

**REDUCING CONSUMER SHARIAH RISK THROUGH
TRUTH-IN-LENDING DISCLOSURES**

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INTRODUCTION

In recent years, Islamic finance products have grown in popularity around the world. In response, foreign jurisdictions and international

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organizations have created Shariah-compliance regulatory schemes that could serve as a model for Islamic finance-specific consumer protection law in the United States. However, no United States regulatory authority has offered guidance on how to resolve Shariah-compliance questions should they arise in the context of a US Truth-in-Lending Act dispute. This is a particular problem because of the frequent introduction of new Islamic finance products to the market and the lack of consensus amongst Islamic jurists regarding specific products' compliance with Shariah. In other words, without guidance on where to turn to resolve a Shariah-compliance dispute, consumers are unlikely to prevail should a financial institution misrepresent a loan or investment as Shariah-compliant, even though United States courts routinely defer to religious law when parties agree to its relevance to a particular transaction.¹

This article argues that the Truth-in-Lending Act as it exists now is fundamentally compatible with the goal of reducing "Shariah risk" through mandatory ex-ante disclosures. This is true for two primary reasons. First, the act has a history of being adapted to require more disclosures for specific, particularly risky transactions—including transactions that place a consumer's home in potential jeopardy—which is precisely what would be required to suppress Shariah risk for consumers of Islamic mortgage alternatives. Second, the existing rescission remedy allows the government to create a strong compliance incentive for lenders without the need to implement damages provisions likely to face constitutional challenges on the basis of the First Amendment Establishment Clause.

Part I offers background on the relevant Islamic law that necessitates alternatives to traditional mortgages. Part II traces previous changes to the Truth-in-Lending Act and fits Shariah risk disclosures within the existing framework, then offers specific proposed statutory language and a brief defense of that language's constitutionality under the First Amendment. Part III concludes the analysis.

¹ See CYNTHIA BROUGH, CONG. RSCH. SERV., R41824, APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES, at 2–4 (2011).

I. BACKGROUND

A. FINANCIAL TRANSACTIONS IN ISLAMIC LAW

Before embarking on a critique of the United States' financial regulatory regime as applied to Islamic finance, or a comparison of that regime to those of other countries, it is helpful to first briefly discuss the underlying Islamic legal basis for affixing religiously imposed standards to financial transactions.

Islam, unlike Western religions, is greatly concerned with the details of the social and economic order governing its believers.² Generally speaking, Islam commands its followers to create a prosperous and egalitarian social structure that allows all Muslims to maximize their health, wealth, and intellectual and creative output, all for the ultimate glorification of God.³ Despite unfortunate popular conceptions of Islam as somehow incompatible with capitalism or modernity as a whole, Islamic economics actually play quite nicely with Western-style market theories.⁴ The primary difference is that Islam envisions wealth maximization not for its own sake, but rather assumes that actors will combine rational thinking with altruism, and that resultingly greater total wealth will be created and deployed for the benefit of the entire community.⁵

This general ethos is rooted in Islam's canonical texts—the Qur'an and the Sunna—and the details are fleshed out in subsequent interpretation and application from Islamic jurisprudential scholars.⁶ While the canonical texts form the basis of all Islamic jurisprudence, modern Islamic financial contracts are governed for all practical purposes by *Qiyas*: reasoning-by-analogy on the part of Islamic jurists and legal scholars sitting on government- or financial institution-sponsored Shariah

² Scheherazade S. Rehman, *Globalization of Islamic Finance Law*, 25 WIS. INT'L L.J. 625, 626 (2008) (citing John Thomas Cummings, Hossein Askari & Ahmad Mustafa, *Islam and Modern Economic Change, in ISLAM AND DEVELOPMENT, RELIGION, AND SOCIOPOLITICAL CHANGE*, 25, 26 (John L. Esposito ed., 1980)).

³ See *id.*

⁴ See MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE LAW, ECONOMICS AND PRACTICE* 2–3 (2006) (noting that journalists discussing Islamic Finance tend to express disbelief that its proponents are earnestly following Shariah).

⁵ See *id.* at 191 (“[T]he ethical and prudential regulatory substance of Islamic jurisprudence is in fact aligned with the profit motive . . . as well as the ethical point of view of selfless contribution to social and economic development.”); IBRAHIM WARDE, *ISLAMIC FINANCE IN THE GLOBAL ECONOMY* 44 (1st ed. 2000) (“The most important difference between Homo Islamicus and Homo Economicus is the assumption of altruism.”).

⁶ EL-GAMAL, *supra* note 4, at 32–35; Rehman, *supra* note 2, at 626.

advisory boards.⁷ In practice, Islamic finance departs Western-style finance only insofar as any given practice of Western financial institutions is deemed prohibited by Shariah.⁸ In order to legitimize an alternative means of achieving a given transaction, (typically one inspired by a specific Western-style financial product) bankers and lawyers pose questions to scholars of Shariah, who answer with either permission or rejection in the form of a *fatwa* or decree.⁹ Since the genesis of modern Islamic finance in the 1960s and 1970s,¹⁰ Islamic financial institutions have continually innovated an ever-expanding array of Islamic financial products that, according to the relevant Shariah experts, conform with Islamic law.¹¹ Islamic financial institutions first identify a particular financial transaction that is common in the West—for example an interest-bearing residential mortgage.¹² They then devise an alternative that complies with Islamic law,¹³ ask for the approval of the relevant internal or government-backed authority, and finally market the product to investors or borrowers under the Arabic (or, in English-speaking countries, transliterated-from-Arabic) name of the most closely analogous contract form from the classical Islamic era.¹⁴

Via this method, Islamic financial institutions have developed products comparable to corporate bonds (*sukuk*),¹⁵ insurance (*takaful*),¹⁶ and mortgages (*murabaha* and *ijara*).¹⁷ Because this Comment is mostly concerned with the gap in US consumer protection law vis-à-vis Islamic finance, we will limit our discussion to the two Islamic financial transactions most commonly used as an alternative to a Western-style residential mortgage: *murabaha* and *ijara*. To accomplish this, we will first examine the two major prohibitions under Shariah that make this contract form necessary: *riba* and *gahrar*.¹⁸

⁷ EL-GAMAL, *supra* note 4, at 11–20, 32–35.

⁸ *Id.* at 9.

⁹ *Id.* at 34–35.

¹⁰ Rehman, *supra* note 2, at 637.

¹¹ EL-GAMAL, *supra* note 4, at 34–35.

¹² *See id.*

¹³ For reasons that will be described below, a standard interest-bearing mortgage is widely considered impermissible under Shariah.

¹⁴ EL-GAMAL, *supra* note 4, at 34–35.

¹⁵ *Id.* at 5–7.

¹⁶ *See* INSTITUTE OF ISLAMIC BANKING AND INSURANCE, *Islamic Insurance (Takaful)*, ISLAMIC-BANKING.COM, <https://www.islamic-banking.com/explore/islamic-finance/islamic-insurance-takaful> [https://perma.cc/3P2P-GJFJ].

¹⁷ EL-GAMAL, *supra* note 4, at 2–5.

¹⁸ *Id.* at 8.

1. *Riba and Gahrar*

Riba, an Arabic word meaning literally “an increase,” is universally recognized as impermissible under Shariah, and is commonly equated with interest.¹⁹ The first mention of *riba* in the Qur’an warns: “That which you lend to increase in the property of others will not increase with God; but that which you give out in charity, seeking God’s pleasure, it will surely multiply.”²⁰

Despite frequent assertions, especially by Westerners, along the lines of “Islam prohibits interest,”²¹ the truth is in fact much more nuanced, and precisely what entails *riba* and what does not is the topic of vociferous debate among scholars of Islamic law.²² For example, Nico Swartz argues that *riba* refers only to interest assessed at “excessive, exorbitant, and exploitative” rates.²³ Similarly, Mahmoud El-Gamal points out that because Shariah-compliant transactions like *murabaha* generate income to lenders that lenders in turn report to regulatory authorities as interest, there must be some interest that is not *riba*.²⁴ According to El-Gamal, *riba* is better understood as above-market pricing, which is prohibited to avoid inefficiency and ensure that maximum benefit is derived from the community’s resources.²⁵ In the context of a residential mortgage, this

¹⁹ *Id.* at 49.

²⁰ *Id.* at 49–50 (quoting THE HOLY QUR’AN, 30:39).

²¹ See, e.g., Carla Power, *Faith in the Market*, FOREIGN POL’Y, Jan.–Feb. 2009, at 70. (“Islamic law, or *shariah*, forbids pious Muslims from paying interest or investing in morally questionable companies.”). While this formulation of the law may be sufficient for understanding the *murabaha* transactions that this paper focuses on, it is in fact a gross over-simplification of the topic.

²² See Todd J. Schmid, Comment, *The Real Shariah Risk: Why the United States Cannot Afford to Miss the Islamic Finance Moment*, 2013 U. ILL. L. REV. 1293, 1301–03 (2013).

²³ Nico P. Swartz, *Can the Model of the Riba-Free Islamic Commercial Bank Provide a New Paradigm for the Future of Global Banking?: A Theoretical Review*, 2 J. GLOB. BUS. & ECON. 86, 89 (2011).

²⁴ EL-GAMAL, *supra* note 4, at 52.

²⁵ See *id.* at 52. This understanding derives from the Prophet’s admonition against trading some quantity of low-quality dates for a lesser quantity of high-quality dates. *Id.* at 53. Instead, the Prophet instructed his follower to sell the low-quality dates in the market and use the proceeds to buy whatever quantity of higher-quality dates he could. *Id.* In this way, the full market value of all the dates involved would be realized, and presumably, the risk of dates going to waste would be reduced. *Id.* Under El-Gamal’s analysis, it seems that the idea of *riba* is more closely associated with transactions that produce a profit based purely on one party’s information advantage over the other: by trading dates-for-dates (or money-for-money), there is risk that one party to the exchange gets less than he deserves because he has not gathered sufficient information about his dates’ true value from the market. The same analysis *could* apply to a coerced above-market interest rate, but it wouldn’t apply to a fair one.

would not prohibit all interest rates, only interest rates above the prevailing market rate.²⁶

For the purposes of this paper, however, it will suffice to understand *riba* as it is understood by practitioners in the Islamic finance industry, which is the definition that dictates what transactional structures are available to potential consumers of Shariah-compliant mortgage alternatives. The Islamic bank HSBC Ammanah defines *riba* as “any return of money on money.”²⁷ This means that in a conventional mortgage, interest is indeed prohibited, because it represents a profit earned by the lender which results solely from the lender’s possession of a sufficient lump sum of cash to purchase a home outright. By prohibiting *riba*, Shariah aims to prevent the exacerbation of inequality, and avoid exploitation of poor borrowers by wealthy lenders.²⁸

The other major prohibition relevant to Islamic finance is *gahrar*, which is related to the level of risk or uncertainty in a transaction.²⁹ A particular contract is deemed prohibited for *gahrar* when its material terms contain an excessive level of unavoidable risk.³⁰ Classical examples of *gahrar* involve some kind of information inequality between the parties, such as ex-ante sales of a fisherman’s prospective catch.³¹ Modern examples include conventional insurance, where the premium paid by the policyholder is disclosed upfront but the value of the indemnification she will receive in return is unknowable.³²

2. Murabaha Financing

One mortgage alternative commonly offered by Islamic financial institutions is *murabaha*. The *murabaha* sale provides an alternative mode of financing the purchase of a home (or other asset) that simultaneously (1) complies with Shariah and (2) allows lenders with sufficient liquidity to earn a profit on lending funds to consumers who lack liquidity, but nonetheless desire to purchase a valuable asset. In the traditional Western mortgage transaction, an individual approaches a bank for a loan of a

²⁶ See *id.* at 54.

²⁷ Schmid, *supra* note 22, at 1302.

²⁸ *Id.*

²⁹ See EL-GAMAL, *supra* note 4, at 58–60.

³⁰ *Id.* at 58–59.

³¹ *Id.* at 58 n.22.

³² See *Islamic Insurance (Takaful)*, *supra* note 16.

specified amount, interest rate, and repayment schedule.³³ If she is granted the loan, she uses the cash to purchase the designated home, takes title to the home, and grants the bank a lien on the property that the bank can enforce in the event of default.³⁴ She then pays back the borrowed amount plus interest according to an amortization table, and upon paying off the entire loan takes clean title to the property.³⁵

As noted above, however, the majority of Shariah scholars and jurists view this transaction as a form of *riba* in favor of the bank—the bank is earning a return of money in exchange for its investment of money.³⁶ The *murabaha* transaction achieves identical results for both the bank and the home buyer, but in compliance with Shariah, by separating the transaction into an outright purchase of the home by the bank and a subsequent installment sale to the consumer at a marked-up price.³⁷ The amount of the markup may be equal to the total of interest payments under a conventional mortgage; the payments may be made according to the same amortization schedule; and the documents memorializing the transaction may even use traditional mortgage terminology like “borrower,” “interest,” and “loan” in order to comply with local disclosure and prudential regulations.³⁸ Even so, the consensus among Islamic jurists is that *murabaha* contracts are Shariah-compliant, because the transaction as a whole is analogous to a classical Islamic “trust sale,” which permits re-sale of some asset for a profit on the condition that the ultimate user is told the price that his or her agent-intermediary paid first.³⁹

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*; EL-GAMAL, *supra* note 4, at 3.

³⁶ EL-GAMAL, *supra* note 4, at 4.

³⁷ *Id.* at 4.

³⁸ *Id.* at 4–5.

³⁹ *Id.* at 43. El-Gamal argues against this majority view, noting that because a bank’s true business is dealing in financial assets and liabilities rather than trading in tangible assets like homes or cars, that it should be required by Shariah to not only reveal the price it paid for the home, but its own cost of funds—the price it paid for the liquidity it is offering to the consumer—in order to characterize this transaction as a Shariah-compliant *murabaha*. *Id.* This added disclosure, he notes, would go further than the current mandate of the United States’ Truth in Lending Act, which requires merely that the consumer’s own cost of funds, in the form of an APR and a finance charge, be disclosed. This conclusion resonates with the overarching thesis of El-Gamal’s enlightening scholarship: Islamic finance as currently practiced elevates form over substance to produce little more than high transaction costs, but if it is re-focused on the underlying ethical and economic substance that classical practices served to promote, it can serve as a means of harmonizing market activity with selfless dedication to social and economic development, for Muslims and non-Muslims alike. *Id.* at 190–92.

3. *Ijara Financing*

A second popular Shariah-compliant alternative to the standard Western mortgage is the *ijara* contract. Under *ijara*, an Islamic financial institution purchases a property identified by the consumer on the consumer's behalf, then leases the property to the consumer for a specified period before ultimately transferring title of the property to the consumer at the completion of the lease term.⁴⁰ Much like in a *murabaha* transaction, the lease payments are determined by calculating the total finance charge that would have been paid in the form of periodic interest payments in a traditional mortgage, and applying them in the form of a marked-up price beyond the initial purchase price paid by the Islamic financial institution, divided into monthly payments.⁴¹ The key difference between *ijara* and *murabaha* has to do with exactly what the consumer is paying for, not how much she pays. In the context of *ijara*, the consumer pays for occupancy rights and a contingent future interest in title to the property.⁴² Title finally transfers at the completion of the agreed lease period and takes effect automatically without the need for any additional consumer action.⁴³ This is in contrast to *murabaha*, where the consumer takes title at the consummation of the transaction and pays to extinguish the financial institution's security interest in the purchased property.

Similar to the *murabaha* context, the mark-up is not considered prohibited *riba* because the consumer is aware of the difference between the total cost of the property to the Islamic financial institution and the total cost of the property to himself.⁴⁴ This is because the consumer is responsible for identifying the property and negotiating the terms of the property's sale to the bank, as well as making a down payment computed as a percentage of the financial institution's purchase price.⁴⁵

B. SHARIAH GOVERNANCE

A jurisdiction's approach to governing Shariah-compliance among its financial institutions depends on its willingness to allow its

⁴⁰ *Id.* at 12–15; Office of the Comptroller of Currency, Interpretive Letter No. 806 (Oct. 17, 1997) [hereinafter OCC Letter No. 806].

⁴¹ OCC Letter No. 806, *supra* note 40, at 2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See EL-GAMAL, *supra* note 4, at 43.

⁴⁵ OCC Letter No. 806, *supra* note 40, at 2.

courts to adjudicate rights derived from Shariah. As we will see, excluding Shariah questions from a jurisdiction's courts does not necessarily implicate hostility toward Islamic finance, but it may deprive borrowers choosing to use Shariah-compliant mortgage alternatives of some of the protections afforded to borrowers engaged in more traditional financing.

1. *Muslim-Majority Jurisdiction: Malaysia*

Malaysia has one of the most highly developed systems for regulating Islamic finance of any country in the world.⁴⁶ This is due at least in part to the newly-elected government's desire to enrich the Malaysian economy by attracting international capital to Malaysian financial institutions through tax incentives.⁴⁷ The government's motives notwithstanding, the system is governed by the Islamic Financial Services Act of 2013, which constitutes a comprehensive system for regulating the Islamic financial services industry in the country, including granting power to the Malaysian central bank, Bank Negara Malaysia (BNM), to regulate the Islamic financial sector and prohibiting financial institutions that conduct Islamic financial businesses from also conducting non-Shariah-compliant business.⁴⁸ This is important for protecting Islamic investors' capital from financing industries that facilitate forbidden practices under Islam, namely alcohol production, pork production, and gambling. Most relevant to this article's theme is the Islamic Financial Services Act's establishment of a Shariah Advisory Council housed within the BNM, whose rulings on finance-related Shariah questions become binding on courts and arbitrators within Malaysia.⁴⁹

2. *US Regulation*

The United States' regulatory authorities have taken a much less unified approach to regulating Islamic finance, by comparison. Since US financial institutions first expressed interest in opening "Islamic

⁴⁶ Rodney Gerard D'Cruz & Murni Zuyari Zulkifli Aziz, Malaysia, in *THE ISLAMIC FINANCE AND MARKETS LAW REVIEW* 69 (John Dewar & Munib Hussain eds., 4th ed., 2019).

⁴⁷ For example, even though Islamic and conventional institutions are taxed at the same general rate in Malaysia, professional fees related to the issuance of Shariah-compliant bonds (*sukuk*) are either deductible or double deductible, depending on which classical nominate contract the securities are based on (*murabaha*-backed *sukuk*, for example, are double deductible). *Id.* at 43–44, 56–57.

⁴⁸ *Id.*

⁴⁹ *Id.*

Windows,” the Office of the Comptroller of the Currency (OCC) has issued a grand total of two interpretive letters concerning Islamic mortgage alternatives: One permits *ijara* financing and the other permits *murabaha*.⁵⁰

It was necessary for the OCC to issue this guidance because, as a means of preventing real estate speculation, US banks are generally prohibited from owning real assets except for limited periods of time between foreclosing on a security interest and selling the asset to recoup losses incurred by a default.⁵¹ The OCC determined that *ijara* and *murabaha* transactions were permissible because they were “functionally equivalent to or a logical outgrowth of secured lending and therefore permissible under existing banking law.”⁵² In other words, they did not present the risks that the rule was designed to eliminate, and therefore did not violate the prudential regulatory regime already in place.⁵³

However, Islamic financial transactions *do* present an additional, unique risk to both consumers and financial systems in the form of “Shariah risk.” Simply put, this is the risk that any transaction held out by a financial institution as Shariah-compliant may later be deemed *non-compliant*.⁵⁴ If this happens, financial institutions risk that an individual investor (or a lot of individual investors) will want their money back, which could cause that financial institution to become over-extended or even insolvent. This scenario also raises questions surrounding the enforceability of a financial institution’s contract against a consumer default if the consumer can show that the entire transaction was impermissible from the beginning.⁵⁵

⁵⁰ See Thomas C. Baxter, Jr., Exec. Vice President & Gen. Couns., Fed. Rsrv. Bank N.Y., Address Before the Seminar on Legal Issues in the Islamic Financial Services Industry: Regulation of Islamic Financial Services in the United States (Mar. 2, 2005); Office of the Comptroller of Currency, Interpretive Letter No. 867 (June 1, 1999) [hereinafter OCC Letter No. 867] (referencing *murabaha*); OCC Letter No. 806, *supra* note 40, at 2 (alluding to *ijara*, but not directly referencing it by name).

⁵¹ Baxter, *supra* note 50.

⁵² *Id.*

⁵³ See Schmid, *supra* note 22, at 1319–20.

⁵⁴ See generally MAHMOUD AMIN EL-GAMAL, A BASIC GUIDE TO CONTEMPORARY ISLAMIC BANKING AND FINANCE 4, 6 (2000), <http://www.ruf.rice.edu/~elgamal/files/primer.pdf> [<https://perma.cc/9KW4-SGWE>] (providing an overview of Islamic banking).

⁵⁵ *Id.* at 24.

II. ANALYSIS

A. THE TRUTH-IN-LENDING ACT AS A BASELINE FOR INCORPORATING CONSUMER PROTECTIONS SPECIFIC TO ISLAMIC FINANCIAL PRODUCTS INTO US LAW

In order to protect American borrowers and investors from the moral and financial consequences of doing business with a Shariah non-compliant financial institution, the United States must implement further regulation than the limited, ad-hoc prudential approval represented by the OCC's two interpretive letters on Islamic financial contracts.⁵⁶ Fortunately, two existing landmarks of the Truth-in-Lending Act (TILA), lend themselves naturally to the incorporation of protections tailored specifically to consumers of Islamic financial offerings.⁵⁷ First, TILA places a stronger emphasis on ex-ante disclosures to foster savvy comparison shopping by consumer borrowers than it has on substantive restrictions on permissible contract terms.⁵⁸ Second, TILA already provides that in certain circumstances, a consumer who relies on defective disclosures in consummating a loan is entitled to simply rescind the transaction and return the borrowed funds rather than sue for damages. This remedy may prove particularly useful in the context of an American protection for Shariah-compliant borrowers because legislators and courts are likely to encounter First Amendment Establishment Clause issues if they wade into the question of how much actual harm an individual has suffered when he or she has unknowingly entered into a Shariah non-compliant transaction.

1. *TILA Disclosures as an Adaptable Risk-Reduction Mechanism*

The overarching purpose of TILA is to ensure that consumer borrowers are informed of the costs of borrowing before consummating a

⁵⁶ See OCC Letter No. 806, *supra* note 40; see also OCC Letter No. 867, *supra* note 50.

⁵⁷ As will be noted in Part II.C of this paper's analysis, doing so would require a deft touch and a keen sensitivity toward the Establishment Clause. However, this paper takes the position that such a project is not ultimately doomed to unconstitutionality, even as it acknowledges the high potentiality that such an amendment to TILA is likely to toe the line and may therefore be a political non-starter for most legislators.

⁵⁸ See NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING § 1.4 (10th ed. 2019) (hereinafter NCLC TREATISE).

loan, allowing them to comparison-shop amongst lenders more easily, so its primary emphasis is on clear ex-ante disclosure of key contract terms.⁵⁹

When the act was debated in Congress, the bill's sponsors paid particular attention to increasing consumer debt and the increasing share of bankruptcy proceedings initiated by individuals rather than businesses.⁶⁰ The bill aimed to (1) decrease the risk that outsized total consumer debt could intensify the effects of future recessions, (2) spur growth by reducing the deadweight loss incurred when a dearth of information causes a consumer to simply pay more for credit than the market actually dictates, and (3) make monetary policy more efficient by forcing consumer lenders to present their interest rates in a manner more easily comparable to the rates advertised by banks. By reducing information gaps between lenders and borrowers in this way, TILA aims to prevent fraudulent, misleading, or exploitative lending; allow the market for consumer borrowing to function efficiently; and promote "economic stabilization" by lowering the total risk of consumer credit default nationwide.⁶¹

Under TILA, certain information must be disclosed to a consumer before any closed-end loan can be consummated.⁶² Residential mortgages are subject to these requirements plus an additional, more detailed set of disclosure requirements as well.⁶³ Specifically, in any closed-end loan, the lender must provide the consumer with the amount financed, total finance charge expressed both as a dollar amount and as an annual percentage rate (APR), payment schedule, and any security interest the lender will be granted in connection with the loan.⁶⁴ For the most part, the disclosures are incredibly straightforward, in keeping with the law's sponsor's characterization at time of its enactment as a "simple and modest measure."⁶⁵

⁵⁹ *Id.* § 1.1.1; *see also* *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 751 (7th Cir. 2000) ("Congress enacted TILA to ensure that consumers receive accurate information from creditors in a precise and uniform manner that allows them to compare the cost of credit."); *Taylor v. Countrywide Home Loans*, 2010 WL 750215, at *7 (E.D. Mich. Mar. 3, 2010) ("TILA's purpose is twofold: to facilitate the consumer's acquisition of the best credit terms available and to protect the consumer from divergent and at times fraudulent practices stemming from the uninformed use of credit.") (citing *Mourning v. Family Publ'n Serv.*, 411 U.S. 356 (1973)).

⁶⁰ 109 CONG. REC. 2027 (1963) (statement of Sen. Paul Douglas).

⁶¹ *See* 15 U.S.C. § 1601(a) (congressional findings and declaration of purpose); 109 CONG. REC. 2027 (1963) (statement of Sen. Paul Douglas).

⁶² NCLC TREATISE, *supra* note 58, § 5.1.

⁶³ *Id.* § 5.11.

⁶⁴ 15 U.S.C. § 1638(a).

⁶⁵ 109 CONG. REC. 2027 (1963) (statement of Sen. Paul Douglas).

But the law's simplicity is precisely its power, especially when one considers the confusing tactics that were permissible prior to its passage. For example, before TILA's APR disclosure mandate became effective, lenders could use varying methods of calculating interest rates, such as the "add-on rate" method,⁶⁶ making credit appear less costly to the unsophisticated consumer and potentially inducing a borrower to choose the more expensive of two available loans. The National Consumer Law Center provides a striking example of just how inefficient and confusing the market for consumer credit could operate in the days before a nationally-unified method of interest rate calculation and disclosure:

Consider a \$100 loan repayable in twelve monthly installments of \$10.83, with a total of payments of almost \$130. Prior to the Truth-in-Lending Act, a lender could legally have quoted this as a 30% loan. In reality, the annual percentage rate on this transaction is 51.4%.⁶⁷

The Truth-in-Lending Act has been adapted and expanded multiple times since its original passage, demonstrating how the law can be tailored to fit the introduction of new financial products, along with corresponding new risks to consumers, into the market. A notable change to the law took place during the Great Recession.

Since the sub-prime mortgage crisis and the subsequent passage of the Dodd-Frank Wall Street Reform Act in 2010, TILA also compels lenders to disclose additional information before the consummation of a residential purchase-money mortgage or home equity loan.⁶⁸ Lenders must disclose commission fees paid to the originator of the loan by either the borrower or the lender, any state-law protections against a deficiency

⁶⁶ In an add-on interest rate arrangement, the interest rate is multiplied by the principal amount, then "added on" to the total amount to be repaid, spread evenly over the lifetime of a loan. An add-on interest rate at a given value will always cost a borrower more than a loan where the APR is equal to the same number. See Julia Kagan, *Add-On Interest*, INVESTOPEDIA, https://www.investopedia.com/terms/a/add-on_interest.asp [<https://perma.cc/53QU-DBKA>].

⁶⁷ NCLC TREATISE, *supra* note 58, § 1.1.1.

⁶⁸ See *id.* § 5.11.1; 15 U.S.C. § 1602(cc)(5). It bears mentioning here that the post-financial crisis amendments to the Truth-in-Lending Act also include various substantive restrictions in connection with mortgage lending, such as the prohibition on broker compensation in the form of yield-spread premiums (often referred to as YSPs). Under such an arrangement, the lender's underwriters determine a minimum rate at which it is willing to loan money to a potential homebuyer. If the broker succeeds in consummating a loan at a higher interest rate, he or she is entitled to a commission. These arrangements are now prohibited by the Consumer Financial Protection Bureau's Regulation Z, 12 C.F.R. § 226.36(d), (e) (2022). Because it is unlikely that substantive restrictions on Islamic mortgage alternatives are likely to pass constitutional muster, this paper focuses instead on existing disclosure requirements. See generally NCLC TREATISE, *supra* note 58, § 9.

judgment, and the lender's policies regarding partial payments, among other things.⁶⁹ In enacting the amendment, Congress effectively designated a special class of credit transactions in which, both for consumer protection and systemic risk reasons, the consumer must be apprised of more information before she enters into the transaction.

The mortgage crisis of 2007-2008 was precipitated at least in part by the predatory practices and perverse incentives of mortgage lenders and their brokers, who offered unsophisticated consumers mortgages that were, from their inception, exceedingly likely to end in default.⁷⁰ These included adjustable-rate mortgages that featured relatively low introductory interest rates climbing within two to three years by as much as forty percent and causing payments to become unaffordable for the borrower.⁷¹ Many of these loans included sufficiently low minimum payments that a borrower could spur negative amortization and quickly owe more on a loan than the underlying security interest in her home was worth.⁷² Even in a stable market, a negatively amortizing loan puts a borrower in an extremely tenuous position. The situation was made even worse, however, by falling housing prices that pushed homeowners even further "underwater" than they would have been if housing prices remained stable.⁷³ To make matters *still* worse, consumers entered into these dangerous financing arrangements without a clear understanding of the key terms.⁷⁴ As Allen Fishbein, Director of Housing Policy at the Consumer Federation of America, testified before the Senate in 2010:

Consumers today face a dizzying array of mortgage products that are marketed and promoted under a range of products names. While the number of products has exploded, there appears to be little understanding by many borrowers about key features in today's

⁶⁹ NCLC TREATISE, *supra* note 58, §§ 1.2.11, 5.11.1; 15 U.S.C. § 1638(a)(18) (loan origination fees); 15 U.S.C. §§ 1639c(g)(2)–(3) (state-law protections against deficiency judgments); 15 U.S.C. § 1639c(h) (creditor's partial payment policy).

⁷⁰ S. REP. NO. 111-176, at 11 (2010).

⁷¹ *Id.*

⁷² The Consumer Financial Protection Bureau defines negative amortization this way: "Amortization means paying off a loan with regular payments, so that the amount you owe goes down with each payment. Negative amortization means that even when you pay, the amount you owe will still go up because you are not paying enough to cover the interest." *What is Negative Amortization?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-negative-amortization-en-103> [<https://perma.cc/6SNS-BN2W>].

⁷³ Manoj Singh, *The 2007-2008 Financial Crisis in Review*, INVESTOPEDIA, <https://www.investopedia.com/articles/economics/09/financial-crisis-review.asp> [<https://perma.cc/6ZX2-H4DM>].

⁷⁴ S. REP. NO. 111-176, at 12 (2010).

mortgages and how to compare or even understand the differences between these products. A 2004 . . . survey found that most consumers cannot calculate the payment change for an adjustable rate mortgage. . . . [A]ll respondents underestimated the annual increase in the cost of monthly mortgage payments if the interest rate [increased] from 6 percent to 8 percent. . . . Younger, poorer, and less formally educated respondents underestimated by as much as 50 percent.⁷⁵

In other words, the motivation behind the additional mortgage disclosures was to assist borrowers who had been successfully misled into taking on intolerably high levels of risk, even without running afoul of the existing disclosure requirements. Just as a car dealer could legally advertise a deceptively low add-on rate to induce a buyer into agreeing to an economically wasteful financing arrangement in the days before the original TILA enactment, purchase-money mortgage lenders and especially home equity lenders could legally hide a high potential for default in an adjustable-rate loan in the years leading up to the financial crisis. Congress therefore acted to heighten the disclosure requirements with the goal of curbing this abusive lending behavior.

That American consumer credit law already places such strong emphasis on disclosure rather than substantive restrictions on financing terms bodes well for the prospect of incorporating legislation tailored specifically to Islamic financial products into the existing TILA framework. Further, there is substantial precedent for carving out special classes of credit transactions that require a heightened set of disclosures above and beyond what is mandated under the original, general closed-end credit transaction disclosures.⁷⁶ These transactions include not only residential mortgage loans, as mentioned in the preceding paragraph, but also private student loans, credit cards and other forms of unsecured credit, and variable or adjustable-rate loans.⁷⁷ In the aftermath of a recession precipitated by imprudent mortgage lending, Congress identified a class of transactions in which consumers needed more ex-ante information for their own sake and for the sake of the market writ large.⁷⁸ It then authored a new set of disclosures that provide would-be borrowers with more information in the hopes of reducing the overall risk inherent in the market.⁷⁹

⁷⁵ *Id.*

⁷⁶ *See, e.g.,* NCLC TREATISE, *supra* note 58, §§ 5, 6.

⁷⁷ *Id.*

⁷⁸ *See* NCLC TREATISE, *supra* note 58, §§ 1.2.9–11.

⁷⁹ S. REP. NO. 111-176, at 2 (2010).

The same logic is readily applied to the context of Islamic financial products like *murabaha* and *ijara* financing. These products occupy a unique position within the same mortgage market Congress deemed so important to stabilize and carry a unique set of currently unaddressed risks in the form of Shariah noncompliance risk. By addressing Shariah risk via a set of disclosure requirements rather than through substantive restriction, there is no need for Congress or the courts to weigh in on which specific transactions are or are not Shariah-compliant. This makes it possible to avoid potential Establishment Clause issues that could doom Shariah finance regulation as unconstitutional, while fostering consumer choice among an array of Islamic financial products that the legitimate differences of opinion on a certain transaction within the Islamic jurisprudential community.⁸⁰

Luckily for US legislators, the highly developed Shariah governance regimes elsewhere in the world provide a model for how to encourage transparency on the part of Islamic financial institutions with regard to the designation of their products as Shariah compliant or non-compliant. US consumers are often drawn to Islamic financial products out of either religious piety or low risk-tolerance. With sufficient information about financial institutions' internal decisions, consumers will be better equipped to evaluate products for themselves. A closer look at these provisions will follow in Part II.B, with a cursory assessment of their permissibility under the First Amendment in Part II.C.

2. *Adapting the Existing TILA Recission Remedy in the Context of Shariah Risk-Assessment Disclosures.*

Additional, existing aspects of TILA that make it well-suited to accommodate protections for consumers choosing Shariah-compliant mortgage alternatives such as *murabaha* or *ijara* contracts are the recission and statutory damages remedies that the law already features. In the case of a defective Shariah risk-assessment disclosure, applying either remedy

⁸⁰ The decentralized nature of Shariah-compliance review and of Islamic jurisprudence more broadly inevitably leads to differences of opinion regarding certain transaction's permissibility, especially in jurisdictions without a central, binding Shariah authority. See EL-GAMAL, *supra* note 4, at 11–20, 32–35. Wijdan Tariq, *Introduction: Shariah Governance in Islamic Finance*, in THE EDINBURGH COMPANION TO SHARIAH GOVERNANCE IN ISLAMIC FINANCE 1, 15–17 (Syed Nazim Ali, Wijdan Tariq & Bahnaz Al-Quradaghi, eds., 2020). For Establishment Clause reasons, it seems to go without saying that the US government cannot promulgate an interpretation of Islamic law itself. This issue is the subject of much more detailed discussion in Part II.B of this section below.

would make it possible for the federal government to introduce basic protections for consumers of Islamic financial products without forcing American legislators, regulators, or courts to endorse any particular view of Shariah.

In order for Shariah risk-assessment disclosures to offer consumers of Islamic mortgage alternatives meaningful protection, Islamic financial institutions must face a credible threat of enforcement if and when a consumer vindicates his or her rights under the hypothetical statute following a disclosure-related violation. But any potential law must tread just as carefully in the remedy arena as it does when prescribing pre-transaction disclosures. That is, even assuming that any future Shariah risk-assessment disclosures are sufficiently focused on processes and transparency rather than on substantive regulation of a financial transaction's governing terms, courts may still find themselves in an uncomfortable position when it comes time to enforce a violation of such a disclosure rule.

Consider for example a hypothetical, devout Muslim borrower B, who enters into an *ijara* transaction with Bank X to finance a home purchase. Some time after the transaction is consummated, the borrower learns that Bank X has also issued derivative securities backed by B's and other Shariah-compliant borrowers' *ijara* contracts. This kind of trading in debt is likely to be considered excessive *gahrar*,⁸¹ and indeed the idea of contributing to this kind of speculative behavior is offensive to B's sense of religious piety. For this reason, Bank X explicitly stated in its Shariah risk-assessment disclosures that B's *ijara* contract would not serve as the basis for any derivative securities. The issue of whether the bank has violated the statute is straightforward enough: in making her own Shariah noncompliance risk-assessment, B relied on X's assurance that it would not securitize her *ijara* contract. Subsequently, Bank X failed to keep its promise to B.

The question of what remedy B should be entitled to in this scenario is somewhat thornier, however, and much more likely to give a court sensitive to potential Establishment Clause problems some pause. How is the court to measure the damages B has suffered as a result of being induced to indirectly participate in a transaction that she finds offensive to her religious beliefs? Under the current TILA framework, certain disclosure violations trigger automatic statutory damages, others allow for rescission of the loan agreement, and still others are compensable only by

⁸¹ See EL-GAMAL, *supra* note 4, at 58–60.

actual damages.⁸² An actual damages award that attempts to measure the precise value of a consumer's inducement into conduct that is repugnant to them on the basis of religion alone is likely to constitute an establishment of religion.⁸³ However, application of statutory damages or rescission in the event of a Shariah risk-related disclosure requirement violation could provide a meaningful remedy without necessitating an ad hoc assessment of the monetary value of religious adherence.

A consumer entitled to rescission under TILA—typically a borrower in a non-purchase-money loan secured by his or her home—may simply pay back the funds received from her lender in the transaction, less any offsets.⁸⁴ Currently, the rescission remedy is only available to borrowers in transactions that grant the lender a security interest in the borrower's home, but which are not purchase-money mortgages, including open- or closed-end home equity loans.⁸⁵ Rescission of the transaction is a powerful remedy that can substantially reduce the leverage of a creditor midway through a foreclosure proceeding, and its inclusion reflects the statute drafters' strong desire to preserve home ownership when possible.⁸⁶ However, this desire is understandably balanced against concerns over title clarity. Therefore, in the context of a purchase-money mortgage, a borrower who relied on defective TILA disclosures may not void his or her lender's security interest in the home and simply walk away with a windfall in the form of the house itself.⁸⁷ Rather, the borrower is entitled to statutory and/or actual damages resulting from the defective disclosure, which may substantially offset or even eclipse the total amount owed to the lender, but will not afford him or her a "free house."⁸⁸

There is no reason to think that such a substantial windfall to even a wronged borrower would be appropriate compensation for a defective Shariah risk-assessment disclosure if it is not appropriate in the context of an analogous Western-style transaction. Therefore, even though rescission remedies are intuitively appealing in the context of Islamic mortgage alternatives—they allow a misled borrower to simply wash his or her hands of a transaction, without the need for any attempt by a court to quantify actual damage caused by inducement to religiously impermissible

⁸² NCLC TREATISE, *supra* note 58, § 5.1.

⁸³ See generally *infra* part II.C (discussing potential Establishment Clause issues).

⁸⁴ NCLC TREATISE, *supra* note 58, § 10.1.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

conduct—legislators will likely still not wish to grant such a substantial windfall to a wronged homebuyer simply because they chose a Shariah-compliant financing option rather than a standard, Western-style one.

However, just as there is a particular class of Western-style secured transactions where potential windfalls of property are not at risk (i.e., home equity loans), so, too, there is a particular Shariah-compliant mortgage alternative where potential windfalls of property are not at risk. The key aspect of home equity loans that makes rescission remedies appropriate is the lack of a title exchange resulting from the increased liquidity the consumer receives in the transaction. In a purchase-money mortgage, the consumer uses the borrowed money to obtain title to a home, so a rescission voiding the lender's security interest in the home doesn't result in a "clean slate," but rather results in a windfall.⁸⁹ By contrast, in the context of a home equity loan, voiding the lender's property interest returns the consumer and the lender more or less to their respective pre-loan states.⁹⁰

A similar analysis applies to the two most common forms of Shariah-compliant mortgage alternatives, *murabaha* and *ijara*. As discussed above, *murabaha* contracts track extremely closely with Western-style purchase money mortgages.⁹¹ The consumer takes title to a new property, incurs an obligation to make scheduled payments to a financial institution, and grants that financial institution a security interest in the property financed.⁹² Therefore, if rescission were available to consumers who relied on a defective Shariah risk-assessment disclosure in a *murabaha* arrangement, the same windfall property ownership problem that would arise in the context of a purchase-money mortgage is likely to result.

However, *ijara* contracts avoid this potential problem because, like home equity loans, the benefit a consumer receives in exchange for his or her pledge to make continuing payments is something other than title to a home. A home equity loan benefits a consumer with a simple infusion of cash, often as means of financing improvements to the home that the consumer already has title to.⁹³ *Ijara* contracts benefit the consumer with a present right to occupy the home and a future interest in

⁸⁹ See EL-GAMAL, *supra* note 4, at 3.

⁹⁰ See NCLC TREATISE, *supra* note 58, § 10.1

⁹¹ See EL-GAMAL, *supra* note 4, at 4–5.

⁹² *Id.*

⁹³ See Julia Kagan, *Home Equity Loan*, INVESTOPEDIA, <https://www.investopedia.com/terms/h/homeequityloan.asp> [https://perma.cc/A9TL-YCWJ].

outright ownership, both contingent on her completion of the scheduled lease-to-own payments.⁹⁴

Precisely because *ijara* transactions bifurcate the transfer of title into a transfer from the seller to an Islamic financial institution, followed by a transfer from that financial institution to the buyer at the end of the lease period,⁹⁵ a rescission remedy need not result in a windfall of property to a consumer who has been misled by some Shariah risk-assessment disclosure. Instead, rescission in the context of *ijara* could simply involve a mutual relinquishment by the Islamic financial institution and the consumer of their future rights arising out of the transaction from the time rescission is awarded. That is, the consumer relinquishes his or her right to take title to the financed property at the end of his or her lease, and the Islamic financial institution relinquishes its right to collect lease payments. This allows the consumer to absolve herself of any connection with a Shariah non-compliant transactional structure without conferring a “free house” on anyone.

Of course, even if a consumer is granted rescission after relying on a defective Shariah risk-assessment disclosure in an *ijara* transaction, he or she has not been made financially whole, even if the state has done all it can under the Establishment Clause to alleviate the damage to a consumer’s religious ethic. Because, again, a consumer’s ownership is delayed until the end of the lease period in the *ijara* context, rescission alone would deprive the consumer of the equitable quasi-ownership right that an *ijara* transaction gives rise to. That is, because the consumer was led to believe that his or her Islamic financial institution would act within its stated Shariah-compliance bounds, both parties entered into a relationship with the expectation that the consumer would eventually take ownership of the home being financed, given nothing more than timely payments. If the Islamic financial institution subsequently conducts itself in a way not in line with its disclosures, such that a religiously-motivated consumer seeks and wins rescission rights, the Institution stands to profit from its own duplicity by selling the property (which it still owns outright) and keeping the lease payments that represent—equitably speaking—progress toward outright ownership on the part of the consumer. But simply because rescission is an available remedy does not mean that it must be an exclusive remedy. Actual damages, currently available under TILA for all defective disclosures, could be easily calculated from the payments

⁹⁴ See OCC Letter No. 806, *supra* note 40, at 2.

⁹⁵ *Id.*

made on the *ijara* contract before discovery of the Islamic financial institution's misconduct, plus perhaps a pro rata share of the financed property's appreciation in the time elapsed between the *ijara* contract's conclusion and the subsequent rescission.

B. PROPOSING A SHARIAH RISK-ASSESSMENT DISCLOSURE STATUTE

Having seen the basic compatibility between the existing TILA framework and the information necessary for consumers to make an informed Shariah risk-assessment on their own, a specific proposal for the content of a Shariah risk-assessment disclosure requirement is a useful tool to further demonstrate how much can be accomplished with a few lines of statutory text. Such an amendment would logically fall under the existing heading 15 U.S.C. § 1638(a), which provides that “for each consumer credit transaction other than under an open-end credit plan, the creditor shall disclose each of the following items, to the extent applicable.”⁹⁶ The amendment might look something like this:

15 U.S.C. § 1638(a)(20):

In the case of a residential mortgage transaction which the creditor represents as “Islamic” or “Shariah compliant,” or otherwise holds out as complying with rules of Islamic or Shariah law, the creditor must provide:

(A) A brief explanation of the creditor's basis for its belief that the transaction in question permissible under Islamic law.

(B) The names, professional affiliations, and academic credentials of any individuals employed or contracted by the creditor for the purpose of advising on matters related to Islamic law or a given transaction's permissibility thereunder.

(C) Whether the creditor follows a written policy related to the permissibility under Islamic law of its investments, or the permissibility under Islamic law of the investments derived from certain individuals' deposits or transactions. If such a policy exists, the creditor will provide the consumer a copy of the policy.

(D) Any external standards, whether disseminated by another financial institution, a nonprofit or nongovernmental organization, or a foreign government, which the creditor, or individuals whom the creditor employs or contracts with, rely

⁹⁶ 15 U.S.C. § 1638(a).

upon or consult in forming opinions on the permissibility of any transactions under Islamic law.

(E) Contact information of a person or office with knowledge of the creditor's positions on issues related to Islamic law who is reasonably available to consumers.

C. INVESTIGATING SHARIAH RISK-ASSESSMENT DISCLOSURES' CONSTITUTIONAL PERMISSIBILITY UNDER THE FIRST AMENDMENT ESTABLISHMENT CLAUSE

Up to now, this paper has made multiple reference to the potential First Amendment issues that could arise were Congress to amend TILA to include Shariah risk-assessment disclosures. In this section, that possibility is investigated in somewhat finer detail, arriving at the ultimate conclusion that although the doctrine on the subject is somewhat unclear and the proposed amendment arguably comes close to crossing the line into constitutional impermissibility, Congress need not fear that an effort to protect consumers who desire Shariah-compliant mortgage alternatives would be beyond its constitutional powers.⁹⁷

The potential constitutional issue implicated by Shariah risk-assessment disclosures stems from the First Amendment, which provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."⁹⁸ When scrutinizing statutes for potential violation of the Establishment Clause, courts have most often applied the test developed by the Supreme Court in *Lemon v. Kurtzman*, which requires that the challenged law (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive entanglement with religion, in order to avoid being thrown out.⁹⁹ The Supreme Court has also utilized a variation on the *Lemon* test,

⁹⁷ Of course, even if the opposite were true, Congress has not shown any significant desire to enact a proposal such as this one. In fact, recent state legislation in Oklahoma has shown that Islamophobic sentiment remains politically popular with a significant portion of the country. *See, e.g.,* *Awad v. Ziriax*, 670 F.3d 1111, 1117–20 (10th Cir. 2012) (providing factual background on Oklahoma's proposed "Save our State" Constitutional amendment, which specifically prohibits the application of Shariah or any other form of international law from consideration in Oklahoma courts, and which was approved by an affirmative vote of both the Oklahoma legislature and general electorate). Luckily for the author, legal scholarship is not restrained to the paltry world of ideas likely to pass political muster.

⁹⁸ U.S. CONST. amend. I.

⁹⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). *See generally* CYNTHIA BROUGH, CONG. RSCH. SERV., APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES (2011) (providing background information on the *Lemon* test).

commonly referred to as the “endorsement test,” which prohibits government endorsement or approval of religion, on the grounds that endorsement “sends a message to the non-adherents that they are outsiders . . . and an accompanying message to adherents that they are insiders, favored members of the political community, [and that d]isapproval sends the opposite message.”¹⁰⁰

Process-focused Shariah risk-assessment disclosures do not appear to constitute an Establishment of religion under the *Lemon* standard. The first prong of the test, whether the law has a secular purpose, seems clear enough. The introduction of Shariah risk-assessment assessment disclosures does not serve any real religious purpose. They do not force a financial institution to offer Shariah-compliant financial products or to adhere to any particular school of thought within the Islamic legal community when choosing which contractual forms to offer to consumers. Under the general language of § 1638(a) proposed above, the disclosures themselves only apply “to the extent applicable” meaning that they do not compel the advice of a Shariah advisory board, or a policy regarding prohibited investments, or anything else. They only mandate that the consumer is provided this information *if* any of it exists.

In this way, the disclosures would serve much the same secular purpose as the current TILA disclosures do. They would help to ensure that consumers are not misled and induced into making financial commitments that they otherwise would not. If the disclosures are effective, they would potentially protect Muslim borrowers from mistakenly violating their own religious ethics, but they would be at least rationally related to secular economic interests as well. If certain disclosures are not made *ex ante*, a devout Muslim borrower, might decide not to secure mortgage or mortgage-adjacent financing at all, and thus the potential positive externalities of his or her home ownership would be lost.

The second and third prongs of the *Lemon* test are satisfied as well. The primary effect of the law is not to promote Islam itself, or even to promote Islamic finance, but rather to promote transparency about what exactly an Islamic financial institution is offering in an easy-to-understand way for the sake of consumers that choose Shariah-compliant financial products.¹⁰¹ Similarly, the disclosures need not foster any entanglement between the government and any religious doctrine or institution, because they merely require an Islamic financial institution to clearly state how it

¹⁰⁰ *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

¹⁰¹ These consumers, of course, need not actually be Muslim.

has already chosen to entangle *itself* with religion in choosing a particular Shariah advisory board or particular set of international standards to comply with. It cannot be emphasized enough that the proposed disclosures do not compel any religious conduct or commitment by a financial institution, but merely a justification of its position to the consumer by institutions that do choose to hold their products out as Shariah-compliant.

Likewise, simply because the government chooses to regulate a specific contractual form that may appeal more to consumers who care about religious piety does not mean that the government is endorsing those consumers' religion. If anything, a disclosure requirement "sends a message" of skepticism regarding the lender's propensity to live up to its characterization of a key aspect of a transaction. *Lynch*'s reference to "endorsement" referred to a city government's erection of a nativity scene, and concluded that using public funds to display religious iconography was insufficient to constitute an endorsement because the nativity scene's was surrounded by other holiday decoration.¹⁰² In the Court's view, this meant that the *intention* of the city government's message was not to endorse Christianity, but rather simply to celebrate a public holiday.¹⁰³ A similar argument can be made on behalf of a putative Shariah risk-assessment disclosure. The purpose of the disclosure is not to send a message that Shariah-compliant transactions are more or less desirable than Western-style ones. Instead, the risk-assessment disclosures send a message that the federal government prefers its citizenry to be fully informed before taking on financial obligations, regardless of whether a selling point of that particular obligation is its interest rate or its Islamic legal status.

With regard to remedies, and as intimated above, a damages award that attempts to measure the harm caused by a failure to live up to the contracted-for Shariah compliance behavior clearly does run afoul of the Establishment Clause. It is hard to imagine how a court awarding money for religious harm is not an endorsement of the compensated party's religious view. Similarly, such an award would likely fail at least two factors of the *Lemon* test. The purpose is to rectify an injury that only exists if the details of religious conduct are afforded the same legal significance as financial or physical harm. Asking a court to determine exactly what is

¹⁰² *Lynch*, 465 U.S. at 692–95 (O'Connor, J., concurring).

¹⁰³ *Id.*

permissible in the highly complex and contested field of Shariah jurisprudence is likely to be seen as a high degree of entanglement.

However, rescission remedies do not encounter the same issues. Their secular purpose, just as in the context of a secular home equity loan, is to afford a misled consumer a chance to back out of a transaction predicated on a fundamental miscommunication or deceit. Their primary effect in the *ijara* context is to force a financial institution to find a buyer for a piece of real property, and in all likelihood the institution can simply sell the home to the consumer who identified the property in the first place (mistrust aside, no one likes to move). Finally, there is once again no implication of the court's entanglement with religion. Liability on a Shariah risk-assessment disclosure violation requires looking only at the content of the financial institutions' own factual statements and subsequent conduct, not any foray into Shariah doctrine. Awarding a rescission remedy on the basis of that liability asks for even less.

III. CONCLUSION

Even though Islamic mortgage alternatives present a unique set of risks to legislators interested in protecting consumer expectations, diminishing those risks does not necessitate a wholly different approach than Congress has adopted and adapted over the years with the Truth-in-Lending Act. It bears mentioning once more that the Islamic financial industry is one that is marked by disagreement. On one level, there is debate about specific transactional forms that may or may not avoid impermissible levels of *riba* or *gahrar*. At a more basic level, there is disagreement about the meaning of those prohibitions and whether they are adequately addressed by contractual arrangements so at home within the existing American system. Those debates are beyond the objectives of this analysis, and hopefully no reader will glean any endorsement on one side or the other of such a debate from my work. But there is certainly room for consumers interested in Shariah-compliant financing to be included in the marketplace and afforded similar protection to everyone else.