IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BANK POLICY INSTITUTE, OHIO CHAMBER OF COMMERCE, OHIO BANKERS LEAGUE, AMERICAN BANKERS ASSOCIATION and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Plaintiffs,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant.

Case No. 2:24-cv-04300
District Judge Algenon L. Marbley
Magistrate Judge Chelsey M. Vascura

Oral Argument Requested

Ruling Requested By October 31, 2025

Plaintiffs' Motion For Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 7.2 of the Local Civil Rules of the United States District Court for the Southern District of Ohio, Plaintiffs move this Court for summary judgment on all of their claims. The grounds for this Motion are set forth in the accompanying Memorandum in Support. Additionally, five declarations are attached as Exhibits 1–5 in support of this Motion. To ensure that the Board can implement necessary reforms to the stress tests in time for the 2026 cycle, Plaintiffs respectfully request a decision by October 31, 2025.

Plaintiffs request oral argument pursuant to Local Rule 7.1(b)(2). This case involves important administrative-law, statutory, and constitutional issues regarding the Board of Governors of the Federal Reserve System's stress-testing process as it relates to billions of dollars in binding capital requirements for the nation's largest banks. Accordingly, Plaintiffs respectfully submit that oral argument would assist the Court in its decisionmaking process.

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Respectfully submitted,

/s/ James A. King
James A. King (No. 0040270)
Trial Attorney
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street, Suites 2800 - 3200
Columbus, OH 43215
Telephone: (614) 227-2051
jking@porterwright.com

/s/ Eugene Scalia
Eugene Scalia*
Matt Gregory*
Max E. Schulman*
Giuliana C. Cipollone*
Olivia R. Goldberg*
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W., Washington, D.C. 20036
Telephone: (202) 955-8500
escalia@gibsondunn.com

Attorneys for Plaintiffs Bank Policy Institute, Ohio Chamber of Commerce, Ohio Bankers League, American Bankers Association, and Chamber of Commerce of the United States of America

Don Boyd (No. 0089180)
OHIO BANKERS LEAGUE
4215 Worth Avenue, Suite 300
Columbus, OH 43219
Telephone: (614) 340-7595

Attorney for Plaintiff Ohio Bankers League

John Court*
Sarah Flowers*
BANK POLICY INSTITUTE
1300 Eye Street, N.W., Suite 1100 West
Washington, D.C. 20005
Telephone: (202) 289-4322

Attorneys for Plaintiff Bank Policy Institute

Thomas J. Pinder*
Andrew Doersam*
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 663-5035

Attorneys for Plaintiff American Bankers Association

Tony Long (No. 0037784)*
OHIO CHAMBER OF COMMERCE
34 South Third Street, Suite 100
Columbus, OH 43215
Telephone: (614) 228-4201

Attorney for Plaintiff Ohio Chamber of Commerce

Jennifer Bandy Dickey*
Jordan L. Von Bokern**
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

Attorneys for Plaintiff Chamber of Commerce of the United States of America

*Admitted *pro hac vice*
**Application for admission *pro hac vice* pending

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The models and scenarios "have the 'force and effect of law'" and "impose new . . . duties and change the legal status of regulated parties." *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022). Accordingly, they must be subject to notice and comment under the Administrative Procedure Act. On similar facts, the D.C. Circuit held that an EPA model was a legislative rule even where, unlike here, the model did not *directly* impose legal obligations on the public. *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988); *see also Batterton v. Marshall*, 648 F.2d 694, 704–08 (D.C. Cir. 1980); *Tennessee Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1046 (6th Cir. 2018).

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The Board's annual stress tests—including the models and scenarios—also implement express statutory delegations and are therefore "a quintessential legislative rule." *Mann*, 27 F.4th at 1144. The stress tests implement the Dodd-Frank Act, which directs the Board to "conduct annual analyses" to evaluate "whether [banks] have the capital, on a total consolidated basis, necessary to absorb losses as a result of adverse economic conditions." 12 U.S.C. § 5365(i)(1)(A). And the stress-capital buffer was adopted pursuant to the Board's statutory authority to "issue . . . regulations and orders relating to the capital requirements for bank holding companies" and collect reports about the financial condition of banks. 12 U.S.C. § 1844(b), (c).

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"[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see* U.S. Const. amend. V. Here, the Board's refusal to fully disclose the models underlying its stress-test process "fails to comply with due process" because the Board's secrecy deprives "a person of ordinary intelligence fair notice of" the criteria by which the Board determines banks' capital requirements. *Fox Television*, 567 U.S. at 253.

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INTRODUCTION

This case concerns the annual "stress tests" overseen by the Board of Governors of the Federal Reserve System. The Board uses the stress tests to establish, in part, binding capital requirements for the nation's largest banks. The substantive choices underlying these tests' methodology are among the most consequential policy decisions made by any agency in the federal government, requiring banks to hold hundreds of billions of dollars in capital as protection against a potential economic downturn. When calibrated properly, capital requirements help ensure the safety and soundness of the financial system. But if capital requirements are set too high, or are subject to unpredictable year-to-year volatility, they force banks to withhold too much liquidity from the economy, resulting in higher lending costs and slower growth for the economy as a whole. Currently the Board makes these enormously important policy decisions through a secretive process that eschews the disclosure and public participation required by the Administrative Procedure Act and other fundamental principles of administrative law and democratic government.

As relevant here, the stress tests posit hypothetical, worst-case economic scenarios—in the jargon of the stress tests, a "severely adverse" economic scenario—and then use economic models developed and overseen by Board staff to predict how banks will fare in this hypothetical economic crisis. Changes to these models and scenarios result in directives to banks that can vary widely from year to year, imposing tens of billions of dollars in unexpected new capital burdens on banks, sometimes due solely to undisclosed, unexplained changes in the Board's internal methodology. To guard against this volatility, banks have little choice but to hold still more capital, lest they be caught short by a change in the Board's methodology.

By refusing to put its stress-test models and scenarios through public notice and comment—and refusing to fully disclose the models at any point—the Board violates the APA,

infringes on the public's right to participate in rulemaking, and hobbles its own decisionmaking by depriving itself of the benefit of the public's input.

Recently the Board effectively acknowledged that the stress-test regime is legally suspect, saying that it had "analyzed the current stress test in view of the evolving legal landscape," and as a consequence would begin subjecting the models and scenarios to notice and comment some time in the future.[1] Although the Board has yet to take concrete steps to remedy the current process's flaws, Plaintiffs welcome the announced reforms—Plaintiffs are *not* opposed to stress testing or stress-capital requirements. Rather, this suit seeks to strengthen the Board's stress-testing regime by ensuring that going forward—beginning in 2026 at latest—the Board ceases using the current, unlawful stress-test regime and instead follows a transparent process commensurate with the tests' importance.

This suit challenges what are effectively two distinct phases of Board action regarding the stress tests. Counts 1 through 4 challenge the Board's recent actions, in 2024 and 2025, in adopting the particular stress-test scenarios and models that the Board used (or will use) to impose stress-capital requirements on individual banks in those years. Counts 5 through 7 challenge earlier Board actions, in 2019 and 2020, by which it established the current process for adopting those scenarios and models every year. Plaintiffs request a ruling from this Court **by October 31, 2025**, so the Board has ample time to institute a new process for the 2026 stress-testing cycle.

The Board's actions are unlawful in three main ways, each of which provides an independent reason to grant Plaintiffs their requested relief.

[1] *Dec. 23, 2024 Press Release*, Board of Governors of the Federal Reserve, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20241223a.htm ("*Dec. 23 Press Release*").

Counts 1 and 2. The APA requires agencies to adopt legislative rules—i.e., substantive policy decisions that have legal consequences and implement statutory delegations—through a notice-and-comment process that allows the public to participate in the agency's rulemakings. Here, the Board's stress-test models and annual economic scenarios are legislative rules because they impose legal consequences on banks through the stress-capital buffer, which is a capital requirement explicitly derived from each bank's performance in the stress tests. The models and scenarios also implement express statutory delegations authorizing the Board to: (1) conduct annual stress tests; and (2) impose capital requirements on bank holding companies. For good reason, therefore, the Board has said it will begin subjecting the models and scenarios to the APA's notice-and-comment process, effectively acknowledging that the current framework cannot be reconciled with the requirements of modern administrative law.

Counts 3 and 4. The Freedom of Information Act's amendments to the APA and Due Process Clause independently forbid the Board from imposing secret law on banks. The Board has never fully disclosed the models it uses in the annual stress tests, even though the Board uses those models to impose hundreds of billions of dollars in capital requirements on banks. Under basic principles of transparency and fair notice, before a federal agency may ordain such requirements, it must disclose the standards by which the regulated public is being judged.

Counts 5 through 7. The separate Board actions that established the current regime in 2019 and 2020, under which stress tests are used to determine stress-capital requirements but are never fully disclosed or subjected to notice and comment, were arbitrary and capricious. In the series of rulemakings that culminated in the current black-box regime, commenters explained repeatedly to the Board that: (1) the APA forbids using stress tests to set capital requirements without subjecting the Board's methodology to notice and comment; and (2) allowing the public the

opportunity to participate would strengthen the stress tests by allowing banking experts, economists, academics, and others to propose improvements to the Board's models and scenarios. The Board's reaction to these commenters was itself a sharp repudiation of the norms of notice and comment rulemaking: it summarily rejected the public's arguments and evidence, adopting without material change the opaque and undemocratic process that it had proposed and has kept in place ever since—and which it now acknowledges is inappropriate.

The value of compliance with the APA was illustrated recently in another rulemaking involving the Board. In July 2023, the Board and other bank regulators proposed changes to another set of bank capital rules, in a rulemaking to implement standards of the 2017 Basel Committee (a global organization that designs prudential standards for regulating banks). This time, the Board published its proposed methods for setting capital requirements and invited comments. The response was thunderous. Commenters by the hundreds—not just banks, but borrowers, community groups, asset managers, and others—identified numerous methodological flaws in the Board's proposal, leading the Board Chair to testify before Congress that the proposed rule must be significantly improved before it is finalized. There is every reason to believe that subjecting the methodology underlying the stress tests to public notice and comment would similarly improve the Board's capital rules—one of the key premises underlying the APA's notice-and-comment requirements.

BACKGROUND

I. The Stress-Test Framework And Its Impact.

In several statutory provisions, Congress authorized the Board to establish capital requirements for banks and bank holding companies.[2] For example, the Dodd-Frank Act provides that the Board may issue "regulations and orders relating to the capital requirements for bank holding companies." 12 U.S.C. § 1844(b). The Board may also "establish prudential standards" for bank holding companies, which "shall include . . . risk-based capital requirements and leverage limits." *Id.* § 5365(b)(1)(A). The law specifically requires the Board to "conduct annual analyses"—stress tests—to determine whether bank holding companies "have the capital, on a total consolidated basis, necessary to absorb losses as a result of adverse economic conditions." *Id.* § 5365(i)(1)(A).[3]

The Board implements these statutory directives by testing banks' financial performance during hypothetical economic crises, and requiring bank holding companies to hold a corresponding amount of capital based on the results—the "stress-capital buffer." Under the Board's rules, bank holding companies with total consolidated assets of $100 billion or more are subject to either annual or biennial stress tests (depending on their size). 12 C.F.R. §§ 252.43(a), 252.153(e)(5). The stress-capital buffer is just one component (albeit an important one) of a broader set of capital requirements that, together, establish a bank holding company's total capital obligation.[4]

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[2] This case concerns capital requirements that are applicable specifically to bank holding companies; for simplicity this brief generally uses the term "banks" to include both banks and their holding companies, except where the distinction is warranted by context.

[3] The Board has also pointed to the International Lending Supervision Act, which authorizes banking agencies to "cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital . . . and by using such other methods as [the agencies] deem[] appropriate." 12 U.S.C. § 3907(a)(1).

[4] Other components include risk-sensitive minimums (measured at 4.5 percent of risk-weighted assets), 12 C.F.R. § 217.10(a)(1)(i); various risk-*insensitive* leverage requirements (measured

At a high level, and largely behind closed doors, the stress tests unfold as follows:

The annual scenarios. For each annual stress test, the Board develops a "scenario" consisting of hypothetical economic conditions characteristic of a severe recession or a market crisis.[5] For some banks, the stress tests include a separate component known as the "global market shock," which tests vulnerability to sudden, extreme changes in the market value of banks' trading positions.

These scenarios (including the global market shock) vary significantly from year to year. Each year's scenarios are typically made available to the public in February. *See* 12 C.F.R. § 252.44(b). But by then, the scenarios are final—the Board does not allow the public an opportunity for comment.

The models. To apply the tests to individual banks, the Board collects comprehensive financial information from banks and then uses the Board's own internal "models"—statistical and economic techniques to convert banks' data into quantitative estimates of the banks' future performance—to determine how banks will perform under hypothetical conditions set forth in the annual scenarios. 12 C.F.R. § 252.44(a). The models "are developed or selected by Federal

against total assets on a non-risk-weighted basis, ranging from 4 percent to 6 percent), *id.* § 217.10(a)(1)(ii), (iv); a capital surcharge for so-called "global systemically important" banks (currently ranging from 1 percent to 4.5 percent), *id.* § 217.403; and other buffer requirements such as a counter-cyclical capital buffer (which is currently set at zero, but is designed to increase or decrease in different economic conditions), *id.* § 217.11(b)(2)(i), (iv). And banks that are not subject to the stress-capital buffer are subject to a different buffer that serves a similar purpose: the capital-conservation buffer, which is 2.5 percent (an amount identical to the minimum stress-capital buffer). *Id.* § 3.11(a)(3), (a)(4)(ii).

[5] AR-2264–68, PageID 2386–90 (Board of Governors of the Federal Reserve System, *2025 Stress Test Scenarios* 3–7 (Feb. 2025) ("*2025 Stress Test Scenarios*")).

Reserve staff."[6] At a high level, individual banks provide data to the Board, the staff inputs the data into their models, and the models in turn apply complex methodology to project banks' future income, expenses, and capital under the hypothetical scenarios. The Board "generally does not adjust supervisory projections for individual firms or implement firm-specific overlays to model results used in the stress test," so as to "ensure[] that the stress test results *are determined by* supervisory models and firm-specific input data." AR-2369, PageID 2491 (*2024 Supervisory Stress Test Methodology*) (emphasis added). In other words, the models determine how a bank is judged on the stress tests, and the Board treats those results as determinative of the bank's stress-capital buffer.

These models are therefore critical to the stress tests and the amount of capital banks must hold. Yet the Board has declined to provide key information about how the models operate and they have never been subjected to notice and comment.

To be sure, the Board makes available *some* information about the models.[7] But the Board has not come close to fully disclosing its methodology. As one example, the Board's descriptions of its methodology are insufficient for the public to fully understand how the models estimate so-called "operational risk" losses, an opaque category that includes losses that could result from employee misconduct or external events such as fraud, cyberattacks, or natural disasters.

The stress-capital buffer. For each bank, the Board uses the results of the stress tests to establish the stress-capital buffer—a ratio of "common equity tier 1 capital to risk-weighted assets"

[6] AR-2368, PageID 2490 (Board of Governors of the Federal Reserve System, *2024 Supervisory Stress Test Methodology* (Mar. 2024)).

[7] *See, e.g.*, AR-2358, PageID 2480 (*2024 Supervisory Stress Test Methodology*).

that the bank must maintain. 12 C.F.R. § 225.8(f)(2)(i)(A).[8] In essence, the stress-capital buffer requires a bank to hold an additional amount of capital to ensure that the bank would remain well capitalized even after an economic crisis. Since this capital must be retained, the bank cannot use it in other ways, such as supporting loans to the public. And if the bank fails to maintain the buffer, it faces increasingly strict regulatory restrictions on its ability to make distributions to shareholders and discretionary bonus payments. *Id.* § 217.11(c); *see also* 12 U.S.C. § 1818(b), (i) (authorizing Board enforcement actions to seek penalties for violations of regulations). A bank's stress-capital buffer is subject to a 2.5 percent regulatory minimum; above that level, it will be higher or lower depending on the stress-test results. 12 C.F.R. § 225.8(f)(2)(ii).

By June 30 every year, the Board reports the results of the stress tests to banks, advises each bank of its new stress-capital buffer, and publicly discloses a summary of the results. 12 C.F.R. §§ 252.46, 225.8(f); *see* 12 U.S.C. § 5365(i)(B)(v). Although the tests' ultimate results are disclosed to banks, banks are not told how they were judged in specific areas, such as operational risk. 12 C.F.R. §§ 225.8(h), 252.46(b).

In other words, banks are informed of Board determinations that have multi-billion dollar impacts on individual institutions—and that, collectively, require banks to withhold hundreds of billions in capital from lending and other uses—but the banks are not told the criteria and grounds on which it was determined these immense costs must be borne, nor even all the specifics of their performance under the secret models.

The final stress-capital buffers are reported publicly by August 31. *See* 12 C.F.R. § 225.8(h)(1), (4)(i). On October 1 of each year, the new stress-capital buffer requirements become effective and banks are bound to comply as of that date. *Id.* § 225.8(h)(4)(ii).

[8] "Common equity tier 1" roughly corresponds to the value of the bank's stock.

The stress-capital buffer applies to all bank holding companies with $100 billion or more in consolidated assets, *supra* at 5, so even small changes in the results of the stress tests can have massive economic ramifications. A change of a tenth of a percent can translate into *billions* of additional capital that a bank must maintain. Changes in the year-to-year results of the stress tests therefore can have enormous consequences for banks and indeed for the broader economy.

The amount of the stress-capital buffer varies widely from bank-to-bank depending on the stress-test results. In 2024, for example, banks' stress-capital buffer ranged from 2.5 percent (the regulatory minimum) to as high as 13.9 percent.[9] The buffer can also vary widely for individual banks from one year to the next. In 2024, for example, several banks saw their requirements rise or fall more than one percent from the year before—for some individual banks, this could translate into tens of billions in higher capital requirements.[10]

Banks regularly experience wild swings in the amount of their stress-capital buffer for reasons that have nothing to do with changes in their real-world vulnerability to a recession. According to one estimate provided by a commenter when the Board adopted the stress-capital buffer, banks' stress-capital buffer requirements would have "increased from an average of 3.0 percent . . . to an average of 3.9 percent" between 2017 and 2018 if the 2020 Rule had been in effect back then.[11] Indeed, much of the volatility results solely from changes to the Board's internal (and

[9] AR-2289, PageID 2411 (Board of Governors of the Federal Reserve System, *Large Bank Capital Requirements* 4 (Aug. 2024)).

[10] *Compare id. with* Board of Governors of the Federal Reserve System, *Large Bank Capital Requirements* 4 (July 2023), https://www.federalreserve.gov/publications/files/large-bank-capital-requirements-20230727.pdf .

[11] AR-143 n.8, PageID 287 (The Clearing House, Comment Letter on Proposed Amendments to the Regulatory Capital, Capital Plan and Stress Test Rules at 6 n.8 (June 25, 2018) ("The Clearing House Letter on 2020 Rule")) (citing Francisco Covas, Bill Nelson & Robert Lindgren, *An*

undisclosed) methodology—the models. For example, one study estimated that undisclosed changes to the methodology in the 2022 stress tests increased minimum capital requirements by $55 billion for three of the largest U.S. banks alone.[12] Because of the lack of transparency in the current process, banks cannot anticipate these swings. To avoid making abrupt, last-minute changes in their capital distributions, banks tend to hold excess capital, resulting in estimates of up to $50 to $100 billion held by banks that "could otherwise be deployed in the economy." AR-250, PageID 394 (Goldman Sachs Comment Letter on 2019 Rules).

In 2019, BPI economists studied the differences between the results of the Board's stress-test models and banks' internal models.[13] The analysis (which used the same scenarios for both sets of models) found that "the Fed and banks' own projections often disagree on the year-over-year change in capital requirements." *Id.* at 3. In fact, the correlation between the two projections was a mere 25 percent. *Id.* Changes in capital requirements under the Board's models were "about twice as volatile" as under the banks' internal models. *Id.* This discrepancy indicates that the Board's models may be "excessive[ly] sensitiv[e]," and that errors or biases in the models—not changes in the annual scenarios or real-world risk to banks in the event of adverse economic conditions—are a driving factor behind the volatility of Board capital requirements. *Id.* at 4.

Assessment of DFAST 2018 Results Through the Lenses of the SCB and eSLR Proposals (June 22, 2018), https://tinyurl.com/5x6b9xza).

[12] Guowei Zhang and Peter Ryan, Securities Industry and Financial Markets Association, *U.S. Stress Test Capital Requirements Are Excessively Volatile and Overestimate Losses* (Oct. 6, 2022), https://www.sifma.org/resources/news/blog/u-s-stress-test-capital-requirements-are-excessively-volatile-and-over-estimate-losses-identifying-the-problem-and-how-to-solve-it/.

[13] *See* Francisco Covas, Paul Calem, and Adam Freedman, Bank Policy Institute, *Reducing Spurious Volatility in the Federal Reserve's Supervisory Stress Tests* (Oct. 16, 2019), https://bpi.com/reducing-spurious-volatility-in-the-federal-reserves-supervisory-stress-tests/.

II. The Board Adopts The Stress-Test Regime In A Series Of Rulemakings, Over The Objections Of Commenters Who Sought More Transparency.

The current regime discussed above results from four interrelated agency actions by the Board in 2019 and 2020—these are the agency actions at issue in Counts 5 through 7. The 2019 rulemakings resulted in: (1) the "Policy Statement on the Scenario Design Framework for Stress Testing" (referred to in this brief as the "Scenario Policy Statement"), AR-43, PageID 187 (84 Fed. Reg. 6,651, (Feb. 28, 2019)); (2) the "Stress Testing Policy Statement," AR-56, PageID 200 (84 Fed. Reg. 6,664 (Feb. 28, 2019)); and (3) the "Enhanced Model Disclosure Document," AR-31, PageID 175 (84 Fed. Reg. 6,784 (Feb. 28, 2019)).[14] The 2020 Rule adopted the stress-capital buffer, formalizing the Board's longstanding practice of incorporating the results of the stress tests into banks' capital requirements. AR-1, PageID 145 (85 Fed. Reg. 15,576 (Mar. 18, 2020)).

A. In The 2019 Policy Statements, The Board Refuses To Subject The Stress-Test Scenarios Or Models To Notice And Comment Or To Fully Disclose The Models.

In December 2017, the Board published notices of proposed rulemaking for three nominally separate agency actions related to the stress tests; those three proposals were later finalized on the same day in February 2019.

1. The Board Invites Comments On The Stress-Test Framework, Including Whether Additional Transparency Is Warranted.

The Scenario Policy Statement. The first proposal, the Scenario Policy Statement, was intended to "modify" the process for developing the stress-test scenarios and "to enhance the . . . transparency of the Board's scenario design framework." AR-101, 103, PageID 245, 247 (82 Fed. Reg. 59,533, 59,535/2 (Dec. 15, 2017)). In 2013, the Board had published a high-level description of how it developed the scenarios; now, it was considering changes to that process. AR-102–03,

[14] This brief refers to those three rulemakings collectively as the "2019 Policy Statements."

PageID 246–47 (*id.* at 59,534/2, 59,535/2); *see* 78 Fed. Reg. 64,153 (Oct. 28, 2013). In proposing those changes, the Board also invited comments on whether it should more fully disclose the annual scenarios. AR-106, PageID 250 (82 Fed. Reg. at 59,538/1).

The Stress Testing Policy Statement. The Stress Testing Policy Statement was meant to explain "the Board's approach to the development, implementation, and validation of models used in the supervisory stress test." AR-95, PageID 239 (82 Fed. Reg. 59,528, 59,528/2 (Dec. 15, 2017)). The proposed Stress Testing Policy Statement, which was four pages long, laid out the high-level "principles," "policies," and "procedures" used by the Board in developing the models. For example, one such principle is "independence"—the models are developed "internally and independently" by the Board, and they do not "rely on models or estimates provided by covered companies." AR-97, PageID 241 (*id.* at 59,530/1). As another example, the Board says it prioritizes "consistency" by "us[ing] the same set of models and assumptions to produce loss projections for all covered companies." *Id.* (at 59,530/2–3).

In two short paragraphs, the Board vowed to pursue "soundness in model design" by subjecting the models "to extensive review of model theory and logic and general conceptual soundness." AR-98, PageID 242 (82 Fed. Reg. at 59,531/1). Yet the Board did not share any specifics about its process for purportedly ensuring the soundness of the models—much less about the theory and logic that were supposedly sound. The Board also reserved the right to "revise its supervisory stress test models," and warned that "[r]evisions to the supervisory stress test models may at times have a material impact on modeled outcomes"—that is, unpredictable volatility in the amount of capital banks are required to hold. AR-98, PageID 242 (*id.* at 59,531/2). In this document, too, the Board invited comments on whether it should more fully disclose information related to the stress tests. AR-96, 100, PageID 240, 244 (*id.* at 59,529/1–2, 59,533/1).

The Enhanced Model Disclosure Document. The third document, published in December 2017, was titled "Enhanced Model Disclosure." AR-86, PageID 230 (82 Fed. Reg. 59,547 (Dec. 15, 2017)). This document invited comments on whether the Board should more fully disclose the stress-test models. The Board began by acknowledging the "significant public benefits" of transparency. *Id.* (at 59,547/3). According to the Board, the limited information it had already disclosed increased "public and market confidence in the process," and "[m]ore detailed disclosures could further enhance the credibility of the stress test by providing the public with information on the fundamental soundness of the models." *Id.* In addition, the Board admitted that disclosure would "facilitate comments on the models from the public, including academic experts," which would "lead to improvements" in the models. *Id.* Transparency would also "further[] the goal of maintaining market and public confidence in the U.S. financial system," and it would help regulated entities "understand the capital implications of changes to their business activities." AR-86–87, PageID 230–31 (*id.* at 59,547/3, 59,548/1).

Next, the Board described what it perceived to be the "material risks associated with fully disclosing the models to the firms subject to the supervisory stress test." AR-87, PageID 231 (82 Fed. Reg. at 59,548/1). The Board speculated that "firms could conceivably use [the models] to make modifications to their businesses that change the results of the stress test without changing the risks they face." *Id.* Another supposed risk was that full model disclosure could "increase correlations in asset holdings among the largest banks, making the financial system more vulnerable to adverse financial shocks." *Id.* And it might also "incent banks to simply use models similar to the Federal Reserve's, rather than build their own," which would create a "model monoculture" and "miss key idiosyncratic risks faced by the firms." *Id.* After articulating these considerations, the Board proposed that it would not fully disclose the models to the public. *Id.*

2. Commenters Explain That The Board's Proposals Are Inadequate And Inconsistent With The Administrative Procedure Act.

Commenters, including Plaintiff BPI's two predecessor organizations, The Clearing House Association and the Financial Services Roundtable, identified flaws in all three proposals.[15] Commenters explained that all aspects of the scenarios and the models should be fully disclosed and subjected to the notice-and-comment process required by the APA. AR-2490, PageID 2612 (The Clearing House Letter). Full disclosure, commenters said, would improve the quality and credibility of the stress tests. AR-2490–92, PageID 2612–14; *see also* AR-497–500, PageID 641–44 (Financial Services Roundtable Comment Letter) (proposing specific disclosures to reduce uncertainty and volatility for regulated parties).

The Clearing House also pointed out that the Board's stress-test models necessarily "reflect assumptions about the overall performance of the economy and different asset classes" used to establish "the very set of standards used to determine whether banks pass or fail the stress test." AR-2498, PageID 2620. In other words, the models incorporate a series of policy judgments that have "significant economic consequences" for regulated parties. AR-2498–99, PageID 2620–21. It was "untenable" for the Board to maintain that its regulatory regime must be kept secret "because those subject to the regime might align their behavior with its rules and standards." AR-2499, PageID 2621. Acting in conformity with a regulation "is not 'gaming' or 'reverse engineering'; it is obedience and compliance." *Id.*

Nor could a bank improve its stress-test performance without undertaking a longer-term change in its risk profile. AR-2499–500, PageID 2621–22 (The Clearing House Letter). As a practical matter, it is impossible for banks to "divest and shortly thereafter re-acquire large portfolios of assets, which are highly likely to be relatively illiquid." AR-2500, PageID 2622.

[15] *See, e.g.*, AR-2490, PageID 2612; AR-453, PageID 597; AR-495, PageID 639.

Additionally, banks are subject to other regulatory requirements that make manipulating a bank's risk profile difficult. "[T]he Board could easily identify and address any actions of this nature through its routine monitoring and supervisory activities." *Id.*

Moreover, if the Board was concerned that banks would use the models to make longer-term adjustments to their holdings without reducing the risks they posed, that "would suggest potential weaknesses in the models themselves, rather than a problem with disclosing them." AR-2500, PageID 2622 (The Clearing House Letter). If the models accurately identify the relevant risks, conformance with the models (and thus better performance on the stress tests) should reflect a lower risk profile. *Id.* The best way to address any concerns to the contrary would be to make the models "as accurate and effective as possible"—a goal that would be furthered, not hindered, by notice-and-comment rulemaking. *Id.* And in response to the Board's purported concern about a "model monoculture," the Clearing House explained that other regulations require banks to develop proprietary models tailored to their particular risk profiles. AR-2499–500, PageID 2621–22; *see* 12 C.F.R. §§ 252.54, 252.56.

3. In The Final Rules, The Board Declines To Disclose Any Additional Information Or Subject The Models And Scenarios To Notice And Comment.

In February 2019, the Board issued the final versions of the three rules. When it came to the question of transparency (or the lack thereof), the final rules tracked the proposals closely—they did not disclose any additional information about the scenarios or the models, and offered little by way of further justification or response to commenters.

In the final Scenario Policy Statement, the Board noted that commenters sought to have the scenarios published for notice and comment. AR-46, PageID 190 (84 Fed. Reg. at 6,654/3). The Board responded simply that it was "considering these comments and weighing the costs and

benefits of publishing the scenarios for comment." *Id.* Despite saying this, the Statement made no provision for comment and the scenarios have never been subject to notice and comment.

The final Stress Testing Policy Statement did not even mention publication of the models or the possibility of notice and comment. AR-35, PageID 179 (84 Fed. Reg. 6,664).[16] The models have remained secret and, like the scenarios, have never been subject to notice and comment.

In the final Enhanced Model Disclosure Document, the Board repeated its prior rationalizations for keeping the models secret, including supposed concerns about banks manipulating their holdings to perform well on the stress tests, copying the Board's models, and increasing correlations in their asset holdings. AR-32, PageID 176 (84 Fed. Reg. at 6,785/2–3).[17] The Board briefly acknowledged that commenters favored publication of the models and notice and comment, but it repeated its view that the initial proposal struck "[the] appropriate balance" between the "costs and benefits of disclosure." AR-33, PageID 177 (*id.* at 6,786/2). The Board did not respond to *any* of the specific points raised by commenters who explained why none of the Board's reasons for keeping the models secret withstood scrutiny. Those criticisms were simply ignored.

B. In The 2020 Rule, The Board Formalizes The Link Between The Stress Tests And Banks' Capital Requirements, But Again Fails To Subject The Models Or Scenarios To Notice And Comment Or To Fully Disclose The Models.

In the fourth challenged action, the Board adopted the stress-capital buffer, formalizing its longstanding practice of using the results of the stress tests to establish banks' capital requirements.

[16] The Board made minor revisions to the Stress Testing Policy Statement in 2020 and 2021. Those revisions are not relevant to the issues in this case.

[17] The Board later decided to release additional information about the stress-testing methodology on an annual basis. *Supra* at 7 & n.7. But as explained above, those disclosures remain insufficient to allow the public to fully understand the Board's methodology.

1. The Board Proposes A Direct Link Between The Stress Tests And Banks' Capital Requirements.

In April 2018 (while the three other rulemakings above were ongoing), the Board announced a proposal to formally integrate the stress tests into the Board's process for setting banks' capital requirements. AR-57, 60, PageID 201, 204 (83 Fed. Reg. 18,160, 18,163/1 (Apr. 25, 2018)). The Board explained that it planned to use the stress tests "to size each firm's stress buffer requirements," after which the firm would need to maintain capital ratios above these requirements "to avoid restrictions on its capital distributions and discretionary bonus payments." AR-61, PageID 205 (*id.* at 18,164/2).

2. Commenters Again Urge The Board To Provide More Transparency And Allow The Public To Participate.

Commenters again highlighted the need for greater transparency in the stress-test process.[18] The Clearing House noted that, in prior rulemakings, it had "consistently maintained" that more transparency should be provided; it argued that the Board should consider adopting those recommendations. AR-147–48 & n.17, PageID 291–92 & n.17. The Clearing House added that the scenarios "should be subject to the public notice-and-comment process to increase transparency," and should be published earlier in the stress-testing cycle to assist banks in their planning. AR-144–45, PageID 288–89.

The Clearing House also requested that the Board more clearly articulate its parameters for designing the scenarios, to "avoid excessive and unrealistic volatility from year to year." AR-146, PageID 290. Similarly, the Financial Services Forum explained that "the lack of transparency regarding stress testing models and scenario design" "exacerbates volatility" in capital requirements, forcing some banks to set "larger capital buffers than are necessary for safe and sound

[18] *See, e.g.*, AR-138, PageID 282 (The Clearing House Letter).

management and that thereby inhibit firms' ability to support the broader economy." AR-270, PageID 414; *see also* AR-275, PageID 419 (similar). Another commenter warned the Board that because the "stress test loss models are a 'black box,'" banks must hold extra capital "as a 'volatility buffer' against the uncertainty of the [stress-capital buffer]." AR-302, PageID 446 (Committee on Capital Markets Letter).

3. In The Final Rule, The Board Declines To Meaningfully Respond To Commenters' Concerns.

The Board published the final stress-capital rule in March 2020. AR-1, PageID 145 (85 Fed. Reg. 15,576). The preamble noted that several commenters had "raised concerns about potential volatility in capital requirements as a result of the Board's stress testing framework," and that commenters had suggested "publishing each year's severely adverse scenario for notice and comment" "to reduce the uncertainty associated with capital requirements." AR-5, PageID 149 (*id.* at 15,580/3). The Board dismissed these concerns. It stated that "*[s]ome* degree of volatility is inherent to risk-based capital requirements" and stress testing, but it declined to address whether its rules would cause *too much* volatility—and with it, unjustified and costly burdens—and whether public comment would (as intended) improve the scenarios and thereby minimize unwarranted volatility. *Id.* (emphasis added). The Board added that it "continues to study potential ways to mitigate unnecessary volatility in requirements, while retaining plausible changes in the scenarios to reflect changing risks." AR-6, PageID 150 (*id.* at 15,581/1). In a similar vein, the Board stated vaguely: "Regarding the publication of scenarios for comment, the Board is considering these comments and weighing the benefit of increased transparency against the costs, including, increased risk of window-dressing by firms and reduced flexibility by the Board to respond to salient risks." *Id.* (at 15,581/1–2). Nothing further was said on the point.

As for the models, the Board acknowledged that commenters had urged it to "enhance the transparency of the models used in the supervisory stress test by publishing model specifications for comment, or publishing its methodology for comment each year." AR-14, PageID 158 (85 Fed. Reg. at 15,589/2). But it responded that its "methodology for conducting the supervisory stress test was not part of the proposal." *Id.* (at 15,589/3). The Board also claimed that it had already taken all necessary "steps to respond to these comments" in the 2019 Policy Statements. *Id.*

III. The Board Acknowledges That The Stress Tests Are Inconsistent With The APA's Notice-And-Comment Requirements.

On December 23, 2024, facing the imminent threat of this lawsuit, the Board acknowledged that its stress-test regime is legally untenable. *Dec. 23 Press Release.* The Board publicly stated that "[i]n view of the evolving legal landscape," it would "soon seek public comment on significant changes to improve the transparency of its bank stress tests and to reduce the volatility of resulting capital buffer requirements." *Id.* Specifically, the Board said it "intends to propose changes" that would include "disclosing and seeking public comment on all of the models that determine the hypothetical losses and revenue of banks under stress" and "ensuring that the public can comment on the hypothetical scenarios used annually for the test, before the scenarios are finalized." *Id.*

In testimony before the House Financial Services Committee a few months later, the Board Chair elaborated that "it's time . . . to disclose the models" because "[t]he Supreme Court has . . . increased our obligations to be transparent under the Administrative Procedure Act." CSPAN, *Federal Reserve Chair Testifies on Monetary Policy Report* 2:06:00–2:06:15 (Feb. 12, 2025), https://tinyurl.com/5647yk6v; *see also id.* at 1:05:37–1:06:38 (Board Chair saying the Board is "putting . . . the models and . . . everything else out for comment" because of "raised expectations for compliance with the Administrative Procedure Act"). The Board Chair similarly told the Senate Banking Committee that "on transparency, we're going to release the models, you know, clean

them up and—and publish the models, put them out for comment." CSPAN, *Federal Reserve Chair Testifies on Monetary Policy Report* 1:51:22-1:51:30 (Feb. 11, 2025), https://tinyurl.com/3fecbhyb.

Despite this acknowledgment that the current stress-testing regime is legally untenable, the Board thus far has failed to subject either the models or scenarios to notice and comment. Instead, the Board is currently using the existing framework to develop stress-capital requirements in the 2025 stress tests, which are already underway, and has published no proposed changes for the 2026 stress tests, which will kick off early next year.

A separate recent Board rulemaking on capital requirements illustrates the value of public input on the Board's methodologies. In September 2023, the Federal Reserve, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency jointly proposed a rule to amend capital requirements for large banks in accordance with the standards of the 2017 Basel Committee. *See* 88 Fed. Reg. 64,028 (Sept. 18, 2023). Unlike with the stress tests, the proposal explained in detail how the regulators would set capital requirements for individual banks, including the methodology and equations they would use. Yet they cited none of the concerns the Board had used previously to justify keeping the stress-testing models secret—e.g., the purported fear that publishing models would incentivize banks to hold assets that the Board views as less risky.

The public's assessment of the proposed rule was damning. One study concluded that, of the 356 comments submitted in response, "more than 97%" "opposed the Proposal in full or raised substantial concerns with parts of it." Latham & Watkins LLP, *Comments on the Basel III Endgame Proposal: Opposition and Significant Concerns Dominate the Record* 2 (Feb. 2, 2024), https://tinyurl.com/59ccync4. The criticism came from a broad range of commenters, including

not just the banks and bank trade associations, but small businesses, manufacturers, members of Congress from both major political parties, academics, and many others. *Id.* at 24–30.

The Board Chair told Congress that the public's participation in the rulemaking would have a major impact on the agencies' final rule. "We do hear the concerns and I do expect there will be broad and material changes to the proposal," he testified. House Committee on Financial Services, *Hearing Entitled: The Federal Reserve's Semi-Annual Monetary Policy Report* 56:45–59:57, 2:09:23–2:14:40 (Mar. 6, 2024), https://tinyurl.com/mvxtus6c. He reiterated the Board's "commit[ment] to doing transparent, and reasonable, and data-based rulemaking in compliance with the Administrative Procedure Act." *Id.* at 2:11:53–2:12:03.

IV. This Lawsuit

Plaintiffs are a group of five trade associations representing bank holding companies (or their affiliates) that are subject to the stress tests. *See* Exs. 1–5 (Declarations). Several of Plaintiffs and their members also filed comments in the proceedings that culminated in the 2019 Policy Statements and the 2020 Rule. *See id.*; *supra* at 11–18.

On December 24, 2024, Plaintiffs filed this suit, stating six claims. Counts 1 and 2 allege that the Board violates 5 U.S.C. § 553 by failing to subject the 2024 and 2025 stress-test scenarios and models to notice and comment. ECF No. 1 ("Compl.") ¶¶ 102–14, PageID 35–37. Counts 3 and 4 allege that the Board violates 5 U.S.C. § 552 and the Due Process Clause by failing to publish the 2024 and 2025 models. *Id.* ¶¶ 115–26, PageID 37–39. Counts 5 through 7 allege that the 2019 Policy Statements and 2020 Rule were arbitrary and capricious. *Id.* ¶¶ 127–36, PageID 39–41.

The parties proposed and the Court has entered a stipulated schedule under which merits briefing will be complete by June 2025. ECF No. 34, PageID 129; ECF No. 36, PageID 139. To avoid potential disruptions to the annual stress-testing process, which is underway, Plaintiffs seek relief commencing with the 2026 stress tests. Compl. ¶ 19, PageID 8; *see id.* ¶ 137 (Prayer for

Relief), PageID 41–42. Accordingly, and to ensure the Board has adequate time to comply with a decision in Plaintiffs' favor, and that the parties have an opportunity to appeal an adverse decision, Plaintiffs requested a decision on the merits by October 31, 2025, three months before the Board is scheduled to release the scenarios for 2026. ECF No. 34 at 2–3, PageID 130–31; *see also* 12 C.F.R. § 252.44(b).

LEGAL STANDARD

In "cases brought pursuant to the Administrative Procedure Act," this Court may grant "[s]ummary judgment" where "'the entire case on review is a question of law.'" *Ohio Env't Council v. U.S. Forest Serv.* (*Ohio Env't I*), 2023 WL 2712454, at *5 (S.D. Ohio Mar. 30, 2023) (Marbley, C.J.). The APA requires the Court to determine whether "agency action" is "in excess of statutory jurisdiction, authority, or limitations," "contrary to constitutional right," "without observance of procedure required by law," or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)–(D).

This Court's review is "'searching and careful.'" *Ohio Env't I*, 2023 WL 2712454, at *6. It reviews legal questions "de novo," *Louisville Gas & Elec. Co. v. FERC*, 988 F.3d 841, 846 (6th Cir. 2021), and ensures that agency decisions are both "'reasonable and reasonably explained,'" *Ohio v. EPA*, 603 U.S. 279, 292 (2024). And if the reasoning offered by the agency below is deficient, "[t]he reviewing court should not attempt itself to make up for such deficiencies" and "'may not supply a reasoned basis for the agency's action that the agency itself has not given'" in the proceedings under review. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). If an agency "has relied on multiple rationales (and has not done so in the alternative), and . . . at least one of the rationales is deficient, [a court] will ordinarily vacate" the agency's action unless the court is

"certain that [the agency] would have adopted it even absent the flawed rationale." *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

ARGUMENT

In a day when many of our government's most important legal proscriptions are issued by federal regulatory agencies, the public's right to participate in making law is often dependent upon adherence to the protections of the Administrative Procedure Act ("APA"). The APA requires that the public be notified of the terms of new proposed rules; that the public be given the opportunity to comment and suggest improvements to those rules, and receive meaningful responses from the agency to those comments and suggestions; and that the rules, once finalized, be published so the public may know the standards by which they will be judged and can conform their conduct accordingly, consistent with due process.

The Board's procedures for conducting stress tests and imposing stress-capital buffers trample on these requirements. The stress-test models and scenarios—which the Board uses to impose hundreds of billions of dollars of capital requirements on banks every year—are legislative rules (or components thereof), which the APA requires be subjected to public scrutiny, notice, and comment. Once finalized, the models are required to be published (alongside the scenarios) under the Freedom of Information Act's amendments to the APA and the Due Process Clause of the Fifth Amendment, so banks have fair notice of the standards by which they are to be judged.

The Board disregarded all these requirements in the 2019 and 2020 regulatory actions that established its current secret-law regime—and continues to disregard them each time it changes its models and scenarios without going through notice and comment. Those 2019 and 2020 rulemakings themselves were inconsistent with the public's right to participate in rulemaking: time and again the Board gave non-responsive answers to commenters, justified its action with

statements that made no sense on their own terms, or simply refused to acknowledge and address significant points raised by the public. The resulting rules were neither reasonable nor reasonably explained, and for that reason too must be vacated.

The Board itself has acknowledged that its current regime is untenable, but has failed to take the concrete steps needed to ensure the stress tests comply with the law going forward. Accordingly, this Court's intervention is necessary. The Court should enter an order directing that after the current 2025 stress-testing cycle concludes, the Board must cease using models and scenarios to establish banks' capital requirements without subjecting the models and scenarios to notice and comment and publication in the Federal Register. Beginning with the 2026 cycle, the Board can and should adhere to the requirements laid down by Congress to ensure a fair, informed, and participatory rulemaking process.

I. The Models And Scenarios Are Legislative Rules That Were Required To Go Through Notice And Comment. (Counts 1 and 2)

"Before an agency may promulgate a regulation that has the force of law," the APA "requires it to run through a light-shedding process" of notice and comment. *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022). The agency must "publish in the Federal Register" "notice of [the] proposed rule making" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553.

The APA requires notice and comment for legislative rules, meaning rules that bear "the 'force and effect of law.'" *Mann*, 27 F.4th at 1143. "Legislative rules impose new rights or duties and change the legal status of regulated parties." *Id.* A primary indication that a rule is legislative is that it "carries out an express delegation of authority from Congress to an agency," which shows the agency is not "merely clarify[ing] the requirements that Congress has already put in place." *Id.*

This process benefits the public, regulated parties, and agencies alike: "Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019). It also protects the public's democratic right to participate in decisions made by agencies that are otherwise insulated from the democratic process. "This 'chance to participate' is 'one of the central purposes' of the notice and comment requirement." *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009).

Here, the stress-test models and scenarios are legislative rules because they impose hundreds of billions of dollars in capital requirements with the force and effect of law, and they implement statutory delegations of authority to set capital requirements and test banks' resilience against economic crises. As legislative rules, they must be published for notice and comment under the APA so that banks, economists, academics, and the rest of the public have the opportunity to provide input on the Board's methodology and strengthen and improve the stress-test regime.[19]

A. The Models And Scenarios Have The Force And Effect Of Law.

The models and scenarios "have the 'force and effect of law,'" and therefore are legislative rules, because they "impose new . . . duties and change the legal status of regulated parties." *Mann*, 27 F.4th at 1143. In particular, the models and scenarios impose billions of dollars in capital requirements on banks through the stress-capital buffer. *Supra* at 5. Indeed, the Board's own

[19] The APA broadly defines a rule to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). For this reason, it makes no difference for purposes of this lawsuit whether the stress-test scenarios and models are legislative rules themselves or components of legislative rules. *See, e.g.*, *United Farm Workers v. Perdue*, 2020 WL 6318432, at *8 (E.D. Cal. Oct. 28, 2020) (one agency action that "is part of another agency action" is itself "also an agency action for purposes of review under the APA" (citing *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, at *6 (D. Or. July 3, 2014))).

regulations frame the stress-capital regime as a set of "requirements" that banks "must comply with." 12 C.F.R. § 252.43(b); *see id.* Pt. 252, Subpart E ("Supervisory Stress Test Requirements").

1. The Board's internal models form the backbone of the stress tests that determine the amount of capital banks must hold each year. In the Board's own words, it uses the "stress test models" to "project[] how banks are likely to perform under hypothetical economic conditions" and then "uses the results of a supervisory stress test, in part, to set capital requirements for participating banks." AR-2260, PageID 2382 (*2025 Stress Test Scenarios*).

On similar facts, the D.C. Circuit held that an EPA model was a legislative rule even where, unlike here, the model did not *directly* impose legal obligations on the public. *See McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988). In *McLouth*, a steel corporation petitioned the EPA to "exclude waste generated at its steel-making facility from EPA's list of hazardous waste subject to regulation under the Resource Conservation and Recovery Act." *Id.* at 1318–19. The EPA denied the petition, relying on an internal model that predicted the levels of hazardous components in the corporation's waste. *Id.* at 1319. The EPA argued that the model was immune from the APA's notice-and-comment requirements because it was "just one of many tools" that the agency used to "evaluat[e] delisting petitions," and the agency "d[id] not consider itself bound by the VHS model." *Id.* at 1320 (alterations omitted). The D.C. Circuit correctly rejected that argument, explaining that even if the agency retained some flexibility it "treat[ed] the model as a binding norm" in most cases. *Id.* Thus, the model had "present-day binding effect on the rights of" regulated parties, and notice and comment were required. *Id.* at 1321.

The D.C. Circuit's decision in *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980), is similar. There, the D.C. Circuit held that the Department of Labor's "statistical methodology" for calculating the unemployment rate was a legislative rule, where the Department used the rate as a

key variable in a formula for determining emergency job grants for local governments. *Id.* at 704–08. The Department's "methodology [was] not merely an interpretation of statutory language because it actually prescribe[d] the regulatory structure through which the critical variable in the [emergency job grant] formula is attained." *Id.* at 705–06; *see also Comm. for Fairness v. Kemp*, 791 F. Supp. 888, 893–96 (D.D.C. 1992) (changes in methodology for calculating housing subsidies were legislative rules).

Here, too, the stress-test models have a "present-day binding effect" on banks' capital requirements, *McLouth*, 838 F.2d at 1321, and "actually prescrib[e] the regulatory structure through which the critical variable in the" stress-capital buffer is determined, *Batterton*, 648 F.2d at 706. So here, too, the APA requires that the Board subject the models to notice and comment.

The massive economic impacts of the Board's choices in designing the models confirm that they are legislative rules for which public participation is mandatory under the APA. The Board's stress-test procedures and compliance with the resulting stress-capital buffer are time-consuming and costly, come with penalties for non-compliance, *supra* at 8, and impose sweeping consequences on banks and the broader economy—"all characteristics of legislative rules." *Mann*, 27 F.4th at 1143. Because the models determine the amount of capital that the largest banks must hold, they directly implicate the balance between, on the one hand, ensuring that banks are resilient in the face of a potential economic crisis, and—on the other hand—banks having ample resources to use for lending and other activities that support economic growth. Put differently, each year, hundreds of billions of dollars in capital requirements turn on policy judgments made by a federal agency. The APA entitles the public to participate in the development of those judgments, yet the Board's analysis and decisionmaking are hidden from public view.

In *Tennessee Hospital Ass'n v. Azar*, 908 F.3d 1029 (6th Cir. 2018), the Sixth Circuit recognized that agency choices implicating far less money were the kind of "sweeping" policy decisions indicative of a legislative rule. *Id.* at 1046. There, the Sixth Circuit reasoned that the government's decision to change the methodology governing Medicaid payments "affects a broad range of payments and scenarios and likely involves large sums of money." *Id.* at 1045–46. Here, the Board's decisions in crafting the models affect an even broader range of banking activities, and the economic impact of the Board's decisions dwarfs those at issue in *Tennessee Hospital*.

2. The annual scenarios also are legislative rules because they, too, "impose new . . . duties" by determining how much money a bank must keep on hand to satisfy the stress-capital buffer. *Mann*, 27 F.4th at 1143. The scenarios are "variables" that the Board uses to set—and change—the capital requirements determined through the annual stress-test process. AR-2260, PageID 2382 (*2025 Stress Test Scenarios*); *supra* at 6. The Board changes the scenarios every year with each new stress test, reflecting the fact that the Board is not simply applying pre-existing standards, and instead is re-setting the standards annually. The scenarios "'add[] content to the governing legal norms'" and are therefore legislative rules requiring notice and comment. *Tennessee v. DOE*, 104 F.4th 577, 609 (6th Cir. 2024).

The Sixth Circuit's decision in *Tennessee Hospital* is instructive. There, the agency decided to account for third-party insurers' contributions in calculating a limit on certain Medicaid payments to hospitals. 908 F.3d at 1035–37. The agency had previously suggested that it would *not* account for these contributions, so the agency's decision changed the method of calculating the amount of money to which the hospitals were entitled. The Sixth Circuit agreed with the plaintiffs that the new policy "substantively alter[ed] the existing regulatory framework, and therefore could not be enacted or enforced except through notice-and-comment rulemaking." *Id.* at 1043.

Here, similarly, each annual scenario hypothesizes different economic conditions and implements a substantive change in the stress tests, and therefore "substantively alters the existing regulatory framework." *Tennessee Hosp.*, 908 F.3d at 1043. For example, the "2025 global market shock features fading inflationary pressures, while [2024]'s global market shock was characterized by expectations for higher inflation." AR-2271, PageID 2393 (*2025 Stress Test Scenarios*). And unlike in "prior stress tests," "[p]rivate equity shocks are not included in the 2025 global market shock component." AR-2272, PageID 2394. These substantive changes to the hypothetical global market shock implicate billions of dollars in higher or lower capital requirements, yet the Board never allows the public an opportunity to comment on them and to suggest how the global market shock (or other components of the annual scenarios) could be improved.

The Board's failure to allow the public to participate also prevents commenters from helping the Board ensure that the scenarios indeed "reflect conditions that characterize post-war U.S. recessions," as the Board intends them to. Appendix A to Part 252, 4.2.1(a). Without the safeguard of notice and comment, the public has no way to tell the Board that its scenarios might involve unrealistic and fanciful circumstances that bear no relationship to the Board's stated standards.

B. The Models And Scenarios Implement Express Statutory Delegations.

The Board's annual stress tests—including the models and scenarios specifically—also implement express statutory delegations and are therefore "a quintessential legislative rule." *Mann*, 27 F.4th at 1144. Indeed, a "binding rule promulgated pursuant to a delegation of legislative authority is 'the clearest possible example of a legislative rule.'" *Mendoza v. Perez*, 754 F.3d 1002, 1022 (D.C. Cir. 2014). When Congress "specifically decline[s] to create a standard," but leaves that task to the agency instead, an agency cannot "claim its implementing rule" is a mere "interpretation of the statute," rather than a legislative rule in its own right. *Id.*

Here, the stress-test models and scenarios implement express statutory delegations and therefore are legislative rules that must be subjected to notice and comment under the APA. The stress tests implement authority delegated by the Dodd-Frank Act, which directs the Board to "conduct annual analyses" to evaluate "whether [banks] have the capital, on a total consolidated basis, necessary to absorb losses as a result of adverse economic conditions." 12 U.S.C. § 5365(i)(1)(A). And the resulting capital requirements similarly implement express statutory delegations directing the Board "to issue regulations" or "set permissible standards." *Tennessee Hosp.*, 908 F.3d at 1043; *supra* at 5. For example, the stress-capital buffer was adopted pursuant to the Board's statutory authority to "issue . . . regulations and orders relating to the capital requirements for bank holding companies" and collect reports about the financial condition of banks. 12 U.S.C. § 1844(b), (c).

The Board uses the models and scenarios to determine (in part) banks' capital requirements, so the models and scenarios are "carr[ying] out [these] express delegation[s] of authority from Congress." *Mann*, 27 F.4th at 1143. They are not simply interpreting other statutory or regulatory provisions—the models and scenarios add concrete, numerical prescriptions to more general statutory and regulatory provisions governing the stress tests and banks' capital requirements. *See United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021) ("[W]hen an agency wants to state a principle in numerical terms, terms that cannot be derived from a particular record, the agency is legislating and should act through rulemaking." (quotations omitted)). The decisions the Board makes in crafting the models and annual scenarios are "substantive policy choice[s]" that result in legislative rules. *Id.* (explaining the distinction between legislative and interpretive rules in the context of a related issue under the Sentencing Guidelines). Indeed, they are among the most economically consequential policy choices made by anyone in the federal government, with

hundreds of billions of dollars in bank capital hinging on decisions by the Board in developing its models and scenarios.

C. The Board Itself Has Acknowledged That The Current Stress-Test Regime Should Be Subjected To Notice And Comment.

For good reason, therefore, the Board has acknowledged that the models and scenarios should be subjected to notice and comment. The Board recently said that it intends to "disclos[e] and seek[] public comment on all of the models" at an undisclosed point in the future. *Dec. 23, 2024 Press Release*, *supra* at 19. The Board also said it would change its procedures for developing the annual scenarios so that the "public can comment . . . before the scenarios are finalized." *Id.*; *see also supra* at 19–20 (collecting additional examples). Under Sixth Circuit precedent, the Board's "recogni[tion] that the [models and scenarios] ought to be implemented through notice-and-comment rulemaking" further "weigh[s] in favor of treating [them] as a legislative rule." *Tennessee Hosp.*, 908 F.3d at 1045; *see also Tennessee v. DOE*, 104 F.4th at 611 (agency's proposal to use notice and comment "'weigh[s] in favor' of finding that the [challenged action] is legislative").

The Board similarly acknowledged the benefits of showing its work to the public when it adopted the current regime—even while refusing to subject the models and scenarios to notice and comment. For example, the Board conceded that "disclosing additional information about supervisory models and methodologies has significant public benefits," including "providing the public with information on the fundamental soundness of the models and their alignment with best modeling practices," and facilitating comments from "academic experts." AR-32, PageID 176 (84 Fed. Reg. at 6,785/2).

As explained above, the Board witnessed the benefits of notice and comment in the 2023 Basel rulemaking, acknowledging publicly that commenters had identified major problems in the bank regulators' proposed methodology for setting capital requirements and stating that

commenters' input would lead to substantial changes to improve the proposed rule. *Supra* at 20–21. The stress-capital buffer requirement, like the Basel proposal, implicates billions of dollars.[20] But because the Board crafts its standards for the stress-capital buffer in secret, both the public and the Board are deprived of the benefits of notice and comment.

Of course, these benefits reflect some of the key premises underlying the APA's notice-and-comment requirements. "Public notice and comment" are "the safety valves in [an agency's] use of sophisticated methodology." *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (quotations and alterations omitted). Even where an agency's methodology is relevant only to the agency's *defense* of a rule—unlike here, where the models and scenarios themselves impose binding requirements on banks—the APA requires the agency to disclose its methodology "'in time to allow for meaningful commentary.'" *Id.* An agency cannot "'play hunt the peanut with technical information, hiding or disguising the information it employs.'" *Id.* at 237. These principles apply with even more force here, where the Board is shielding from the public methodologies that impose hundreds of billions of dollars in regulatory costs on the economy.

II. The Board Failed To Make The Models Available To The Public In Violation Of Section 552 And The Due Process Clause. (Counts 3 and 4)

The Board's refusal to publish the models independently violates 5 U.S.C. § 552 and the Due Process Clause.[21]

[20] Professor Anthony Saunders, Comment Letter on Regulatory Capital Rule 1–3 (Jan. 12, 2024), https://tinyurl.com/sda6679r.

[21] Because the Board makes the scenarios public, albeit without a comment period, Plaintiffs' arguments under Section 552 and the Due Process Clause do not apply to the scenarios.

A. The Freedom Of Information Act's Amendments To The APA Require The Board To Publish Its Rules, Including The Models.

Consistent with ordinary principles of fair notice and the rule of law, the Freedom of Information Act's amendments to the APA require agencies to publish their rules. 5 U.S.C. § 552 provides that agencies "shall . . . publish in the Federal Register" "substantive rules of general applicability," "statements of general policy or interpretations of general applicability," and "each amendment, revision, or repeal of the foregoing." 5 U.S.C. § 552(a)(1)(D), (E); *see also id.* § 553(d) (requiring that, subject to limited exceptions, a rule "shall be" published "not less than 30 days before its effective date"). If regulated parties lack "actual and timely notice" of "a matter required to be published in the Federal Register [which is] not so published," they "may not in any manner be required to resort to, or be adversely affected by" the agency action in question. *Id.* § 552(a).

These provisions bring transparency to the workings of our democracy by ensuring that "agencies must disclose their 'working law'" and are "not permitted to develop a body of 'secret law,' used by [an agency] in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege." *Elec. Frontier Found. v. Department of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014) (some quotations omitted) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975); *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983)). "[P]ublication under FOIA, if anything, should be easier to secure than under [Section 553 of] the APA, given the language and purposes of the two statutes." *Batterton*, 648 F.2d at 710 n.89.

Agency actions must be published under Section 552 if they "appl[y] to a general segment of the public rather than to specific named individuals." *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1374 (Fed. Cir. 2020); *see D&W Food Ctrs., Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986) (agency action is generally applicable if it "results" in a

"significant impact on any segment of the public"). In *D&W Food Centers*, for example, the Sixth Circuit held that the Department of Agriculture's interpretation of the phrase "packing establishment" in federal meat-inspection laws was "generally applicable," and hence required to be published by Section 552, because it "will affect every intrastate-selling grocery store in any one of the twenty-seven designated states" at issue. 786 F.2d at 757.

Here, the Board's stress-test models apply to a general "segment of the public," *D&W Food Centers*, 786 F.2d at 758—namely, bank holding companies with assets exceeding certain, specified amounts, 12 C.F.R. § 252.43. Accordingly, the models are generally applicable, and the Board's failure to publish them violates 5 U.S.C. § 552. The Board must publish them in full, before it may use them "in any manner" to impose capital requirements. *Id.* § 552(a)(1)(E).[22]

B. The Due Process Clause Independently Forbids The Board's Secret Law.

Under the Due Process Clause, "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see* U.S. Const. amend. V. Absent fair notice, vague standards create a constitutionally forbidden "danger of arbitrary and discriminatory application that violates the basic principles of due process." *United Food & Com. Workers Union v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 (6th Cir. 1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)); *see also Miller v. City of Cincinnati*, 622 F.3d 524, 539–40 (6th Cir. 2010) (applying the same rule to affirm injunction of an "Administrative Regulation" as likely unconstitutional); *Breeze Smoke, LLC v. FDA*, 18 F.4th 499, 503 (6th Cir. 2021) ("Administrative agencies are generally required to provide 'fair notice' of requirements."). Agency action that deprives a regulated party of the use of its

[22] As noted, *supra* at 6–7, the Board makes available some information about the models and their methodology. But the Board itself concedes that it has never fully disclosed them. *Supra* at 16, 19–20.

property therefore triggers the constitutional duty to provide notice just as much as agency action imposing penalties. *See United States v. Chrysler Corp.*, 158 F.3d 1350, 1354–55 (D.C. Cir. 1998).

Here, the Board's refusal to fully disclose the models underlying its stress-test process "fails to comply with due process" because the Board's secrecy deprives "a person of ordinary intelligence fair notice of" the criteria by which the Board determines banks' capital requirements. *Fox Television*, 567 U.S. at 253. As explained, the stress-test models determine individual banks' stress-capital buffer and thus limit banks' control over their own assets, to the tune of billions of dollars in capital requirements that fluctuate year-to-year based on the Board's methodology. *See supra* at 5–10. In addition, if a bank does not comply with the stress-capital buffer, it faces automatic and strict limits on discretionary payments and capital distributions, 12 C.F.R. § 217.11(c)(i), backed up by potential penalties, 12 U.S.C. § 1818(b), (i)—thereby further "depriv[ing]" the bank of control over its own property, *Chrysler*, 158 F.3d at 1354–55. The Board's refusal to tell banks, in advance, how it evaluates their performance in the stress tests deprives them the opportunity to conform their conduct to the Board's criteria and thereby avoid unduly high capital restrictions (and unwarranted volatility in their capital requirements). The Board's secretive process for setting capital requirements raises precisely the "'danger of arbitrary and discriminatory application'" that "due process" forbids. *Miller*, 622 F.3d at 540.

III. The 2019 Policy Statements And 2020 Rule Are Also Arbitrary And Capricious. (Counts 5, 6, And 7)

The current stress-test framework is unlawful for the independent reason that it was adopted through a series of arbitrary and capricious agency actions—the 2019 Policy Statements and the 2020 Rule. *Supra* at 11–19. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decision." *Montgomery County v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211,

221 (2016)). Among other things, that requirement means an agency must give a "reasoned response" to commenters' concerns. *Ohio v. EPA*, 603 U.S. at 293–94; *see also, e.g.*, *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012) (failure to address significant comments is arbitrary and capricious). "After all, if an agency could ignore every comment regardless of its content, then the process of soliciting public input would be pointless." *Oakbrook Land Holdings, LLC v. Comm'r of Internal Revenue*, 28 F.4th 700, 713 (6th Cir. 2022).

Here, in the 2019 Policy Statements and the 2020 Rule, the Board failed to reasonably explain its decisions to shield the scenarios and models from notice and comment, and failed to provide a reasoned response to commenters who sought more transparency and explained why the Board's explanations for shrouding the stress tests in secrecy lacked merit.

A. The 2019 Policy Statements Are Arbitrary And Capricious.

In a series of interrelated 2019 actions, released on the same day, the Board refused to subject the scenarios and models to public comment, even though commenters had explained that the Board's lack of transparency: (1) was unlawful; (2) deprived the public of the opportunity to provide meaningful input on the stress tests; and (3) deprived the Board itself of the benefit of the public's analysis and expertise on the methodology underlying the test, resulting in a weaker stress-test regime than one that complied with the APA. *Supra* at 11–16. In none of its 2019 actions did the Board cogently explain why it was taking a less transparent approach to the stress tests and refusing to permit public scrutiny and comment.

1. As to the scenarios, the Board responded to commenters only in the final Scenario Policy Statement. AR-46, PageID 190 (84 Fed. Reg. at 6,654/3). There, the Board stated simply that it was "considering these comments and weighing the costs and benefits of publishing the scenarios for comment." *Id.* The Board failed to explain what these costs and benefits were, why it needed more time to evaluate them after spending more than a year considering the proposal, or

why it was choosing to go forward without notice and comment in the meantime. The Board's proffered "reasoning" could as easily justify *allowing* comment as refusing it. Indeed, allowing comment in the face of this supposed uncertainty would have made more sense, given the value the law ascribes to notice and comment and because accepting comments on the next year's stress tests would have better informed the Board of its costs and benefits. In any event, a preference to punt the question "is not an affirmative basis for" *any* particular decision on whether to subject the scenarios to notice and comment, so the action was necessarily arbitrary and capricious. *Montgomery County*, 863 F.3d at 493.

As the Supreme Court made clear just last year, the Board's mere acknowledgment of commenters who argued for "a fully transparent scenario" process, AR-46, PageID 190 (84 Fed. Reg. at 6,654/3), is no substitute for the agency's obligation to respond *substantively* to the comments. "[A]wareness is not itself an explanation" that satisfied the requirement to "offer a reasoned response to [commenters]' concern." *Ohio v. EPA*, 603 U.S. at 294–95. The Board here simply "acknowledged the concern and moved on"—that is "no substitute for reasoned consideration." *Louisiana v. Dep't of Energy*, 90 F.4th 461, 473 (5th Cir. 2024).

2. As to the models, the final Enhanced Model Disclosure Document recited the Board's concerns that "full disclosure" could result in banks: (1) manipulating their holdings to perform well on the stress tests; (2) holding similar assets; and (3) using the Board's models to manage risk rather than creating their own internal models to account for bank-specific risks. AR-32, PageID 176 (84 Fed. Reg. at 6,785/2–3). But as commenters had explained, those rationales made little sense. *See supra* at 14–15. A result in which banks become "less susceptible to losses under stress as determined by the Federal Reserve's models . . . is not a policy problem; *it is the very objective of the [stress-testing] exercise*." AR-460, PageID 604 (The Clearing House Letter) (emphasis

added). This "[u]nexplained inconsistency" in the Board's analysis is itself "a reason for holding" its non-publication decision to be "arbitrary and capricious." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). And just four years later, the Board—joined by other bank regulators—issued a rule proposal with detailed models for determining capital requirements under the international Basel framework, without anywhere asserting that disclosing the models would weaken rather than fortify bank stability. *Supra* at 20–21.

Commenters also explained that banks *cannot* manipulate their assets to perform well on the stress tests without making longer-term changes to their risk profile. AR-2500, PageID 2622 (The Clearing House Letter); *see also* AR-548, PageID 692 (Committee on Capital Markets Letter) (charging that the Board failed to present "analysis to justify the claim" that disclosure could result in "gaming of the stress test"). And commenters explained that other regulations independently require each bank to develop models tailored to its individual risk profile, negating the Board's claim that publication could somehow lead to a "model monoculture." AR-2499–500, PageID 2621–22 (The Clearing House Letter); *see* 12 C.F.R. §§ 252.54, 252.56; *see also* AR-521, PageID 665 (U.S. Chamber Letter) (the Board had offered "no consideration of the regulatory or supervisory tools available to mitigate those risks"). Although these objections went to the heart of the Board's rationale for pretermitting notice and comment and blocking public scrutiny, the Board said nothing in response. Instead, it simply acknowledged commenters' demand for transparency in two quick sentences and repeated its prior (unsupported) assertion that "full disclosure" might "allow[] firms to make modifications to their businesses that would change their supervisory stress test results without materially changing their risk profile." AR-33, PageID 177 (84 Fed. Reg. at 6,786/2). Commenters had disproved this claim; the Board simply repeated it. That does not come

close to a "reasoned response" to commenters' specific objections. *Ohio v. EPA*, 603 U.S. at 293–94.

Finally, the Board failed to "consider reasonable alternatives" and "provide a reasoned explanation" why those alternatives "are insufficient." *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 758, 761 (6th Cir. 1995); *see also State Farm*, 463 U.S. at 48–51 (holding agency action arbitrary and capricious for failure to consider reasonable alternative); *Spirit Airlines, Inc. v. U.S. DOT*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (similar). Commenters identified an obvious and reasonable alternative to address the Board's concern that banks would try to game the models: "the Board could easily identify and address any [manipulative actions] through its routine monitoring and supervisory activities." AR-2500, PageID 2622 (The Clearing House Letter). The Board provided no "reasoned explanation" why this alternative was "insufficient." *Cincinnati Bell*, 69 F.3d at 761. Instead, the Board simply asserted that it "view[ed] the proposal as striking an appropriate balance," and made the vague assurance that it would "continue to improve its disclosures and to consider ways to further increase the transparency of the stress test." AR-33, PageID 177 (84 Fed. Reg. at 6,786/2).

B. The 2020 Rule Is Arbitrary And Capricious.

The Board's 2020 decision adopting the stress-capital buffer was similarly arbitrary and capricious. In the 2020 Rule, the Board codified the link between the results of the stress tests and the capital requirements imposed on banks: the stress-capital buffer. *Supra* at 16–19. By formally incorporating the stress-test results into banks' capital requirements, the 2020 Rule confirmed that the substantive components of the stress tests—the scenarios and the models—directly impose billions of dollars of capital requirements on banks. Accordingly, commenters again urged the Board to comply with the APA and make the scenarios and models available for notice and comment. The Board again refused.

1. In the proposal for the 2020 Rule, the Board had asked commenters "[w]hat . . . other changes" should be considered, and specifically highlighted the possibility of "[p]ublishing for notice and comment the severely adverse scenario." AR-68, PageID 212 (84 Fed. Reg at 18,171/1–2). Commenters took the Board up on that invitation: The American Bankers' Association urged the Federal Reserve to "publish scenarios for notice and comment" and "publish its models for notice and comment." AR-354–55, PageID 498–99; *see also, e.g.*, AR-144, 147, PageID 288, 291 (The Clearing House Letter) (urging the Board to "[s]ubject[] supervisory scenarios and scenario components to the notice-and-comment process" and "significantly enhance its disclosures about supervisory models to allow for greater model transparency"); AR-252, PageID 396 (Goldman Sachs Letter) (recommending that the Board publish the severely adverse scenario for notice and comment and "provide significantly enhanced disclosure about its models"). Having invited such comments, the Board in the final rule merely fell back on the hollow assurance in its 2019 Policy Statements that it continues to "consider[]" and "weigh[] the benefit of increased transparency against the costs." AR-6, PageID 150 (85 Fed. Reg. at 15,581/1–2).

The Board also failed to give a "reasoned response" to commenters who sounded the alarm (again) about the need for transparency to reduce unwarranted and unexplained volatility in banks' capital requirements. *Ohio v. EPA*, 603 U.S. at 293. The Clearing House explained that the proposed rule would "heighten the urgency to address the volatility of estimated stress losses through increased transparency." AR-142, PageID 286; *see also* AR-354, PageID 498 (ABA Letter) (similar); AR-302, PageID 446 (Committee on Capital Markets Letter) (similar); AR-270, PageID 414 (Financial Services Forum Letter) (similar). Transparency would "allow firms to operate with more reasonable operational buffers, to engage more effectively in capital management and planning to comply with their [stress-capital buffer] requirements[,] and to more specifically comment

on the supervisory scenarios and scenario components, effectively increasing the Federal Reserve's accountability." AR-146, PageID 290 (The Clearing House Letter).

The Board simply "sidestep[ped]" the issue, *Ohio v. EPA*, 603 U.S. at 295, asserting that "[s]ome degree of volatility is inherent to risk-based capital requirements," AR-5, PageID 149 (85 Fed. Reg. at 15,580/3), while ignoring concerns that it was greatly *increasing* volatility and refusing to engage with commenters' explanation of how a more transparent process would help address the problem. *See Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) (it is not "appropriate" for an agency to "disregard alternatives merely because they do not offer a complete solution to the problem"); *see also Pub. Citizen v. FMCSA*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (the mere fact that the "magnitude" of an effect is "uncertain is no justification for disregarding the effect entirely"). The Board then repeated the same inadequate explanation it gave in 2019—that it was continuing to *consider* the benefits of additional transparency against their purported costs, "including, increased risk of window-dressing by firms and reduced flexibility by the Board to respond to salient risks." AR-6, PageID 150 (85 Fed. Reg. at 15,581/2). Nowhere did the Board determine that the purported costs outweighed the benefits or otherwise attempt to articulate any meaningful "affirmative basis" for again refusing to subject the scenarios to notice and comment. *Montgomery County*, 863 F.3d at 493.

2. When it came to the models, the 2020 Rule gave even less attention to the demands for full disclosure. The Board acknowledged that commenters had urged it to "enhance the transparency of the models used in the supervisory stress test by publishing model specifications for comment, or publishing its methodology for comment each year." AR-14, PageID 158 (85 Fed. Reg. at 15,589/2). But it bluntly responded that "the Board's methodology for conducting the

supervisory stress test was not part of the proposal." *Id.* (at 15,589/3). That comes far short of the reasoned response required by the APA.

The whole point of the 2020 Rule was to directly incorporate "the Board's methodology for conducting the supervisory stress test[s]" into banks' binding capital requirements. AR-14, PageID 158 (85 Fed. Reg. at 15,589/3). When commenters pointed out that this increased the need for transparency, the Board was obligated to consider those comments—an agency cannot avoid a problem with its proposed rule simply by asserting that problems raised by commenters were not "part of the proposal," *id.* Instead, agencies have a "duty to respond to 'significant points raised by the public,'" *Oakbrook*, 28 F.4th at 713, and the response must be "reasoned," *Ohio v. EPA*, 603 U.S. at 293. *See also, e.g.*, *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (final rule is arbitrary and capricious "if [the agency] fails to respond to 'significant points' and consider 'all relevant factors' raised by the public comments"); *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 769 (4th Cir. 2012) ("[D]uring notice and comment proceedings, the agency is obligated to identify and respond to relevant, significant issues raised during those proceedings.").

Finally, the Board claimed that it had already taken several "steps to respond to these comments" in its 2019 rulemakings. AR-14, PageID 158 (85 Fed. Reg. at 15,589/3). But as explained above, those rulemakings themselves were arbitrary and capricious because they failed to reasonably respond to commenters who urged the Board to fully disclose its models and subject them to the notice-and-comment process required by the APA. *Supra* at 36–39.

* * *

In sum, even if the Board had authority to shield the scenarios and models from notice and comment, it was required to provide a reasoned explanation for doing so. Because it did not, the

2019 Policy Statements and 2020 Rule arbitrarily and capriciously adopted a regime for establishing banks' capital requirements without disclosing the criteria for those edicts and without allowing the public to comment on them.

IV. The Court Should Bar The Board From Using The Current Stress-Test Regime To Impose Capital Requirements After The 2025 Stress-Testing Cycle.

For the reasons explained above, this lawsuit challenges the process by which the Board set banks' current stress-capital requirements in 2024, the Board's use of that same process for the 2025 stress tests, which are ongoing, and any future use of the stress-test models or annual scenarios to impose capital requirements without fully disclosing them and allowing the public to comment. To avoid any potential disruption to banks' current capital requirements, and to allow the Board sufficient time to incorporate the procedures required by the APA into its annual stress-testing cycle, Plaintiffs request that the Court order relief commencing in 2026, as follows.

A. To start, the Court should declare that the stress-test models and scenarios used by the Board in 2024, and that will be used by the Board in 2025 and 2026: (1) are legislative rules that the Board was required to subject to notice and comment under the APA; and (2) must be fully published under the Freedom of Information Act's amendments to the APA and the Due Process Clause. *See supra* at 24–35. The APA expressly authorizes courts to issue "declaratory judgments." 5 U.S.C. § 703. That includes "declaratory judgment[s] preventing the [agency] from enforcing" unlawful rules "in the future." *Mann Constr. v. United States*, 86 F.4th 1159, 1163 (6th Cir. 2023); *see also, e.g.*, *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 668 (6th Cir. 2021) (affirming "declaratory judgment that the [challenged] Order exceeds the government's statutory grant of power, that it violates the Constitution, and that its promulgation violated the Administrative Procedure[] Act").

B. The Court should also enter a permanent injunction forbidding the Board's enforcement of the stress-capital buffer after October 2026 (when the 2026 stress-capital buffer is scheduled to take effect), unless the models and scenarios have been adopted pursuant to notice and comment.

As an initial matter, the FOIA amendments to the APA command this result: Because the models have not been properly published, Plaintiffs "may not in any manner be . . . adversely affected" by the models. 5 U.S.C. § 552(a)(1)(E).

Each of the four factors governing the issuance of a permanent injunction is also easily satisfied, as is typical in most APA cases. Plaintiffs' members suffer "irreparable injury" from the Board's unlawful actions in the form of hundreds of billions of dollars in capital restrictions. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006); *see also Tennessee v. DOE*, 104 F.4th at 613 ("the federal government's 'sovereign immunity'" renders "'compliance costs'" "irreparable"). Plaintiffs' members have no adequate "remedies available at law, such as monetary damages," *eBay*, 547 U.S. at 391, because "the APA[] prohibit[s] . . . suits for money damages," *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The "balance of hardships" favors Plaintiffs as well, *eBay*, 547 U.S. at 391, since the Board would not be prejudiced by an injunction committing it to the increased transparency that it has already recently promised to provide, *supra* at 19–21. And "the public interest would not be disserved by a permanent injunction," *eBay*, 547 U.S. at 391, because "'the public's *true* interest lies in the correct application of the law,'" *Tennessee v. DOE*, 104 F.4th at 614; *see League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."). That is especially so here, where Plaintiffs seek relief that is carefully tailored to avoid any disruptions to the Board's annual stress tests or banks' capital requirements.

C. Finally, the Court should vacate and set aside the 2024 and 2025 stress-test models and scenarios, the results of the 2024 stress tests, the 2019 Policy Statements, and the 2020 Rule. "The standard remedy for violations of the APA is vacatur of the agency action." *Ohio Env't Council v. U.S. Forest Serv.* (*Ohio Env't II*), 2023 WL 6370383, at *2 (S.D. Ohio Aug. 3, 2023) (Marbley, C.J.); *see* 5 U.S.C. § 706 (courts "shall" "hold unlawful and set aside" arbitrary and capricious agency action); *Kentucky v. EPA*, 123 F.4th 447, 473 (6th Cir. 2024) (vacatur is the "default" APA remedy). Courts "must 'set aside' agency actions that fail to follow" the APA's notice-and-comment requirements. *Mann*, 27 F.4th at 1143 (quoting 5 U.S.C. § 706(2)(D)).

Vacatur is the appropriate remedy here because of "the seriousness of" the "deficiencies" in the Board's use of the stress-test models and scenarios to establish capital requirements without notice and comment. *Ohio Env't II*, 2023 WL 6370383, at *2–3. And any "potential disruptive consequences" of vacatur, *id.* at *5, can be eliminated through a limited vacatur that sets aside the actions described above only to the extent the Board uses them to enforce stress-capital buffers after October 2026 (by which time the Board can complete a new round of stress testing that complies with the APA). That narrowed relief would be an appropriate exercise of this Court's "discretion to fashion an appropriate remedy as equity requires." *Id.* at *2; *see also GPA Midstream Ass'n v. DOT*, 67 F.4th 1188, 1201–02 (D.C. Cir. 2023) (noting courts' discretion to "'invalidate only some applications'" of an agency's rule).

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment and enter the relief described above. To ensure that the Board can implement necessary reforms to the stress tests in time for the 2026 cycle, Plaintiffs respectfully request a decision by October 31, 2025.

Dated: March 21, 2025

Respectfully submitted,

/s/ James A. King
James A. King (No. 0040270)
Trial Attorney
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street, Suites 2800 - 3200
Columbus, OH 43215
Telephone: (614) 227-2051
jking@porterwright.com

/s/ Eugene Scalia
Eugene Scalia*
Matt Gregory*
Max E. Schulman*
Giuliana C. Cipollone*
Olivia R. Goldberg*
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W., Washington, D.C. 20036
Telephone: (202) 955-8500
escalia@gibsondunn.com

Attorneys for Plaintiffs Bank Policy Institute, Ohio Chamber of Commerce, Ohio Bankers League, American Bankers Association, and Chamber of Commerce of the United States of America

Don Boyd (No. 0089180)
OHIO BANKERS LEAGUE
4215 Worth Avenue, Suite 300
Columbus, OH 43219
Telephone: (614) 340-7595

Attorney for Plaintiff Ohio Bankers League

John Court*
Sarah Flowers*
BANK POLICY INSTITUTE
1300 Eye Street, N.W., Suite 1100 West
Washington, D.C. 20005
Telephone: (202) 289-4322

Attorneys for Plaintiff Bank Policy Institute

Thomas J. Pinder*
Andrew Doersam*
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 663-5035

Attorneys for Plaintiff American Bankers Association

Tony Long (No. 0037784)*
OHIO CHAMBER OF COMMERCE
34 South Third Street, Suite 100
Columbus, OH 43215
Telephone: (614) 228-4201

Attorney for Plaintiff Ohio Chamber of Commerce

Jennifer Bandy Dickey*
Jordan L. Von Bokern**
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

Attorneys for Plaintiff Chamber of Commerce of the United States of America

*Admitted *pro hac vice*
**Motion for admission *pro hac vice* pending