No. 14-520

In the Supreme Court of the United States

VALERIE J. HAWKINS AND JANICE A. PATTERSON,
PETITIONERS

v.

COMMUNITY BANK OF RAYMORE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Equal Credit Opportunity Act (ECOA) makes it unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction," on the basis of prohibited characteristics including sex and marital status. 15 U.S.C. 1691(a). Since 1985, regulations promulgated by the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau have provided that, for certain purposes, the "applicants" protected from discrimination under the Act include guarantors and other secondary obligors. The question presented is as follows:

Whether the regulations issued by the Board and the Bureau permissibly interpret ECOA's definition of "applicant" to encompass guarantors.

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INTEREST OF THE UNITED STATES

The Consumer Financial Protection Bureau (CFPB or Bureau) is authorized to promulgate regulations implementing the Equal Credit Opportunity Act (ECOA or Act), 15 U.S.C. 1691 *et seq.* See 15 U.S.C. 1691b(a). One of those regulations provides that, for certain purposes, the "applicants" protected under the Act include guarantors. 12 C.F.R. 1002.2(e). The validity of that regulation is directly at issue here. In addition, the Bureau, the Department of Justice (DOJ), and other federal agencies are responsible for enforcing the Act through administrative proceedings and litigation. 15 U.S.C. 1691c, 1691e(g) and (h). The United States therefore has a substantial interest in the Court's resolution of the question presented.

STATEMENT

This case involves a challenge to a longstanding regulation implementing the Equal Credit Opportunity Act's prohibition against discrimination on the basis of marital status. The regulation recognizes that when a creditor requires an individual to guarantee her spouse's debt obligation solely because the couple is married, both the primary borrower and the guarantor spouse qualify as "applicants" who suffer discrimination in violation of the Act.

A. The Equal Credit Opportunity Act And Regulation B

Congress enacted ECOA in 1974 in response to "widespread discrimination on the basis of sex and marital status in the granting of credit to women." S. Rep. No. 278, 93d Cong., 1st Sess. 16 (1973) (Senate Report). The "clear pattern" of discrimination by creditors included, among other practices, holding women to different standards of creditworthiness, discounting married women's income, and refusing to grant individual credit to married persons. *Id.* at 16-17. The Act sought to eliminate those practices and to make credit "equally available to all creditworthy customers without regard to sex or marital status." ECOA, Pub. L. No. 93-495, § 502, 88 Stat. 1521.

In 1976, Congress amended ECOA to prohibit discrimination on additional grounds. ECOA Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251-252. As amended, the Act makes it unlawful "for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction" on the basis of characteristics including "race, color, religion, national origin, sex or marital status, [and] age." 15 U.S.C. 1691(a). The Act defines an "applicant" as "any person who applies to a creditor directly for an

extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. 1691a(b).

Congress gave the Board of Governors of the Federal Reserve System (Board) broad authority to "prescribe regulations to carry out the purposes of [ECOA]." 15 U.S.C. 1691b(a) (2006). The Board exercised that authority by promulgating rules known as "Regulation B." 12 C.F.R. Pt. 202 (2010). In 2010, Congress transferred the Board's rulemaking authority to the CFPB. 15 U.S.C. 1691b(a).[1] The Bureau has now repromulgated Regulation B and the accompanying Official Interpretations without material change. 12 C.F.R. Pt. 1002 & Supp. I; see 76 Fed. Reg. 79,442 (Dec. 21, 2011).[2]

If a creditor violates ECOA or Regulation B, an "aggrieved applicant" may bring a suit seeking actual damages, punitive damages, and equitable or declaratory relief. 15 U.S.C. 1691e(a)-(c); see 15 U.S.C. 1691a(g). In addition, the CFPB, DOJ, and other federal agencies have the authority to enforce the Act through administrative proceedings and litigation. 15 U.S.C. 1691c, 1691e(g) and (h).

B. The Additional Parties Rule

This case involves Regulation B's Additional Parties Rule (Rule), 12 C.F.R. 202.7(d) (2010), which gov-

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, §§ 1061(b)(1) and (d), 1085, 124 Stat. 2036, 2039, 2083-2085.

[2] Because the relevant events in this case occurred before the Bureau repromulgated Regulation B, this brief cites the Board's regulations and Official Staff Interpretations, 12 C.F.R. Pt. 202 & Supp. I (2010).

erns the circumstances under which a creditor may require a borrower to provide a signature from another person, including a guarantor, surety, cosigner, or similar party.

1. Guarantors, sureties, and cosigners are secondary obligors who assume liability on a loan provided for another person's use in order to induce the creditor to make the loan. Their duties are defined by the terms of their agreements with creditors and by applicable state law. In general, however, a surety or cosigner is "jointly and severally liable with the principal obligor," whereas a guarantor becomes liable only "upon default of the principal obligor." Restatement (Third) of Suretyship & Guaranty § 15(a), (c), and (d) (1996) (Restatement of Guaranty); see 23 Richard A. Lord, *Williston on Contracts* § 61:2, at 8-12 (4th ed. 2002).

2. Since its inception in 1975, Regulation B has included an Additional Parties Rule prohibiting creditors from automatically requiring spouses to assume liability for each other's debt obligations. 12 C.F.R. 202.7(d) (2010); see 40 Fed. Reg. 49,308-49,309 (Oct. 22, 1975). The Rule targets one of the core forms of marital-status discrimination that ECOA sought to end. Before the Act, some creditors refused to lend to married women "without their husbands' signatures." Senate Report 17. Others imposed the same requirement on married people of both sexes. *Id.* at 17-18. Indeed, "[i]n some segments of the credit industry, it [wa]s common practice to ask every married person * * * to obtain the signature of his or her spouse." Anne J. Geary, *Equal Credit Opportunity—An Analysis of Regulation B*, 31 Bus. Law. 1641, 1652 (1976) (Geary). Such requirements created extra

obstacles for married people seeking credit and made it impossible for them to maintain separate credit histories. Senate Report 17-20.

The Additional Parties Rule provides that if an applicant for individual credit satisfies "the creditor's standards of creditworthiness," the creditor generally may not "require the signature of [that] applicant's spouse or other person." 12 C.F.R. 202.7(d)(1) (2010).[3] If the creditor's lending standards require "the personal liability of an additional party" to provide adequate assurances of repayment, the creditor may "request a cosigner, guarantor, endorser, or similar party." 12 C.F.R. 202.7(d)(5) (2010). But the creditor may not "require that the [primary borrower's] spouse be the additional party." *Ibid.* The Rule thus ensures that married persons are able to obtain credit on the same terms as similarly situated unmarried persons and to maintain independent credit histories.

Since 1977, the Additional Parties Rule has also barred a creditor from "impos[ing] requirements upon an additional party that the creditor is prohibited from imposing upon an applicant" under the Rule. 12 C.F.R. 202.7(d)(6) (2010); see 42 Fed. Reg. 1247, 1256 (Jan. 6, 1977). That provision has particular relevance for small business loans such as those at issue in this case. Creditors can, and routinely do, require personal guarantees from the officers or owners of small

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[3] The Rule provides exceptions when an applicant relies on community or jointly owned property to satisfy the creditor's lending standards. 12 C.F.R. 202.7(d)(2)-(4) (2010). In such circumstances, the creditor may not require the applicant's spouse or the joint owner of the property to become personally liable for the debt, but may require that person's signature on an instrument making the property available to the creditor in the event of a default. *Ibid.*

businesses seeking credit. 12 C.F.R. Pt. 202, Supp. I, ¶ 7(d)(6)-1 (2010); see Marshall E. Tracht, *Insider Guaranties in Bankruptcy: A Framework for Analysis*, 54 U. Miami L. Rev. 497, 517 (2000). Under Section 202.7(d)(6), creditors that require such guarantees "may not automatically require that the spouses of married officers also sign the guarantee." 12 C.F.R. Pt. 202, Supp. I, ¶ 7(d)(6)-2 (2010). Rather, a creditor may require additional signatures only subject to the rules that apply to signature requirements imposed on primary borrowers. *Ibid.*; see 42 Fed. Reg. at 1247.

Since 1977, therefore, Regulation B has recognized that a creditor engages in discrimination prohibited by the Additional Parties Rule and ECOA when it improperly requires an individual to guarantee or cosign her spouse's debt obligations—both when the primary borrower is the spouse and when the primary borrower is instead a business owned or operated by the spouse.

3. Although the Board has consistently defined *what* constitutes discrimination in violation of the Additional Parties Rule, it has not always clearly specified precisely *who* is discriminated against when the Rule is violated. Since 1985, however, Regulation B has made clear that when a creditor requires a spousal guarantee in violation of the Rule, both the primary borrower and the guarantor spouse qualify as "applicants" who suffer discrimination under the Act.

a. As originally promulgated in October 1975, Regulation B repeated ECOA's statutory definition of "applicant" without explicitly addressing the status of guarantors or other secondary obligors. 40 Fed. Reg. at 49,306. A few months later, however, the Board

added a substantive provision indicating that the term included "an applicant who is secondarily liable such as an endorser, co-maker * * * or guarantor." 41 Fed. Reg. 20,576-20,577 (May 19, 1976).

b. In 1977, the Board revised Regulation B in response to the 1976 amendments to ECOA. 42 Fed. Reg. at 1242. The revised regulation included a new definition of "applicant" specifically excluding "a guarantor, surety, endorser, or similar party." *Id.* at 1252. That exclusion ensured that, in dealing with guarantors, creditors would not be required to adhere to certain "technical rules" added to Regulation B to implement the 1976 amendments. Dolores S. Smith, *Revision of the Board's Equal Credit Regulation: An Overview*, 71 Fed. Res. Bull. 913, 918 (1985) (Smith). But the Board emphasized that "[r]equiring the signature of a guarantor or endorser on a discriminatory basis would be prohibited" under the Additional Parties Rule. 41 Fed. Reg. 49,124 (Nov. 8, 1976).

Because ECOA prohibits discrimination against "applicant[s]," 15 U.S.C. 1691(a), courts interpreted the 1977 amendments to Regulation B to mean that when a creditor violated the Additional Parties Rule by requiring a spousal guarantee, the only "applicant" who suffered discrimination under the Act was the primary borrower—not the guarantor spouse. See, *e.g.*, *Morse* v. *Mutual Fed. Sav. & Loan Ass'n of Whitman*, 536 F. Supp. 1271, 1278 (D. Mass. 1982). And because only "aggrieved applicant[s]" may bring suit under the Act, 15 U.S.C. 1691e(a)-(c), those courts also held that only the primary borrower could bring an action in court. See, *e.g.*, *Morse*, 536 F. Supp. at 1278; see also Smith 918.

c. In 1985, the Board revisited Regulation B's definition of "applicant." 50 Fed. Reg. 10,891 (Mar. 18, 1985). The Board explained that the prior definition had left "a guarantor whose signature has been illegally required" without recourse under ECOA. *Ibid.* The Board therefore proposed to define "applicant" to include guarantors and similar parties in order to clarify that when such parties are required to sign a credit instrument in violation of the Additional Parties Rule, they qualify as "applicants" who suffer discrimination in violation of the Act and who can therefore seek relief in court. *Ibid.*

The Board sought comment on whether to exclude guarantors from coverage under other provisions of Regulation B addressing "applicants." 50 Fed. Reg. at 10,891 Commenters responded that treating guarantors as "applicants" under certain other provisions could subject creditors to unwarranted liability for "technical violations." 50 Fed. Reg. 48,020 (Nov. 20, 1985). The Board therefore defined "applicant" to include "guarantors, sureties, endorsers and similar parties" only "[f]or purposes of" the Additional Parties Rule, 12 C.F.R. 202.7(d). 50 Fed. Reg. at 48,027.

The Board emphasized that this amended definition "impose[d] no new requirements on creditors." 50 Fed. Reg. at 48,018. The conduct prohibited by the Additional Parties Rule remained unchanged: As before, a creditor could not require a borrower's spouse to guarantee a loan solely because of marital status, and could not impose signature requirements on a guarantor that could not be imposed on a primary borrower. *Ibid.*; see 12 C.F.R. 202.7(d)(5) (1984). But the amendment clarified that violations of those rules

constitute discrimination not only against the primary borrower, but also against the guarantor spouse.

d. Since 1985, Regulation B has continued to define guarantors and other similar parties as "applicants" for purposes of the Additional Parties Rule. 12 C.F.R. 202.2(e) (2010); see 12 C.F.R. 1002.2(e) (current CFPB regulation).

C. The Present Controversy

1. Petitioners' husbands are the member-owners of PHC Development, LLC (PHC), a Missouri limited liability company. Between 2005 and 2008, PHC obtained four loans from respondent to finance a real estate development. Petitioners and their husbands executed personal guarantees on the loans. In 2012, respondent declared that PHC was in default on the loans and demanded payment under the guarantees. Pet. App. 2.

Petitioners filed a suit in the United States District Court for the Western District of Missouri alleging that respondent had violated ECOA and the Additional Parties Rule by requiring them to execute guarantees solely because they were married to PHC's owners. Petitioners sought damages and a declaration that the guarantees were void. Respondent counterclaimed, seeking enforcement of the guarantees. Petitioners asserted the alleged ECOA violation as an affirmative defense to the counterclaim. Pet. App. 3.

2. The district court dismissed petitioners' ECOA claim and struck their ECOA-based affirmative defense. Pet. App. 17-24. The court held that petitioners were not "applicants" under the Act because "a guarantor does not, by definition, apply for anything." *Id.* at 22 (citation omitted). The court declined to

defer to Regulation B because it believed that the Act was unambiguous. *Id.* at 22-23.

3. The court of appeals affirmed. Pet. App. 1-16.

a. The court of appeals held that ECOA "clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another." Pet. App. 6. The court reasoned that because the Act defines an "applicant" as a person who "applies" for credit, 15 U.S.C. 1691a(b), "a person is an applicant only if she requests credit." Pet. App. 6. The court recognized that a guarantor "desires for a lender to extend credit to a borrower." *Id.* at 6-7. It also acknowledged that the Sixth Circuit had deferred to Regulation B's interpretation after concluding that the term "applicant" is ambiguous. *Id.* at 7 (citing *RL BB Acquisition, LLC* v. *Bridgemill Commons Dev. Grp.*, 754 F.3d 380, 385 (6th Cir. 2014)). But the court concluded that "it does not follow from the execution of a guaranty that a guarantor has requested credit or otherwise been involved in applying for credit." *Ibid.* And the court further concluded that because petitioners had not "alleged that they participated in the loan-application process" other than by executing guarantees, their claims were properly dismissed. *Id.* at 10.

b. Judge Colloton concurred. Pet. App. 11-16. He concluded that "an 'applicant' who 'applies for credit' is one who requests credit to benefit herself, not credit to benefit a third party." *Id.* at 12. He also argued that other provisions of ECOA referring to "applicants" confirm that the term includes only persons who seek credit for their own use. *Id.* at 12-14.

SUMMARY OF ARGUMENT

Since 1985, Regulation B has authoritatively construed ECOA to include guarantors within the class of "applicants" protected from discrimination under the Additional Parties Rule. That longstanding interpretation reflects a permissible construction of the Act and warrants deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984) (*Chevron*).

A. Regulation B's interpretation of "applicant" is entitled to great deference. Congress framed ECOA in general terms and granted the Board unusually broad authority to make regulations addressing the wide variety of credit transactions that fall within its scope. In construing the parallel delegation of authority in the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, this Court has emphasized that Congress "specifically designated the [Board] * * * as the primary source for interpretation and application of [the] law." *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 238 (2004) (citation omitted; first set of brackets in original). And deference is especially appropriate here because Congress has repeatedly amended the Act without disturbing the Board's longstanding interpretation of "applicant."

B. Regulation B's definition of "applicant" is a permissible interpretation of ECOA's text.

1. The Act defines an "applicant" as a person who "applies" for credit. 15 U.S.C. 1691a(b). In ordinary usage, to "apply" for something is to make a request for it. Guarantors are thus reasonably regarded as "applicants" because they request the extension of credit to the primary borrower—in fact, the whole purpose of a guarantee is to induce the creditor to make the loan. In practice, moreover, guarantors and

other secondary obligors are often extensively involved in the application process. The court of appeals thus erred in holding that ECOA's definition of "applicant" unambiguously excludes guarantors.

2. The court of appeals left open the possibility that a particular guarantor might qualify as an "applicant" if she were sufficiently involved in the application process. But the Board reasonably rejected a fact-intensive, case-by-case inquiry in favor of a rule that treats all guarantors and similar parties as "applicants" for purposes of the Additional Parties Rule. That approach provides clarity for creditors and consumers, which is especially important in light of the number and variety of transactions covered by ECOA.

3. Judge Colloton concluded that the term "applicant" includes only persons who request credit *for themselves*. But "applicant" does not carry that restrictive meaning. And even if it did, the Act still would not unambiguously exclude guarantors because—as other banking regulations confirm—a guarantor may reasonably be regarded as receiving an extension of credit.

C. Regulation B's definition of "applicant" furthers ECOA's purposes. When a creditor requires an individual to guarantee her spouse's loan solely because of the couple's marital status, the creditor discriminates against *both* the primary borrower *and* the guarantor spouse. The spouse is required to assume an unwanted liability and loses the ability to maintain an independent credit history. That is precisely the sort of discriminatory harm that ECOA sought to end. The same is true when a creditor improperly requires the owner of a small business borrower to provide not

only a personal guarantee, but also a guarantee from her spouse.

Because the practices prohibited by the Additional Parties Rule constitute discrimination against primary borrowers, they would be prohibited even if guarantors were not regarded as "applicants." But violations of the Rule discriminate against the affected guarantors as well, and Regulation B reasonably recognizes that those guarantors are entitled to protection under the Rule and ECOA. Treating guarantors and other secondary obligors as "applicants" also avoids arbitrary distinctions between individuals who are improperly required to join their spouses' credit obligations, but who do so in different capacities.

D. The other challenges to Regulation B's definition of "applicant" lack merit. First, treating guarantors as "applicants" would not create any anomaly or inconsistency in other provisions of ECOA. Second, Regulation B's definition is entitled to deference even though it has the effect of allowing additional individuals to sue under the Act's private right of action. *Chevron* applies with full force where, as here, an agency's interpretation of a substantive statutory provision affects the scope of an associated private right of action. Third, there is no merit to the Seventh Circuit's suggestion that treating guarantors as applicants unduly expands creditors' liability by allowing guarantors to void improperly obtained guarantees. See *Moran Foods, Inc.* v. *Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441, cert. denied, 552 U.S. 821 (2007). That remedial question raises distinct issues and will not be decided by this Court's resolution of the question presented.

ARGUMENT

REGULATION B PERMISSIBLY INTERPRETS ECOA TO PROTECT GUARANTORS FROM DISCRIMINATION

For 30 years, Regulation B has provided that, for purposes of the Additional Parties Rule, the "applicants" protected from discrimination by ECOA include guarantors, sureties, and similar parties such as cosigners. That interpretation was adopted through notice-and-comment rulemaking and pursuant to ECOA's unusually broad delegation of regulatory authority. Because it is a permissible construction of the Act, it is controlling under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

A. Regulation B Is Entitled To Deference

Where, as here, Congress provides "'an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulation,'" the agency's implementing regulations are "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843-844). That principle has special force in this case.

1. ECOA broadly provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction." 15 U.S.C. 1691(a). Recognizing the complexity and variety of credit transactions, Congress did not attempt to enact a comprehensive list of the practices that constitute impermissible discrimination. Instead, adhering to the approach it had used in TILA, "Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency

with the necessary experience and resources to monitor its operation." *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973).

As it did in TILA, Congress in ECOA granted the Board broad authority to "prescribe regulations to carry out the purposes of [the Act]." 15 U.S.C. 1691b(a); cf. 15 U.S.C. 1604 (1970). Using language drawn from TILA, Congress further provided:

> These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the [Board] are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

15 U.S.C. 1691b(a); cf. 15 U.S.C. 1604 (1970). Congress also provided that statutory references to the Act's requirements include requirements adopted in the Board's regulations. 15 U.S.C. 1691a(g).

This Court has emphasized that the parallel provisions of TILA delegate "expansive authority to the [Board] to enact appropriate regulations to advance th[e] purpose" of the statute, *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 235 (2004), and indicate that Congress "specifically designated the [Board] * * * as the primary source for interpretation and application of [the] law," *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). The Court has therefore admonished that, in interpreting TILA, "judges ought to refrain from substituting their own interstitial lawmaking for that of the [Board]." *Id.* at 568.

Like TILA, ECOA granted expansive rulemaking authority to an expert agency charged with implementing broad statutory requirements across a wide range of credit transactions. Accordingly, like rules promulgated under TILA, "the Board's regulation implementing this legislation should be accepted by the courts" absent "some obvious repugnance to the statute." *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981); see *Pfennig*, 541 U.S. at 238-239.

2. Deference is especially appropriate in this case. Regulation B has defined "applicant" to include guarantors and other secondary obligors for three decades. This Court "will normally accord particular deference" where, as here, the agency interpretation in question is "of 'longstanding' duration." *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002) (citation omitted).

Moreover, Congress has repeatedly amended ECOA since 1985 without disapproving the Board's settled view.[4] "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted); see, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013). Congress's failure to disturb the Board's interpretation is especially notewor-

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[4] See, *e.g.*, Dodd-Frank Act, §§ 1071, 1474, 124 Stat. 2056-2057, 2199-2200; Act of Sept. 30, 1996, Pub. L. No. 104-208, § 2302, 110 Stat. 3009-420; Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 223, 105 Stat. 2306-2307; Women's Business Ownership Act of 1988 (Women's Business Act), Pub. L. No. 100-533, § 301, 102 Stat. 2692-2693.

thy because guarantors and other similar parties have routinely litigated violations of the Additional Parties Rule, and until recently Regulation B's interpretation of "applicant" had enjoyed "universal deference" from the courts. *RL BB Acquisition, LLC* v. *Bridgemill Commons Dev. Grp.*, 754 F.3d 380, 386 (6th Cir. 2014).[5]

B. Regulation B's Definition Of "Applicant" Is A Permissible Interpretation Of ECOA's Text

Because Regulation B's longstanding definition of "applicant" warrants deference, it is controlling unless "Congress has directly spoken to the precise question at issue" by unambiguously excluding guarantors from protection under ECOA. *Pfennig*, 541 U.S. at 239 (quoting *Chevron*, 467 U.S. at 842). Congress has not done so. To the contrary, the Act's definition of "applicant" readily encompasses guarantors and other secondary obligors.

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[5] See, *e.g.*, *Silverman* v. *Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 30-31 (3d Cir. 1995); *FDIC* v. *Medmark, Inc.*, 897 F. Supp. 511, 514-515 (D. Kan. 1995); *Integra Bank/Pittsburgh* v. *Freeman*, 839 F. Supp. 326, 328-330 (E.D. Pa. 1993); *Stern* v. *Espirito Santo Bank*, 791 F. Supp. 865, 867-869 (S.D. Fla. 1992); *Bank of the W.* v. *Kline*, 782 N.W.2d 453, 457-458 (Iowa 2010); *Boone Nat'l Sav. & Loan Ass'n* v. *Crouch*, 47 S.W.3d 371, 375-376 (Mo. 2001) (en banc); *Eure* v. *Jefferson Nat'l Bank*, 448 S.E.2d 417, 419-421 (Va. 1994). As respondent notes (Br. in Opp. 31-32), creditors in many cases did not challenge Regulation B's definition of "applicant." But the numerous cases litigated by guarantors and similar parties undermine respondent's speculation (Br. in Opp. 32-33) that the Board's longstanding interpretation went unnoticed when Congress revisited the Act.

1. Guarantors are reasonably viewed as "applicants" who request the extension of credit

a. ECOA defines an "applicant" as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. 1691a(b). Ordinarily, to "apply" for something means "to make a (formal) request." *Oxford English Dictionary*, http://www.oed.com/view/Entry/9724 (last visited May 26, 2015).[6] Thus, as the court of appeals recognized, a person qualifies as an "applicant" under the Act if she requests the extension of credit. Pet. App. 6.

That understanding of "applicant" encompasses guarantors and other secondary obligors. A guarantor "formally approach[es] a creditor in the sense that the guarantor offers up her own personal liability," and the whole purpose of that offer is to induce the creditor to make the loan. *RL BB Acquisition*, 754 F.3d at 385. Accordingly, it has long been understood that a guarantor (at a minimum) "impliedly request[s]" the extension of credit to the primary borrower. 38A C.J.S. *Guaranty* § 26 (2008); see 1 Joseph M. Perillo, *Corbin on Contracts* § 3.14, at 381 (rev. ed.

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[6] See *The American Heritage Dictionary of the English Language* 87 (4th ed. 2006) ("[t]o request or seek assistance, employment, or admission"); *Black's Law Dictionary* 120 (10th ed. 2014) ("[t]o make a formal request or motion"); *The Random House Dictionary of the English Language* 102 (2d ed. 1987) ("to make an application or request"); *Webster's Third New International Dictionary of the English Language* 105 (1971) ("to make an appeal or a request, esp. formally and often in writing and usu. for something of benefit to oneself").

1993) (*Corbin*) ("In most cases of guaranty contracts, the offer comes from the guarantor requesting the giving of credit to a principal debtor."); see also, *e.g.*, *Paul Revere Protective Life Ins. Co.* v. *Weis*, 535 F. Supp. 379, 386 (E.D. Pa. 1981) ("implied[] request[]"); *Valley Nat'l Bank* v. *Foreign Car Rental, Inc.*, 404 P.2d 272, 274 (Colo. 1965) ("request for credit"); *Union Bank* v. *Coster's Ex'rs*, 3 N.Y. 203, 211 (1850) ("implies a request").

Indeed, a guarantee is typically enforceable precisely because the guarantor has expressly or impliedly requested that the creditor extend credit. Like other contracts, guarantee agreements generally must be supported by consideration—something "sought by the [guarantor] in exchange for his promise." Restatement (Second) of Contracts § 71(2) (1981); see Restatement of Guaranty § 9. In the usual case, that bargained-for consideration is the loan made to the primary borrower. Restatement of Guaranty § 9, cmt. a; 3 *Corbin* § 9.4, at 252-253 (rev. ed. 1996). A guarantee is thus reasonably understood as a request that the creditor extend credit. *RL BB Acquisition*, 754 F.3d at 385.[7]

b. The actions commonly taken by guarantors and other secondary obligors confirm the reasonableness of that understanding.

Some guarantee agreements expressly "request" an extension of credit. See, *e.g.*, *Equitable Trust Co.*

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[7] Guarantors also apply for credit "directly" within the meaning of 15 U.S.C. 1691a(b). The Act refers to "direct[]" applications to distinguish them from "indirect[]" applications in which a consumer attempts to use an "existing credit plan" such as a credit card to make a purchase "for an amount exceeding a previously established credit limit." *Ibid.*; see Senate Report 10.

v. *Bratwursthaus Mgmt. Corp.*, 514 F.2d 565, 569 (4th Cir. 1975) (reciting that the guarantor "requested [the creditor]" to make the loans); *Cardinal Wholesale Supply, Inc.* v. *Chaisson*, 504 So. 2d 167, 168 (La. Ct. App. 1987) (similar). Indeed, some of the guarantees at issue here state that they were executed "to induce [respondent] to extend * * * credit" to PHC. D. Ct. Doc. 4-1, at 24, 27 (July 13, 2012).

In addition, secondary obligors are often extensively involved in the application process. Cosigners of consumer loans frequently join in the primary borrowers' requests for credit by signing the same applications. See 12 C.F.R. Pt. 202, App. B (2010) (model consumer credit applications). Personal guarantees required for business loans are likewise often "contained within the promissory agreement" or credit application signed by the principal borrower. *United States* v. *Crain Ltd. P'ship*, 884 F.2d 138, 143 n.5 (4th Cir. 1989).[8] And prospective secondary obligors are commonly required to provide financial information and subjected to a creditworthiness analysis comparable to that applied to principal borrowers. See 12 C.F.R. Pt. 202, App. B (2010) (model consumer credit applications); 76 Fed. Reg. 41,597 (July 15, 2011).

c. The court of appeals was thus quite wrong to assert that "a guarantor unambiguously does not request credit." Pet. App. 7. Guarantors always request credit implicitly, often do so explicitly, and regularly participate extensively in the application process—

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[8] See also, *e.g.*, *Capitol Grp., Inc.* v. *Collier*, 365 S.W.3d 644, 650 (Mo. Ct. App. 2012); *American Builders & Contractors Supply Co.* v. *Frank's Roofing, Inc.*, 979 N.E.2d 15, 17 (Ohio Ct. App. 2012); *Jamshed* v. *McLane Express Inc.*, 449 S.W.3d 871, 879 (Tex. Ct. App. 2014).

sometimes by signing the application submitted by the primary borrower. Particularly in light of ECOA's broadly framed prohibition making it unlawful for "*any* creditor to discriminate against *any* applicant, with respect to *any* aspect of a credit transaction" and defining "applicant" to include "*any* person who applies" for credit, 15 U.S.C. 1691(a), 1691a(b) (emphases added), Regulation B permissibly interprets the Act to extend protection to guarantors, cosigners, and other secondary obligors. Cf. *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach.").

2. Regulation B permissibly adopted a bright-line rule treating all secondary obligors as "applicants" for purposes of the Additional Parties Rule

The court of appeals did not address ECOA's coverage of secondary obligors other than guarantors. It also appeared to leave open the possibility that, in a particular case, a guarantor might qualify as an "applicant" under ECOA if she "participated in the loan-application process" to some unspecified extent. Pet. App. 10; see *id.* at 6 ("a person does not qualify as an applicant under the statute *solely* by virtue of executing a guaranty") (emphasis added). But the Board reasonably declined to make the Act's coverage turn on an ill-defined, fact-intensive inquiry into the circumstances of a particular guarantor's involvement in a specific application.

Instead, Regulation B establishes a bright-line rule encompassing all "guarantors, sureties, endorsers, and similar parties." 12 C.F.R. 202.2(e) (2010). That approach is consistent with ECOA's definition of "applicant" because all secondary obligors at least implic-

itly request that the creditor extend credit to the primary borrower. And Regulation B's "clear, easy to apply (and easy to enforce) rule," *Pfennig*, 541 U.S. at 245, was a reasonable exercise of the Board's authority to "prescribe regulations to carry out the purposes of [ECOA]" and to make "such classifications, differentiation, or other provision" as the Board deemed "necessary or proper to effectuate the purposes" of the Act, 15 U.S.C. 1691b(a). Particularly because the Act applies to a wide variety of credit transactions entered into under diverse circumstances, the "case-by-case approach" contemplated by the court of appeals would lead to uncertainty for creditors and consumers and litigation about the application of the Act to the circumstances of particular transactions. *Pfennig*, 541 U.S. at 244.

3. A person need not request credit for her own use in order to qualify as an "applicant"

In his separate concurrence, Judge Colloton appeared to acknowledge that a guarantor or other secondary obligor "requests credit." Pet. App. 12. But he asserted that "an 'applicant' who 'applies for credit' is one who requests credit to benefit herself, not credit to benefit a third party." *Ibid.* Judge Colloton relied on a dictionary defining "apply" as "to make an appeal or request . . . *usu[ally] for something of benefit to oneself*." *Id.* at 11-12 (quoting *Webster's Third New International Dictionary of the English Language* 105 (1971) (*Webster's Third*)). He acknowledged that "there are unusual meanings of 'apply' that encompass making a request on behalf of another," but he maintained that the existence of such meanings "is not sufficient to make a term ambiguous for pur-

poses of *Chevron*." *Id.* at 12. That analysis suffers from three fatal flaws.

First, the ordinary meaning of "apply" does not exclude requests for benefits to others. Most standard definitions of the term omit that limitation. See p. 18 & note 6, *supra*. Even the dictionary cited in the concurrence specifies only that the term "usu[ally]" refers to a request for something that benefits the requester—not that the relevant meaning excludes requests that benefit someone else. *Webster's Third* 105. And even if it supported a more restrictive interpretation, a single dictionary could not demonstrate that the Act *unambiguously* excludes a broader meaning. To the contrary, "[t]he existence of alternative dictionary definitions * * * , each making some sense under the statute, itself indicates that the statute is open to interpretation." *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 418 (1992).

Second, Regulation B would be a permissible interpretation of "applicant" even if the term encompassed only an individual who requests something to benefit herself. As the court of appeals recognized, guarantors typically offer a guarantee precisely because they "desire[] for a lender to extend credit to a borrower." Pet. App. 6-7. The guarantees in this case, for example, stated that petitioners "expect[ed] to derive substantial benefits" from the loans. D. Ct. Doc. 4-1, at 24, 27. The concurrence thus must limit the term "apply" further: It is not enough that an individual requests an extension of credit that will benefit her; she must also *receive* the credit herself. But the concurrence cited no authority supporting that further

limitation on the ordinary meaning of the word "apply."

Third, even if the term "applicant" included only parties that would receive the requested extension of credit, it still would not unambiguously exclude guarantors and other secondary obligors. Other banking statutes and regulations addressing persons who receive an "extension of credit" (or using comparable terms such as "borrower") are reasonably construed to include guarantors. See, *e.g.*, 12 C.F.R. 215.3(a)(4), 618.8325, 932.9(a). For example, banking regulators consider a guarantor to receive an "extension of credit" for purposes of a provision of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, that allows consumer reporting agencies to furnish a consumer's credit report in connection with a transaction "involving the *extension of credit* to * * * the consumer." 15 U.S.C. 1681b(a)(3)(A) (emphasis added).[9]

C. Regulation B's Definition Of "Applicant" Furthers ECOA's Purposes

Regulation B's definition of "applicant" advances one of the central purposes of ECOA: the elimination of marital-status discrimination in credit transactions. Violations of the Additional Parties Rule affecting

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[9] See Letter from the Office of the Comptroller of the Currency et al. to the Fed. Trade Comm'n (May 31, 2001), https://www.fdic.gov/news/news/financial/2001/fil0161a.html; see also Fed. Trade Comm'n, *Advisory Opinion to Tatelbaum* (June 22, 2001), https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-tatelbaum-06-22-01. These examples refute the assumption that a guarantor *cannot* be viewed as receiving an extension of credit. But the term is ambiguous, and in other contexts agencies have reasonably determined that a guarantor should not be viewed as receiving an "extension of credit." See, *e.g.*, 12 C.F.R. Pt. 31, App. B.

guarantors and other secondary obligors take two basic forms, both of which constitute the type of discrimination that ECOA sought to end. Excluding guarantors from the definition of "applicant" would not affect the scope of the conduct prohibited by the Rule—a creditor improperly insisting on a spousal guarantee would still violate the rights of the primary borrower. But accepting the court of appeals' approach would undermine the Act by failing to accord relief to an entire class of victims harmed by the violations, and it would create arbitrary distinctions between parties that are equivalently situated for all purposes relevant under the Act.

1. The most straightforward violations of the Additional Parties Rule occur when a creditor requires a borrower's spouse to cosign or guarantee a loan even though the creditor would have extended credit without another signature if the borrower had been unmarried. See 12 C.F.R. 202.7(d)(1) (2010). Prior to ECOA, such requirements were routine. Senate Report 17-18; Geary 1652.

One of the principal purposes of the Act was to eliminate spousal-signature requirements in order to ensure that creditworthy married persons can obtain independent credit and establish their own credit profiles. Senate Report 16-17. Congress was concerned, for example, that widows and divorcees faced difficulty getting credit because their credit histories were typically in their husbands' names. *Id.* at 16. The forced linkage of spouses' credit histories also meant that women "share[d] the taint of any adverse information" in their husbands' credit reports, which "impair[ed] [their] effort to secure independent credit." *Credit Discrimination: Hearings Before the*

Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 93d Cong., 2d Sess. 273 (1974) (report by United States Comm'n on Civil Rights).

When a creditor requires a borrower's spouse to cosign or guarantee a loan solely because of the couple's marital status, the creditor obviously discriminates against *the borrower*, who is denied the ability to obtain individual credit and is subjected to a requirement that would not have been imposed on an unmarried person. But such requirements also constitute marital-status discrimination against *the guarantor*, who is "required to assume a debt obligation merely by virtue of being married to the applicant." Smith 918-919.

A spouse who is required to cosign or guarantee a loan also suffers one of the core discriminatory harms that ECOA sought to prevent: the inability to maintain an independent credit profile. As the major credit-reporting agencies explain, cosigning or guaranteeing a loan "could negatively impact [the spouse's] credit report and creditworthiness."[10] From the outset, the obligation may "appear on [the spouse's] credit report" and "impact [her] credit scores."[11] And if

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[10] Mechel Glass, Equifax, *Should I Co-Sign On a Loan for a Family Member?* (Apr. 17, 2014), http://blog.equifax.com/credit/should-i-co-sign-on-a-loan-for-a-family-member.

[11] Experian, *Credit Score FAQs*, http://www.experian.com/credit-education/score-faqs.html (last visited May 26, 2015). Immediate reporting to credit bureaus is most common when individuals cosign consumer debt, but recently some creditors have begun reporting guarantees of business loans as well. See, *e.g.*, John Tozzi, *When Your Business Loan Affects Your Personal Credit*, Bloomberg Bus. (Jan. 25, 2010), http://www.businessweek.com/smallbiz/content/jun2009/sb20090612_665812.htm.

the borrower "miss[es] payments or default[s] on the loan, [the spouse's] credit reports will show the delinquencies," thereby tarnishing her credit history and ability to secure credit—even if she pays the debt.[12]

As noted, the Additional Parties Rule would prohibit spousal-signature requirements even if guarantors were not "applicants" under ECOA—and in fact did so before the Board amended Regulation B's definition to include guarantors. See 12 C.F.R. 202.7(d) (1984). The Rule effectuates the Act's prohibition on marital-status discrimination against primary borrowers whether or not guarantors also qualify as "applicants." But excluding guarantors from the definition of "applicant" ignores the fact that a spouse who is improperly required to guarantee a loan also suffers the sort of discrimination that ECOA sought to prevent. And where, as is often the case, the spouse accedes to the demand for an illegal guarantee, it also leaves the victim most likely to suffer injury from the violation without a remedy under the Act.

2. The other paradigmatic violation of the Additional Parties Rule occurs in connection with business credit. As explained above, creditors routinely (and prudently) require personal guarantees from the owners of small businesses. See pp. 5-6, *supra*. But where a creditor also requires personal guarantees from the owners' spouses—and where, as petitioners allege occurred here, it does so solely because of their marital status—that further request violates the Rule.

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[12] TransUnion, *The Benefits and Issues of Co-Signing a Loan*, http://www.transunion.com/personal-credit/credit-issues-bad-credit/cosigning-a-loan.page (last visited May 26, 2015); see 12 C.F.R. 227.14(b)(1).

12 C.F.R. 202.7(d) (2010); 12 C.F.R. Pt. 202, Supp. I, ¶ 7(d)(6)-2 (2010).

Violation of the Rule in this manner inflicts similar discriminatory injuries on the spouse who is required to sign a guarantee because of her marital status. It also implicates another of ECOA's central purposes by discriminating against the married business owner who is denied the ability to guarantee her business's loan without her spouse's involvement. Congress sought to ensure that creditworthy individuals "have equal access to the benefits of full participation in the credit economy," without regard to sex or marital status. Senate Report 18. One important aspect of the credit economy is the ability of entrepreneurs and small business owners to secure commercial credit, and in amending ECOA Congress has repeatedly sought to ensure that businesses owned by women have full and equal access to loans.[13] When a small business owner or officer who is individually creditworthy is denied the ability to guarantee a business loan by herself and is instead required to secure a spousal guarantee, that owner suffers the type of discrimination that ECOA was intended to prevent.

Again, this sort of demand for a spousal guarantee would violate the Additional Parties Rule even if guarantors did not qualify as "applicants"—and was prohibited even before the 1985 amendment to the regulation. See 12 C.F.R. 202.7(d)(5) (1984).[14] But

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[13] See H.R. Rep. No. 955, 100th Cong., 2d Sess. 15 (1988); see also Dodd-Frank Act, § 1071, 124 Stat. 2056-2057; Women's Business Act, § 301, 102 Stat. 2692-2693.

[14] Although the only "applicant" in that circumstance would be the business entity, requiring the spousal guarantee would violate the business's rights under ECOA by discriminating against it on

treating guarantors as "applicants" in this circumstance properly recognizes that the signature requirement constitutes discrimination not only against the business entity that sought the loan, but also against the owner or officer who was denied the ability to secure credit for her business by providing an individual guarantee.

3. Finally, excluding guarantors and other secondary obligors from protection under ECOA would lead to arbitrary distinctions. Before the Act, when creditors routinely demanded that married borrowers obtain signatures from their spouses, the capacity in which spouses were required to sign "varie[d] from case to case." Geary 1652. Some creditors insisted on a guarantee or co-signature, while others required a spouse's signature as a joint borrower rather than as a secondary obligor. See Senate Report 17; see also, *e.g.*, *Anderson* v. *United Fin. Co.*, 666 F.2d 1274, 1276-1277 (9th Cir. 1982).

The two alternatives are equivalent from the creditor's standpoint: In either case, the creditor secures the right to pursue both spouses for the full amount of the loan. The alternatives also have the same discriminatory effects: In either case, the primary borrower is unable to obtain individual credit and her spouse is required to assume an unwanted liability because of

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the basis of its owner's marital status. See 12 C.F.R. Pt. 202, Supp. I, ¶ 2(z)-1 (2010) (explaining that the Act bars discrimination based on the characteristics of the "officers of an applicant in the case of a corporation" and discrimination based on "the characteristics of individuals with whom an applicant is affiliated or with whom the applicant associates"). Petitioners thus err in contending (Br. 11, 29-33) that a decision holding that only principal borrowers qualify as "applicants" would deny business entities protection under ECOA.

marital status. Under the court of appeals' interpretation, however, the two scenarios have very different consequences: A spouse who is required to become a joint borrower qualifies as an "applicant" entitled to protection and relief under ECOA, but a spouse who is required to become a guarantor does not—despite experiencing equivalent discrimination and suffering essentially the same harms. Those "illogical results * * * argue strongly against the conclusion that Congress intended" to exclude guarantors from protection under the Act. *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 133 (1987).

D. The Remaining Objections To Regulation B Lack Merit

Respondent and others have argued that Regulation B's definition of "applicant" is inconsistent with other provisions of ECOA, that it impermissibly expands the Act's private right of action, and that it unduly increases creditors' liability. Those contentions are unsound.

1. Regulation B's definition of "applicant" is consistent with other provisions of ECOA

Respondent and Judge Colloton's concurrence argued that other provisions of ECOA demonstrate that the term "applicant" includes only primary borrowers. None of the provisions on which they rely support, much less compel, that narrow interpretation.

First, the concurrence noted that ECOA requires a creditor to "notify *the* applicant of its action on the application." 15 U.S.C. 1691(d)(1) (emphasis added). The concurrence argued that the "use of the definite article" demonstrates that "the applicant is the single person to whom credit would be extended." Pet. App.

12. But that inference is foreclosed by the Dictionary Act's instruction that "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. 1. It also fails to account for the common situation in which two parties apply jointly for shared credit for which they will both have primary liability.[15]

Second, the concurrrence observed that the Act requires creditors to provide notice to "[e]ach applicant against whom adverse action is taken," but specifies that a refusal to extend additional credit under an existing arrangement is not an "adverse action" if "the applicant is delinquent or otherwise in default." 15 U.S.C. 1691(d)(2) and (6). The concurrence assumed that if guarantors were treated as "applicants" for purposes of this provision, a creditor would have to provide notice of an adverse action to a guarantor even if it refused to extend credit because the primary borrower was delinquent. Pet. App. 13. But that assumption is incorrect. A guarantor applies for the same extension of credit sought by the primary borrower. If the creditor refuses to extend the requested credit because the primary borrower is delinquent, there is no "adverse action" at all and no party is entitled to an adverse-action notice.[16]

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[15] Nor is it "unnatural" to say that a guarantor submits a "completed application for credit" or an "application for a loan" under 15 U.S.C. 1691(d)(1) and (e)(1). Pet. App. 13. A guarantor's agreement to accept personal liability, offered to induce a creditor to extend credit, may reasonably be considered part of the "application" submitted by the primary borrower.

[16] The concurrence also erred in stating that guarantors could not fit within Section 1691(d)'s provisions governing "applicants" because guarantors do not "become 'delinquent' or 'in default.'" Pet. App. 13. In fact, that is precisely the consequence when a

Third, the concurrence noted that Section 1691(d)(4) contemplates a circumstance in which a creditor may be "*requested by a third party* to make a specific extension of credit directly or indirectly to an applicant." The concurrence inferred that *any* person other than the primary borrower who requests credit must be a "third party" covered by this provision. Pet. App. 13-14. But as the context makes clear, the "third part[ies]" referenced in Section 1691(d)(4) are intermediaries who handle credit applications—for example, a car dealer who "shops" a buyer's application to multiple lenders. 42 Fed. Reg. at 1248. That provision thus sheds no light on the status of guarantors, who perform a very different role.

Finally, respondent relies (Br. in Opp. 33-34) on a provision requiring financial institutions to maintain certain information about applications for credit for "women-owned, minority-owned, or small business[es]." 15 U.S.C. 1691c-2(b). Respondent notes that the required information includes "the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant," and asserts that this requirement could not encompass guarantors. 15 U.S.C. 1691c-2(e)(2)(C). That is incorrect. CFPB has not yet implemented Section 1691c-2, and Regulation B has thus far treated guarantors as "applicants" only for purposes of the Additional Parties Rule. 12 C.F.R. 1002.2(e). But nothing would prevent the Bureau

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guarantor fails to satisfy its obligations. See, *e.g.*, 12 C.F.R. Pt. 202, App. B (2010) (Uniform Residential Loan Application asking whether mortgage applicant is "*delinquent or in default* on any Federal debt or any other loan, mortgage, financial obligation, bond, *or loan guarantee*") (emphases added).

from requiring creditors to maintain records reflecting "the amount of the credit transaction or the credit limit approved" for a guarantor.

2. Regulation B's definition of "applicant" does not impermissibly expand ECOA's private right of action

Judge Colloton's concurrence also suggested that Regulation B's definition of "applicant" reflects an impermissible expansion of ECOA's private right of action. Pet. App. 15-16. It is true that when the Board amended Regulation B's definition of "applicant" to include guarantors, it stated that the change would "give guarantors legal standing in the courts" to seek redress for violations of the Additional Parties Rule. 50 Fed. Reg. at 48,018. But Regulation B's definition of "applicant" construes the scope of ECOA's substantive provision barring discrimination "against any applicant." 15 U.S.C. 1691(a). The change clarified that when a creditor violates the Additional Parties Rule by requiring a spousal guarantee, the primary borrower and the guarantor spouse both suffer discrimination in violation of the Act. Smith 918-919. The Board's reference to a "change in 'standing'" thus reflected its "enlarged view about what is unlawful about [a lender's] conduct" when the lender violates the Rule. *Mayes* v. *Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994).

The Board's expanded view of ECOA's substantive scope has the consequence that additional parties may assert claims under the Act's private right of action, 15 U.S.C. 1691e(a)-(c). But this Court has made clear that *Chevron* applies with full force where, as here, an agency's "reasonable interpretation of ambiguous language in a substantive statutory provision" affects

the scope of a private right of action that is "expressly linked" to the substantive provision. *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 59 (2007). "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001).

3. Regulation B's definition of "applicant" does not unduly expand the scope of liability under ECOA

The Seventh Circuit has suggested, in dicta, that Regulation B's definition of "applicant" unduly expands creditors' liability. *Moran Foods, Inc.* v. *Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441, cert. denied, 552 U.S. 821 (2007). The Seventh Circuit believed that if a guarantor qualified as an "applicant," then an improperly obtained guarantee would be "unenforceable"—which would mean that a creditor that violated the Additional Parties Rule could "lose the entire debt" if the primary borrower defaulted. *Ibid.* But that objection conflates the validity of Regulation B's treatment of guarantors with a distinct set of remedial issues that are not presented here.

Some courts have held that a guarantor or other party may assert an ECOA violation as a defense to a creditor's attempt to enforce an improperly obtained guarantee. See, *e.g.*, *RL BB Acquisition*, 754 F.3d at 387; *Silverman* v. *Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 32-33 (3d Cir. 1995). But other courts have held, without questioning guarantors' status as "applicants," that ECOA does not permit that remedy. See, *e.g.*, *FDIC* v. *32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1480 (D. Kan. 1995). Treating guarantors as "applicants" thus does not necessarily

lead to the conclusion that illegal guarantees are unenforceable.

Conversely, *excluding* guarantors from the definition of "applicant" would not necessarily prevent the invalidation of a guarantee obtained in violation of the Additional Parties Rule. The guarantor would not be an "aggrieved applicant" eligible to seek relief under the Act. 15 U.S.C. 1691e(a)-(c). But the primary borrower could bring an action seeking to void the guarantee, or the guarantor could attempt to raise the ECOA violation as a defense under state-law principles barring the enforcement of illegal contracts. See, *e.g.*, *Bank of the W.* v. *Kline*, 782 N.W.2d 453, 462-463 (Iowa 2010). Alternatively, a federal regulatory agency could require the lender to release the improperly obtained guarantee—as has been the banking agencies' longstanding enforcement policy. See Board, *Supervisory Enforcement Policy for the ECOA and the Fair Housing Act* 5-7 (Oct. 23, 1981) (on file with the Office of the Solicitor General).

None of those remedial questions will be decided by the Court's resolution of the question presented—and the Seventh Circuit thus went astray in suggesting that its view of the proper scope of liability under ECOA provided a basis for refusing to defer to Regulation B's permissible interpretation of "applicant."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 1691 provides:

Scope of prohibition

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or

other pertinent element of credit-worthiness as provided in regulations of the Bureau;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Bureau, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value;

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant; or

(5) to make an inquiry under section 1691c-2 of this title, in accordance with the requirements of that section.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special so-

cial needs which meets standards prescribed in regulations by the Bureau;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Copies furnished to applicants

(1) In general

Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.

(2) Waiver

The applicant may waive the 3 day requirement provided for in paragraph (1), except where otherwise required in law.

(3) Reimbursement

The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.

(4) Free copy

Notwithstanding paragraph (3), the creditor shall provide a copy of each written appraisal or valuation at no additional cost to the applicant.

(5) Notification to applicants

At the time of application, the creditor shall notify an applicant in writing of the right to receive a

copy of each written appraisal and valuation under this subsection.

(6) Valuation defined

For purposes of this subsection, the term "valuation" shall include any estimate of the value of a dwelling developed in connection with a creditor's decision to provide credit, including those values developed pursuant to a policy of a government sponsored enterprise or by an automated valuation model, a broker price opinion, or other methodology or mechanism.

2. 15 U.S.C. 1691a provides in pertinent part:

Definitions; rules of construction

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(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

* * * * *

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

* * * * *

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.

3. 15 U.S.C. 1691b provides in pertinent part:

Promulgation of regulations by the Bureau

(a) In general

The Bureau shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

(b) Exempt transactions

Such regulations may exempt from the provisions of this subchapter any class of transactions that are not primarily for personal, family, or household purposes, or business or commercial loans made available by a financial institution, except that a particular type within a class of such transactions may be exempted if the Bureau determines, after making an express finding

that the application of this subchapter or of any provision of this subchapter of such transaction would not contribute substantially to effecting the purposes of this subchapter.

(c) Limitation on exemptions

An exemption granted pursuant to subsection (b) shall be for no longer than five years and shall be extended only if the Bureau makes a subsequent determination, in the manner described by such paragraph,[1] that such exemption remains appropriate.

* * * * *

4. 15 U.S.C. 1691c-2 provides in pertinent part:

Small business loan data collection

(a) Purpose

The purpose of this section is to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

(b) Information gathering

Subject to the requirements of this section, in the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, the financial institution shall—

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[1] So in original. Probably should be "subsection,".

(1) inquire whether the business is a women-owned, minority-owned, or small business, without regard to whether such application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means, and whether or not such application is in response to a solicitation by the financial institution; and

(2) maintain a record of the responses to such inquiry, separate from the application and accompanying information.

(c) Right to refuse

Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit.

(d) No access by underwriters

(1) Limitation

Where feasible, no loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit shall have access to any information provided by the applicant pursuant to a request under subsection (b) in connection with such application.

(2) Limited access

If a financial institution determines that a loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit should have access

to any information provided by the applicant pursuant to a request under subsection (b), the financial institution shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.

(e) Form and manner of information

(1) In general

Each financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a request under subsection (b).

(2) Itemization

Information compiled and maintained under paragraph (1) shall be itemized in order to clearly and conspicuously disclose—

(A) the number of the application and the date on which the application was received;

(B) the type and purpose of the loan or other credit being applied for;

(C) the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant;

(D) the type of action taken with respect to such application, and the date of such action;

(E) the census tract in which is located the principal place of business of the women-owned, minority-owned, or small business loan applicant;

(F) the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant preceding the date of the application;

(G) the race, sex, and ethnicity of the principal owners of the business; and

(H) any additional data that the Bureau determines would aid in fulfilling the purposes of this section.

(3) No personally identifiable information

In compiling and maintaining any record of information under this section, a financial institution may not include in such record the name, specific address (other than the census tract required under paragraph (1)(E)),[1] telephone number, electronic mail address, or any other personally identifiable information concerning any individual who is, or is connected with, the women-owned, minority-owned, or small business loan applicant.

(4) Discretion to delete or modify publicly available data

The Bureau may, at its discretion, delete or modify data collected under this section which is or will

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[1] So in original. Probably should be "(2)(E)),".

be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest.

* * * * *

5. 15 U.S.C. 1691e provides in pertinent part:

Civil liability

(a) Individual or class action for actual damages

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Recovery of punitive damages in individual and class action for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among

other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief

Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

(d) Recovery of costs and attorney fees

In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Bureau or interpretation or approval by an official or employee of Bureau of Consumer Financial Protection duly authorized by Bureau

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding

that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

* * * * *

6. 12 C.F.R. 202.2 (2010) provides in pertinent part:

Definitions.

* * * * *

(e) *Applicant* means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

* * * * *

7. 12 C.F.R. 202.7 (2010) provides in pertinent part:

Rules concerning extensions of credit.

(d) *Signature of spouse or other person*—(1) *Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission

of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

(2) *Unsecured credit.* If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

(3) *Unsecured credit—community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to community property.

(4) *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instru-

ment necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) *Additional parties.* If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

(6) *Rights of additional parties.* A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section.

* * * * *

8. 12 C.F.R. 202.2 (1984) provides in pertinent part:

Definitions and rules of construction.

* * * * *

(e) *Applicant* means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be con-

tractually liable regarding an extension of credit other than a guarantor, surety, endorser, or similar party.

* * * * *

9. 12 C.F.R. 202.7 (1984) provides in pertinent part:

Rules concerning extensions of credit.

* * * * *

(d) *Signature of spouse or other person.* (1) Except as provided in this subsection, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

(2) If an applicant requests unsecured credit and relies in part upon property to establish creditworthiness, a creditor may consider State law; the form of ownership of the property; its susceptibility to attachment, execution, severance, and partition; and other factors that may affect the value to the creditor of the applicant's interest in the property. If necessary to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the property relied upon available to satisfy the debt in the event of default.

(3) If a married applicant requests unsecured credit and resides in a community property State, or if the property upon which the applicant is relying is located in such a State, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable State law denied the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

(4) If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support extension of the credit request-

ed,[10] a creditor may request that the applicant obtain a co-signer, guarantor, or the like. The applicant's spouse may serve as an additional party, but a creditor shall not require that the spouse be the additional party. For the purposes of paragraph (d) of this section, a creditor shall not impose requirements upon an additional party that the creditor may not impose upon an applicant.

* * * * *

[10] If an applicant requests individual credit relying on the separate income of another person, a creditor may require the signature of the other person to make the income available to pay the debt.