms that Congress was well aware of nationwide lending practices at the time of the statute's enactment in 1977. During the congressional hearings, data was presented showing that "about 11 percent of the money deposited in Brooklyn remains, and 89 percent is invested elsewhere" and Senator Proxmire observed that some banks "take money from the community and reinvest it elsewhere, in some cases abroad, in some cases in other parts of the country," while other banks "sometimes ship their funds to the major money markets." 123 CONG. REC. 17603, 17630 (June 6, 1977). Yet, Congress did not address the issue by authorizing the FBAs to review bank lending activity across the entire country. Instead, to encourage banks "to help meet the credit needs of the local communities in which they are chartered," Congress directed the FBAs to review bank performance in meeting the credit needs of all income-level demographic segments within the "entire community." 12 U.S.C. §§ 2901(a)(3), 2903(a)(1).

The Final Rule transforms the CRA by converting a demographic concept for encouraging credit services in low- and moderate-income neighborhoods within a bank's local community into a geographic concept for nationwide credit allocation. Indeed, Senator Proxmire squarely rejected "red herring" arguments that the CRA would "provide for credit allocation":

> [T]his was not a credit allocation bill and I certainly don't see it that way. Whatever we can do to prevent it from being a credit allocation bill I want to do. What this bill would do would be to try to make the banks more sensitive than they have been in the past to their responsibilities to provide for local community needs. [. . .] You're not going to put a bank out of business if they don't loan locally. You're not going to say you have to make certain loans at all.

Community Credit Needs: Hearings on S. 406 Before the Sen. Comm. On Banking, Hous. & Urban Affs., 95th Cong. 1st Sess. 2, 154 (1977) (statement of Senator Proxmire). Emphasizing the CRA's focus on local—rather than national—credit needs, Senator Proxmire explained that the "Community Reinvestment Act would not allocate credit, nor would it require any fixed ratio of deposits to loans. But it would provide that a bank charter is indeed a franchise to serve local convenience and needs, including credit needs." *Id.* Through the CRA, Congress intended to encourage banks to reinvest a portion of their deposits back into their local communities in the form of loans, not to monitor nationwide loans made outside of a bank's local community.

II. The Final Rule Is Projected to Deflate Bank CRA Ratings and Implicates Significant Economic Matters Relating to Bank Business and Community Development Efforts

The Major Questions Doctrine applies in cases "that involve decisions of vast economic and political significance." Appellants' Br. 39 (internal quotations omitted). The Final Rule implicates significant economic matters, and the district court correctly applied the Major Questions Doctrine in favor of Plaintiffs-

Appellees.

By congressional design, the ratings that the FBAs assign to banks following CRA performance assessments have significant economic impacts on the rated banks. The CRA directs the FBAs to "(1) assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution; and (2) take such record into account in its evaluation of an application for a deposit facility by such institution." 12 U.S.C. § 2903(a)(1)-(2). As to the first statutory directive, under the existing regulations, the FBAs assign banks one of the following CRA ratings at the conclusion of an assessment: "Outstanding," "Satisfactory," "Needs to Improve," or "Substantial Noncompliance." Final Rule at 6784. The Final Rule maintains these ratings, except that the existing "Satisfactory" rating will be split into "High Satisfactory" and "Low Satisfactory." *See id*. As to the second statutory directive, the FBAs must consider a bank's assigned CRA rating when determining whether to approve any bank "application for a deposit facility," which includes bank applications for establishing a domestic branch, engaging in a merger, consolidation, acquisition of assets or assumption of liabilities, relocating a main office or branch, making a deposit insurance request, and entering transactions subject to the Bank Merger Act—all of which represent significant economic business activities for banks. 12 U.S.C. § 2902(3).

Projections published by the FBAs reveal that the Final Rule is expected to deflate bank CRA ratings under the new Retail Lending Test, which drives the overall CRA rating, thereby imposing detrimental economic consequences on banks and on all segments of the communities they serve, including low- and moderate-income communities. These deflations are projected to occur in two ways, triggering two sets of adverse economic consequences for banks and low-and moderate-income communities.

First, the Final Rule is projected to increase the percentage of banks that receive "failing" CRA ratings. This is highly significant for bank business because, consistent with the existing regulations, the Final Rule enables the FBAs to deny deposit facility applications based on the applicant bank's CRA record, thus preventing banks from opening branches or pursuing mergers and acquisitions. *See* Final Rule at 7049 ("the current rule as well as final [] provide that a bank's record of performance under the CRA examination may be the basis for denying or conditioning approval of an application" and "a bank's CRA performance is often a controlling factor . . . when reviewing applications"). Banks with failing CRA ratings are also subject to reputational risk because ratings are published by the FBAs.[7]

[7] *See* FED. FIN. INSTS. EXAMINATION COUNCIL, *FFIEC Interagency CRA Rating Search*, https://www.ffiec.gov/%5C/craratings/default.aspx (last visited Sept. 24, 2024) [hereinafter, "FFIEC Ratings Search"]; FED. DEPOSIT INS. CORP., *Community Reinvestment Act (CRA) Performance Ratings*, https://crapes.fdic.gov/searchResults (last visited Sept. 24, 2024); OFF. OF THE

Data publicly reported by the FFIEC for the 2021 to 2023 time period confirms that, under the existing regulations, between 1.3% and 2.7% of all banks received an overall Needs to Improve or Substantial Noncompliance rating.[8] Under the Final Rule, the FBAs project that 10.3% of banks would receive a Needs to Improve or Substantial Noncompliance rating on the Retail Lending Test.[9] The

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COMPTROLLER OF THE CURRENCY, *CRA Performance Evaluations*, https://www.occ.gov/publications-and-resources/tools/index-cra-search.html (last visited Sept. 24, 2024); BD. OF GOVERNORS OF THE FED. RSRV. SYS., *Community Reinvestment Act – Search: Evaluations & Ratings*, https://www.federalreserve.gov/apps/CRAPubWeb/CRA/BankRating (last visited Sept. 24, 2024).

[8] In 2021, 1.3% of banks received a Needs to Improve or Substantial Noncompliance rating and failed their CRA examination (14 out of 1,099 total banks examined); in 2022, 1.4% of banks received a Needs to Improve or Substantial Noncompliance rating and failed their CRA examination (15 out of 1,104 total banks examined); and in 2023, 2.7% of banks failed their CRA examination (28 out of 1,040). FFIEC Ratings Search, *supra* note 7 (statistics compiled by Greg Thomas from search; statistics do not include wholesale banks, limited purpose banks, and strategic plan banks); *see also* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *Statement on the Community Reinvestment Act Final Rule by Governor Michelle W. Bowman* (Oct. 24, 2023), https://www.federalreserve.gov/aboutthefed/boardmeetings/files/bowman-statement-20231024.pdf ("Today, the number of banks with a 'Needs to Improve' rating stands at roughly one percent.") [hereinafter, "Bowman Statement"]. Any concern regarding the ratings assigned by the FBAs can be addressed through training on examination procedures under the existing regulations—data from 2021 to 2023 shows that the FDIC awards a higher percentage of Needs to Improve and Substantial Noncompliance ratings (2.2%) than the OCC (1.8%) and the Federal Reserve Board (0.2%). FFIEC Ratings Search, *supra* note 7 (statistics compiled by Greg Thomas from search; statistics do not include wholesale banks, limited purpose banks, and strategic plan banks).

[9] Final Rule at 6914 & Table 33: Estimated Institutions-Level Retail Lending Test Conclusions with Retail Lending Volume Screen Applied (showing "estimated

Retail Lending Test represents 40% of the overall rating for large banks and 50% of the overall rating for intermediate banks. *See* Final Rule at 6576. Given this weight, a bank that receives a failing rating under the Retail Lending Test would likely receive a failing rating overall. The Final Rule's projected CRA ratings deflation would trigger serious economic consequences by restricting bank business activity: Needs to Improve and Substantial Noncompliance ratings generally freeze a bank's ability to engage in branching or merger and acquisition activities because the FBAs deny applications submitted by banks with those CRA ratings.[10]

Second, the Final Rule is projected to decrease the percentage of larger banks receiving an Outstanding rating on the Retail Lending Test and put such rating out of reach for the very largest banks. Under the existing regulations, 40.2% of banks with assets over $10 billion and 57.7% of banks with assets over $50 billion received

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distribution of institution-level conclusions on the Retail Lending Test over the 2018-2020 period"); *see also Bowman Statement*, *supra* note 8 ("[B]ased on changes to the retail lending test alone, nearly 10 percent of banks would be rated 'Needs to Improve' based on data from 2018 to 2020.").

[10] *See, e.g.*, FED. DEPOSIT INS. CORP., *Applications Procedures Manual, Section 1.10: Processing Applications Using CRA and Compliance Information* (Sept. 2022), https://www.fdic.gov/system/files/2024-07/section-01-10-cra.pdf (a bank's application "warrants a recommendation of denial when its CRA rating is Substantial Non-Compliance" and a bank "with a CRA rating of Needs to Improve … will be considered to have a record that raises supervisory concerns" such that "[a]n adverse recommendation will generally be warranted").

Outstanding ratings between 2018 and 2020.[11] Under the Final Rule, the FBAs project that 9.4% of banks with assets over $10 billion would receive an Outstanding rating on the Retail Lending Test.[12] While the Final Rule omitted projected ratings for banks with assets over $50 billion, the proposed regulations estimated that not a single bank with assets over $50 billion would have received an Outstanding rating on the Retail Lending Test between 2017 and 2019.[13] In the Final Rule, the FBAs acknowledge the connection between receiving an Outstanding rating on the Retail Lending Test and receiving an Outstanding rating overall.[14] The forty-two large banks with over $50 billion in assets as of June 30, 2024 represent less than 1% of all banks and the 132 banks with over $10 billion in assets represent less than 3% of

[11] FFIEC Ratings Search, *supra* note 7 (statistics compiled by Greg Thomas from search; statistics do not include wholesale banks, limited purpose banks, and strategic plan banks).

[12] Final Rule at 6914-15 & Table 34: Estimated Institutions-Level Retail Lending Test Conclusions with Final Rule Multipliers (showing "estimated distribution of institution-level conclusions on the Retail Lending Test over the 2018-2020 period").

[13] *See* Community Reinvestment Act Proposed Rule, 87 Fed. Reg. 33884, 33954 (June 3, 2022) (Table 9 – Distribution of Reporter Banks Estimated Retail Lending Test Conclusions, by Bank Assets, projects that 0% of banks with ">$50B" will receive an "Outstanding" rating).

[14] *See* Final Rule at 7030 ("a large bank will generally need to receive an 'Outstanding' performance conclusion on one or more performance tests, including either or both of the 'Retail Lending Test' or Community Development Financing Test, to receive an 'Outstanding' rating.").

all banks, but they respectively control 78% and 88% of all bank assets.[15] The projected reduction in Outstanding ratings on the Retail Lending Test for larger banks—the banks with a comparatively greater ability to move the needle in low- and moderate-income communities—may diminish a powerful incentive for implementing aggressive CRA business strategies designed to achieve top performance ratings.

The Final Rule's projected grade deflation of bank CRA ratings on both ends of the spectrum is artificial and arbitrary. Lower CRA ratings under the Final Rule will not necessarily indicate lower levels of community reinvestment but rather an arbitrarily adjusted grading curve. Some banks will simply receive lower ratings under the Final Rule's Retail Lending Test than they would have received under the existing regulations based on the same record of performance.

III. A Need to Modernize to Address a Subset of Online Banks Does Not Justify Overhauling the Existing Regulations with Overly Complex Rulemaking

The district court properly concluded that the balance of equities and the public interest support injunctive relief. ROA.606. The FBAs completely overhauled the existing CRA regulations, and the Final Rule would establish a new CRA regime

[15] BD. OF GOVERNORS OF THE FED. RSRV. SYS., *Federal Reserve Statistical Release: Large Commercial Banks* (as of June 30, 2024), https://www.federalreserve.gov/releases/lbr/current/ (statistics compiled by Greg Thomas); FED. DEPOSIT INS. CORP., *Quarterly Banking Profile, Second Quarter 2024* (Sept. 2024), https://www.fdic.gov/system/files/2024-09/qbp.pdf#page=1.

of unprecedented complexity requiring 649 triple-column pages and 60,000-words to articulate. The public interest is not served by this type of overly complicated rulemaking, particularly given that the existing regulations are generally working well. *See id.*; *see also* discussion, *supra* p. 17.

Several executive orders mandate simple and digestible agency rulemaking. *See, e.g.*, Exec. Order No. 12866 § 2(b), 58 Fed. Reg. 51735, 51737 (Oct. 4, 1993) ("Each agency shall draft its regulations to be simple and easy to understand."); Exec. Order No. 13563 § 1(a), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (regulations must be "accessible, consistent, written in plain language, and easy to understand."). More recently, the Consumer Financial Protection Bureau ("CFPB") has identified multiple reasons why agencies should "move away from highly complicated rules" and has perfectly articulated the key point: "Markets work best when rules are simple, easy to understand, and easy to enforce." CONSUMER FIN. PROT. BUREAU, *Rethinking the Approach to Regulations* (June 17, 2022), https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations/. Application of the CFPB's reasoning persuasively tilts against the Final Rule.

First, the CFPB recognizes that "unnecessarily complex guidance and rules impede consumer protection, and instead simply increase compliance costs." *Id.* Here, Plaintiffs-Appellees have demonstrated that banks will incur substantial hard

costs to comply with the Final Rule. Second, rulemaking with "clarity and simplicity will promote consistency among government agencies responsible for enforcement." *Id.* The overhauled Final Rule is so enormously dense that CRA examiners themselves may be expected to experience substantial difficulty internalizing and consistently applying the new standards in bank CRA performance assessments. The "point of rulemaking" is to secure "a large increase in efficiency and predictability," and the Final Rule undercuts that important objective in the public interest due to its overcomplexity. *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 689 (D.C. Cir. 1984) (Scalia, J.).

The Final Rule not only replaces regulations that have worked well for nearly 30 years with regulations that are overly complex, it does so without justification. The FBAs maintain that the "important focus of the rulemaking was that a subset of banks now conduct a substantial share of their banking activities online." Appellees' Br. 2, 10. This "subset" of online banks could and should have been addressed with targeted amendments to the existing regulations or through the traditional process of providing guidance through interagency questions-and-answers.[16]

[16] For example, the final CRA regulation promulgated by the OCC in 2020 states that the "OCC has observed an increase in the number of internet banks and the use of internet platforms for collecting deposits, making deposit-based assessment areas increasingly relevant." Community Reinvestment Act Regulations OCC Final Rule, 85 Fed. Reg. 34734, 34757 (June 5, 2020). The OCC regulation required banks receiving "more than 50% of their retail domestic deposits from outside of their facility-based assessment areas" to "delineate separate deposit-based

CONCLUSION

For the foregoing reasons, Dr. Thomas respectfully requests that this Court affirm the judgment of the district court.

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assessment areas in geographies where they receive five percent" concentrations of retail deposits. *Id.* The OCC rescinded its regulation in December 2021. OFF. OF THE COMPTROLLER OF THE CURRENCY, *OCC Issues Final Rule to Rescind Its 2020 Community Reinvestment Act Rule* (Dec. 14, 2021), https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-133.html.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,616 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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