Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition

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I. INTRODUCTION

In the wake of the devastating effects of the global financial crisis and the collapse of the national housing market, non-profit organizations, private citizens, and government agencies have increasingly filed discrimination lawsuits against creditors and mortgage lenders for extending credit to minority borrowers on terms less favorable than those offered to white borrowers with similar risk profiles.[1] These lawsuits argue that creditors pursued discriminatory policies, which, although neutral on their face, have had an adverse and indefensible "disparate impact" on minority borrowers in violation of numerous antidiscrimination laws, including the Equal Credit Opportunity Act (ECOA).[2] Indeed, volumes of evidence now reveal that these challenged practices directly contributed to minority communities across the country suffering a greater loss of wealth during the crisis and a slower recovery in the wake of the crisis.[3]

To prove wrongdoing, these cases rely on the "disparate impact theory" of discrimination: a long-recognized legal theory of liability that permits victims of unequal treatment to prove discrimination by demonstrating through statistical analysis that a specific practice or

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[1] *See* Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 38 (2008).

[2] *See* 59 CONSUMER FIN. L.Q. REP. 304 (2005). Many of these same lawsuits have also brought disparate impact discrimination claims under the Fair Housing Act.

[3] Expert Report of Thomas J. Sugrue, *Adkins v. Morgan Stanley*, Case No. 1:12-cv-7667-VEC (June 27, 2014) (No. 133), *available at* http://perma.cc/2FMB-VA9E; DEBBIE GRUENSTEIN BOCIAN, KEITH S. ERNST & WEI LI, CENTER FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (May 31, 2006), *available at* http://perma.cc/F4XA-SE9M.

policy adversely affects a protected class of people.[4] Proving a claim for disparate impact discrimination thus does not require evidence of discriminatory intent, but rather proof of discriminatory impact.[5] Statutes that make it unlawful to engage in disparate impact discrimination aim broadly to prevent the incidence and undo the consequences of systemic discrimination.

Disparate impact cases brought under the ECOA have resulted in multi-million-dollar class settlements in recent years by companies such as General Motors Acceptance Corporation, Ford Motor Credit Company, and Nissan Motors Acceptance Corporation.[6] Unsurprising, therefore, the banking and lending industries have marshaled their resources to advance a strategic litigation campaign to overturn the longstanding legal understanding that the ECOA imposes liability for disparate impact discrimination.[7] Although no court has yet to accept their argument, creditors continue to defend against disparate impact claims by arguing that the text of the ECOA, read in light of recent Supreme Court precedent, compels the conclusion that the ECOA neither proscribes disparate impact discrimination nor permits private plaintiffs to bring disparate impact claims to challenge lending practices that create or perpetuate unequal access to credit.

These same advocates have waged a parallel campaign against the longstanding interpretation that the Fair Housing Act also authorizes claims for disparate impact discrimination.[8] Their efforts to put this issue before the current Supreme Court have been tenacious, and largely aided by the conservative Supreme Court Justices who have demonstrated an eagerness to rule on the issue by continuously granting certiorari in cases raising it.[9] In the face of numerous settlements mooting the issue on

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[4] Most antidiscrimination statutes protect classes of people based on race, religion, sex, and national origin, among other protected characteristics. For example, a neutral practice or policy that substantially and unjustifiably adversely affects Hispanics, or women, or Catholics in a given area may violate a statute outlawing disparate impact discrimination on the basis of race, or sex, or religion.

[5] 59 CONSUMER FIN. L.Q. REP. 304 (2005).

[6] *See e.g. Case Index – Closed Cases*, NATIONAL CONSUMER LAW CENTER, http://perma.cc/T5HL-NWYW; *see also* 59 CONSUMER FIN. L.Q. REP. 304 (2005).

[7] *See* Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 38–39 (2008).

[8] *Id.*

[9] *Id. See also* Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc., 133 S.Ct. 2824 (2013) (granting certiorari); Magner v. Gallagher, 132 S.Ct. 548 (2011) (granting certiorari).

appeal,[10] advocates engineered a case that wouldn't be settled, finally providing the Supreme Court with the opportunity this Term to decide whether disparate impact claims are cognizable under the Fair Housing Act.[11] However, the legal battle over the scope of the FHA's discrimination prohibition is merely one offensive in a far more ambitious campaign to completely eliminate the disparate impact theory of discrimination from American jurisprudence.[12]

As such, not only is the specific question of whether the ECOA bars disparate impact discrimination likely to soon preoccupy the courts, but the analysis of that question is immediately relevant to the analogous FHA disparate impact case now before the Supreme Court, and to the doctrine of disparate impact liability more generally. This paper argues that the ECOA, in no uncertain terms, prohibits disparate impact discrimination, and that the lending industry's argument to the contrary drastically misconstrues the precedents it relies on, while ignoring other relevant case law and essential tools of statutory interpretation. More broadly, this paper clarifies *how* courts should perform the task of interpreting whether anti-discrimination laws prohibit disparate impact discrimination. The fairest method of interpretation—the one most faithful to congressional intent and most consistent with Supreme Court precedent—construes the meaning and scope of an antidiscrimination statute by holistically examining the statute's text, legislative history, purpose, interpretations by the implementing agency, treatment of the issue by the Circuit courts, and related Supreme Court precedent. In applying this method, it becomes unmistakably clear that the ECOA—as written and as Congress intended—authorizes claims for disparate impact discrimination. Not only would it be legal error to hold otherwise, but a contrary finding would eradicate one of the most effective means of halting discriminatory practices in credit lending—practices that deeply

[10] *See e.g.* Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc., 134 S.Ct. 636 (2013) (dismissing certiorari for mootness); Magner v. Gallagher, 132 S.Ct. 1306 (2012) (dismissing certiorari for mootness).

[11] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., No. 13-1371, 2014 WL 4916193, at *1 (U.S. Oct. 2, 2014) (granting certiorari).

[12] This campaign began with the effort to secure a Supreme Court determination that the Equal Protection Clause of the U.S. Constitution does not prohibit governmental policies that have a discriminatory impact on protected classes. *See* Arlington Heights v. Metropolitan Hous. Corp. 429 U.S. 252 (1977). As Congress has taken steps to statutorily forbid, and provide a cause of action to remedy, private instances of both intentional and disparate impact discrimination, pro-business advocates have increasingly turned their attention to litigating the meaning and scope of these anti-discrimination provisions.

suppress the economic opportunity of poor and marginalized communities.

II. BACKGROUND: EQUAL ACCESS TO CREDIT AS A CIVIL RIGHT

The 93rd Congress enacted the ECOA to serve two distinct, but related, purposes: first, to directly address the well-documented and financially devastating problem of credit discrimination based on impermissible factors, including race and gender;[13] and second, to help realize that era's grand endeavor to eliminate poverty and dramatic racial inequality in America.[14] By the time Congress began enacting civil rights legislation in the mid-1960's, it was widely recognized that rampant racial discrimination and inequality persisted across the nation because the essential building blocks of social and economic advancement—employment, education, housing, and credit—had been systematically denied to minority segments of the population. In essence, the ongoing inaccessibility of gainful employment, decent education, valuable housing, and fair-term lending ensured that African-Americans were less likely to accumulate wealth or equity, trapping generation after generation within an ongoing cycle of historically-rooted poverty.[15]

It is no coincidence, therefore, that civil rights advocates prioritized and championed legal campaigns to dismantle inequality and discrimination in the spheres of education, employment, housing, and financial services throughout the civil rights era.[16] Beginning with the Supreme Court's landmark decision in *Brown v. Board of Education*, climaxing with the sequential passage of two Civil Rights Acts in 1964 and 1968 outlawing employment, education, voting, and housing discrimination, and concluding with the enactment of the ECOA protecting equal access to credit, the federal government erected a legal apparatus that advanced the grand task of eradicating the most socially destructive forms of discrimination. In pursuit of this goal, Congress devised and the courts recognized the disparate impact theory of discrimination to give legal force to the understanding that practices "which operate unfairly because of the historical discrimination that

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[13] *See infra* Part III.C.

[14] This Legislative and Executive endeavor consisted of a series of sweeping domestic welfare reforms in the mid-1960's, referred to as the "Great Society."

[15] Expert Report of Thomas J. Sugrue, *Adkins v. Morgan Stanley*, Case No. 1:12-cv-7667-VEC at 49–50 (June 27, 2014) (No. 133), *available at* http://perma.cc/J4MC-Q3PU.

[16] *See generally* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT THE CIVIL RIGHTS REVOLUTION (1994).

undergirds them" and cause protected groups to suffer adverse impact ought to be outlawed as a matter of public policy.[17]

The well-documented history of housing segregation and discrimination in the first half of the twentieth century made it abundantly clear that any committed effort to de-stratify American society along racial lines required legislation ensuring equal access to credit. Thus, in March 1976, Congress passed an amendment to the Equal Credit Opportunity Act requiring financial institutions to make credit equally available to all creditworthy consumers without discriminating against any applicant on the basis of race, color, religion, national origin, age, sex or marital status.[18] Section 1691(b) authorizes the Federal Reserve Board (FRB) to promulgate regulations "to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers."[19] One year to the day after Congress enacted the ECOA, the FRB implemented a new rule giving effect to the Act's purposes and provisions and outlawing disparate impact discrimination.[20]

While the enacting Congress viewed the ECOA as an integral piece of remedial legislation to end the discriminatory denial of credit, history has shown that the Act was needed as much as a prophylactic against ensuing discriminatory lending to poor, predominately African American communities. Beginning in the early 1980's, the old practice of refusing credit to low-income, minority communities—which the ECOA expressly prohibited—was replaced by the equally devastating practice of targeting these same communities for high-risk, high-interest loans. In the same years that the credit industry was expanding into these markets, it adopted business models based entirely on risk and ushered in a new era of deregulation and limited oversight.[21] Unsurprisingly, it was during

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[17] Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 518 (E.D. Va. 1968); *see* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 434–435 (2005). In disparate impact claims, plaintiffs are still required to show causation, and a defendant may defend against the claim by showing a legitimate business reason for the challenged practice. *See* 59 CONSUMER FIN. L.Q. REP. 304.

[18] The original enactment of the ECOA in 1974 only prohibited discrimination on the basis of sex and marital status. While there was Congressional inertia to include race as a prohibited factor in this legislation, the parties failed to reach a compromise and such legislation was enacted as an Amendment to the original ECOA in 1976.

[19] Pub. L. 93-495 § 502.

[20] *See* 12 C.F.R. §§ 202 et seq.

[21] Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 102 (2006).

this "perfect storm" that subprime mortgage lending began to flourish.[22] Borrowers who were at high-risk of defaulting were specifically targeted for loans with terms that almost ensured the borrower would not be able to pay back their mortgage and enjoy the wealth-building benefits of homeownership.[23] At the same time, the rise of the secondary mortgage market, consisting of securitized loans, incentivized lenders to make and securitize the largest quantity of mortgages possible, without regard for the financial position and stability of the borrower.[24] In order to satiate the growing demand for securitized loans from investors on Wall Street, creditors substantially weakened their underwriting standards, which in turn caused lenders to approve an abundance of loans to poor borrowers who could not afford the loan and who would likely not have been approved for a loan under traditional underwriting criteria.[25] Lending institutions extended a high percentage of these toxic loans to minority borrowers through discriminatory underwriting and targeting criteria.[26]

The ECOA—along with the Fair Housing Act, as currently interpreted by the Department of Justice and the Department of Housing and Urban Development—is an integral tool in halting lending practices that discriminate against protected groups and perpetuate historic inequalities. The Act is centrally concerned with equalizing access to credit; in other words, it mandates exactly what its name suggests—*equal credit opportunity*. To accomplish this, the ECOA not only punishes intentional discrimination, but also outlaws facially neutral lending practices that result in minority borrowers holding riskier and costlier loans then they otherwise would qualify for and then creditors extend to white borrowers in comparable financial circumstances. In so doing, the Act provides a mechanism for eliminating all lending practices that result in unequal access to credit.[27]

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[22] Gregory D. Squires, *Urban Development and Unequal Access to Housing Finance Services*, 53 N.Y.L. SCH. L. REV. 255, 260 (2008/2009).

[23] Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1261–65 (2005).

[24] *See* Expert Report of Patricia A. McCoy, *Adkins v. Morgan Stanley*, Case No. 1:12-cv-7667-VEC at 23–24 (October 23, 2014) (No. 130), *available at* http://perma.cc/32BS-RPVM.

[25] *Id.*

[26] Vicki Been, Ingrid Ellen & Josiah Madar, *The High Cost of Segregation: Exploiting Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L.J. 361, 363–370 (2009); *see also* Expert Report of Ian Ayres, *Adkins v. Morgan Stanley*, Case No. 1:12-cv-7667-VEC (October 23, 2014) (No. 131), *available at* http://perma.cc/6KHM-RS3E.

[27] *See* Jamie Duitz, *Battling Discriminatory Lending: Taking A Multidimensional Approach Through Litigation, Mediation, and Legislation*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 101, 107 (Fall 2010).

III. THE FAIR AND FAITHFUL METHOD OF INTERPRETING ANTI-DISCRIMINATION PROVISIONS

The argument that the ECOA incorporates a disparate impact theory of liability is convincing under each accepted tool of statutory interpretation: the text, legislative history, statutory purpose, interpretations by the implementing agency, and Supreme Court and Circuit court precedents all support this interpretation. The conclusion is simply undeniable, however, when the issue is evaluated by holistically examining all of these tools, which is the analytic approach that the Supreme Court has consistently employed when interpreting antidiscrimination provisions.

The Court first developed its interpretive model for resolving whether a statute bars disparate impact discrimination in the 1971 case of *Griggs v. Duke Power Company*.[28] *Griggs* presented a challenge to the government's interpretation of Title VII as barring both intentional and disparate impact employment discrimination. Relying principally on congressional purpose and the interpretation of the implementing agency (the Equal Employment Opportunity Commission (EEOC)), a majority of the Court found that Title VII bars disparate impact employment discrimination because "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[29] The application of disparate impact liability in this case became widely known as the *Griggs* "effects test."

The Court in *Griggs* reasoned that "[t]he objective of Congress in the enactment of Title VII"[30] and "[t]he administrative interpretation of the Act by the enforcing agency"[31] required a finding that Title VII mandates "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[32] Thus, disparate impact liability was, from the start, grounded in legislative purpose and agency interpretation. In fact, the Court emphasized that "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference,"[33] and concluded, "[f]rom the sum of the

[28] 401 U.S. 424 (1971).
[29] *Id.* at 430.
[30] *Id.* at 429.
[31] *Id.* at 433–34.
[32] *Id.* at 430.
[33] *Id.* at 433–34.

legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of [Title VII] . . . comports with congressional intent."[34] Ever since, the Court has employed the analytical framework it used in *Griggs* to determine whether a civil rights anti-discrimination statute cognizes claims for disparate impact discrimination.[35]

Most recently, in *Smith v. City of Jackson*,[36] the Court again held that a civil-rights era anti-discrimination statute—the Age Discrimination in Employment Act (ADEA)[37]—bars disparate impact discrimination.[38] The Court arrived at its conclusion by applying the *Griggs* method of examining the evidence of Congress's intent to prohibit disparate impact discrimination and heeding the interpretation of the implementing agency (the EEOC).[39] Writing for a majority, Justice Stevens determined that the provision prohibiting conduct that "adversely affects" employment on the basis of age evinced a congressional intent to proscribe disparate impact employment discrimination.[40] Concurring, Justice Scalia found that the ADEA supported disparate impact claims because the EEOC's endorsement of this interpretation was owed substantial deference.[41]

Contrary to the banking industry's efforts to cast dicta in *Smith* as establishing a rule that antidiscrimination statutes must contain specific "effects" language in order to support disparate impact claims,[42] the Supreme Court confirmed that the availability of disparate impact claims turns solely on Congress's intent to proscribe disparate impact

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[34] *Id.* at 436.

[35] *See e.g.* Lau v. Nichols, 414 U.S. 563, 571 (1974) (plurality opinion); Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582, 592–93 (1983) (plurality opinion) (holding that Title VI prohibits disparate impact discrimination by relying on text, agency interpretation, and the congressional reenactment doctrine); Alexander v. Choate, 469 U.S. 287, 299 (1985) (relying on precedent, legislative history, and the statutory objective of the act, the Court "assume[d] without deciding that [the Rehabilitation Act of 1973] reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."); Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (stating that "both disparate-treatment and disparate-impact claims are cognizable under the [Americans with Disabilities Act," by referring to text and precedent but not offering further discussion.).

[36] 544 U.S. 228 (2005).

[37] 29 U.S.C. §§ 621–634 (1967).

[38] *See* 544 U.S. at 240.

[39] 544 U.S. 228, 235–36 (2005).

[40] *See id.*

[41] 544 U.S. at 243 (Scalia, J., concurring).

[42] *See* Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack On Disparate Impact Race Discrimination Claims Under The Fair Housing Act And The Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 41–49 (Fall 2008) (describing cases).

discrimination, as evidenced by the statutory text, the legislative history, the purpose of the statute, the implementing agency's interpretation, Circuit court decisions and related Supreme Court precedent.[43] Each of these interpretive tools unquestionably reveal that Congress intended the ECOA to prohibit disparate impact discrimination.

IV. INTERPRETING THE ECOA'S PROHIBITION ON DISPARATE IMPACT DISCRIMINATION

A. The Text

In 1976, Congress enhanced a previously-enacted prohibition against credit discrimination on the basis of gender and marital status by expanding the prohibited criteria on which a creditor could base a credit transaction to include race, color, religion, national origin, and age.[44] As amended, the antidiscrimination clause of the Equal Credit Opportunity Act[45] reads:

> § 1691. Scope of prohibition
> (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction--
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
> (2) because all or part of the applicant's income derives from any public assistance program; or
> (3) because the applicant has in good faith exercised any right under this chapter.[46]

The statute makes it unlawful "to discriminate," the ordinary meaning of which means "unfairly treat a person or group of people differently from other people or groups."[47] Nothing in the definition of the word "discriminate" implies that the conduct must be intentional. In fact, this provision is immediately followed by two subsections listing discriminatory conduct that does *not* constitute discrimination under

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[43] 544 U.S. at 232–33, 238 (plurality opinion); *id.* at 248, 253–56 (O'Connor, J. concurring).

[44] Equal Credit Opportunity Act of 1976, Pub. L. No. 94–239, 90 Stat. 251.

[45] 15 U.S.C. §§ 1691 et seq. (1976).

[46] 15 U.S.C. § 1691(a).

[47] MERRIAM-WEBSTER'S DICTIONARY, *available at* http://perma.cc/DG4C-5ELL.

section 1691(a).[48] The terms "unintentional discrimination" or "disparate impact discrimination" appear nowhere on this list, nor does any language describing conduct similar to the concept of disparate impact discrimination.[49] Under the long-recognized canon of statutory interpretation, expressio unius est exclusio alterius—the express mention of one thing excludes all others—activities that constitute discrimination under the plain definition of that term, and which are not included within an express list of activities that *do not* constitute discrimination under the Act, are presumed to be included within the scope of the Act's prohibition. In other words, because Congress *did* lay out a set of activities that do not violate section 1691(a), but did *not* include disparate impact discrimination within that list, it should be presumed that Congress intended for this standard form of discrimination to violate the Act.

Additionally, the ECOA peculiarly includes a "good faith defense" in the statute, which lends substantial support to the interpretation that the ECOA bars disparate impact discrimination. Within the section of the statute that authorizes a private right of action against a violation of the ECOA, the statute provides that "no provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau."[50] By definition, "good faith" is a defense to a claim of intentional discrimination—one has not intentionally discriminated if one believed in good faith they were not discriminating. Thus, if Congress had intended to only outlaw intentional credit discrimination, the inclusion of a "good faith defense" against such acts would be superfluous. Because all parts of a statute are to be given effect when interpreting a specific provision, and an interpretation of one provision that renders another unnecessary or nugatory are disfavored by the Court,[51] one can only conclude, as at least one lower court has, "that the 'good faith defense' provision was incorporated into the ECOA because

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[48] 15 U.S.C. § 1691(b)–(c).

[49] Subsection (b) provides that it does not constitute discrimination under the ECOA for a creditor to inquire about the marital status or age of an applicant in order to ascertain credit-relevant information, such as income levels, credit history, or the creditor's rights and remedies applicable to the particular extension of credit. Subsection (c) provides that it is not a violation of the ECOA to refuse to extend credit to an applicant on the terms of a credit assistance program offered by the government, nonprofit organizations, or for-profit special purpose credit programs that meet Bureau-prescribed standards. *Id.*

[50] 15 U.S.C. § 1691(e).

[51] *See e.g.* Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 163 (1982).

the statute reaches beyond intentional discrimination to include conduct and practices that have unintentional discriminatory effects."[52] In other words, the best reading of the statute as a whole is that the ECOA prohibits both intentional and disparate impact discrimination and that Congress provided creditors with a statutory good faith defense against all violations of the Act.

B. Legislative History

The legislative history of the Equal Credit Opportunity Act specifies that the enacting Congress intended this legislation to bar disparate impact discrimination. Legislative Reports and hearing testimony accompanying the drafting and passage of the bill specifically state that the law prohibits lending practices that have a discriminatory effect on protected classes. These legislative materials further explain that the law reaches the same discriminatory conduct as Title VII does in the employment discrimination context, often explicitly referencing and endorsing the *Griggs* effects test in discussions about the meaning and scope of the ECOA's anti-discrimination provision. This history documenting the intentions and understandings of the enacting Congress shows in explicit terms that it drafted and passed the ECOA with the intent to bar disparate impact.

The legislative origins of the ECOA date to the early 1970's when various members of Congress introduced bills to address credit discrimination against groups who were systematically denied financial opportunity and independence—namely, women and African Americans.[53] The Congressional hearings leading to the enactment of the 1974 ECOA, barring credit discrimination on the basis of sex and marital status, and those leading to the 1976 ECOA Amendments, publically grappled with the appropriate standard of proof to be used in the area of credit and lending discrimination.[54]

Within this debate, the effectiveness and suitability of outlawing credit practices that had a discriminatory effect on protected classes was openly considered and carefully assessed.[55] For example, Congress members and witnesses testifying in committee debated whether the

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[52] Osborne v. Bank of Am., Nat. Ass'n, 234 F.Supp.2d 804, 811 n.4 (M.D. Tenn. 2002).

[53] *See e.g.* H.R. 14856, H.R. 14908.

[54] *See infra* Part D.

[55] *See* Marcia K. Baer, *The Equal Credit Opportunity Act and the "Effects Test"*, 95 BANKING L.J. 241, 246–251 (1978) (discussing legislative history of the ECOA "effects test").

1974 ECOA should define the discriminatory conduct it aimed to prohibit as "invidious discrimination," "arbitrary discrimination," or simply "discrimination" with no limiting or explanatory modifier. The terms "invidious discrimination" and "arbitrary discrimination" were technical legal terms then used by the courts to describe a category of discriminatory conduct that included both intentional discrimination and conduct producing discriminatory effects.[56] Ultimately, the subcommittee unanimously voted to include only the word "discriminate" and allow the courts to determine the full scope of the statutory prohibition.[57]

Because this legislation was considered in the final days of the 93rd Congress, it was only possible to gather enough votes to enact a law prohibiting credit discrimination on the basis of sex and marital status, rather than all suspect classifications.[58] Almost immediately upon convening, however, the next Congress resumed the effort to pass comprehensive legislation outlawing all forms of credit discrimination. The bill that emerged from this effort and gained speedy passage in the House of Representatives was H.R. 6516, which would go on to pass the Senate, with minor revisions, within a year and become law as the ECOA Amendments. The Senate and House Committee Reports accompanying H.R. 6516 indicate clearly that both houses of Congress intended this landmark legislation to bar disparate impact discrimination.

The Reports specify that the Act applies to both lending practices that are motivated by discrimination *and* those that have a discriminatory effect.[59] Additionally, the Reports state that Congress intended the ECOA's prohibition against credit discrimination to be analogous to Title VII's prohibition against employment discrimination, as the Supreme Court had interpreted it in *Griggs v. Duke Power Co.* five years earlier.

The House Committee Report[60] endorses the *Griggs* "effects test" as a method for proving discrimination under the ECOA. Commenting on a provision in an early draft of H.R. 6516 (later deleted) that stated it was not necessarily a violation of the ECOA to lend to protected groups in proportions unequal to that group's population percentage or to disregard

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[56] *See Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong., 2d Sess. 35, 56–65 (1974).

[57] *Id.* at 402.

[58] H.R. REP. NO. 210, at 5 (1975).

[59] *See e.g.* S. REP. NO. 589, at 4, 5 (1976).

[60] H.R. REP. NO. 210, at 5 (1975).

a borrower's protected status when determining creditworthiness, the Report states:

> These provisions are not, however, intended to limit the use of population statistics to establish a *prima facie* case of discrimination in accordance with the "effects" test established by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), or otherwise to overrule the holding of the case. For example, the Federal Home Loan Bank Board uses the *Griggs* effects test in connection with alleged "redlining" of geographic areas by mortgage lenders, and the provision is not intended to affect the Board's enforcement efforts . . . . The Committee recognizes that in a number of civil rights cases courts have ruled that statistical evidence can be used to establish a *prima facie* case of discrimination, shifting the burden of proof to the defendant to prove nondiscrimination. The language of [the Act] does not challenge this general legal principle.[61]

More importantly, the provision this comment was addressing—which appears to be an attempt to limit liability for disparate impact discrimination—was eventually deleted and does not appear in the final version of the bill that passed the House of Representatives on June 3, 1975.[62]

That July, the Senate Committee on Banking, Housing and Urban Affairs held a series of hearings to consider H.R. 6516 and a number of other similar bills[63] to amend the 1974 ECOA. Both advocates and opponents of disparate impact liability acknowledged at these hearings that H.R. 6516 (and its Senate equivalent, S. 1927) were written to outlaw disparate impact credit discrimination. Werner H. Kamarsky, Commissioner of the New York State Division of Human Rights, understood the bill to address "the consequences [and] not simply the motivation" of discrimination, in the same way that Title VII addresses both intentional and unintentional employment discrimination.[64] His testimony was solicited in part to educate committee members that

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[61] *Id.*

[62] *See* 121 CONG. REC. H4780–4791 (daily ed. June 3, 1975).

[63] S. 483, S. 1900, S. 1927 (essentially analogous to H.R. 6516), S. 1961, and H.R. 6516.

[64] *Equal Credit Opportunity Act Amendments and Consumer Leasing Act: Hearings on S. 483, S. 1900, S. 1927, S. 1961 & H.R. 6516 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 47–48 (1975) (citing *Griggs v. Duke Power Co.*).

statistical evidence of discrimination is as applicable in the credit and lending fields as it is in the employment context. On the other side of the debate, the International Consumer Credit Association also agreed that H.R. 6516 authorized claims for disparate impact discrimination. In a letter imploring Senator Joseph Biden (D-DE), who introduced H.R. 6516 in the Senate, to reconsider his support for the bill, the International Consumer Credit Association wrote:

> [B]oth H.R. 6516 and S. 1927 were drafted to maintain the so called 'rule of proportionality' known as the 'effects test of discrimination' handed down by the U.S. Supreme Court in 1971. S. 1927 was drafted on H.R. 6516 and the legislative history of that bill makes it clear that H.R. 6516 is a civil rights measure intended to supplement and strengthen existing civil rights acts. Thus, both bills intend for credit to be granted proportionally to applicants on the basis of sex, marital status, race, color, religion, national origin and even age. If that is not the intention of the sponsors, then both bills need to be amended to make the real intention(s) clear.[65]

The Senate Committee on Banking, Housing and Urban Affairs subsequently adopted H.R. 6516, prepared a Committee Report to accompany the bill, and reported it favorably to the full Senate for a vote. This Senate Report also embraces the *Griggs* "effects test" and exhibits a clear intent for the ECOA to outlaw both intentional and disparate impact credit discrimination. The Report reads:

> The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. In the Committee's view, these characteristics are totally unrelated to creditworthiness and cannot be considered by any creditor. In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), and *Albemarle Paper Company v. Moody* (U.S. Supreme Court, June 25, 1975), are intended to

[65] *Id*. at 489–490.

> serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.[66]

The Senate passed its version of H.R. 6516 and after a Conference Committee aligned the slight differences between the two bill, both houses passed the ECOA Amendments on March 23, 1976. As explained in further detail below, the federal agency charged with implementing the statute then interpreted the law as outlawing disparate impact discrimination and promulgated rules accordingly.[67] Every court to then address this rarely-contested issue concurred that the ECOA prohibits creditors from engaging in lending practices that have a discriminatory effect on protected groups.[68] Twenty years later, Congress enacted a series of amendments to the ECOA in the Economic Growth and Regulatory Paperwork Reduction Act of 1996.[69] Yet during this time, Congress made no effort to revise the long-recognized interpretation that the ECOA authorizes claims for disparate impact discrimination. Under the legislative reenactment doctrine of statutory construction, a court should presume that Congress has acquiesced to a longstanding judicial or administrative legal interpretation of a statute if Congress later revisits the statute and does not substantially alter or redefine the established interpretation. As such, courts should continue to hold that the enacting Congress intended, and subsequent Congresses confirmed, that the ECOA prohibits disparate impact discrimination.

C. Statutory Purpose

The legislative history of the ECOA also sheds valuable light on Congress's reasons for enacting the law as written and the purposes Congress intended the Act to fulfill. An examination of the statute read in light of its historical and political context reveals, in short, that the ECOA was conceived and implemented to be a ground-breaking law,

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[66] S. REP. NO. 589, at 4, 5 (1976).

[67] *See infra* Part D.

[68] *See e.g.* Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds*, 492 U.S. 901 (1989); Miller v. Am. Express Co., 688 F.2d 1235, 1239–40 (9th Cir. 1982); Haynes v. Bank of Wedowee, 634 F.2d 266, 269 n.5 (5th Cir. 1981); Gross v. United States Small Bus. Admin., 669 F. Supp. 50 (N.D.N.Y. 1987); Sayers v. General Motors Acceptance Corp., 522 F.Supp. 835 (W.D. Mo. 1981); Cherry v. Amoco Oil Co., 490 F.Supp. 1026 (N.D. Ga. 1980).

[69] Economic Growth and Regulatory Paperwork Reduction Act of 1996, H.R. 3810, 142d Cong., contained in the Omnibus Appropriations Act, Pub. L. No. 104–208, 142 Cong. Rec. H11755 (Sept. 28, 1996) (enacted).

designed for, and capable of, eradicating systemic discrimination in the area of credit lending. Reading the statute as barring disparate impact discrimination is most consistent with this purpose.

Evidence of this purpose comes from the text itself and the legislative history. As written, the statute sweeps within its ambit *all* credit transactions, regulating not just consumer lending but also extensions of credit to small businesses, large corporations, partnerships, and trusts.[70] The goal for enacting such a comprehensive law was to provide the public with "the strongest possible law on credit discrimination."[71] From the beginning, the ECOA was no "half-way measure[]"[72] towards achieving Congress's stated goal "to prevent the kinds of credit discrimination which have occurred in the past, and to anticipate and prevent discriminatory practices in the future."[73] Neutral credit policies that had a discriminatory effect on minority and marginalized consumers represented exactly the "kinds of credit discrimination" that had occurred in the past and that Congress anticipated would continue to occur in the future in the absence of intervening legislation.

A closer look at the historical context in which the ECOA was enacted further supports this conclusion. The impetus for enacting new civil rights protections in 1968 was spurred in part by nationwide riots challenging racial segregation and discrimination. In response, President Johnson commissioned the National Advisory Commission on Civil Disorders to identify the root causes of these race riots. The resulting Kerner Report concluded that the riots were a direct result of the "nation [] moving toward two societies, one black, one white—separate and unequal."[74] In particular, the Kerner Report identified residential segregation and structural discrimination within society's essential social and economic spheres as the primary cause of the widespread racial tension and violence.[75] The Commission recommended that Congress pass comprehensive legal reforms to eliminate housing discrimination and the unequal availability of similarly integral social and economic necessities.[76] Within two months of the report's release, Congress passed

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[70] 15 U.S.C. § 1691a(e)–(f) (1994); Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,267 (1994).

[71] 121 CONG. REC. S10443–10445 (daily ed. June 12, 1975).

[72] *Id.*

[73] S. REP. NO. 94-589, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406.

[74] KERNER COMM'N, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS (1968).

[75] *See id.* at 13.

[76] *Id.*

the Civil Rights Act of 1968, outlawing discrimination in the sale, rental, and financing of housing and imposing penalties for willfully injuring, intimidating or interfering with a person's efforts to partake of society's most basic opportunities, including: a public education; access to commercial goods, services, and facilities; participation in government programs and services; a gainful employment; jury duty; voting; and interstate travel.[77]

By 1974, however, Congress understood it had neglected to safeguard one other fundamental necessity of modern life from discrimination: credit. Beginning in the early 1970's, numerous instances of denial of credit for reasons other than a person's creditworthiness were brought to the attention of the House Committee on Banking, Currency and Housing.[78] Ensuing hearings before the Committee produced compelling testimony about the critical importance of credit, which the Committee resoundingly adopted as its chief reason for why Congress should address discrimination in credit transactions. Describing the need for such legislation, the Committee wrote in its Report recommending passage of the ECOA:

> It would be difficult to exaggerate the role of credit in our society. Credit is involved in an almost endless variety of transactions reaching from the medical delivery of the newborn to the rituals associated with the burial of the dead. The availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing. Indeed, the availability of credit has a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitution.

In light of this vital role that credit plays in society, the Committee determined that a prohibition on credit discrimination would constitute "landmark legislation" for its promise to "pertain[] directly to the problem of credit discrimination" by fully "forbid[ing] discrimination based on race, color, religion, national origin and age in all areas of credit, not just mortgage finance."[79] Taking up consideration of the legislation, the Senate Committee on Banking, Housing and Urban Affairs agreed that "[c]redit has ceased to be a luxury item," noting

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[77] Pub. L. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 42 U.S.C.).

[78] *See* H.R. REP NO. 210, at 3,5 (1975); 121 CONG. REC. S10443–10445 (daily ed. June 12, 1975).

[79] H. REP. NO. 94–210 (1975).

especially that, "[v]irtually all home purchases are made on credit. About two-thirds of consumer automobile purchases are on an installment basis. Large department stores report that 50% or more of their sales are on revolving or closed-end credit plans. Upwards of 15% of all consumer disposable income is devoted to credit obligations other than home mortgages."[80]

The Senate and House sponsors of the bill also garnered support for the legislation while repeatedly emphasizing that because credit is a necessity, the law must guarantee full and equal access to it. House sponsor Representative Frank Annunzio (D-IL) advocated that "consumer credit is more important than ever to the lives of Americans," and "the right to get credit on a nondiscriminatory basis and maintain an accurate credit record is no longer the luxury it used to be—it is a necessity."[81] Introducing the House-passed bill in the Senate, Senator Biden affirmed:

> Credit has become an increasingly important part of the well-being of consumers and their families. In many cases credit is virtually a necessity if consumers are to participate in the fruits of our American economy—homes, auto-mobiles, appliances are more often purchased on credit than on a cash basis . . . nearly 15 percent of all consumer disposable income is allocated to repayment of installment debt. No form of consumer credit has grown so rapidly as that available through credit cards, which offer consumers unprecedented convenience and purchasing power. In this marketplace it is intolerable that some consumers—because of the accident of their age, or color or ethnic origins—should be foreclosed from their equitable share of credit.[82]

Additionally, months before Senator Biden introduced H.R. 6516 in the Senate, Senator William Brock III (R-TN) first introduced another version of a bill to amend the ECOA. Senator Brock's bill focused only on prohibiting discrimination in credit transactions on the basis of age in an effort to halt certain concerning credit policies that were having a disparate impact on the elderly.[83] In introducing his bill, Senator Brock explained that the legislation would "solve this one unconscionable problem" of creditors "discriminating against our older citizens simply

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[80] S. REP. 94–589, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 405.
[81] 122 CONG. REC. H732–733 (daily ed. Feb. 4, 1976).
[82] 121 CONG. REC. S10443–10445 (daily ed. June 12, 1975).
[83] *See* S. 483, 94th Cong. (as introduced, Jan. 29, 1975).

because of their age . . . [by], for instance, bas[ing] credit worthiness primarily on evidence of gainful full-time employment, while disregarding the fact that retired persons no longer need to rely on employment for their incomes. This practice continues, although proceeds from social security, pensions, and annuities tend to be more permanent and reliable than income from employment."[84] In other words, the first bill to extend the 1974 ECOA that the Senate considered also demonstrates that the problem Congress had identified had more to do with lending policies that had an unjustifiable discriminatory effect on certain groups, rather than with intentional credit discrimination. This bill was considered by the Committee on Banking, Housing and Urban Affairs at the same time the Committee was drafting its version of H.R. 6516 for adoption.

It may fairly be said, therefore, that the legislative purpose of the ECOA was to ensure that the necessary and precious commodity of credit was fairly and equally available to all consumers. Members of Congress were concerned, in other words, with the actual incidence and effects of lending discrimination—regardless of whether it resulted from lending practices that were intentionally or unintentionally discriminatory. Their concern over unequal access to credit was coupled with the understanding that policies which had discriminatory effects pervasively hinder the fair and equal extension of credit. The most rational understanding of their legislative work, therefore, is that they sought to impose liability for engaging in lending practices that created or perpetuated the unequal or discriminatory denial of a critical financial service—no other remedy scheme would more directly address the specific problem Congress identified and sought to correct with the passage of the ECOA. Furthermore, the legislative materials repeatedly emphasize the landmark nature of this bill, suggesting that the enacting Congress was not engaged in crafting standard or limited legislation on this issue, but rather was pursuing the enactment of unconventional and transformational legislation that could quickly and effectively remedy credit discrimination. Placing the burden on minority consumers to prove intentional discrimination in order to secure nondiscriminatory access to credit would seriously undercut this goal; whereas placing the burden on lending institutions to show their practices do not result in unequal and discriminatory access to credit is a policy choice that directly reflects the enacting Congress's goal for the ECOA to be a momentous piece of civil rights legislation.

[84] 121 CONG. REC. S1143–1144 (daily ed. Jan. 29, 1975).

D. Agency Interpretation

The ECOA grants the Federal Reserve Board (FRB) broad rulemaking authority to issue implementing regulations and expound on the meaning of the terms in the statute.[85] Upon passage of the 1974 ECOA, the FRB issued Regulation B[86] implementing the Act's prohibition against credit discrimination on the basis of sex or marital status. In December 1976, the FRB amended Regulation B to incorporate the Act's recently expanded coverage to prohibit discrimination on the basis of race, color, religion, national origin, and age. In the process of drafting, enacting, and subsequently amending Regulation B, the agency extensively examined the scope and meaning of the ECOA. It held hearings, solicited comments, and reviewed the text and legislative history of the Act to arrive at a final rule governing the information a creditor may consider when evaluating an application for credit. That rule explicitly endorses the interpretation that the ECOA outlaws disparate impact discrimination and makes it illegal for a creditor to use information in a way that causes a discriminatory effect on protected groups.[87]

The FRB began its process of developing and arriving at this rule by first concluding from the legislative record that the ECOA "proscribes intentional discrimination and, also may be interpreted as prohibiting actions that have the effect of discriminating against applicants on any prohibited basis."[88] Accordingly, in the summer of 1976, it proposed a rule that creditors may not use information "for the purpose of discriminating against an applicant on a prohibited basis," and specified that this includes the use of general or facially neutral information that is "not causally related to a determination of creditworthiness where the effect of using such information would be to discriminate against an applicant on a prohibited basis, even though the creditor may have no intent to discriminate." The Board acknowledged that the use of certain information "may deny credit to a class of persons protected by the [ECOA] at a substantially higher rate than persons not of that class," and determined "in accordance with the Board's understanding of the *Griggs* decision, [that] such use may be a violation of [the ECOA] unless the creditor establishes that the information has a manifest relationship to

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[85] *See* 15 U.S.C. § 1691a(g) ("Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question.").

[86] 12 C.F.R. § 202.

[87] 12 C.F.R. § 202.6(a), 68 Fed. Reg. 13,144, 13,150, 13,155–56 (March 18, 2003).

[88] 41 Fed. Reg. 29,870, 29,874 (July 20, 1976).

creditworthiness." The Board elaborated that "in accordance with the *Albemarle* decision," if the use of other information would have a less discriminatory effect and would equally predict creditworthiness, then a creditor's refusal to use this information instead of that which has a discriminatory effect "would be evidence the creditor was employing the information used merely as a pretext for discrimination, e.g., with the intent of discriminating against applicants on a prohibited basis."[89]

A thorough explanation of the agency's reasoning behind this proposed provision and its interpretation of §1691 of the ECOA was included in the Notice of Proposed Rulemaking and Notice of Hearing issued to the public. It explained that the ECOA "proscribes intentional discrimination and, also may be interpreted as prohibiting actions that have the effect of discriminating against applicants on any prohibited basis" because the Act's language is similar to that of Title VII of the Civil Rights Act of 1964, which prohibits hiring methods "that are discriminatory in effect even though neutral in purpose," and because "Congress intended certain judicial decisions enunciating this 'effects test' from the employment area to be applied in the credit area." The Board announced that it interpreted the application of an "effects test" to the credit area to mean that:

> [T]he use of certain information in determining creditworthiness, even though such information is not specifically proscribed by [the proposed rule], may violate the [ECOA] if the use of that information has the effect of denying credit to a class of persons protected by the [ECOA] at a substantially higher rate than persons not of that class, unless the creditor is able to establish that the information has a manifest relationship to creditworthiness. Even then, if an aggrieved applicant could show that a creditor could have used a less discriminatory method which would serve the creditor's need to evaluate creditworthiness as well as the challenged method, a violation may be found to exist.[90]

Subsequent to publishing its proposed rule and inviting comment, the FRB also held hearings in August 1976. At this time, the proposed revisions came under intense scrutiny for adopting disparate impact liability as law under the ECOA in too passive and trivializing a way. Roger S. Kuhn of the Center for National Policy Review, Catholic

[89] *Id.* at 29880–81 & n.7.
[90] *Id.* at 29874.

University School of Law, best articulated this view when he testified before the FRB that a "major point on which the Board's proposal is inexplicably deficient [is] the exposition of the so-called 'effects test' of discrimination embodied in the ECOA." He criticized the Board's treatment of the issue as "hesitant and misleading" for failing to spell out what the effects test means and for framing the rule as prohibiting the use of information "*for the purpose* of discriminating," when "this language contradicts the very essence of the effects test and the *Griggs* case, which unequivocally state that *purpose is irrelevant*." Additionally, the proposed rule ambiguously stated that the use of criteria which disproportionately discriminates against members of a protected class "may be a violation" of the law, which Mr. Kuhn noted is nonsensical because the *Griggs* effects test makes clear that "unless such a criterion is manifestly related to creditworthiness, its use *is* a violation of the law. There is no room for any *other* understanding, and the regulations should so state *unequivocally*." Finally, the Board's interpretation of the application of *Albemarle* to the area of credit discrimination was scrutinized for suggesting "that a borrower must prove that a criterion was used with the intent to discriminate, which once again is precisely what the borrower need *not* prove."[91]

Based on this and similar testimony and comments received, the Board revised portions of its July draft of Regulation B in November 1976.[92] In its revisions, the Board changed the phrasing of its prohibition on the use of information "for the purpose of discriminating" to the current wording of barring information "used to discriminate." The rule was also altered to eliminate the vague "may be a violation" language in favor of the unequivocal and wholesale adoption of the "effects test concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.* [] and *Albemarle Paper Co. v. Moody*, [] to be applicable to a creditor's determination of creditworthiness."[93] Finally, the Board further clarified the meaning of the effects test by explaining that lending practices unlawfully discriminate if:

> (i) Those practices result in adverse credit decisions regarding applicants who are members of a class protected by the Act and this part; (ii) Such decisions occur at a significantly higher rate

[91] Marcia K. Baer, *The Equal Credit Opportunity Act and the "Effects Test"*, 95 BANKING L.J. 241, 253 (1978) (quoting Roger Kuhn's testimony before the Board of Governors of the Federal Reserve System on Aug. 12, 1976).

[92] 41 Fed. Reg. 49,123, 49,124 (Nov. 8, 1976).

[93] *Id.* at 49,135.

> than adverse decisions involving applicants who are not members of the protected class; and (iii) The information or evaluation criteria underlying the practice does not have a manifest relationship to the creditor's determination of creditworthiness.[94]

In the publication of its revised proposed rule, the FRB added to its prior commentary on the rule that the purpose of its changes and the substitution of "to discriminate" for the words "for the purpose of discriminating" was to "underscore the fact that the general rule regarding use of information is not limited to intentional acts of discrimination."[95] The commentary retained all the rest of the July draft's explanation of this section except for one line, which was deleted because it could have been mistakenly interpreted to suggest that a borrower claiming a violation of the Act is required to show an intent to discrimination, which is exactly what the borrower does not have to prove when claiming disparate impact discrimination. In sum, the November draft of Regulation B was written to give greater weight to the "effects test" doctrine in the granting of credit, demonstrating the FRB's firm commitment to an interpretation of the ECOA as prohibiting disparate impact discrimination.

After consideration of additional comments, the FRB made last revisions to the November draft of Regulation B and published a final rule on January 6, 1977.[96] The final rule streamlined the entire issue of disparate impact liability and the "effects test" by shortening the lengthy rule and accompanying footnote to simply state in relevant part: "a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis"[97] and "[t]he legislative history of the Act indicates that the Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.* [] and *Albemarle Paper Co. v. Moody* [] to be applicable to a creditor's determination of creditworthiness."[98] The FRB explained again in its commentary accompanying the final rule that although "the footnote has been shortened in the final version[,] it refers to the legislative history of the amended Act, which shows that Congress intended certain Judicial decisions enunciating the 'effects test' in the

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[94] *Id.*
[95] 41 Fed. Reg. 49,123, 49,127 (Nov. 8, 1976).
[96] 42 Fed. Reg. 1242 (Jan. 6, 1977).
[97] *Id.* at 1255.
[98] *Id.*

employment area to be applied in the credit area, especially with respect to the allocation of burdens of proof."[99]

Since this time, the FRB has made no substantive changes[100] to section 202.6 of Regulation B. The 1977 version, which fully endorses and implements disparate impact liability, remains the official and binding interpretation of the scope and meaning of the ECOA's prohibition on credit discrimination.[101] Pursuant to statute, the FRB conducted a regular review of Regulation B in 1985 and made a few substantive revisions to other parts of the Regulation.[102] The only revisions made to section 202.6 during this review, however, were a few minor structural and editorial changes.[103]

One such alteration is potentially significant, however, as a further demonstration of the FRB's longstanding interpretation that the ECOA cognizes claims for disparate impact discrimination. The last sentence of the footnote to section 202.6 of the regulation, which contained a citation to portions of the legislative history of the ECOA dealing with the "effects test," was replaced in favor of a lengthy and explicit exposition of the "effects test" in an accompanying Official Staff Commentary, which provides official explanations of all the provisions contained in Regulation B. Seemingly, therefore, the FRB chose in 1985 to more prominently display its evidence that the ECOA incorporates disparate impact liability and its commitment to effectuating Congress's intent to outlaw disparate impact discrimination. The Official Staff Commentary explains:

> The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.). Congressional intent that this doctrine apply to the credit

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[99] *Id.* at 1246.

[100] Minor revisions for semantic purposes have occasionally been made over the years.

[101] 12 C.F.R. § 202.6(a), 68 Fed. Reg. 13,144, 13,150, 13,155–56 (March 18, 2003).

[102] 50 Fed. Reg. 48,018 (Nov. 20, 1985). The Official Staff Commentary explains that the FRB's revised version of Regulation B leaves "most of the regulatory provisions substantially unchanged," and that "in the review of the regulation, it was frequently found that no substantive change in regulatory provisions was required—that elaborating on a given point in a staff commentary could effectively facilitate creditor compliance. Accordingly, an official staff commentary has been prepared." *Id.* at 48,019.

[103] Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,021 ("The few changes in this section are structural or editorial only. Captions have been added to facilitate use of the regulation. Footnote 7 of the current regulation has been renumbered footnote 2.").

> area is documented in the Senate Report that accompanied H.R. 6516, No. 94-589, pp. 4-5; and in the House Report that accompanied H.R. 6516, No. 94-210, p. 5. The act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on is face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact. For example, requiring that applicants have incomes in excess of a certain amount to qualify for an overdraft line of credit could mean that women and minority applicants will be rejected at a higher rate than men and non-minority applicants. If there is a demonstrable relationship between the income requirement and creditworthiness for the level of credit involved, however, use of the income standard would likely be permissible.[104]

In 1995, the Board revisited its Official Staff Commentary to "provide guidance on several issues including disparate treatment."[105] After reviewing comments and upon further analysis, the FRB rejected the concerns of commentators about "the Board's articulation of the standards of proof and burdens of persuasion under a disparate impact analysis," as laid out in the Commentary's "Effects test" paragraph (quoted above). In fact, while the FRB "recognize[d] that this is an evolving area of law, one in which creditors and consumers alike would benefit from more specificity," the only revision it did make to its official commentary on section 202.6 was to *add* a reference to the Civil Rights Act of 1991, which codified the standards used for disparate impact under Title VII.[106] The addition of this sentence suggests that the amended Title VII disparate impact burdens of proof, which Congress enacted in 1991 to statutorily reverse a Supreme Court decision limiting disparate impact liability for employment discrimination,[107] also apply to the ECOA.

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[104] *Id.* at 48050.

[105] Equal Credit Opportunity, 60 Fed. Reg. 29965 (June 7, 1995).

[106] *Id.* at 29967–8. The "Effects test" paragraph now begins: "The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), and the burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e-2)." *Id.*

[107] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

Around this same time, ten federal agencies charged with enforcing financial regulations also issued a joint "Policy Statement on Discrimination in Lending," explicitly endorsing the availability of disparate impact claims under the ECOA.[108] The statement issued against a backdrop of judicial suspicion over disparate impact liability to confirm the position that the FRB has consistently held—that "[e]vidence of discriminatory intent is not necessary" to prove a violation of the ECOA.[109] Although it is quite convincing to argue that the ECOA itself clearly authorizes claims for disparate impact discrimination,[110] any statutory silence or ambiguity on this issue is resolved by the agency Congress charged with implementing the statute.[111] Courts owe substantial deference to an implementing agency's reasonable interpretation of an ambiguous provision,[112] and the FRB's determination that the ECOA proscribes lending practices that have a disparate impact on members of protected classes is not just reasonable—it is the only logical and legitimate interpretation of the statute.

E. Circuit Court Decisions and Related Supreme Court Precedent

Every Circuit court to address the issue has ruled that disparate impact claims are cognizable under the ECOA, and district courts from nearly every Circuit have also uniformly confirmed or accepted this conclusion.[113] In fact, in recent cases relitigating this issue, defendants

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[108] 59 Fed. Reg. 18,266 (Apr. 15, 1994).

[109] *Id.* at 18269.

[110] *See supra* Parts IV.A-C.

[111] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984).

[112] *Id.*

[113] *See e.g.* Golden v. City of Columbus, 404 F.3d 950, 963 n.11 (6th Cir. 2005); Miller v. Am. Express Co., 688 F.2d 1235, 1239–40 (9th Cir.1982); Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1101 (5th Cir.1987), *vacated and remanded on other grounds*, 492 U.S. 901 (1989); Haynes v. Bank of Wedowee, 634 F.2d 266, 269 n.5 (5th Cir. 1981); *see also* Barrett v. H & R Block, Inc., 652 F. Supp. 2d 104, 108 (D. Mass. 2009); Guerra v. GMAC LLC, 2:08-CV-01297-LDD, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009); Dismuke v. Connor, 05-CV-1003, 2007 WL 4463567 (W.D. Ark. Dec. 14, 2007); Powell v. Am. Gen. Fin., Inc., 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004); Smith v. Chrysler Fin. Co., CIV.A. 00-6003 (DMC), 2003 WL 328719 (D.N.J. Jan. 15, 2003); Wide ex rel. Estate of Wilson v. Union Acceptance Corp., IP 02-0104-C-M/S, 2002 WL 31730920 (S.D. Ind. Nov. 19, 2002); Osborne v. Bank of Am., Nat'l Ass'n., 234 F.Supp. 2d 804, 811-12 (M.D. Tenn. 2002); Faulkner v. Glickman, 172 F.Supp.2d 732, 737 (D. Md. 2001); Church of Zion Christian Ctr., Inc. v. SouthTrust Bank of Alabama, CA 96-0922-MJ-C, 1997 WL 33644511 (S.D. Ala. July 31, 1997); Latimore v. Citibank, F.S.B., 979 F.Supp. 662, 664 n.7 (N.D. Ill. 1997); A.B. & S. Auto Serv., Inc. v.

have been unable to even cite a district court decision that holds the ECOA does not permit disparate impact claims.[114] This uniform and unbroken body of caselaw, going back over three decades, lends indisputable support to the interpretation that the ECOA bars disparate impact discrimination.

Related Supreme Court decisions, many of which are cited in the legislative history of the Act and were relied upon by the enacting Congress when writing and voting for the passage of the ECOA, additionally support the argument that, unless otherwise stated, civil rights statutes prohibiting discrimination include a prohibition against some policies that are facially neutral but have a discriminatory effect on protected groups.[115] As discussed above, opponents of disparate impact liability have attempted to cast the Supreme Court's decision in *Smith v. City of Jackson*[116] as introducing a rule that anti-discrimination statutes do not authorize claims for disparate impact discrimination unless those statutes explicitly prohibit conduct that "adversely affects" a protected group.[117] Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (AEDA)—the statute at issue in *Smith*—have nearly-identical sections barring employment discrimination, each containing two distinct provisions: one that prohibits employers from engaging in employment discrimination because of an employee's race, color, religion, sex, national origin, or age; and another that outlaws employment policies that would "adversely affect" an employee on the basis of race, color, religion, sex, national origin, or age.[118] The Supreme Court in *Griggs* interpreted Title VII's prohibition on discrimination that "adversely affects" employees to

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South Shore Bank of Chi., 962 F.Supp. 1056, 1060 (N.D. Ill. 1997); Gross v. United States Small Bus. Admin., 669 F. Supp. 50 (N.D.N.Y. 1987); Sayers v. General Motors Acceptance Corp., 522 F. Supp. 835 (W.D. Mo. 1981); Cherry v. Amoco Oil Co., 490 F. Supp. 1026 (N.D. Ga. 1980).

[114] *See e.g.* Alleyne v. Flagstar Bank, FSB, CIV.A. 07-12128-RWZ, 2008 WL 8901271 (D. Mass. Sept. 12, 2008).

[115] *See e.g.* Griggs v. Duke Power Company, 401 U.S. 424 (1971) (recognizing claims for disparate impact race discrimination in employment under Title VII); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (same); Smith v. City of Jackson, Mississippi, 544 U.S. 228 (2005) (accepting some claims for disparate impact age discrimination in employment under the AEDA); *cf.* Thornburg v. Gingles 478 U.S. 30 (1986) (holding that election systems resulting in "vote dilution through submergence" violate the Voting Rights Act); Alexander v. Choate, 469 U.S. 287, 298 (1985) (assuming the ADA outlaws some claims of disparate impact discrimination).

[116] 544 U.S. 228 (2005).

[117] *See supra* Part III.

[118] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a).

outlaw employment policies that have a disparate impact on a protected class of employees. Decades later, the *Smith* Court held that the AEDA also bars disparate impact discrimination on the basis of age, since the AEDA's provision barring discrimination that "adversely affects" employees is nearly identical to the provision at issue in *Griggs*.

Conversely, the ECOA contains only one general prohibition making it unlawful for a creditor "to discriminate" against an applicant on a prohibited basis. Opponents argue that, under *Smith*, the ECOA's anti-discrimination provision does not bar disparate impact discrimination because it does not include an explicit reference to lending practices that "adversely affect" minority borrowers. However, the *Smith* decision was not based exclusively on the presence of the words "adversely affect" or on the inclusion of two provisions barring discrimination instead of one. Rather, the Court considered these textual clues along with the statute's implementing regulations, the purpose of the AEDA as discerned from the legislative history, and the uniform interpretation by the Circuit courts that the AEDA authorizes claims for disparate impact discrimination.[119] Thus, it is not clear at all that the *Smith* decision compels an interpretation of the ECOA as permitting disparate impact discrimination. If anything, the decision requires courts to examine all available and reliable indicators of whether Congress intended the anti-discrimination statute at issue to outlaw disparate impact discrimination. In the case of the ECOA, as extensively discussed above, every indication is that Congress intended to proscribe and provide a remedy for credit practices that have an indefensible discriminatory effect on protected groups. It is therefore not surprising that no court presented with this argument has ruled that *Smith* mandates a finding that disparate impact claims are not cognizable under the ECOA.[120]

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[119] Smith v. City of Jackson, 544 U.S. 228, 233–40 (2005).

[120] *See e.g.* Guerra v. GMAC LLC, 2:08-CV-01297-LDD, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009) (citing the following cases: "*Hoffman v. Option One Mortgage Corp.*, 589 F.Supp.2d 1009, 1010-11 (N.D.Ill.2008) (concluding that *Smith* does not preclude disparate impact claims under the FHA and the ECOA); *Taylor v. Accredited Home Lenders, Inc.*, 580 F.Supp.2d 1062, 1067 (C.D.Cal.2008) (holding that *Smith* has not overruled prior precedent recognizing the FHA and the ECOA permit disparate impact claims); *Nat'l Cmty. Reinvestment Coal. v. Accredited Lenders Holding Co.*, 573 F.Supp.2d 70, 79 (D.D.C.2008) (holding that *Smith* does not preclude disparate impact claims brought pursuant to the FHA); *Payares v. JP Morgan Chase & Co.*, No. 07-5540, 2008 WL 2485592, at *1 (C.D.Cal. June 17, 2008) (concluding that *Smith* does not bar disparate impact claims under the FHA and the ECOA); *Ramirez v. GreenPoint Mortgage Funding, Inc.*, No. 08-0369, 2008 WL 2051018, at *4 (N.D.Cal. May 13, 2008) (holding that defendants failed to demonstrate that *Smith* is "clearly irreconcilable" with Ninth Circuit precedent holding that disparate impact claims are cognizable under the FHA and the ECOA); *Zamudio v. HSBC N. Am. Holdings, Inc.*, No. 07-4315, 2008

Another case defendants often rely on is *Alexander v. Sandoval*,[121] which held that the agency charged with implementing Title VI of the Civil Rights Act of 1964 may not create a private right of action to sue for disparate impact discrimination through the administrative rulemaking process because the statute in no way contemplates a private right of action. Opponents of disparate impact liability under the ECOA argue that the FRB may not interpret the ECOA to authorize private claims for disparate impact discrimination because the ECOA does not expressly include a provision authorizing such claims. The differences between Title VI and the ECOA are quite stark, however. Section 601 of Title VI prohibits programs and agencies receiving federal funding from discriminating on the basis of race, color, or national origin; however, section 602 then contains no "rights-creating" language explicitly conferring a right on a class of persons,[122] and expressly authorizes and directs federal agencies "to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders."[123] Conversely, the ECOA is directed at private actors and its anti-discrimination provision contains rights-creating language by conferring a right on applicants to be free of lending discrimination.

The Court assumed in *Sandoval* that the implementing agency "may validly proscribe activities that have a disparate impact on racial groups" under Title VI, because section 601 is a general anti-discrimination mandate that is silent on whether it proscribes disparate impact discrimination.[124] The Court held, however, that the agency could not create a *private right to sue* for conduct that the agency prohibited by regulation, but which was not proscribed explicitly by the statute itself.[125] Put succinctly, the Court held only that, "language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has

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WL 517138, at *2 (N.D.Ill. Feb.20, 2008) (concluding that *Smith* does not bar disparate impact claims under the FHA and the ECOA); *Garcia v. Countrywide Fin. Corp., et al.*, No 07-1161, Am. Order Granting in Part and Denying in Part Defs.' Mot. Dismiss, at *11 (C.D.Cal. Jan. 17, 2008) (declining to hold that *Smith* overturned Ninth Circuit precedent recognizing disparate impact claims under the FHA and ECOA); *Beaulialice v. Fed. Home Loan Mortgage Corp.*, No. 04-2316, 2007 WL 744646, at *4 (M.D.Fla. Mar.6, 2007) (concluding that *Smith* does not bar disparate impact claim under the FHA and assuming the same under the ECOA).")

[121] 532 U.S. 275, 293 (2001).

[122] *See* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) ("[T]he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action.")

[123] 532 U.S. at 288–89.

[124] *Id.* at 275.

[125] *Id.* at 279–82.

not."[126] Properly understood, therefore, this holding poses no bar to recognizing a private right of action to sue for disparate impact discrimination under the ECOA.[127] The ECOA itself is directed to the conduct of private actors and provides a private right of action to enforce its provisions, one of which bars lending practices that have a discriminatory effect on protected groups.

V. CONCLUSION

Under the Supreme Court's interpretive methodology for determining whether an antidiscrimination statute bars disparate impact discrimination, the Equal Credit Opportunity Act clearly outlaws credit lending practices that have a discriminatory effect on protected groups. This methodology, devised during the civil rights era and reaffirmed as recently as 2005, instructs courts to consider the statute's text, legislative history, purpose, prior interpretations by its implementing agency, treatment of the issue by the Circuit courts, and related Supreme Court precedent to holistically and faithfully discern whether Congress intended its law to carry a prohibition against disparate impact discrimination and to authorize a right to sue for such conduct.

An examination of the ECOA in light of each of these interpretive tools unmistakably reveals that the statute's text bars all forms of lending discrimination; that the enacting Congress intended to prohibit widespread and invidious credit practices that adversely effect minority borrowers; that Congress passed the ECOA for the purpose of ending the unequal and discriminatory denial or extension of what has become a necessary and precious commodity; that the agency charged with interpreting and implementing the ECOA has continuously and unequivocally endorsed the availability of disparate impact liability under the Act; that the Circuit courts to address this question have uniformly ruled that the ECOA bars disparate impact discrimination; and that the Supreme Court's precedents fully support the same conclusion.

[126] *Id.* at 289.
[127] 15 U.S.C. § 1691e.