No. 17-11736

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Regions Bank,

Plaintiff-Appellee,

v.

Legal Outsource PA, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

Hon. John E. Steele

Hon. Paul A. Magnuson

Case No. 2:14-cv-00476

Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Defendants-Appellants and Reversal

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Regions Bank v. Legal Outsource PA, et al.
No. 17-11736

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that, to my knowledge, interested persons in this case are those listend in the Certificates of Interested Persons accompanying Appellants' brief and Appellee's Response in Opposition to Motion to Reinstate Appeal and the following persons and entitites:

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STATEMENT OF THE ISSUES

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 marital status. 15 U.S.C. § 1691(a)(1). The questions addressed in this brief are:

1. Whether a business entity can state an ECOA discrimination claim by alleging that a creditor discriminated against it on the basis of its owner's marital status.

2. Whether the regulations issued pursuant to ECOA reasonably interpret the term "applicant" to encompass guarantors.

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau (Bureau), an agency of the United States, files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

Congress has granted the Bureau the authority to enforce ECOA and to promulgate regulations implementing the statute. *See* 15 U.S.C. §§ 1691b(a), 1691c. At issue in this case are both the scope of ECOA's protections and the validity of one of its implementing regulations. The Bureau therefore has a substantial interest in the issues in this case.

STATEMENT

A. Legal Background

ECOA: Congress enacted ECOA in 1974 to address "widespread discrimination on the basis of sex and marital status in the granting of credit to women." S. Rep. No. 93-278, at 16 (1973) (1973 Senate Report). ECOA originally made it "unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction." Pub. L. No. 93-495, § 503, 88 Stat. 1521, 1521 (1974). In 1976, Congress expanded the Act to prohibit credit discrimination based on other characteristics. Pub. L. No. 94-239, § 2, 90 Stat. 251, 251 (1976). Since 1976, ECOA has made it unlawful "for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1).

Congress intended ECOA to protect applicants for both consumer credit and "all forms of business credit." S. Rep. No. 94-589, at 10 (1976) (1976 Senate Report). Congress therefore defined "applicant"

as "any person who applies to a creditor" for credit,[1] and specified that "person" means "a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association," 15 U.S.C. §§ 1691a(b), (f).

Regulation B: Congress initially gave the Board of Governors of the Federal Reserve System (Board) the authority to "prescribe regulations to carry out the purposes of [ECOA]." 15 U.S.C. § 1691b(a) (2006). In 2011, the Board's authority over ECOA and its regulations, known as "Regulation B," was transferred to the Bureau.[2] This brief cites the Board's regulations, however, because they were still in effect during the relevant events in this case.

Prohibited Basis Definition: Like ECOA, Regulation B has always prohibited discrimination "on the basis of sex or marital status" in the granting of "business credit." 40 Fed. Reg. 49298, 49309 (1975).

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[1] A person is an "applicant" if the person applies to the 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).

[2] 15 U.S.C. § 1691b(a); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(1), (d), 1085, 124 Stat. 2036, 2039, 2083-85. The Bureau has adopted and recodified Regulation B and its interpretive supplement. 76 Fed. Reg. 79,442 (Dec. 21, 2011) (promulgating 12 C.F.R. Pt. 1002 & Supp. I); *see also* 81 Fed. Reg. 25,323 (Apr. 28, 2016).

After the 1976 amendment to ECOA, the Board revised Regulation B to define the "prohibited bas[es]" for making credit decisions under ECOA. 42 Fed. Reg. 1242, 1253 (Jan. 6, 1977). The revised regulation clarified that the prohibited bases of "race, color, religion, national origin, sex, marital status, or age" are "not limited to characteristics of the applicant." *Id.* at n.3. Rather, a creditor also violates ECOA if it discriminates based on the characteristics of the "partners or officers of an applicant" or "of individuals with whom an applicant deals." *Id.* For example, the Board explained, "a creditor may not discriminate against a non-Jewish applicant because of that person's business dealings with Jews." *Id.*

In a 1985 notice-and-comment rulemaking, the Board moved certain portions of its interpretation of "prohibited basis" to the interpretive supplement to Regulation B. *See* 50 Fed. Reg. 48018, 48049 (Nov. 20, 1985). But that move did not narrow the scope of the prohibition. During the events in this case, the interpretation continued to provide that a "prohibited basis [for making credit decisions] refers not only to characteristics—the race, color, religion, national origin, sex, marital status, or age—of an applicant (or officers of an applicant in the case of a corporation) but also to the

characteristics of individuals with whom an applicant is affiliated or with whom the applicant associates." 12 C.F.R. Pt. 202, Supp. I ¶ 2(z)-1 (2010).

Additional Parties Rule: Regulation B has always included an Additional Parties Rule (the 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. 49,308-09 (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 "in [their] own name[s]" or "without their husbands' signatures." 1973 Senate Report 16-17. Such requirements created extra obstacles for married people seeking credit and prevented them from maintaining separate credit histories. *Id.* at 17-20. To prevent this discrimination, the Rule provides that if an applicant for 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] A creditor may "request a cosigner, guarantor,

[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).

endorser, or similar party" if needed to satisfy its creditworthiness standards, but it may not "require that the [primary borrower's] spouse be the additional party." 12 C.F.R. § 202.7(d)(5) (2010). Similarly, in the common situation where a creditor (permissibly) requires the personal guarantee of the officers or owners of a small business, the creditor "may not automatically require that the spouse of married officers also sign the guarantee." 12 C.F.R. Pt. 202, Supp. I ¶ 7(d)(6)-2 (2010).

Although the Board had consistently defined what constitutes discrimination in violation of the Rule, it had not always specified precisely who is discriminated against when the Rule is violated—the person who is required to obtain a spouse's guarantee or signature, the spouse who is required to guarantee the loan or sign the application, or both. In 1985, however, the Board made clear that "applicant"—those against whom creditors may not discriminate—included, "[f]or purposes of" the Rule, "guarantors, sureties, endorsers and similar parties." 50 Fed. Reg. 48,018, 48,020, 48,027 (Nov. 20 1985). The Board explained that the amended definition "impose[d] no new requirements on creditors." *Id.* at 48,018. Rather, the effect of the change was to clarify that violations of the Rule constitute

discrimination not only against the primary borrower, but also against the additional party, including a guarantor spouse.

B. Facts

In 2005, Legal Outsource, a company wholly owned by Charles Phoenix, obtained a revolving line of credit from Regions Bank. (Doc. 137, ¶¶ 8, 96.a) In 2011, Periwinkle Partners, which was indirectly owned by Charles's wife, Lisa Phoenix, executed a loan agreement with Regions Bank, which Lisa guaranteed. (Doc. 137, ¶¶ 17, 82.b). According to the Phoenixes, Regions Bank required Charles and Legal Outsource to guarantee the Periwinkle Loan solely because Charles was married to Lisa. (Doc. 137, ¶¶ 88, 102, 116).

In 2014, Legal Outsource defaulted on its loan and neither Legal Outsource nor Charles paid off the debt. (Doc. 137, ¶ 22). Regions Bank informed Periwinkle that pursuant to the terms of the Periwinkle Loan, because Legal Outsource and Charles were guarantors of the Periwinkle Loan, the default on the Legal Outsource Loan constituted an event of default on the Periwinkle Loan. (Doc. 137, ¶ 32.g.i).

C. Proceedings Below

Regions Bank sued Periwinkle, Legal Outsource, Lisa, and Charles seeking the amount of the Periwinkle Loan and foreclosure on the

property securing it. (Doc. 1). The defendants counterclaimed alleging that Regions Bank violated ECOA and the Additional Parties Rule. (Doc. 137 at 47-59, Counterclaims 9-12.) The district court rejected the ECOA counterclaims brought by Legal Outsource, Charles, and Lisa as guarantors of the Periwinkle Loan. Relying on *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 1072 (2016), the district court concluded that a guarantor is not an "applicant" entitled to raise ECOA discrimination claims. (Doc. 278 at 9-12).

Although Periwinkle was indisputably the applicant on the Periwinkle Loan, the district court granted summary judgment against Periwinkle based on a rationale not raised by Regions Bank. The court concluded that Periwinkle "cannot avail itself of the protections of [ECOA] because," as a company, "it cannot have a marital status." (Doc. 376 at 7-8.)

SUMMARY OF ARGUMENT

I. ECOA protects all credit applicants, both natural persons and entities, from discrimination on the basis of marital status. The district court's conclusion that a company cannot state a claim for marital-status discrimination is therefore incorrect.

A. ECOA defines an "applicant" as "any person" who applies for credit, including "a corporation, . . . partnership, cooperative, or association." 15 U.S.C. §§ 1691a(b), (f). A company may therefore bring suit if it is discriminated against "on the basis of" the marital status of its owner. Nothing in the statute requires the company itself to have a marital status to state an ECOA claim. Rather, as Regulation B expressly recognizes, the Act also prohibits discrimination based on the characteristics of "officers of an applicant in the case of a corporation" and "of individuals with whom an applicant is affiliated or with whom the applicant associates." 12 C.F.R. Pt. 202, Supp. I, ¶ 2(z)-1 (2010).

B. This interpretation furthers the Act's purposes and is consistent with the long-held understanding of the Act. Congress intended ECOA to protect those seeking business credit, 1976 Senate Report at 11, and entrepreneurs do not forfeit the protections of the Act by taking advantage of a corporate form. Courts, regulators, and the lending industry have thus long recognized that company applicants are proper plaintiffs in discrimination suits under ECOA.

C. Protecting companies' ECOA rights is consistent with how this and other courts understand other anti-discrimination statutes.

Section 1981 and the Fair Housing Act, for example, both have broad coverage that allows plaintiffs to state discrimination claims on the basis of characteristics that they themselves do not have.

II. Since 1985, Regulation B has authoritatively interpreted the term "applicant" in ECOA to include guarantors for purposes of the Additional Parties Rule. This longstanding interpretation of the ambiguous definition of "applicant" is reasonable and entitled to deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

A. ECOA defines "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. And even if the term "applicants" included only those who request a benefit for themselves, it would still reasonably be read to include guarantors.

B. 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.

C. Regulation B's definition of "applicant" is consistent with other regulatory schemes. As various banking regulations demonstrate, it is common for a guarantor to be viewed as requesting or receiving credit.

ARGUMENT

I. ECOA Protects Business Entities from Discrimination on the Basis of Their Owners' Marital Status

The district court held that "Periwinkle Partners cannot avail itself of the protections of [ECOA] because it is a company, not an individual, and it cannot have a marital status." Doc. 376 at 7. That holding is incorrect. Periwinkle is an "applicant" for credit, and ECOA protects "any applicant" from discrimination "on the basis of . . . marital status." 15 U.S.C. § 1691(a). ECOA's text, Regulation B, and judicial precedent confirm that an entity like Periwinkle can bring a claim when it suffers discrimination from a creditor impermissibly

taking its owner's marital status into account in making credit decisions. This Court should reverse.

A. The Plain Text of ECOA and Regulation B Protects Companies from Discrimination

Under ECOA, an "applicant" encompasses "any person who applies to a creditor directly for an . . . extension of credit." 15 U.S.C. § 1691a(b). A "person," in turn, includes "a corporation, . . . partnership, cooperative, or association." *Id.* § 1691a(f). Thus, by its plain terms, ECOA protects business applicants from unlawful discrimination.

The district court's decision cannot be reconciled with Congress's decision to include companies as "applicants" protected under ECOA. While prohibited bases for credit discrimination — race, color, religion, national origin, marital status, sex, and age — are typically associated with natural persons, Congress made a conscious decision, reflected in the statutory text, not to limit "applicants" to natural

persons.[4] *See* 1976 Senate Report at 10; 1973 Senate Report at 27. The district court's rationale for rejecting Periwinkle's ECOA claim effectively ignores how Congress defined that term.

The district court's conclusion can only have resulted from a misreading of what it means for an applicant to have been "discriminate[d] against . . . on the basis of . . . marital status." 15 U.S.C. § 1691(a)(1). The district court appears to have interpreted that phrase to mean that the discrimination must be on the basis of *the applicant's* marital status rather than simply "on the basis . . . of marital status." But the italicized phrase does not appear in the statute, and there is no justification for reading that limitation into the

[4] Although ECOA currently offers applicants various protections beyond the prohibition on credit discrimination, when Congress first enacted ECOA, its sole substantive provision was the prohibition on credit discrimination. *See* Pub. L. No. 93-495, §§ 503, 701(a), 88 Stat. 1500, 1521 (1974). The original act, nonetheless, regarded companies as applicants, *id.* §§ 702(b), (f), confirming that Congress intended to authorize companies to state a claim for sex or marital-status discrimination under ECOA.

statutory text.[5] *See Cherry v. Amoco Oil Co.*, 481 F. Supp. 727, 731 (N.D. Ga. 1979) ("Under § 1691(a)(1), it is unlawful for a creditor to discriminate against 'any' applicant 'on the basis of race'. The statutory language does not say on the basis of 'that applicant's' race or 'his or her' race."); *cf. Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 705 (2d Cir. 1982) (Friendly, J.) ("[The statute] says that 'No person in the United States shall, on the ground of race, color, or national origin, be excluded' . . . . The statute does not say 'No person in the United States shall, on the ground of his race, color, or national origin' etc., and we perceive no reason to read it as if it did.").

Any lingering doubt is resolved by Regulation B and its interpretive supplement, which were adopted through notice-and-comment rulemaking and are entitled to substantial deference. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 975

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[5] By contrast, a discrimination claim under 15 U.S.C. § 1691(a)(2) requires an allegation that the creditor discriminated against the applicant "because all or part of the *applicant's* income derives from any public assistance program" (emphasis added). Congress's decision not to include a similar qualifier in § 1691(a)(1) further indicates that Congress did not intend § 1691(a)(1) to be qualified in that manner. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.").

n.3 (7th Cir. 2004) (citing *Chevron*, 467 U.S. at 844). Under Regulation B, a "prohibited basis" for discrimination "is not limited to characteristics of the applicant," but "refers also to the characteristics of individuals with whom an applicant deals." 42 Fed. Reg. at 1253 n.3. Thus, ECOA prohibits discrimination based on the characteristics of "officers of an applicant in the case of a corporation" and "of individuals with whom an applicant is affiliated or with whom the applicant associates." 12 C.F.R. Pt. 202, Supp. I, ¶ 2(z)-1 (2010). Because the owner of a company is an officer, affiliate, or associate of the company, the applicant company may bring a claim if it suffers discrimination on the basis of its owner's marital status.

B. Allowing Companies to Avail Themselves of ECOA Rights Furthers the Act's Purposes and Is Consistent with the Long-Held Understanding of the Act

The district court's attempt to distinguish between business entities and natural persons would fundamentally undermine ECOA's purposes. Unlike certain other federal consumer financial laws, whose protections are focused on natural persons who enter into transactions for personal, family, or household purposes (*see*, *e.g.*, 15 U.S.C. §§ 1602(i), 1693a(2)), Congress deliberately extended ECOA's nondiscrimination protections to include non-natural-person

applicants and business credit transactions. 1976 Report at 10-11. Congress understood that "the antidiscrimination protections of the Act" were needed to protect "minorities, women and others who encounter problems of discrimination in obtaining credit to establish businesses or conduct normal business operations." *Id.* at 11.

Under the district court's reading, however, ECOA would fail to apply to applications for credit where a business entity is the sole applicant. Thus, the district court would require entrepreneurs to choose between the protections of ECOA and the benefits of operating as corporations (or other business forms). *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014) ("HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty [under the Religious Freedom Restoration Act] or forgo the benefits, available to their competitors, of operating as corporations."). But there is no reason to believe that Congress intended to put entrepreneurs to that choice simply to avoid what Congress believed to be "irrational discrimination." 1976 Senate Report at 3.

It is unsurprising, then, that ECOA has long been understood to forbid lenders from considering certain characteristics not only of the

applicant but also of any "individuals with whom an applicant deals." 42 Fed. Reg. at 1253 n.3; *Cherry*, 481 F. Supp. at 732 (holding that a white applicant residing in a primarily black neighborhood could bring an ECOA claim against a creditor for discriminating against applicants from her zip code). Business entities have brought ECOA claims against creditors for discriminating against them on the basis of their owners' characteristics. *See, e.g.*, *Diamond Ventures, LLC v. Baruah*, 699 F. Supp. 2d 57 (D.D.C. 2010) (minority-owned company); *JAT, Inc. v. Nat'l City Bank of Midwest*, 460 F. Supp. 2d 812 (E.D. Mich. 2006) (African-American-owned businesses and predominantly African-American churches). And regulators have long recognized that ECOA protects companies from credit discrimination based on the protected characteristics of individuals who are associated with them.[6] Indeed, the lending industry itself has recognized that ECOA's

[6] *See*, *e.g.*, Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,268 (Apr. 15, 1994) (interagency statement explaining that a lender may not discriminate on the basis of the characteristics of "[a] person associated with a credit applicant (for example, a co-applicant, spouse, business partner, or live-in aide)"); OCC Fair Lending Handbook (Jan. 2010) at 53, 54, online at https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/Fair%20Lending%20Handbook.pdf (instructing examiners to investigate denied credit applications from businesses "located in minority and/or integrated geographics" or that "appear to be owned by women or minority group members").

protections extend to enterprises that seek credit. *See* Amicus Brief of Am. Bankers Ass'n, *Hawkins v. Cmty. Bank of Raymore*, No. 14-520 (July 30, 2015), at 30 ("In the case where a women-owned business attempts to receive a loan, but the lender refuses to provide the loan based on the fact that women own the borrower, the ECOA would provide the business itself with a cause of action for discriminatory lending."). The district court's *sua sponte* conclusion that a company cannot state an ECOA claim because it lacks a marital status runs contrary to the longstanding and uniform understanding of ECOA's reach.

C. Protecting Companies' ECOA Rights is Consistent with How This and Other Courts Understand Other Anti-Discrimination Statutes

ECOA's broad proscription on the use of protected characteristics in credit decisions is not an outlier. Rather, it is consistent with the scope of other federal antidiscrimination statutes.

For example, this Court recognized that "Section 1981's protections [against discrimination] extend to companies." *Webster v. Fulton Cty., Ga.*, 283 F.3d 1254, 1256 n.3 (11th Cir. 2002). In doing so, this Court approvingly cited *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S.

1068 (1992), *reinstated* 975 F.2d 886 (D.C. Cir. 1992), which explains why this is the case.

In *Gersman*, a healthcare company and its owner sued a software company that had broken a contractual relationship with the healthcare company, allegedly because the healthcare company's owner was Jewish. 931 F.2d at 1567. The court held that the owner of the company could not sue under section 1981 since that statute protects the right to make and enforce contracts and the owner was not a party to the contract. But with respect to the healthcare company, the court concluded that "a party may suffer a legally cognizable injury from discrimination even where that party is not a member of a protected minority group." *Id.* at 1567, 1569. "To hold otherwise," the court stated, "would render a whole range of discrimination claims unlitigable" because the non-contract-party owners cannot bring suit and only the company can sue based on the discrimination. *Id.*; *see also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 n.1 (2006) ("We note . . . that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims.").

Likewise, the Fair Housing Act (FHA), which provides a cause of action for any "aggrieved person," 42 U.S.C. § 3613(a), allows a wide group of plaintiffs to assert the protections of the Act.[7] The Supreme Court has allowed FHA suits by: a city alleging economic injuries from housing discrimination, *Bank of America Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1304 (2017); white tenants claiming that their landlord deprived them of "important benefits from interracial associations" by discriminating against minority prospective tenants, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); a village alleging that racial-steering had undermined its racial balance and cost it tax revenue, *Gladstone Realtors v. Village Of Bellwood*, 441 U.S. 91, 110-11 (1979); and a nonprofit organization that spent money combatting housing discrimination, *Havens Realty v. Coleman*, 455 U.S. 363, 379 (1982).

Like these other statutes, ECOA allows plaintiffs to state a discrimination claim on the basis of characteristics that they

[7] The FHA defines "person" broadly to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [of the United States Code], receivers, and fiduciaries." 42 U.S.C. § 3602(d).

themselves do not have. In the case of ECOA, an "applicant" that brings a claim may recover if a creditor makes a credit decision "on the basis of [the] marital status" of others who are associated with the applicant. 15 U.S.C. § 1691(a)(1). As applied here, this means that Periwinkle may pursue its ECOA claim by alleging that Regions Bank impermissibly treated Periwinkle differently by requesting an additional guarantor, strictly on the basis of the marital status of its owner. The district court's conclusion to the contrary should be reversed.

II. Regulation B Reasonably Interprets ECOA to Protect Guarantors from Discrimination

For over 30 years, the federal agency charged with implementing ECOA has interpreted the term "applicant" to include guarantors and similar parties for purposes of the Additional Parties Rule. This reasonable interpretation of an ambiguous phrase is entitled to deference under *Chevron*. *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 235 (2004) (examining parallel "expansive authority" to write rules under the Truth in Lending Act).

The district court wrongly held that "the text of the ECOA is unambiguous regarding whether a guarantor constitutes an applicant."

Doc. 278 at 10 (citing *Hawkins*, 761 F.3d 937).[8] As the Sixth Circuit has recognized, "ECOA's definition of 'applicant' is not straightforward and is easily broad enough to capture a guarantor." *See RL BB Acquisitions, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 386 (6th Cir. 2014). Because ECOA's definition of "applicant" is ambiguous and Regulation B's interpretation is reasonable, the district court's decision should be reversed.

A. Regulation B's Definition of "Applicant" is a Reasonable Interpretation of ECOA's Text

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

The term "applicant" refers to "any person who applies" for credit. 15 U.S.C. § 1691a(b). Ordinarily, to "apply" for something means "to make a (formal) request." Oxford English Dictionary,

[8] *Hawkins* was affirmed without an opinion by an evenly divided Supreme Court, 136 S. Ct. 1072 (2016) (Mem.), and therefore produced no precedent that is binding in this Court, *Durant v. Essex Co.*, 74 U.S. 107, 113 (1868) (statement that a judgment is affirmed by an equally divided court "prevents the decision from becoming an authority for other cases of like character").

http://www.oed.com/view/Entry/9724.[9] Thus, an "applicant" under the Act is someone who requests the extension of credit.

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" to induce the creditor to make the loan. *RL BB Acquisition*, 754 F.3d at 385. A guarantor thus (at a minimum) "impliedly requests[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. 1993).

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. 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 252-53 (rev. ed. 1996). A guarantee is thus reasonably understood as a request that the

[9] *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").

creditor extend credit. *RL BB Acquisition*, 754 F.3d at 385; *see also, e.g.*, *Equitable Tr. Co. 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).[10]

Secondary obligors are also 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). 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.

[10] 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." *Id.*; *see* 1973 Senate Report 10.

Pt. 202, App. B (2010) (model consumer credit applications); 76 Fed. Reg. 41,597 (July 15, 2011).

Guarantors therefore always request credit implicitly, often do so explicitly, and regularly participate extensively in the application process.

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

In a separate concurrence to the Eighth Circuit's decision in *Hawkins*, Judge Colloton appeared to acknowledge that a guarantor or other secondary obligor "requests credit" but asserted that "an 'applicant' who 'applies for credit' is one who requests credit to benefit herself, not credit to benefit a third party." 761 F.3d at 943. To reach this conclusion, Judge Colloton relied on a single dictionary defining "apply" as "to make an appeal or request … usu[ally] for something of benefit to oneself." *Id.* (quoting *Webster's Third New International Dictionary of the English Language* 105 (1971) (*Webster's Third*)). But this reliance is misplaced.

The ordinary meaning of "apply" does not exclude requests for benefits to others. Most standard definitions of the term omit that limitation. *See* footnote 9 and accompanying text. Even the dictionary entry cited in the concurrence specifies only that the term "usu[ally]"

refers to a request for something that benefits the requester—not that the word 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 statutes is open to interpretation." *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992).

In any event, Regulation B would be a permissible interpretation of "applicant" even if the term encompassed only an individual who requests something to benefit herself. Guarantors typically offer a guarantee precisely because they desire for a lender to extend credit to a borrower and they view that extension as a benefit to themselves. Judge Colloton's concurrence thus must further limit the term "apply": It is not enough that an individual requests an extension of credit that will benefit her; she must also *receive* the credit herself. But Judge Colloton cited no authority supporting that further limitation on the ordinary meaning of the word "apply."

B. 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 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, including, as discussed above, if that primary borrower is a non-natural person like a corporation. But accepting the district court's approach would undermine the Act by failing to accord relief to an entire class of victims.

One type of violation of the Rule occurs 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.

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 by virtue of being married. A spouse who is required to guarantee or cosign a loan suffers one of the core discriminatory harm that ECOA sought to prevent: the inability to maintain an independent credit profile and avoid being unnecessarily encumbered by someone else's debt. As the major credit-reporting agencies explain, cosigning or guaranteeing a loan "could negatively impact [the spouse's] credit report and creditworthiness"[11] both because the obligation may appear on the spouse's credit report from the outset and because in the event of the

[11] 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.

borrower defaulting or missing a payment, the spouse's credit report will reflect this, even if the spouse pays the debt.[12]

The other paradigmatic violation of the Additional Parties Rule occurs, as is alleged here, in connection with business credit. Creditors routinely (and prudently) require personal guarantees from the owners of small businesses for credit requested for the business. But where a creditor also requires personal guarantees from the owners' spouses solely because of their marital status, that further request violates the Rule. 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 non-owner spouse who is required to sign a guarantee because of his marital status. It also discriminates against the married business owner who is denied the ability to guarantee her business's loan without her spouse's involvement. 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

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[12] Experian, *Credit Score FAQs*, http://www.experian.com/credit-education/score-faqs.html (last visited July 19, 2017); 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 July 19, 2017).

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 Rule even if guarantors did not qualify as "applicants"—and was prohibited even before the 1985 amendments to the regulation's definition of "applicant." See 12 C.F.R. § 202.7(d)(5) (1984). But 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 only her individual guarantee.

C. Regulation B's Definition of "Applicant" Is Consistent with Other Regulatory Schemes

Finally, Regulation B is not alone in recognizing that guarantors can be regarded as requesting or receiving an extension of credit. For example, banking regulations provide that secondary obligors receive an extension of credit when they provide a guarantee or otherwise assume a secondary obligation. *See, e.g.*, 12 C.F.R. § 215.3(a)(4) (defining "extension of credit" to include acquiring a note upon which an insider "may be liable as . . . endorser, guarantor, or surety" in Board regulation limiting extensions of credit to banks' insiders); 12

C.F.R. § 932.9(a) (Federal Housing Finance Board regulation providing that, for purposes of limits on extending unsecured credit "to any single counterparty," a "third party-guarantor shall [in certain circumstances] be considered the counterparty" to whom credit is extended). Likewise, 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., which 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).[13] And regulations requiring credit unions to provide privacy notices treat "individual[s] acting as a guarantor" as persons entitled to such notice because they "obtain credit from" the credit union. 12 C.F.R. § 1016.4 (regulation originally promulgated by National Credit Union Administration, *see* 76 Fed. Reg. 79,025, 79,025-26 (Dec. 21, 2011)).

[13] *See* Letter from Office of the Comptroller of the Currency, et al. to the Fed. Trade Comm'n (May 31, 2001), online at https://www.fdic.gov/news/news/financial/2001/fil0161a.html ; Fed. Trade Comm'n Advisory Opinion to Tatelbaum (June 22, 2001), online at https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-tatelbaum-06-22-01.

To be sure, not every federal regulation treats guarantors as requesting extensions of credit.[14] But those counterexamples reflect the inherent ambiguity in classifying the guarantor's role in the credit application process. To survive judicial scrutiny under *Chevron*, "[a]ll that matters is whether the regulation is a reasonable construction of an ambiguous statute." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009). For the reasons discussed above, Regulation B satisfies that test.

[14] *See*, *e.g.*, 12 C.F.R. Pt. 31, App. B ("Generally speaking, guarantees are included in the part 215 definition of 'extension of credit' but are not included in the definition of 'extension of credit' in part 32 unless other criteria are satisfied."); 75 Fed. Reg. 2724, 2727 (Jan. 15, 2010) (explaining that "credit is not . . . extended . . . to a guarantor" for purposes of rules requiring notice when a creditor offers less favorable credit terms due to information in person's consumer report).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated: September 11, 2017 /s/ David A. King Jr.

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