IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

TOWNSTONE FINANCIAL, INC., et al.,

Defendants.

Civil Action No. 1:20-cv-04176

Judge Franklin U. Valderrama
Magistrate Judge Gabriel A. Fuentes

DEFENDANTS' MEMORANDUM OF SUPPLEMENTAL AUTHORITY

In response to the Court's Order of July 11, 2022, Defendants submit this notice of supplemental authority to address the impact of the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587, Nos. 20-1530, 20-1531, 20-1778, 20-1780 (June 30, 2022), on Defendants' pending Motion to Dismiss. ECF No. 32.

In *West Virginia v. EPA*, the Supreme Court applied the major questions doctrine to strike down an EPA rule that would have significantly altered the way power is generated throughout the nation. Under the major questions doctrine, an agency must demonstrate that it has clear congressional authorization to take actions that have major economic and political significance. The doctrine has its genesis in the Constitution's separation of powers and the courts' duty to ensure that executive agencies are not usurping Congress's Article I power to make law. As the Court explained, the doctrine developed though a "series of significant cases, all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." 142 S. Ct. at 2609.

This case raises the same problem. The CFPB here is attempting to expand its regulatory authority—and, thereby, liability for every creditor in the nation—far beyond what Congress

authorized in ECOA. The CFPB's approach to ECOA would arrogate to the CFPB the authority to censor speech, to erect a de facto system of race-based hiring, marketing, and lending quotas, and to create liability for allegedly discriminatory outcomes—that is, disparate impact liability—which ECOA does not authorize. This case therefore presents several major questions of statutory interpretation that the Court should resolve in Townstone's favor.

I. The CFPB's Complaint and Townstone's Motion to Dismiss

The CFPB filed this action in July 2020, after a three-year investigation, during which Townstone produced approximately 100 GB of documents, answered interrogatories, and produced several employees, including Townstone's owner and CEO, defendant Barry Sturner, for sworn testimony. The CFPB's Amended Complaint alleges that Townstone violated ECOA and Regulation B by making five statements on a weekly radio show over a four-year period that allegedly "would discourage prospective applicants, on the basis of race, from seeking or obtaining credit for properties within the Chicago MSA." Am. Cmplt. ¶ 22. *See also id*. at ¶¶ 32, 38, 39, 41. As evidence that Townstone's on-air statements discouraged prospective applicants based on race, the CFPB claims that Townstone drew fewer applications from African-Americans than did undisclosed alleged "peer lenders" of Townstone, *see id*. at ¶¶ 42–50, and that Townstone allegedly failed to engage in targeted marketing to African-Americans and failed to hire African-American loan officers, *see id*. at ¶¶ 40, 51–52.

Townstone filed its initial Motion to Dismiss on October 23, 2020. After the CFPB amended its complaint, Townstone renewed its motion on February 8, 2021—in which it argued that the CFPB's claims are unsupported by the law, unsupported by the facts pled in the complaint, and run afoul of the First and Fifth Amendments to the Constitution. Townstone Mem. Supp. Mot. To Dismiss, ECF No. 32 (Townstone Mem.). As Townstone pointed out, ECOA applies to *credit*

transactions and bars discrimination against *applicants* for credit. *See id.* at 7–11. The CFPB, however, has failed to identify a single individual who was allegedly interested in pursuing credit from Townstone, or even who claimed to have been discouraged from doing so by Townstone's radio show statements. *See id.* at 7–8.

Instead, the CFPB's complaint is based on hypotheticals and speculation. The CFPB hypothesizes that Townstone's on-air statements "would discourage" prospective applicants from applying for credit, but it never details who these prospective applicants might be or how anyone could distinguish a prospective applicant from someone who merely heard Townstone's radio show. *See id.* Indeed, the CFPB seeks to hold Townstone liable not only for discouraging unknown "prospective applicants" from seeking credit from Townstone; the CFPB contends that Townstone is liable for discouraging individuals from predominantly minority neighborhoods (whether those individuals are themselves members of minority groups or not) from applying for credit from *any* company. *See* Am. Cmplt. ¶¶ 32, 38, 39, 41 (alleging that Townstone on-air statements would discourage prospective applicants from applying for credit "including from Townstone"). Further, the CFPB is reading into ECOA affirmative requirements to make marketing, lending, and hiring decisions based on race when ECOA includes no such requirements. *See* Townstone Mem. at 1, 5.

Townstone thus argued that the CFPB was assuming power far beyond what Congress authorized in ECOA and that its interpretation violated the First and Fifth Amendments to the Constitution. Indeed, by expanding, through Regulation B, ECOA's prohibition on discrimination against applicants to statements that "would discourage" "prospective applicants," and by further reading Regulation B's prohibition to include public statements that may have been heard by individuals with no connection to the lender, the CFPB has read ECOA to grant it roving power to

censor creditors' speech. *See* Townstone Mem. at 12–15. That is evident from the facts of this case, as the CFPB is seeking to impose crushing financial penalties on Townstone for making five statements over a four-year period that constituted a tiny fraction of the thousands of minutes of broadcast time during that period. As Townstone explained in its briefs, and as is evident from the face of the Amended Complaint (despite CFPB's effort to twist Townstone's words), the statements were part of innocuous discussions of crime in Chicago and various aspects of home-buying. *See id.* at 18–20. Thus, even if Regulation B could be interpreted to be within the scope of ECOA (which, as Townstone argued, it cannot), the CFPB's interpretation of Regulation B still goes far beyond anything Congress could possibly have intended in passing ECOA. *See id*. at 9.

The CFPB's interpretation of ECOA and Regulation B thus raises several major questions, among them: (1) Does ECOA permit the CFPB to expand liability from actual discrimination against applicants to statements that "would discourage" a "prospective applicant" from seeking credit? (2) Does ECOA permit the CFPB to regulate impromptu public statements not made to any particular person or to anyone connected to the lender, based on the CFPB's view that such statements "would discourage" a "prospective applicant" from seeking credit? (3) Does ECOA permit the CFPB to impose affirmative marketing, lending, or hiring requirements based on race? (4) Does ECOA allow liability based on a disparate impact theory? As Townstone already showed in its briefs in support of the Motion to Dismiss, the answer to these questions is no. *West Virginia v. EPA* confirms that conclusion.

II. Under the Major Questions Doctrine as Explicated in *West Virginia v. EPA*, the CFPB's Complaint Must Be Dismissed

In *West Virginia v. EPA*, the Supreme Court held that a provision of the Clean Air Act directing the EPA to determine the "best system of emission reduction," did not permit it to require coal-powered plants throughout the nation to shift their power generation to alternative sources.

142 S. Ct. at 2613–15. In reaching this conclusion, the Court applied, and clarified, the so-called major questions doctrine. Prior to the decision, the scope and application of the doctrine was subject to some uncertainty, as the Court applied it intermittently, sometimes not by name, and often as a means of determining whether an agency decision was entitled to deference. In *West Virginia v EPA*, however, the Court made clear that the major questions doctrine is, indeed, a doctrine based on "an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Id*. at 2609. And the Court took the opportunity to explain both the roots of the doctrine and its proper application.

"Agencies have only those powers given to them by Congress," the Court explained, "and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *Id.* (citations omitted). Thus, where an agency is making decisions with major economic and political consequences, courts must "'hesitate before concluding that Congress' meant to confer such authority." *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). After all, "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *Id*. at 2609. Nor does Congress typically use "oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *Id*. (quoting *MCI Telecommunications Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)). Thus, even where an agency's interpretation has a "colorable textual basis," courts must use "common sense as to the manner in which Congress [would have been] likely to delegate" the power claimed. *Id*. (citations omitted). "We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *Id*. (citation omitted); *see id*. at 2613. As a result, agencies

must point to clear congressional authorization when they exercise power of major economic and political significance. *See id*. at 2608.

Much like other clear-statement rules and canons of construction, the major questions doctrine has its roots in principle as well as practice. *Id.* at 2609–10. Animating the major questions doctrine is, of course, the constitutional principle of separation of powers, and, in particular, the principle that only Congress possesses the power to make law. *Id*. *See also id.* at 2616–29 (Gorsuch, J., concurring).

As Justice Gorsuch explained in his concurrence, the Court has applied a number of similar clear statement rules "to ensure that acts of Congress are applied in accordance with the Constitution," *id*. at 2616, and that "the government does 'not inadvertently cross constitutional lines,'" *id*. at 2620 (quoting A. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 175 (2010)). As the Court has explained, "[w]ithout explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene v. McElroy*, 360 U.S. 474, 507 (1959). Accordingly, when an agency interpretation of a statute raises serious constitutional questions, the courts must demand a "clear statement from Congress" supporting the interpretation. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). Justice Gorsuch provided a number of examples, including the federalism canon, which requires Congress to speak with unmistakable clarity when it intends to upset the federal-state balance. *See* 142 S. Ct. at 2621 (citing *Gregory v. Ashcroft*, 501 U. S. 452, 459–460 (1991)). Courts have applied the same approach to many constitutional questions. *See id.* at 2616–17 (Gorsuch, J., concurring) (citing examples). Not surprisingly, one area in which the Court has been especially loath to read statutes broadly—absent clear support from Congress for such a reading—

is the freedom of speech. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 574 (1988) (when agency interpretation of National Labor Relations Act would implicate "serious doubts" as to whether the statute "could constitutionally ban" speech, Court required a "clear congressional intent to proscribe such" activity); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (explaining that courts must "identify the affirmative intention of the Congress clearly expressed" when statute could "give rise to serious constitutional questions" under the First Amendment).

The two primary questions at issue in a major questions case are whether the issue presents a question of major economic and political significance and whether Congress clearly authorized the agency interpretation in question. Once it is clear that a case involves a major question, the burden falls on the government to identify clear congressional authorization. *See West Virginia*, 142 S. Ct. at 2609 (stating that "agencies must point" to clear congressional authorization). That question is fundamentally one of statutory interpretation, but because a mere "colorable textual basis" for the agency's interpretation is not enough, a number of other factors can be relevant to resolving the question. Among them, whether the agency has found a new "transformative expansion" of authority in a long extant statute, *id*. at 2610; whether Congress has conspicuously declined to adopt that interpretation, *id*. at 2614; whether the agency's interpretation is of questionable legality or was controversial from the beginning, *id*. at 2610; whether the agency's interpretation fits the broader context of the regulatory scheme, *id*. at 2608, 2614; whether the agency relies on broad or vague language, *id*. at 2609, 2614; and whether the agency knows it is attempting to expand its regulatory reach, *id*. at 2610. Each of these factors can be relevant, but none is dispositive.

III. This Case Presents Questions of Major Economic and Political Significance

As Townstone showed in its briefs in support of its Motion to Dismiss, the CFPB's case against Townstone represents a radical expansion of ECOA in at least three ways. First, relying on Regulation B, the CFPB is attempting to expand liability under ECOA beyond discrimination against applicants to statements that "would discourage" "prospective applicants." Townstone Mem. at 4-8. But, even if that expansion of liability was supported by ECOA, which it is not, the CFPB goes far beyond any normal reading of Regulation B, contending that it prohibits impromptu public statements that are not directed at, or even heard by, any identifiable prospective applicants or anyone who has even had contact with a creditor. *Id*. at 6–8. Second, the CFPB claims that ECOA includes affirmative marketing, lending, and even hiring requirements based on race. *Id*. at 8–12. Third, the CFPB relies on a disparate impact theory of liability, which courts have not approved for ECOA. *Id*. at 9–12. In short, if the CFPB's case against Townstone is legally valid, then the CFPB can impose liability on all creditors *for doing nothing that ECOA actually prohibits*.

The CFPB's interpretation of ECOA raises questions of obviously vast economic and political significance. ECOA applies to all creditors in the nation, which include not only companies that regularly extend, renew, and continue credit, such as banks, mortgage companies, and credit card companies, but also anyone "who regularly arranges for the extension, renewal, or continuation of credit" or "participates in the decision to extend, renew, or continue credit." 15 U.S.C. § 1691a(e). The law thus applies to any broker, dealer, or retailer that offers credit plans or helps arrange credit for customers (mortgage brokers, car companies, and big-box retailers, along with small stores and dealers). In addition, the broad definition of "credit" brings in any company that allows customers to pay for its products on a deferred-installment basis (cable companies, alarm companies, cell phone companies, and many more). 15 U.S.C. § 1691a(d). The reach of

ECOA is vast,[1] and any interpretation that further extends its reach past any rational bounds will have vast consequences throughout the economy.

To pick just two major consequences of the CFPB's interpretation in this case: First, virtually all businesses today market on-line in various forms, including on social media. Under Regulation B, and especially the CFPB's interpretation of it, if anyone covered by ECOA (or any individuals employed by creditors covered by ECOA) makes an errant comment on social media or forwards a post by others that the CFPB believes "would discourage" some unknown "prospective applicant" from applying to someone for credit, that person can be liable for a violation of ECOA. After all, the CFPB's interpretation of Regulation B has no limiting principle. The CFPB points to no definition of "discouragement" or "prospective applicant," meaning that the CFPB can target any creditor on the basis of its own view of what these terms mean. In the context of the CFPB's allegations against Townstone, that would mean any creditor who said that a high crime area was a "war zone," or filled with "hoodlums," or who criticized the Black Lives Matter movement, or the #MeToo movement, or championed the police over protestors, or opposed immigration, or expressed any number of other views that could be (and have been) characterized as discriminatory in recent years, would be open to the claim that it "disparaged" individuals on a prohibited basis in violation of Regulation B. Given the importance of free speech in American law, Regulation B and the CFPB's interpretation of it, alone, constitutes a question of vast political significance. *Cf. DeBartolo Corp.*, 485 U.S. at 571.

[1] To pick two indicia of the impact of ECOA, the Federal Reserve Bank of New York recently estimated the total balance of U.S. household consumer credit in the first quarter of 2022 at $15.84 trillion. https://www.newyorkfed.org/microeconomics/ hhdc.html. And CFPB has estimated that in 2020 and 2021 "the overall size of the small business financing market is up to $2.4 trillion," and that in 2019 "there were approximately 8,100 financial institutions extending small business financing." 86 Fed. Reg. at 56,366, 56,369.

Second, despite ECOA's obvious focus on affirmative acts of discrimination against applicants, the CFPB construes it to impose liability for allegedly failing to reach out to or hire employees from certain populations. Thus, if a creditor simply lends to whoever applies for credit, under the CFPB's interpretation, it can still be guilty of discrimination for failing to market to certain populations, failing to obtain applications from certain populations, failing to make loans to those it failed to obtain applications from, and failing to hire individuals who share the same race as those to whom it allegedly failed to market or obtain loans. Simply doing business with all customers who walk through the door, is, under the CFPB's interpretation, no longer legal.[2]

The CFPB's Kafkaesque interpretation of ECOA raises questions of vast economic and political significance and finds no support in the statute that Congress actually passed.

IV. Congress Did Not Clearly Authorize the CFPB to Exercise the Vast New Powers it is Assuming

As Townstone showed in its Motion to Dismiss briefing, a straightforward interpretation of ECOA leads to the conclusion that the statute does not support the CFPB's claims against Townstone. This case need not be a major questions case and the CFPB need not be straining the limits of the separation of powers or the First Amendment for that to be true. But *West Virginia v. EPA* makes that conclusion even clearer, because the CFPB advances a "transformative expansion" of ECOA, not one aspect of which has been tested in the courts and many of which have been highly controversial for years.

As Townstone noted, the elements of this transformation are: (1) interpreting the key prohibition in ECOA—discriminatory conduct against applicants—to include speech that "would

[2] Among its many other effects, CFPB's interpretation of ECOA would destroy the business model of all small lenders and brokers who serve small markets and have no desire or ability to become large companies with correspondingly large marketing and recruiting budgets. Congress could not have intended that result.

discourage" non-applicants; (2) interpreting that same language not just to ban discrimination, but to require creditors to take positive steps to market to minorities, increase the number of minority applicants, and even hire minorities; and (3) require non-bank mortgage lenders (and, presumably, all creditors) to act like large banks, and engage in affirmative efforts to ensure that they are serving all segments of the community. To be clear, Townstone has no objection to marketing and lending to minorities or anyone else. Its business strategy has always been to market to a wider geographic footprint and to lend to anyone to whom it is able to extend credit. Indeed, that is why it has, among other things, marketed its business on the radio to all of Chicago. What Townstone objects to is crushing liability for allegedly failing to do what ECOA does not require.

In response to Townstone's Motion to Dismiss, the CFPB claims that its interpretation of ECOA follows a well-established path, as shown by decades of government complaints filed against financial institutions. CFPB Response Br. at 8, 12. But this is a half-truth at best. It is true that the government has filed complaints since the early 1990s asserting that banks failed to market to certain areas or had statistical disparities in their loan portfolios or applicant pools as compared with other banks, or that they "discouraged" prospective applicants. *See id*. at 13–15 and accompanying footnotes. But all of those cases were settled before judgment, meaning the government's aggressive theory was never tested in court. *See id.* at 13, n.63; Townstone Reply Br. at 5, 7. *Cf. West Virginia*, 142 S. Ct. at 2610 (noting that EPA's previous interpretation of relevant provision was "never addressed by a court"). In addition, all of those cases included claims under the Fair Housing Act, whose language is susceptible to a brooder ban on discrimination than ECOA's. *See* Townstone Reply Br. at 8, n.33. All were against banks, which, unlike non-bank mortgage lenders such as Townstone, are legally obligated under the Community Reinvestment Act to serve entire communities. *See* CFPB Response Br. at 13, n.33. And all of the cases the

CFPB cites were controversial when filed. *See* Townstone Reply Br. at 6. *Cf. West Virginia*, 142 S. Ct. at 2610.

What the CFPB relies on is not a settled approach to fair-lending laws, but an effort to read into FHA and ECOA affirmative requirements to market and lend to certain communities. As one article described an influential settlement against Chevy Chase (one of the cases on which CFPB relies here), the government "took the position that Chevy Chase violated the FHA and ECOA not by its actions in connection with its treatment of borrowers, applicants, or prospective applicants, but rather by what it *did not do with respect to persons with whom it did not have any contact.*" Vartanian et al, Chevy Chase Case Sets New Standards for Fair Lending Law Compliance, at 1 (Sept. 19, 1994) (emphasis added). *See also* Townstone Reply Br. at 6 nn.26 and 27. Neither law, the article pointed out, includes affirmative lending or marketing requirements. Vartanian, *supra*, at 2. Even so, imposing that obligation on banks has at least a marginally colorable basis, because, as noted, the CRA imposes affirmative obligations on banks to lend to an entire assessment area. *See* 12 C.F.R. § 25.41. Under the CRA, the banks may define this assessment area so long as, among other things, the marketing area does not "reflect illegal discrimination" or arbitrarily exclude low-income areas. 12 C.F.R. § 25.41(e). But because the sanctions under CRA are limited, the government has tried to enforce affirmative lending obligations more vigorously by using laws such as FHA and ECOA.

This entire enterprise is legally questionable, because, as noted, neither FHA nor ECOA includes affirmative lending requirements. While the Supreme Court interpreted FHA to allow for disparate-impact liability, *see Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 543 (2015), this liability is not the same thing as affirmative marketing, lending, or hiring requirements based on race. *Id*. at 544–45. And the

Court's decision in *Inclusive Communities* led to vigorous dissents by Justice Thomas and Justice Alito, joined by Chief Justice Roberts and Justice Scalia. Foreshadowing what the Court would later say in *West Virginia v. EPA*, both dissents pointed out the illegitimacy, and constitutional dangers, of reading disparate impact liability into a statute that does not clearly support it. *See id*. at 555 (Thomas, J., dissenting); *id.* at 565 (Alito, J., dissenting). As Justice Alito put the point:

> Here, privileging purpose over text also creates constitutional uncertainty. The Court acknowledges the risk that disparate impact may be used to "perpetuate race-based considerations rather than move beyond them." *Ante,* at 2524. And it agrees that "racial quotas ... rais[e] serious constitutional concerns." *Ante,* at 2523. Yet it still reads the FHA to authorize disparate-impact claims. We should avoid, rather than invite, such "difficult constitutional questions." *Ante,* at 2524. By any measure, the Court today makes a serious mistake.

Id. at 589–90.

But whether or not Justice Alito was correct about disparate-impact liability under FHA, and whether the government was on solid or flimsy ground in attempting to impose this liability and affirmative marketing and lending requirements on banks under that law, the CFPB's effort to apply all of this—and to add race-based hiring quotas to boot—to *non-bank* mortgage companies under *ECOA* is a bridge too far. It is precisely the sort of expansion that Justice Gorsuch described as inconsistent with "self-government, equality, fair notice. . . . and the separation of powers." *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

The same is true of Regulation B and especially the CFPB's unbounded interpretation of it. Expanding ECOA's central prohibition on discrimination against applicants to statements that "would discourage" "prospective applicants" is undoubtedly a significant expansion of ECOA. *See* Townstone Mem. at 1, 4–8. And although Congress included in ECOA a general delegation to the CFPB to promulgate regulations to carry out the purposes of ECOA, *see* 15 U.S.C. 1691b(a), this is precisely the sort of broad and vague language that the Supreme Court has held, in other major questions cases, cannot justify highly consequential expansions of regulatory authority. *See*

Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2320 (2021). And the CFPB cites no cases that actually analyze the validity of Regulation B as an interpretation of ECOA.

But even if Regulation B can be justified as an interpretation of ECOA in some measure, it does not follow that the CFPB's broad interpretation of it is valid here. Indeed, when Dodd Frank transferred rulemaking authority to the CFPB in 2011, the CFPB reissued Regulation B and simultaneously issued "Supplement I," in which it provided an "official interpretation" of the regulation. As this interpretation noted, "[g]enerally, the regulation's protections apply *only to persons who have requested or received an extension of credit*." 76 Fed. Reg. 79, 422, 79,474 (Dec. 21, 2011) (emphasis added). It then notes the application of § 1002.4(b) to "prospective applicants," and gives as an example a statement that would violate said provision: "A statement that the applicant should not bother to apply, after the applicant states that he is retired." This interpretation strongly suggests that Regulation B applies only to identifiable individuals who have indicated to a creditor an intent to seek credit. While the interpretation goes on to suggest that the Regulation can also apply to advertisements that "suggest a discriminatory preference," that language is too vague to apply meaningfully, and, like the CFPB's broad interpretation of the regulation, runs smack into the First and Fifth Amendments. *See* Townstone Mem. at 12–16.

Indeed, the CFPB's broad interpretation of Regulation B is a textbook example of everything government is *not* permitted to do under the First Amendment. It is content- and viewpoint-based. Townstone Mem. at 13–15. It is vague and its scope undefined. *Id.* at 16–17. It applies to speech about political and social issues. *Id.* at 18–22. And the only way for anyone to determine whether one's speech is legal or illegal is to fight it out in court with a government agency. *See Citizens United v. FEC*, 558 U.S. 310, 336 (2010). The CFPB's interpretation of

Regulation B is precisely what clear statement rules like the major questions doctrine are designed to prevent. *See DeBartolo Corp*., 485 U.S. at 571.

The CFPB tries to avoid this conclusion by claiming that Townstone's on-air statements are an illegal transaction, no different from a "white applicants only" sign. *See* CFPB Response Br. at 16–17. Leaving aside the inflammatory comparison between Townstone's statements and such obviously racist speech, a "white applicants only" sign is qualitatively different from Townstone's on-air comments. The former unmistakably proposes a commercial transaction that is offered only on the basis of race. Unlike Townstone's statements, it is thus both obviously commercial and obviously illegal on its face, and regulating it would pose no threat of chilling or censoring protected speech. *Cf. United States v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) (FHA provision prohibiting discriminatory statements in advertising could be applied to real estate advertising company whose owner admitted to racial steering and whose statements (e.g. "we don't work with the disabled") obviously showed discrimination in a commercial transaction; thus, "[w]hile there may indeed be some cases in which the breadth of section 804(c) encroaches upon the First Amendment, this is not one of those cases.")

CONCLUSION

For the reasons stated herein and in Townstone's briefs in support of its Motion to Dismiss, CFPBs Amended Complaint should be dismissed.

Dated: July 25, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022, I filed the foregoing document via the U.S. District Court's ECF system, which will serve notice of said filing onthe following counsel for CFPB:

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Filer: Barry Sturner
Townstone Financial, Inc.
Document Number: 67

Docket Text:
MEMORANDUM by Barry Sturner, Townstone Financial, Inc. *re Supplemental Authority (ECF Nos. 65 and 66)* (Simpson, Steve)

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