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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15
16 CALIFORNIA REINVESTMENT
COALITION, NATIONAL ASSOCIATION
17 FOR LATINO COMMUNITY ASSET
BUILDERS, DEBORAH LYNN FIELD, and
18 RESHONDA YOUNG,

19 Plaintiffs,

20 v.

21 KATHLEEN L. KRANINGER, Director,
Consumer Financial Protection Bureau,
22 In Her Official Capacity and CONSUMER
FINANCIAL PROTECTION BUREAU,

23 Defendants.
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27
28

No. 4:19-cv-02572-JSW

**PLAINTIFFS' REPLY IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT, AND
OPPOSITION TO DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT**

Date: January 10, 2020
Time: 9:00 a.m.
Dept: Courtroom 5, 2nd Floor
Judge: Hon. Jeffrey S.White

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I. INTRODUCTION

1
2 The Consumer Financial Protection Bureau concedes that it has failed to fulfill its
3 nondiscretionary duty to implement a federal statute enacted to combat discrimination in lending to
4 small businesses. The Bureau admits that “small businesses, including those owned by women and
5 minorities, are critical engines for economic growth”; that “[a]ccess to financing is a crucial
6 component of the success of these businesses”; and that implementing Dodd-Frank Act’s small
7 business lending transparency requirement serves the “important” interest of “increas[ing] public
8 data about small business lending.”¹ It acknowledges that the Dodd-Frank Act requires it to issue
9 regulations implementing Section 1071. And the Bureau concedes that even though it has now had
10 more than eight years to do so, it has failed to issue a rule, and it appears to be no closer to doing so
11 than it was in Fall 2017.

12 Still, the Bureau urges the Court not to exercise its power to order CFPB to fulfill its
13 mandatory duty to implement the statute. It claims that its delay is not unreasonable because it has
14 “many other pressing obligations,” CFPB MSJ at 1, and because it says it is working on a rule, even
15 though it will not commit even to the drawn-out timeline it offers the Court. By the time the Bureau
16 says it *may* issue even a *proposed* rule, in 2021 *or later*, it will be more than a decade overdue.

17 Eight years is enough. Without this Court’s intervention, the Bureau will continue to kick the
18 can down the road on its statutory obligation. Plaintiffs—small business owners and organizations
19 that seek to foster and promote small business development—have waited since 2011 for the Bureau
20 to implement Congress’s clear command, and nothing in the Bureau’s filing suggests that its
21 recalcitrance to do what Congress has required will change anytime soon. As long as the Bureau
22 continues to delay, the statute remains a dead letter, and Plaintiffs will be deprived of the data they
23 need to ensure that the fair lending laws are complied with and small business credit needs are
24 addressed. The Court should therefore order the Bureau to comply with its long-overdue duty to
25 implement Section 1071 on a prompt and definite timeline.

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¹ See Declaration of Thomas Pahl, filed concurrently with CFPB MSJ (“Pahl Decl.”), ¶ 15 & Ex. 2 (remarks of CFPB Director Kathy Kraninger); CFPB MSJ at 18.

II. ARGUMENT

A. For More Than Eight Years, CFPB Has Stalled and Delayed Implementation of Section 1071

The Bureau wisely does not dispute that it is required to implement Section 1071. *See* CFPB MSJ at 12 n.2. The statute is clear. *See* 15 U.S.C. § 1691c–2(g) (providing that Bureau “shall” prescribe rules and issue guidance as necessary to carry out statute, including compliance guidance; *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 172 (1997) (“shall” ordinarily denotes a mandatory duty). And the agency itself has repeatedly acknowledged its nondiscretionary duty going back to 2011.² Yet, even though it promised in April 2011 that it would “act expeditiously” to develop and issue the “necessary implementing regulations,”³ the Bureau’s actions have been anything but expeditious.

To the contrary, the Bureau’s path as regards Section 1071 has been one of frequent stops, occasional starts, and repeated delays—a pattern that appears likely to continue for years to come without the Court’s intervention. In December 2012, some 20 months after its April 2011 assurance that it would “act expeditiously,” CFPB was only able to report that it had “begun the planning process to promulgate rules” implementing Section 1071, and that it was “currently gathering information from stakeholders.”⁴ There had been little evident progress by two and a half years after that, when, in April 2015, CFPB again reported that it had only just “begun preliminary planning” for implementing the statute.⁵ And five years after it promised to “act expeditiously,” in Spring 2016, CFPB still had to perform the basic initial steps of “outreach and research.”⁶ It would take fully

² *See* Declaration of Jeffrey Dubner, filed concurrently with Pl. MSJ (“Dubner Decl.”), Ex. 3, Letter from Leonard Kennedy, General Counsel, CFPB, to Chief Executive Officers of Financial Institutions under Section 1071 of the Dodd-Frank Act (Apr. 11, 2011), <https://files.consumerfinance.gov/f/2011/04/GC-letter-re-1071.pdf> (“Kennedy Letter”) at 1; *see also* Pl. MSJ at 14 (citing other examples of CFPB’s acknowledgment of its mandatory duty).

³ Kennedy Letter at 1.

⁴ Dubner Decl., Ex. 4, CFPB, *Fair Lending Report of the Consumer Financial Protection Bureau* (Dec. 2012) at 25-26.

⁵ Dubner Decl., Ex. 5, CFPB, *Fair Lending Report of the Consumer Financial Protection Bureau* (Apr. 2015) at 32-33.

⁶ Dubner Decl., Ex. 6, CFPB, *Spring 2016 Unified Agenda: Business Lending Data (Regulation B)*.

1 another year before the very first tangible steps toward implementation occurred. During Spring and
 2 Summer 2017, CFPB solicited, and received, comments from various stakeholders, many of whom
 3 urged the Bureau to move quickly to implement the statute.⁷ The Bureau thereafter targeted a prerule
 4 activity date of May 2018. Compl. ¶ 39.⁸

5 These signs of progress offered some promise to Plaintiffs and stakeholders eager to see the
 6 statute finally implemented. Once Mick Mulvaney took over as Acting Director, however, all
 7 progress ground to a halt. At Mulvaney's direction (*see* Pahl Decl. ¶¶ 7-8), the CFPB decided to stop
 8 its Section 1071 implementation activities altogether (an action the Bureau charitably calls a
 9 "temporar[y] pause," Pahl Decl. ¶ 7), reassigning staff to other matters and further delaying its
 10 estimated prerule activities by 10 months in Spring 2018, and then removing Section 1071
 11 implementation from its near-term agenda altogether in its Fall 2018 Regulatory Agenda, stating that
 12 it instead preferred to focus its resources on entirely discretionary revisions to its Home Mortgage
 13 Disclosure Act regulations (for which it had already completed all mandatory rulemakings).⁹ Far
 14 from expressing any interest in continuing to discuss Section 1071 implementation, Acting Director
 15 Mulvaney fired all 25 members of the CFPB's Consumer Advisory Board shortly after Plaintiff
 16 CRC's Executive Director, who served on the board, advocated for CFPB to fulfill its statutory duty
 17 to implement Section 1071.¹⁰ This is not the record of an agency making good-faith efforts to
 18 comply with a statutory mandate.

19 The Bureau half-heartedly attempts to explain its repeated delays in complying with
 20 Congress's command by saying it was busy with other things. But the public record shows that the
 21 Bureau did not implement Section 1071 not because it could not, but because *it did not want to*. The
 22 Bureau does not try to dispute the fact that its decision to revise its Home Mortgage Disclosure Act
 23

24 ⁷ See Request for Information Regarding the Small Business Lending Market; Extension, 82 Fed.
 25 Reg. 32,177 (July 12, 2017).

26 ⁸ See Office of Information and Regulatory Affairs, Fall 2017 Regulatory Agenda, RIN 3170-
 27 AA09, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=3170-AA09>.

28 ⁹ Dubner Decl., Ex. 8, CFPB, *Fall 2018 Rulemaking Agenda* (Oct. 17, 2018).

¹⁰ Declaration of Paulina Gonzalez Brito, filed concurrently with Pl. MSJ (Gonzalez-Brito Decl.),
 ¶¶ 18-19.

1 regulations was entirely discretionary—effectively elevating the Bureau’s own preferences above a
2 clear and undisputed congressional mandate to implement Section 1071. To be sure, the Bureau
3 provides a laundry list of other matters it has handled during its existence. *See* Declaration of David
4 Silberman, filed concurrently with CFPB MSJ, ¶¶ 7-21. There is little doubt that every government
5 agency could produce a similar list of matters; government agencies must be, and are, built to be able
6 to do more than one thing at a time.

7 But the Bureau cannot seriously argue that it lacks the resources it needs to do what Congress
8 has required. Such a claim is irreconcilable with the Bureau’s unique, dedicated funding structure
9 through which its resources are not appropriated by Congress, but rather are provided upon request
10 by the Federal Reserve. In each quarter during the relevant time period, the Bureau has received all
11 the funds it has sought from the Federal Reserve.¹¹ And in the same year that CFPB decided to halt
12 its implementation of Section 1071, its Acting Director requested \$0 in funding for an entire quarter,
13 stating in his letter to Chairperson Yellen: “I have been assured that the *funds currently in the Bureau*
14 *Fund are sufficient for the Bureau to carry out its statutory mandates* for the next fiscal quarter.”¹²
15 Section 1071 is such a statutory mandate, and thus Acting Director Mulvaney was implicitly stating
16 that the Bureau had sufficient funds to carry out the Section 1071 rulemaking. Indeed, at the same
17 time that the Bureau decided it had to halt its Section 1071 implementation to focus its limited
18 resources on other projects, the overall level of funding it requested (and received) from the Federal
19 Reserve dropped nearly in half, from \$602 million in Fiscal Year 2017 to \$381.3 million in Fiscal
20 Year 2018.¹³ It is thus impossible to credit the Bureau’s new claims of a resource crunch without
21

22
23 ¹¹ *See* CFPB, Funds Transfer Requests, <https://www.consumerfinance.gov/about-us/budget-strategy/funds-transfer-requests/>.

24 ¹² *See* Letter from Mick Mulvaney, Acting Director, CFPB, to Hon. Janet L. Yellen, Chair, Board
25 of Governors of the Federal Reserve System (Jan. 17, 2018) (Mulvaney Letter),
26 https://files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf;
27 *see also* Compl. ¶ 41 (citing Jim Puzzaghera, Mulvaney Requests Zero Funding for the Consumer
28 Financial Protection Bureau, L.A. Times, Jan. 18, 2019, <https://www.latimes.com/business/la-fi-cfpb-mulvaney-funding-20180118-story.html> (letter linked in article)).

¹³ These calculations are arrived at by totaling the respective funding requests for each fiscal year as provided on CFPB’s website, *see supra* note 11.

1 calling into question the Bureau’s prior candor regarding its ability to move forward on Section
2 1071.

3 In sum, by 2018, Section 1071 implementation had ground to a complete halt. *See* Pahl Decl.
4 ¶ 7. This was the latest, and most complete, stoppage of work on the rule in an eight-year pattern of
5 repeated stalling and stonewalling, a course the Bureau has willfully chosen over complying with its
6 mandatory duty to implement the rule and protect small businesses.

7 **B. Without Court Intervention, CFPB Will Continue to Delay Its Implementation of**
8 **Section 1071**

9 After this lawsuit was filed, CFPB vaguely announced that it would “recommence work later
10 this year” on prerule activities.¹⁴ Now, for the first time in its summary judgment brief, the Bureau
11 sketches out a broad view of what an implementation timeline *could* look like. By the Bureau’s
12 rough timeline, Plaintiffs could be left with no relief for another three years or more. But even this
13 timeline is ephemeral: despite its protests that it is working on implementing Section 1071, the
14 Bureau refuses to commit to a concrete timeline for implementation, pointedly avoiding any
15 assurances that it will meet the schedule it outlines. The vagueness and drawn-out nature of the
16 Bureau’s timeline only underscores its lack of seriousness with regard to promptly implementing
17 Section 1071. To wit:

- 18 • Even though the Bureau claims it has been planning to continue its work on Section
19 1071 since at least March 6, 2019, *see* Pahl Decl. ¶ 13, the Bureau indicates it plans to
20 wait another six months from November 2019 before so much as briefing the CFPB
21 Director on “the major legal, policy, and economic issues” to be addressed in the
22 rulemaking. This is a total of 14 months from when the Bureau first claims to have re-
23 initiated its preparation for implementation simply to brief the Director on the issues
24 presented by the rulemaking. CFPB MSJ at 10. It is hard to understand why this
25 briefing process has not already occurred. (May 2020)

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28 ¹⁴ Dubner Decl., Ex. 9, CFPB, *Spring 2019 Rulemaking Agenda* (May 22, 2019).

- 1 • Then, the CFPB says it will need *six months more* to prepare the Small Business
2 Regulatory Enforcement Fairness Act (SBREFA) outline of the rulemaking. CFPB
3 MSJ at 10. Again, given the Bureau’s insistence that it has been hard at work on
4 preparing for implementation these last eight years, it defies reason why an additional
5 six months would be needed after briefing the Director simply to prepare an outline.
6 (November 2020)
- 7 • Next, the Bureau will have to wait two months for the report of the SBREFA panel
8 that is required to review rules affecting small businesses. CFPB MSJ at 10. (January
9 2021)
- 10 • Only then, according to the Bureau, will it even *share* an expected date for issuing a
11 *proposed* rule—and even then it will not suggest a timeline for a final rule. It says that
12 the timeline for a proposed rule from this point could be anywhere from *three months*
13 *to a year*. CFPB MSJ at 10 (April 2021-January 2022)
- 14 • After that, issuance of a final rule will take “*at least nine months*,” but possibly
15 “*longer*.” CFPB MSJ at 11. (January 2022-October 2022 or later)

16 This drawn-out timeline—which the Bureau offers but to which it pointedly does not
17 commit—only underscores its reluctance to comply with Congress’s mandate. For instance, the
18 Bureau proposes to take an additional year from November 2019 simply to brief the Director on the
19 issues involved and to write the SBREFA outline. The declarations submitted by Bureau employees
20 provide no plausible justification for why these tasks would take so long, particularly in light of the
21 amount of work the Bureau claims to have already put into implementation: the Bureau insists that it
22 has “already completed” “substantial research and outreach” on implementation. CFPB MSJ at 13.
23 Why, then, it needs a total of 20 months since it first determined it would restart the rulemaking
24 process to prepare an outline is difficult to comprehend. Nor does the Bureau explain how many staff
25 it has dedicated to Section 1071 implementation, either in the past, present, or future, information
26 without which it is impossible to assess the credibility of its claims that it genuinely needs two to
27 three years or more to implement the statute.

1 The Bureau also ignores the fact that when a rulemaking has been a genuine agency priority,
2 it has been able to move with much greater speed. Take, for example, the Bureau’s mortgage
3 servicing, origination, and disclosure rulemakings, a highly complex, technical, and interconnected
4 set of 2013 rules. The Bureau issued these rules on a very rapid timeframe despite not having had the
5 benefit of years of research and outreach as here, reaching finalization within two years of their very
6 first appearance on the regulatory agenda.¹⁵ In those cases, the Bureau was able to publish a
7 SBREFA outline about six months from the first appearance in the regulatory agenda, and proposed
8 rules about three months after SBREFA approval.

9 The complexity and degree of difficult decisionmaking involved in the mortgage rules—one
10 of which occupies 636 pages of the Federal Register—bears no comparison to Section 1071, which is
11 relatively specific and nondiscretionary.¹⁶ To be sure, as is the case for any rulemaking, there are
12 decisions to be made, which the Bureau describe in painstaking detail as if it is providing schematics
13 for reinvention of the wheel. But in reality, the decisions are fairly cabined and discrete, given the
14 relatively specific and mandatory nature of the language of Section 1071. *See, e.g.*, 15 U.S.C. §
15 1691c-2(e) (describing specific items of information to be collected and prescribing manner of
16 itemization); *see also id.* § 1691c-2(h) (defining various terms including “financial institution,”
17 “small business,” and “minority”). Moreover, the Bureau claims it is able to “leverage[] the
18 substantial research and outreach that the Bureau has already completed in support of the Section

19
20 ¹⁵ *See* CFPB, Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act
21 (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730 (Dec. 31, 2013),
22 [https://www.federalregister.gov/documents/2013/12/31/2013-28210/integrated-mortgage-](https://www.federalregister.gov/documents/2013/12/31/2013-28210/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the)
23 [disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the](https://www.federalregister.gov/documents/2013/12/31/2013-28210/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the); CFPB, Loan
24 [Originator Compensation Requirements Under the Truth in Lending Act \(Regulation Z\)](https://www.federalregister.gov/documents/2013/02/15/2013-01503/loan-originator-compensation-requirements-under-the-truth-in-lending-act-regulation-z), 78 Fed.
25 [Reg. 11,280 \(Feb. 15, 2013\)](https://www.federalregister.gov/documents/2013/02/15/2013-01503/loan-originator-compensation-requirements-under-the-truth-in-lending-act-regulation-z), [https://www.federalregister.gov/documents/2013/02/15/2013-](https://www.federalregister.gov/documents/2013/02/15/2013-01503/loan-originator-compensation-requirements-under-the-truth-in-lending-act-regulation-z)
26 [01503/loan-originator-compensation-requirements-under-the-truth-in-lending-act-regulation-z](https://www.federalregister.gov/documents/2013/02/15/2013-01503/loan-originator-compensation-requirements-under-the-truth-in-lending-act-regulation-z);
27 CFPB, Mortgage Servicing Rules Under the Truth in Lending Act (Regulation X), 78 Fed. Reg.
28 [10,902 \(Feb. 14, 2013\)](https://www.federalregister.gov/documents/2013/02/14/2013-01248/mortgage-servicing-rules-under-the-real-estate-settlement-procedures-act-regulation-x), [https://www.federalregister.gov/documents/2013/02/14/2013-](https://www.federalregister.gov/documents/2013/02/14/2013-01248/mortgage-servicing-rules-under-the-real-estate-settlement-procedures-act-regulation-x)
[01248/mortgage-servicing-rules-under-the-real-estate-settlement-procedures-act-regulation-x](https://www.federalregister.gov/documents/2013/02/14/2013-01248/mortgage-servicing-rules-under-the-real-estate-settlement-procedures-act-regulation-x). The
timelines can be ascertained by viewing the associated dockets and RIN pages for each rule, which
are accessible from the rules’ Federal Register web pages, provided above.

26 ¹⁶ In November 2019, the Bureau announced a decision to revisit one of these 2013 mortgage
27 rules, another example of it elevating its discretionary priorities over its mandatory duty to
28 implement Section 1071. *See* CFPB, Consumer Financial Protection Bureau to Assess Integrated
Mortgage Disclosure Rule (Nov. 20, 2019), [https://www.consumerfinance.gov/about-](https://www.consumerfinance.gov/about-us/newsroom/bureau-to-assess-integrated-mortgage-disclosure-rule/)
[us/newsroom/bureau-to-assess-integrated-mortgage-disclosure-rule/](https://www.consumerfinance.gov/about-us/newsroom/bureau-to-assess-integrated-mortgage-disclosure-rule/).

1 1071 rulemaking.” CFPB MSJ at 13. If that it so, then it is unclear why an additional year is needed
2 before the Bureau can even provide an outline of how it plans to proceed.

3 The Bureau expects to issue this mandatory rule—but still will not commit to doing so—
4 sometime in 2022 or later. In other words, Defendants ask this Court to countenance a virtually
5 unprecedented delay of 11 years to fulfill what the Bureau itself admits is an important statutory
6 obligation. And as long as the Bureau delays, the statute has no effect whatsoever, stymying
7 Congress’s express command to collect critical data for deterring and identifying fair lending
8 violations and ameliorating credit deserts. In the interim, small business owners and would-be female
9 and minority entrepreneurs will continue to face the barriers that Congress sought to overcome, as
10 exemplified by Ms. Young and Ms. Field. The Court should exercise its authority to prevent such a
11 result.

12 **C. The *TRAC* Factors Compel Judicial Relief**

13 The equitable *TRAC* factors strongly support judicial relief. For the reasons discussed above,
14 the Bureau’s delay has been unreasonable and unjustified, and its loose outline of a potential
15 implementation timeline inspires no confidence that the Bureau’s dilatoriness will change without
16 judicial intervention. Defendants find no support for their claim that the Court should refrain from
17 exercising its equitable power to fashion appropriate relief despite the Bureau’s delay to date of eight
18 years—much less the eleven years Defendants anticipate will have elapsed before the Bureau may
19 finally comply with its statutory obligations. And just as Defendants do not challenge Plaintiffs’
20 standing to bring this suit, there is no disputing the very real impact the Bureau’s failure has had on
21 Plaintiffs and other small business owners and prospective owners who have been denied credit, or
22 offered less than they need or only on disadvantageous terms. In these circumstances, the Court
23 should not stay its hand.

24 **1. The Length of Delay is Unreasonable**

25 The Ninth Circuit has held that the first *TRAC* factor—the reasonableness of the delay—is
26 the most important. *See In re A Community Voice*; 878 F.3d 779, 786 (9th Cir. 2017). For the reasons
27 discussed above, the Bureau has little to say in its favor on that point. In arguing that the first two
28 *TRAC* factors do not support relief, CFPB identifies no cases in which a court has sustained a

1 complete failure to implement a statutory command for as long as the Bureau has failed to implement
2 Section 1071 to date—much less the eleven-plus years it anticipates. Indeed, as discussed in
3 plaintiffs’ motion for summary judgment, the Ninth Circuit has twice found a delay of the exact
4 same length at issue so far here—eight years—to be excessive. *See* Pl. MSJ at 15 (citing *In re A*
5 *Community Voice*; 878 F.3d 779, 787 (9th Cir. 2017); *In re Pesticide Action Network of N. Am.*, 798
6 F.3d 809, 814 (9th Cir. 2015) (“*PANNA II*”). And the D.C. Circuit has consistently found delays of
7 a similar length or even shorter to be unreasonable. *See id.* at 15-16 (citing *Potomac Elec. Power Co.*
8 *v. ICC*, 702 F.2d 1026, 1035 (D.C. Cir. 1983) (eight-year delay was unreasonable); *MCI Telecomms.*
9 *Corp. v. FCC*, 627 F.2d 322, 324 (D.C. Cir. 1980) (four-year delay was unreasonable); *Nader v.*
10 *FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (ten-year delay was unreasonable)).

11 The Bureau’s reliance on the absence of a specific statutory deadline here is a red herring.
12 None of the cases relied on above involved a specific deadline, and in this Circuit, the *TRAC* factors
13 only apply when there is no such deadline. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166,
14 1177 n.11 (9th Cir. 2002). The second *TRAC* factor, whether Congress has itself provided a deadline,
15 primarily informs the application of the first and primary factor, the reasonableness of delay—in
16 other words, a statutory deadline “may supply content for this rule of reason.” *Brower v. Evans*, 257
17 F.3d 1058, 1068 (9th Cir. 2001) (quoting *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 n.7
18 (9th Cir. 1997)). In the absence of such a deadline, the Court simply determines the reasonableness
19 of delay under the first factor, and there the Bureau’s argument fails.

20 In response, the Bureau cites two D.C. Circuit cases, neither of which is on point. One case
21 concerned a delay of five years to respond to a particular petition for tribal recognition under a
22 program that handled those petitions on a first-in, first-out basis. *See CFPB MSJ* at 13 (citing
23 *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003)). The
24 delay there was substantially shorter than that in issue here. Moreover, there was no claim that the
25 agency had failed to implement the statute. Rather, it was working through a backlog of petitions
26 under the statutory program—a different situation than the Bureau’s complete inaction here. The
27 other case involved a challenge to a consummated rule that was alleged to *inadequately* implement a
28 statute. *See id.* (citing *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 477-78 (D.C. Cir. 1998).

1 There, the agency first issued one rule implementing restrictions on Grand Canyon overflights and
2 then, based on the effects of that first rule, began work on follow-up measures. *See* 154 F.3d at 477
3 (noting that statute “contemplated that the agencies’ first plan might not succeed and might have to
4 be revised—as the agencies have done in the regulatory plan at issue here”). Again, it would be one
5 thing if the Bureau had issued a rule implementing Section 1071 that had proven inadequate over
6 time. Rather, the Bureau has failed entirely to give any effect to the law for more than eight years.
7 That is the problem here, and the Bureau can point to no cases in which courts have countenanced
8 such prolonged disregard for a clear legislative command.

9 The Bureau further states that the Court should not act because it has a plan for
10 implementation. As discussed in greater detail above, the Bureau’s plan falls far short of what is
11 required, both because it refuses to commit to any concrete timeline, and because even its *potential*
12 timeframe for completion of a rule would likely leave Plaintiffs with no relief for another three years
13 or more. The Bureau’s unwillingness to commit to an expeditious and concrete timeframe is
14 especially surprising given its insistence that it has already completed “substantial research and
15 outreach” toward implementation. CFPB MSJ at 13.

16 The Bureau next relies on *In re Pesticide Action Network of N. Am.*, 532 F. App’x 649, 651
17 (9th Cir. 2013) (“*PANNA I*”), for the proposition that an agency’s concrete timeline for action
18 militates against relief. In fact, that case provides a useful contrast and cautionary lesson. There, the
19 court initially denied a mandamus petition despite six years of inaction because the agency provided
20 a “concrete timeline” in which it committed to completion of final action within seven months. *Id.*
21 That stands in stark contrast to this case, where the Bureau has been anything but concrete as to its
22 plans, and has suggested it will take nearly three years to complete its rulemaking at a minimum.
23 That difference alone plainly distinguishes the cases. But back to *PANNA*: two years after the initial
24 denial, the petitioner came back to court because the government had not fulfilled its promise even
25 though the petitioner had, by that point, waited eight years. *PANNA II*, 798 F.3d at 812 (“As an
26 astute reader might have guessed, EPA’s timeline proved not to be ‘concrete.’”). In *PANNA II*, as
27 here, the agency “has spent nearly a decade reviewing” the materials underpinning its action. *Id.* at
28 813. And just as the Bureau has broken its 2011 promise that it would “act expeditiously” to

1 implement Section 1071, the EPA had failed to meet its own assurances as to when it would meet its
2 mandatory duty. And here, as there, “the agency has still not stated with certainty when it intends” to
3 complete its required action. So, just as in *PANNA II*, relief “is necessary to end this cycle.” *Id.*

4 2. **The Bureau’s Contemplated Delay Will Substantially Harm Plaintiffs and the
5 Public**

6 The third and fifth TRAC factors—which involve the nature of the interests harmed by
7 delay—favor relief because, as Plaintiffs explained in their motion for summary judgment, every day
8 that the Bureau fails to enact Section 1071 harms the organizational plaintiffs in their efforts to
9 ensure that the fair lending laws are properly enforced and that needs and opportunities for
10 increasing credit access for small businesses, especially those that serve communities of color, are
11 identified and addressed. Plaintiff CRC faces major challenges to identify which communities are
12 most in need and what a given financial institution’s existing practices are, which it needs to
13 convince financial institutions to agree to provide additional investment in communities that face
14 barriers to accessing credit. Gonzalez-Brito Decl. ¶ 8. Plaintiff NALCAB has spent many tens of
15 thousands of dollars so far to develop research into lending practices and barriers to credit. *See*
16 Declaration of Noel Poyo, filed concurrently with Pl. MSJ, ¶¶ 9-10. But even these enormous efforts
17 cannot come close to filling the information gap left by the Bureau’s failure to implement the statute.
18 *Id.* ¶ 10. Indeed, Defendants do not even try to dispute that Plaintiffs are injured by their ongoing
19 delay, conceding standing and leaving Plaintiffs’ declarations unopposed.

20 Nor is the desire for swift implementation limited to Plaintiffs; rather, the desire for the
21 Bureau to comply with its duty and promptly implement Section 1071 was further underscored by
22 the Bureau’s symposium on November 6, 2019, which reflected a broad consensus among affected
23 stakeholders, including from the regulated community, that it is well past time for the law to be
24 implemented.¹⁷ For example, a Vice President of American Express, a financial institution subject to
25 the law’s data collection requirements, began his testimony by stating, “When the Dodd-Frank Act

26
27 ¹⁷ *See* CFPB, Symposium: Section 1071 of the Dodd-Frank Act (Nov. 6, 2019),
28 <https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-section-1071-dodd-frank-act/>.

1 was signed into law on July 21, 2010 probably no one envisioned that one of its provisions related to
2 the collection of small business data would still be unimplemented more than nine years later.”¹⁸ He
3 continued: “Getting a rule in place expeditiously that may not be perfect, but accomplishes the
4 primary purpose of the provision, should be a priority.”¹⁹

5 A professor from Brigham Young University the Bureau invited to speak on Section 1071
6 implementation explained the research underpinning his conclusion that “[t]he availability of data
7 and information along the consumer’s journey to access capital is of paramount importance if
8 markets are to improve for all consumers.”²⁰ Accordingly, he and his co-authors concluded that “the
9 potential costs of reporting the data called for in Section 1071 are far outweighed by the illumination
10 and marketplace transparency those data have power to provide.”²¹

11 The Bureau responds that human health is not at risk. CFPB MSJ at 18. True; rather, what is
12 at issue is, in the Bureau’s own words, the need to support the “vital role” of small businesses “in
13 driving economic activity and supporting job creation.”²² As Plaintiffs and stakeholders in the
14 financial community have stated, data transparency is critical to ensuring that the small business
15 sector can continue to be a significant engine for American economic growth. The Bureau appears to
16 concede that the rule serves important economic and antidiscriminatory purposes. That it is economic
17 in nature rather than related to human health serves as no bar to relief. Indeed, the D.C. Circuit cases
18 upon which Plaintiffs rely all involved failures to enact *economic* regulations for a similarly lengthy
19 period of time. *See Potomac Elec. Power Co.*, 702 F.2d at 1035 (failure to adjudicate coal
20 transportation rate protest); *MCI Telecomms. Corp.*, 627 F.2d at 324 (failure to revise
21

22 ¹⁸ Statement of Brad Blower, Vice President, Consumer Practices, American Express (Nov. 6,
23 2019) at 1 (“Blower Statement”), [https://files.consumerfinance.gov/f/documents/cfpb_blower-
24 written-statement_symposium-section-1071.pdf](https://files.consumerfinance.gov/f/documents/cfpb_blower-written-statement_symposium-section-1071.pdf).

25 ¹⁹ *Id.*

26 ²⁰ Statement of Glenn L. Christensen, Associate Professor of Marketing, Brigham Young
27 University (Nov. 6, 2019) at 7, [https://files.consumerfinance.gov/f/documents/cfpb_christensen-
28 written-statement_symposium-section-1071.pdf](https://files.consumerfinance.gov/f/documents/cfpb_christensen-written-statement_symposium-section-1071.pdf).

²¹ *Id.*

²² See Dubner Decl., Ex. 1, CFPB, *Key Dimensions of the Small Business Lending Landscape*, at
39 (May 2017).

1 telecommunications rates); *Nader v. FCC*, 520 F.2d at 206 (failure to respond to complaints
 2 regarding telecommunications rate increases). And the Bureau’s claim that the rule may hurt small
 3 businesses is inconsistent with the testimony of industry stakeholders indicating that implementation
 4 of the statute in a manner that benefits small business owners and the public at large should in fact be
 5 a fairly straightforward endeavor—by and large, the Bureau need only stick to the law’s own
 6 mandatory terms.²³

7 3. The Bureau’s Contemplated Delay Will Substantially Harm Plaintiffs and the 8 Public

9 The fourth and sixth factors—which focus on the reasons for delay—also favor judicial relief.
 10 The Bureau describes various projects across the agency, most of which have nothing whatsoever to
 11 do with Section 1071, without explaining how its staffing of those projects would overlap with its
 12 staffing for Section 1071 implementation or how those projects might otherwise suffer from
 13 expeditious progress on Section 1071. Nor does the Bureau explain how it has staffed its Section
 14 1071 implementation team to this point (or if such a team even exists), or any other details about the
 15 resources it is bringing to bear—or declining to tap—to increasing the size and skill of that team. *See*
 16 *Pahl Decl.* ¶¶ 62-70. Without this information, it is impossible to assess the Bureau’s claims that its
 17 drawn-own timetable is the fastest it could reasonably be expected to comply with its statutory
 18 mandate. And, as discussed above, the Bureau is in a unique position relative to other federal
 19 agencies to determine its resource and staffing levels, and it has stated clearly that its funding levels
 20 are “sufficient for the Bureau to carry out its statutory mandates.”²⁴ Accordingly, its complaints that
 21 its resources would be overtaxed by implementing Section 1071 any faster are not well founded. And
 22 in any event, such arguments only go so far. They do not justify a decade of delay. “However many
 23 priorities the agency may have, and however modest its personnel and budgetary resources may be,
 24

25
 26 ²³ *See* Blower Statement, *supra* note 18, at 1 (“The Bureau can meet the purpose of Section 1071
 27 by issuing a simple, workable definition of small business that both lenders and small business
 applicants can follow, and by closely adhering to the language of Section 1071 related to the
 categories of information collected.”).

28 ²⁴ Mulvaney Letter, *supra* note 12.

1 there is a limit to how long it may use these justifications to excuse inaction.” *In re United Mine*
2 *Workers of Am. Int’l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999).

3 Finally, the Bureau suggests that because Plaintiffs do not directly accuse the Bureau of bad
4 faith, the sixth factor does not favor relief. CFPB MSJ at 21-22. But the Bureau misses the whole
5 point of *TRAC* factor six, which is to make clear that bad faith is not required: “the court need not
6 ‘find any impropriety lurking behind agency lassitude in order to hold that agency action is
7 unreasonably delayed.’” *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)
8 (quoting *Public Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984)). In any
9 event, and as discussed above, CFPB’s record of inaction with respect to Section 1071 is difficult to
10 reconcile with the image the Bureau attempts to paint of an agency working in good faith to comply
11 with a mandatory statutory obligation. *See supra* at 2-5. The Bureau admits that it completely shut
12 down its Section 1071 implementation program last year in favor of discretionary actions, despite
13 being well aware of its mandatory duty to implement it and having promised all the way back in
14 2011 that it would “act expeditiously” to do so. And even now, the Bureau will not commit to a
15 specific and proximate timeline for implementation. These are not the actions of an agency that
16 should be relied upon to fulfill its duty without the Court’s intervention. “At some point, we must
17 lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.”
18 *Public Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

19 **D. The Court Should Hold the Bureau to a Specific and Proximate Timeline for**
20 **Implementation**

21 After more than eight years of delays and halts, the Bureau assures the Court that it actually
22 intends to implement the statute this time—but then refuses to commit to any concrete timeline for
23 implementation, much less one that will afford Plaintiffs the relief they seek anytime soon. Given the
24 Bureau’s lengthy history of failing to act on its mandatory duty, the Court should exercise its
25 equitable discretion to direct the Bureau to adhere to a definite timeline that will ensure Plaintiffs—
26 and the entire affected community—the certainty they seek as to implementation of this long-
27 overdue statutory duty.

1 DATED: November 26, 2019

Respectfully submitted,

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