

No.

In the Supreme Court of the United States

LISA M. PHOENIX, PETITIONER

v.

REGIONS BANK

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW SUPREME
COURT LITIGATION CLINIC
*580 Massie Road
Charlottesville, VA 22903*

MARK T. STANCIL
Counsel of Record
MATTHEW M. MADDEN
DONALD BURKE
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER &
SAUBER LLP
*2000 K Street, NW
Washington, DC 20006
(202) 775-4500
mstancil@robbsrussell.com*

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 sex, marital status, and other designated characteristics. 15 U.S.C. § 1691(a)(1). For more than three decades, regulations promulgated first by the Board of Governors of the Federal Reserve System, and then by the Consumer Financial Protection Bureau, pursuant to express delegations of broad rulemaking authority, have provided that, for certain purposes, the “applicants” protected from discrimination by ECOA include guarantors. See 12 C.F.R. §§ 202.2(e), 1002.2(e). The question presented, which recently divided this Court, 4-4, in *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016), is:

Whether the regulations issued by the Board and the CFPB permissibly construe the “applicants” protected from discrimination by ECOA to encompass guarantors.

II

PARTIES TO THE PROCEEDING

Petitioner Lisa M. Phoenix was an appellant in the court of appeals.*

Respondent Regions Bank was the appellee in the court of appeals.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

Regions Bank v. Legal Outsource PA, No. 2:14-CV-00476 (Jan. 31, 2017, opinion amended Feb. 6, 2017) (granting summary judgment to respondent)

United States Court of Appeals (11th Cir.):

Regions Bank v. Legal Outsource PA, et al., No. 17-11736 (Aug. 28, 2019) (affirming summary judgment in part and reversing in part)

Regions Bank v. Legal Outsource PA, et al., No. 18-10244 (Sept. 18, 2019) (affirming denial of motion to vacate judgment and award of attorney's fees to respondent)

Regions Bank v. Legal Outsource PA, et al., No. 19-12269 (pending appeal from order denying motion to recuse)

* The remaining appellants in the court of appeals were Legal Outsource PA, Periwinkle Partners, LLC, and Charles Paul-Thomas Phoenix. These parties, along with petitioner, were among the applicants named in the application for an extension of time within which to file a petition for a writ of certiorari filed by undersigned counsel on November 14, 2019. See No. 19A559. They have determined, however, not to seek further review of the judgment of the court of appeals. Accordingly, petitioner respectfully submits that they do not have any interest in the outcome of this petition.

III

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement.....	2
A. Statutory and regulatory background	2
B. The parties' dispute	5
Reasons for granting the petition	7
A. The decision below deepens the circuit conflict that this court was unable to resolve in <i>Hawkins v. Community Bank of Raymore</i>	8
B. The decision below is incorrect.....	10
C. The question presented continues to warrant review, and this case provides a sound vehicle for resolving it.....	21
Conclusion.....	23
Appendix A — Court of appeals opinion (Aug. 28, 2019	1a
Appendix B — District court opinion and order (Feb. 6, 2017)	78a
Appendix C — District court opinion and order (July 27, 2016)	87a
Appendix D — Statutory and regulatory provis- ions.....	103a

TABLE OF AUTHORITIES

Cases:

<i>Anderson Bros. Ford v. Valencia</i> , 452 U.S. 205 (1981)	11, 15
<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002).....	20
<i>CFTC v. Schor</i> , 478 U.S. 833 (1986)	20
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	7, 8

IV

Cases—Continued:	Page
<i>Comerica Bank v. Pars Ice Cream Co.</i> , No. 338955, 2018 WL 6625171 (Mich. Ct. App. Dec. 18, 2018).....	22
<i>Costanzo v. Tillinghast</i> , 287 U.S. 341 (1932)	20
<i>Environmental Def. v. Duke Energy Corp.</i> , 549 U.S. 561 (2007)	17
<i>Estate of Davis v. Wells Fargo Bank</i> , 633 F.3d 529 (2011).....	9
<i>Ford Motor Credit Co. v. Milhollin</i> , 444 U.S. 555 (1980)	11
<i>General Dynamics Land Sys., Inc. v. Cline</i> , 540 U.S. 581 (2004).	21
<i>Hawkins v. Community Bank of Raymore</i> , 136 S. Ct. 1072 (2016)	2, 7, 8
<i>Hawkins v. Community Bank of Raymore</i> , 761 F.3d 937 (2014)	7, 9, 15, 16
<i>Household Credit Servs., Inc. v. Pfennig</i> , 541 U.S. 232 (2004)	11, 13, 15
<i>Kaminsky v. Equity Bank</i> , No. 17-CV-573-TCK-FHM, 2018 WL 6011658 (N.D. Okla. Nov. 16, 2018).....	21
<i>Manufacturers & Traders Tr. Co. v. Justofin</i> , No. 2045 MDA 2016, 2017 WL 2684632 (Pa. Super. Ct. June 21, 2017)	22
<i>Mares v. Outsource Receivables Mgmt., Inc.</i> , No. 1:19-CV-0004, 2019 WL 2248106 (D. Utah May 24, 2019).....	21
<i>Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.</i> , 476 F.3d 436 (2007)	9, 21

Cases—Continued:	Page
<i>National R.R. Passenger Corp. v. Boston & Me. Corp.</i> , 503 U.S. 407 (1992)	15
<i>Paul Revere Protective Life Ins. Co. v. Weis</i> , 535 F. Supp. 379 (E.D. Pa. 1981).....	12
<i>RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC</i> , 754 F.3d 380 (6th Cir. 2014)	7, 8, 9
<i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997)	17
<i>Sebelius v. Auburn Reg'l Med. Ctr.</i> , 568 U.S. 145 (2013)	20
<i>Smith v. United States</i> , 508 U.S. 223 (1993)	14
<i>Union Bank of La. v. Coster's Ex'rs</i> , 3 N.Y. 203 (1850)	12
<i>United States v. Clintwood Elkhorn Mining Co.</i> , 553 U.S. 1 (2008).....	13
<i>Valley Nat'l Bank of Ariz. v. Foreign Car Rental, Inc.</i> , 404 P.2d 272 (Colo. 1965).....	12
Statutes and regulations:	
Dictionary Act, 1 U.S.C. § 1	16
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1071, 1474, 124 Stat. 2056-2059, 2199-2200.....	20
Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (15 U.S.C. § 1691 <i>et seq.</i>)	
§ 502, 88 Stat. 1521	3
15 U.S.C. § 1691(a)	10, 13
15 U.S.C. § 1691(a)(1).....	3

VI

Statutes and regulations—Continued:	Page
15 U.S.C. § 1691(d)	16
15 U.S.C. § 1691(d)(1).....	16
15 U.S.C. § 1691(d)(2).....	16
15 U.S.C. § 1691(d)(6).....	16
15 U.S.C. § 1691a(b)	3, 12, 13
15 U.S.C. § 1691a(g)	3
15 U.S.C. § 1691b(a) (2006).....	3, 10, 18
15 U.S.C. § 1691e(a)	3
15 U.S.C. § 1691e(b)	3
15 U.S.C. § 1691e(c).....	3
Equal Credit Opportunity Act	
Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251-252.....	3
Federal Deposit Insurance Corporation	
Improvement Act of 1991, Pub. L. No. 102-242, §§ 212(d), 223, 105 Stat. 2300- 2301, 2306-2307.....	20
Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2302, 110 Stat. 3009–420-3009–423.....	20
Truth in Lending Act, 15 U.S.C. § 1601 <i>et</i> <i>seq.</i>	11
12 C.F.R. Pt. 202 (2010).....	3
12 C.F.R. Pt. 202, App. B.....	13, 16
12 C.F.R. § 202.2(e).....	4
12 C.F.R. § 202.7(d)(1)	4
12 C.F.R. Pt. 1002	3
12 C.F.R. Pt. 1002, Supp. I.....	3
12 C.F.R. § 1002.2(e).....	4

VII

Statutes and regulations—Continued:	Page
12 C.F.R. § 1002.7(d)(1)	4
12 C.F.R. § 1002.7(d)(6)	4
50 Fed. Reg. 48,027 (Nov. 20, 1985)	4
76 Fed. Reg. 79,442 (Dec. 21, 2011)	3
Miscellaneous:	
<i>Black’s Law Dictionary</i> (10th ed. 2014)	12
38A C.J.S. <i>Guaranty</i> (2008).....	12
Federal Reserve Bulletin, <i>Changes in U.S.</i> <i>Family Finances from 2013 to 2016:</i> <i>Evidence from the Survey of Consumer</i> <i>Finances</i> (Sept. 2017)	22
Timothy Murray, <i>Corbin on Contracts</i> (rev. ed. 2019).....	12
<i>Oxford English Dictionary</i> , http://www.oed.com/view/Entry/9724	12
<i>The Random House Dictionary of the</i> <i>English Language</i> (2d ed. 1987)	12
S. Rep. No. 278, 93d Cong., 1st Sess. (1973)...	2, 18
<i>Webster’s Third New International</i> <i>Dictionary of the English Language</i> (1971)	12, 14

In the Supreme Court of the United States

No.

LISA M. PHOENIX, PETITIONER

v.

REGIONS BANK

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lisa M. Phoenix respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-77a) is reported at 936 F.3d 1184. The opinion of the district court (App., *infra*, 78a-86a) is not published but is available at 2017 WL 443371. A prior opinion of the district court (App., *infra*, 87a-102a) is not published but is available at 2016 WL 4014875.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2019. On November 20, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 26, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 103a-113a.

STATEMENT

This case presents the question that recently divided this Court, 4-4, in *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016): Whether regulations promulgated under the Equal Credit Opportunity Act (ECOA) by the Board of Governors of the Federal Reserve System (Board) and the Consumer Financial Protection Bureau (CFPB) permissibly interpret the “applicants” protected from marital-status discrimination by ECOA to encompass guarantors. Acknowledging that this issue has “divided [its] sister circuits,” a divided panel of the court of appeals held below that ECOA’s definition of “applicant” unambiguously excludes guarantors. App., *infra*, 2a-3a. The panel majority therefore refused to defer to the definition promulgated by the Board and the CFPB through notice-and-comment rulemaking. *Id.* at 15a. In doing so, the decision below deepens the split of authority that led this Court to grant certiorari in *Hawkins* but which the Court was ultimately prevented from resolving.

A. Statutory And Regulatory Background

1. 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. 278, 93d Cong., 1st Sess. 16 (1973) (Senate Report). Congress sought to eradicate this form of discrimination by making credit “equally available to all creditworthy customers without regard to sex or

marital status.” ECOA, Pub. L. No. 93-495, § 502, 88 Stat. 1521 (1974).

As amended in 1976, 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 race, color, religion, national origin, sex or marital status, or age.” 15 U.S.C. § 1691(a)(1); see ECOA Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251-252. 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).

As originally enacted, ECOA authorized the Board to “prescribe regulations to carry out the purposes of [ECOA].” 15 U.S.C. § 1691b(a) (2006). Acting pursuant to that broad delegation of rulemaking authority, the Board promulgated 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), and the CFPB subsequently repromulgated Regulation B without material change. 12 C.F.R. Pt. 1002 & Supp. I; see 76 Fed. Reg. 79,442 (Dec. 21, 2011).¹

If a creditor violates ECOA or regulations adopted under ECOA, such as 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 *id.* § 1691a(g).

¹ Because the guarantee at issue in this case was executed before the CFPB repromulgated Regulation B, this petition cites the Board’s regulations, 12 C.F.R. Pt. 202.

2. One component of Regulation B, referred to as the Additional Parties Rule, governs 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. To further ECOA's prohibition of marital-status discrimination, the Additional Parties Rule provides that "a creditor shall not require the signature of an applicant's spouse or other person * * * if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1); see also 12 C.F.R. § 1002.7(d)(1) (current CFPB regulation). Thus, the Additional Parties Rule precludes a creditor from requiring married persons to provide a personal guarantee from a secondary obligor if the creditor would not require the same of similarly situated unmarried persons.

The Additional Parties Rule further prohibits a creditor from "impos[ing] requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under" that rule. *Id.* § 1002.7(d)(6). In this manner, the Additional Parties Rule ensures that, when a creditor requires a personal guarantee from an officer or owner of a small business seeking credit, it may not automatically require that the spouse of a married officer or owner also sign the guarantee.

Since 1985, Regulation B has defined the term "applicant" to include, "[f]or purposes of" the Additional Parties Rule, "guarantors, sureties, endorsers, and similar parties." 12 C.F.R. § 202.2(e); 50 Fed. Reg. 48,027 (Nov. 20, 1985); see 12 C.F.R. § 1002.2(e) (current CFPB regulation). The regulatory definition thus clarifies that violations of the

Additional Parties Rule constitute discrimination not only against the primary borrower, but also against a guarantor spouse.

B. The Parties' Dispute

1. Petitioner was the indirect owner of Periwinkle Partners, LLC, when, in 2011, Periwinkle obtained a loan from respondent to finance the purchase of commercial real estate. App., *infra*, 3a-4a.² The Periwinkle loan was guaranteed by petitioner, by petitioner's husband, and by Legal Outsource PA, a law firm owned by petitioner's husband. *Ibid.* The loan documents contained a cross-default provision, under which a default by any of the guarantors on any other loan with respondent would also constitute a default under the Periwinkle loan. *Ibid.*

In 2014, Legal Outsource failed to make a required payment on a loan with respondent. App., *infra*, 4a. Respondent thereafter declared the Periwinkle loan to be in default and demanded full and immediate payment. *Ibid.* Respondent filed suit against petitioner, petitioner's husband, Periwinkle, and Legal Outsource, alleging breach of contract with respect to the Legal Outsource and Periwinkle loans and seeking foreclosure of the mortgage securing the Periwinkle loan. *Id.* at 4a.

Petitioner and her codefendants asserted affirmative defenses and counterclaims in response to respondent's suit. Among them, petitioner asserted a counterclaim under ECOA, alleging that respondent had violated ECOA's prohibition of marital-status discrimination by requiring her husband and his

² At the time the loan at issue here was obtained, Periwinkle's sole member was a company wholly owned by petitioner. App., *infra*, 3a.

business, Legal Outsource, to guarantee the Periwinkle loan solely because petitioner and her husband were married to one another. App., *infra*, 4a; 2 Appellants' C.A. App. 399.

2. The district court granted summary judgment against petitioner on her ECOA counterclaim. Relying on a prior opinion dismissing an ECOA counterclaim asserted by petitioner's husband (App., *infra*, 95a-96a), the district court concluded that, because petitioner was a guarantor rather than a borrower, she could not pursue a claim under ECOA. *Id.* at 85a.³

3. A divided panel of the Eleventh Circuit affirmed in relevant part. App., *infra*, 1a-31a.⁴

a. The panel majority held "that a guarantor is not an 'applicant'" entitled to assert a marital-status discrimination claim under ECOA, an issue that it acknowledged "has divided [its] sister circuits." App., *infra*, 2a-3a. The majority reasoned that "the ordinary meaning of the term 'applicant' is one who requests credit to benefit himself" and that "[a] guarantor does not fit within this definition." *Id.* at 10a. The majority further reasoned that other provisions of ECOA referring to "applicants" confirm that the term includes only borrowers. *Id.* at 12a-15a.

Having concluded that ECOA "unambiguously excludes guarantors" from qualifying as "applicants," the panel majority further concluded that Regulation B's definition of the term was not entitled to deference

³ The district court granted judgment for respondent on all other claims as well. App., *infra*, 86a; 4 Appellants' C.A. App. 740.

⁴ The court of appeals remanded with instructions to correct an error in the judgment awarded to respondent on its breach of contract claim in connection with the Legal Outsource loan. App., *infra*, 30a-31a.

under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See App., *infra*, 15a. The majority acknowledged that the Sixth Circuit had deferred to Regulation B’s definition after concluding that the term “applicant” is ambiguous. *Ibid.* (citing *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385 (6th Cir. 2014)). But it rejected that conclusion and instead sided with the Eighth Circuit’s decision in *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (2014), *aff’d* by an equally divided Court, 136 S. Ct. 1072 (2016). See App., *infra*, 15a.

b. Judge Rosenbaum dissented from the majority’s resolution of petitioner’s ECOA counterclaim. App., *infra*, 31a-77a. She reasoned that defining “applicant” to encompass guarantors was consistent with ECOA’s text and furthered ECOA’s purpose of eradicating marital-status discrimination. *Id.* at 70a-73a. She also emphasized that Congress has repeatedly amended ECOA since 1985 without disturbing the longstanding administrative definition of “applicant.” *Id.* at 73a-76a. Accordingly, Judge Rosenbaum would have deferred to Regulation B’s definition. *Id.* at 76a.

REASONS FOR GRANTING THE PETITION

A divided panel of the court of appeals invalidated Regulation B’s longstanding definition of “applicant,” on the theory that the term unambiguously excludes guarantors. The decision below thus deepens the circuit conflict that led this Court to grant certiorari in *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016), but which the Court was unable to resolve in that case. Moreover, the decision below is incorrect. ECOA’s definition of “applicant” can comfortably encompass guarantors. The majority’s

contrary decision is therefore out of step with well-settled principles of judicial deference to administrative rulemaking.

Because this case provides a sound vehicle for addressing a recurring and important issue of federal law, the petition for a writ of certiorari should be granted.

A. The Decision Below Deepens The Circuit Conflict That This Court Was Unable To Resolve in *Hawkins v. Community Bank of Raymore*

By deepening the circuit conflict that this Court sought to resolve in *Hawkins*, the decision below confirms that the need for this Court's intervention has only increased with the passage of time. Certiorari should accordingly be granted so that this Court can resolve the conflict in the courts of appeals.

1. When this Court granted certiorari in *Hawkins*, there was a clear split of authority in the courts of appeals on the question presented. The Sixth Circuit had held that ECOA's definition of "applicant" was sufficiently broad to "encompass all those who offer promises in support of an application—including guarantors, who make formal requests for aid in the form of credit for a third party." *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385 (2014). At step two of the framework articulated by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Sixth Circuit held that Regulation B's definition of "applicant" is a "permissible construction of the statute" that is entitled to deference. *RL BB Acquisition*, 754 F.3d at 385.

In *Hawkins*, by contrast, the Eighth Circuit concluded that "EOCA 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.” *Hawkins v. Community Bank of Raymore*, 761 F.3d 937, 941 (2014), aff’d by an equally divided Court, 136 S. Ct. 1072 (2016). Concluding that ECOA’s text is “unambiguous,” the Eighth Circuit refused to defer to Regulation B’s definition of “applicant” and held “that a guarantor is not protected from marital-status discrimination by the ECOA.” *Id.* at 942.⁵

2. The decision below squarely—and openly—deepens the circuit conflict that led this Court to grant certiorari in *Hawkins*. The panel majority held that ECOA’s definition of “applicant” unambiguously excludes guarantors. App., *infra*, 15a. Thus, the majority refused to defer to Regulation B’s definition of the term. *Ibid.* As the majority correctly acknowledged, *ibid.*, that conclusion is irreconcilable with the Sixth Circuit’s decision upholding the regulatory definition in *RL BB Acquisition*.

Thus, the circuit conflict on the question presented has persisted—and, indeed, become further entrenched—after this Court was unable to resolve it in *Hawkins*. Further review is therefore warranted.

⁵ In the decision below, the panel majority sought to draw support from the Seventh Circuit’s statement that “[t]here is nothing ambiguous about ‘applicant’ and no way to confuse an applicant with a guarantor.” App., *infra*, 15a (quoting *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441 (2007)). The Seventh Circuit itself has clarified, however, that this statement in *Moran* was dicta. See *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 538 (2011). The Seventh Circuit has not yet resolved whether Regulation B’s definition of “applicant” is entitled to deference.

B. The Decision Below Is Incorrect

This Court’s review is also warranted because the court of appeals erred by invalidating Regulation B’s longstanding definition of “applicant.” For more than 30 years, the Board and the CFPB have understood the “applicants” protected from discrimination by ECOA to include not only borrowers, but also secondary obligors, such as guarantors, sureties, and cosigners. That interpretation, adopted through notice-and-comment rulemaking and pursuant to ECOA’s express delegation of broad interpretive authority to the agencies, is a permissible construction of ECOA. It is therefore entitled to deference under *Chevron*.

1. In ECOA, Congress provided 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). Congress did not, however, attempt to set out a list of the practices that constitute forbidden discrimination in comprehensive detail. Instead, Congress delegated broad authority—first to the Board, and then to the CFPB—to “prescribe regulations to carry out the purposes of [ECOA].” *Id.* § 1691b(a). 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 [agency] are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

Ibid.

ECOA's delegation of interpretative authority is notably expansive. In construing an identically worded 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) (first set of brackets in original). For that reason, this Court has cautioned, courts must "refrain from substituting their own interstitial lawmaking for that of the [Board]." *Id.* at 244 (alteration in original) (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). Likewise, a court should not override a considered regulatory judgment by privileging its own "particular characterization" of regulated transactions when that "characterization * * * is not clearly compelled by the terms and definitions" of the statute and is "one with which others could reasonably disagree." *Id.* at 240. To the contrary, as with the 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).

2. In this case, the panel majority did not question these broad principles of judicial deference to administrative rulemaking. Instead, the majority refused to defer to Regulation B because, in its view, ECOA's text unambiguously excludes guarantors from qualifying as "applicants." App., *infra*, 7a-15a. That is incorrect.

a. ECOA defines "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). To “apply” for something ordinarily means “to make a (formal) request.” *Oxford English Dictionary*, <http://www.oed.com/view/Entry/9724>.⁶ Thus, under ECOA, a person qualifies as an “applicant” if she requests the extension of credit.

Guarantors fall comfortably within this understanding of “applicant.” Indeed, it has long been understood that a guarantor “impliedly request[s]” the extension of credit to the primary borrower. 38A C.J.S. *Guaranty* § 26 (2008); see 1 Timothy Murray, *Corbin on Contracts* § 3.14 (rev. ed. 2019) (*Corbin*) (“In most cases of guaranty contracts, the offer comes from the guarantor requesting the giving of credit to a principal debtor * * *.”).⁷ The purpose of the guarantor’s offer of personal liability is to induce the creditor to make a loan to the primary borrower, and a guarantee is typically enforceable precisely because the creditor’s extension of credit is bargained-for consideration for the guarantor’s promise. 3 *Corbin* § 9.4.

In practice, moreover, prospective guarantors are often as involved in the application process as the

⁶ See also *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”).

⁷ 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 of Ariz. v. Foreign Car Rental, Inc.*, 404 P.2d 272, 274 (Colo. 1965) (“request for credit”); *Union Bank of La. v. Coster’s Ex’rs*, 3 N.Y. 203, 211 (1850) (“implies a request”).

primary borrower, including by providing extensive financial information and subjecting themselves to a similar creditworthiness analysis. See, *e.g.*, 12 C.F.R. Pt. 202, App. B (model consumer credit applications). That was the case here, with petitioner’s financial information playing an important role in respondent’s underwriting decision. See 3 Appellants’ C.A. App. 565.

The panel majority was therefore incorrect in asserting that, “[a]lthough a guarantor makes a promise related to an applicant’s request for credit, the guaranty is not itself a request for credit.” App., *infra*, 11a. In light of the role a guarantor plays in a credit transaction, a guarantor is reasonably viewed as requesting an extension of credit to the primary borrower and is thus reasonably understood to be an “applicant” under ECOA.

In concluding otherwise, the majority treated its own “particular characterization” of a guarantor’s role as authoritative even though that understanding “is not clearly compelled by [ECOA’s] terms and definitions” and is “one with which others could reasonably disagree.” *Pfennig*, 541 U.S. at 240. That would be error under any circumstances, and it was particularly mistaken here given Congress’s deliberately broad phrasing of ECOA’s prohibition against discrimination, which makes it unlawful for “*any* creditor to discriminate against *any* applicant, with respect to *any* aspect of a credit transaction” and defines “applicant” to include “*any* person who applies” for credit. 15 U.S.C. §§ 1691(a), 1691a(b) (emphases added); 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.”).

b. The panel majority also erred by engrafting an idiosyncratic and unsupported additional requirement onto its understanding of “applicant.” In the majority’s view, to qualify as an “applicant” one must not only request credit but must also “request[] credit *to benefit himself.*” App., *infra*, 10a (emphasis added). That proposition is incorrect, and even if accepted it would not justify the majority’s bottom-line conclusion.

The only support the majority offered for its understanding was a single dictionary that defines “apply” as “to make an appeal or a request esp[ecially] formally and often in writing and *usu[ally] for something of benefit to oneself.*” App., *infra*, 10a. (emphasis added) (quoting *Webster’s Third New International Dictionary of the English Language* 105 (1971) (*Webster’s Third*)). But most dictionaries do not include that limitation in their definition of the term “apply.” See p. 12 & note 6, *supra*. And even the definition invoked by the majority states only that the word “usu[ally]” refers to a request for something that is of benefit to the requestor. *Webster’s Third* 105. On its own terms, therefore, the definition does not even suggest that “apply” categorically *excludes* requests made by one person for the benefit of someone else. Cf. *Smith v. United States*, 508 U.S. 223, 230 (1993) (holding that a statutory phrase’s meaning is not delimited by “the example” that is the “first to come to mind” when the phrase is used).

Nor could one dictionary’s idiosyncratically narrow approach establish that ECOA *unambiguously* excludes a broader meaning of “applicant.” Where there are “alternative dictionary definitions” that “each mak[e] some sense under the statute,” that is simply evidence that “the statute is open to

interpretation.” *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992). In that situation, a reviewing court must defer to the regulators’ reasonable choice among the permissible interpretations. See, e.g., *Pfennig*, 541 U.S. at 244; *Anderson Bros. Ford*, 452 U.S. at 219.

In any event, Regulation B’s definition of “applicant” would be a permissible interpretation even if the term were understood to reach only an individual who requests something to benefit himself. As the panel majority recognized, a guarantor’s offer to take on personal liability “ordinarily stems from the guarantor’s desire that the application be granted.” App., *infra*, 11a. Thus, a guarantor *does* derive a benefit when a creditor extends a loan to the primary borrower—that is precisely the reason the guarantor’s promise to repay is enforceable. See p. 12, *supra*.

For that reason, when the panel majority turned to applying its definition of “applicant,” it could justify its conclusion that the term does not encompass guarantors only by imposing a still further limitation on the term’s meaning. In the majority’s view, an individual must not only request an extension of credit that will benefit her; she must also personally stand to *receive* credit from the lender. App., *infra*, 11a (stressing that a guarantee is “certainly not a request for credit *for the guarantor*”) (emphasis added). But the majority cited no authority or logic to support that limitation, which has no basis in ECOA.

c. Invoking Judge Colloton’s concurring opinion in *Hawkins*, 761 F.3d at 943-944, the panel majority asserted that other provisions of ECOA demonstrate that the term “applicant” necessarily includes only borrowers who request credit for their own use. App., *infra*, 12a-15a. But the majority’s effort to derive

support for its narrow understanding from the statutory context is unavailing.

For starters, as the United States has previously explained in addressing Judge Colloton’s *Hawkins* concurrence, none of the provisions invoked by the panel majority are incompatible with Regulation B’s understanding that the statutory term “applicant” can encompass guarantors. See U.S. Amicus Br. at 30-32, *Hawkins, supra* (No. 14-520). Indeed, several of the textual inferences proffered by the majority below cannot withstand even casual scrutiny.⁸

⁸ The panel majority observed, for instance, 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 majority reasoned that this “use of the definite article” establishes that an “applicant is the single person to whom credit would be extended.” App., *infra*, 13a (quoting *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring)). But the Dictionary Act forecloses that inference by providing that “words importing the singular include and apply to several persons, parties, or things.” 1 U.S.C. § 1. Moreover, the majority’s insistence that statutory references to an “applicant” must necessarily refer to a single person cannot account for the common situation in which two parties apply jointly for shared credit—a situation in which both parties are “applicants” under any conceivable understanding of that term.

The majority also erred in invoking a separate provision of ECOA that requires creditors to provide notice to “[e]ach applicant against whom adverse action is taken” and specifies that “a refusal to extend additional credit under an existing credit arrangement” is not an “adverse action” if “the applicant is delinquent or otherwise in default.” 15 U.S.C. § 1691(d)(2), (6). The majority suggested that Section 1691(d)’s references to “applicants” could not encompass guarantors and other secondary obligors because these parties “do[] not in ordinary usage become ‘delinquent’ or ‘in default.’” App., *infra*, 14a. In fact, however, it is perfectly common to apply those terms to a guarantor who has failed to satisfy his obligations. See, e.g., 12 C.F.R. Pt. 202, App. B (2010) (Uniform Residential Loan

More broadly, and even if the panel majority had successfully identified one or more references to “applicant” that would exclude guarantors from the term’s reach, the majority’s reliance on a handful of scattered statutory provisions would not demonstrate that guarantors are unambiguously excluded *whenever* “applicant” appears in ECOA. This Court does not apply an “effectively irrebuttable” presumption “that the same term has the same meaning when it occurs here and there in a single statute.” *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). To the contrary, while a statutory term “may have a plain meaning in the context of a particular section,” it does not follow that “the term has the same meaning in all other sections and in all other contexts.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997)

Thus, an agency charged by Congress with implementing a statute may appropriately conclude that “[a] given term in the same statute * * * take[s] on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Environmental Def.*, 549 U.S. at 574. That principle applies with added force here in light of ECOA’s broad delegation of rulemaking authority to the Board and the CFPB, which includes express authorization to set forth “such classifications,

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*”) (emphasis added). Indeed, respondent’s complaint in this litigation alleged that the “Obligors,” a term defined to include petitioner and the other guarantors of the Periwinkle loan, were “in default” on their obligation to repay the funds that Periwinkle had borrowed from respondent. 1 Appellants’ C.A. App. 39, 45.

differentiation, * * * [and] adjustments and exceptions” as are determined to be necessary to effectuate ECOA’s purposes. 15 U.S.C. § 1691b(a).

3. Regulation B’s definition of “applicant” also furthers ECOA’s central purposes of eradicating marital-status discrimination and ensuring “equal access to the benefits of full participation in the credit economy.” Senate Report 18. By contrast, the panel majority’s approach would frustrate those purposes by denying relief to parties that are victims of the core discriminatory harms targeted by the statute and by drawing unwarranted distinctions between parties who are equivalently situated for all relevant purposes.

Most obviously, excluding guarantors from the definition of “applicant” ignores the fact that a spouse who is improperly required to guarantee a loan suffers the sort of discrimination that ECOA was enacted to prevent. Such a requirement constitutes marital-status discrimination not only against the primary borrower, who is improperly denied the opportunity to obtain individual credit, but also against the guarantor spouse, who is required to assume an unwanted debt obligation because of her marriage to the primary borrower. In this scenario, the guarantor spouse is also denied the ability to maintain an independent credit profile, thereby suffering one of the core discriminatory harms ECOA was enacted to prevent. See Senate Report 16-17.

The same is true when a lender improperly requires the owner of a small business to provide not only a personal guarantee in order to obtain a loan, but also a guarantee from her spouse. When a lender violates the Additional Parties Rule in this manner, the spouse who is required to take on the unwanted

guarantee suffers the same discriminatory harms discussed above. Moreover, the owner of the small business is denied the opportunity to obtain credit for her business on non-discriminatory terms, and the requirement that she obtain her spouse's guarantee leads to further entanglement of the two spouses' credit profiles. Excluding guarantors from the definition of "applicant," as the panel majority's decision requires, would leave both spouses outside ECOA's protections even though they both suffer discrimination of precisely the sort ECOA was enacted to prevent.

The majority's reading of "applicant" would also create arbitrary distinctions between similarly situated parties. That reading focuses exclusively on a party's formal role in the proposed credit transaction. Thus, a spouse who is improperly required to co-sign or guarantee a loan is excluded from ECOA's protections, whereas a spouse who is improperly required to become a joint borrower would qualify as an "applicant" entitled to protection and relief under ECOA. But the two scenarios are entirely equivalent from the creditor's standpoint, because the creditor secures the right to pursue both spouses for the full amount of the loan. And both scenarios involve the same sort of discriminatory harms: The primary borrower is denied the opportunity to obtain individual credit, his spouse is required to take on an unwanted liability, and both spouses are denied the ability to maintain independent credit profiles. By treating guarantors as "applicants" for purposes of the Additional Parties Rule, Regulation B's definition ensures that ECOA's protections extend to both scenarios. Accordingly, the regulatory definition

avoids drawing illogical distinctions that lack any basis in ECOA's overriding objectives.

4. Finally, the reasonableness of Regulation B's definition of "applicant" is underscored by the administrative interpretation's "longstanding duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (internal quotation marks omitted). Regulation B defined "applicant" to encompass guarantors and other secondary obligors more than three decades ago, and the Board and the CFPB have not departed from that definition since that time. Under these circumstances, Regulation B's definition is entitled to "particular deference." *Ibid.*

Moreover, Congress has revisited ECOA repeatedly since the Board adopted Regulation B's current definition of "applicant" in 1985, leaving the statutory definition of "applicant" unchanged each time.⁹ As this Court has held, "congressional failure to revise or repeal [an] agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *CFTC v. Schor*, 478 U.S. 833, 846 (1986); accord *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932).

That inference is particularly sound here because the last of these revisions occurred *after* the Seventh Circuit had expressed doubts, in dicta, regarding Regulation B's inclusion of guarantors in its definition

⁹ See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1071, 1474, 124 Stat. 2056-2059, 2199-2200; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2302, 110 Stat. 3009-420-3009-423; Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, §§ 212(d), 223, 105 Stat. 2300-2301, 2306-2307.

of “applicant.” See *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441 (2007). The Seventh Circuit’s dicta clearly flagged the issue presented here, undercutting any suggestion that it simply escaped Congress’s attention. Accordingly, as the dissent below correctly observed, “[c]ongressional inaction on this point in the face of thirty years of uniformity ‘supports adherence to the traditional view’ that the [Board’s] inclusion of guarantors within the term ‘applicants’ is valid.” App., *infra*, 76a (citation omitted) (quoting *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004)).

C. The Question Presented Continues To Warrant Review, And This Case Provides A Sound Vehicle For Resolving It

The question presented is an important one, as evidenced both by this Court’s prior grant of certiorari in *Hawkins* and by the broad effects of the court of appeals’ erroneous decision. This case also presents a sound vehicle for resolving the question presented.

1. To state the obvious, this Court’s grant of certiorari in *Hawkins* provides powerful confirmation that the question presented warrants review. The circuit split this Court sought to address in that case remains unresolved and, with the addition of the decision below, has become further entrenched. See pp. 8-9, *supra*. Moreover, several other federal and state courts have confronted the question presented in the few years since this Court’s equally divided decision in *Hawkins*, thereby confirming that the issue arises frequently.¹⁰ No development since

¹⁰ See *Mares v. Outsource Receivables Mgmt., Inc.*, No. 1:19-CV-0004, 2019 WL 2248106, at *3 (D. Utah May 24, 2019); *Kaminsky v. Equity Bank*, No. 17-CV-573-TCK-FHM, 2018 WL

Hawkins diminishes the need for this Court's intervention.

2. By erroneously invalidating Regulation B's definition of "applicant," the decision below frustrates the effective implementation and enforcement of ECOA's prohibition of discrimination in lending. That critical safeguard has taken on increasing importance given the prominent role of credit in the modern economy. According to a recent estimate, more than three quarters of American families hold some type of debt. See Federal Reserve Bulletin, *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances* 22 (Sept. 2017).¹¹ The scope of ECOA's protections therefore affects a vast swath of the American populace.

3. This case provides a sound vehicle for addressing the question presented. It arises on summary judgment, and the sole basis for the panel majority's decision was its conclusion that petitioner could not pursue a claim under ECOA because she was a guarantor, rather than a borrower. App., *infra*, 7a. This case therefore cleanly presents the issue that has divided the lower courts and provides this Court with an opportunity to resolve that division of authority.

6011658, at *3 n.1 (N.D. Okla. Nov. 16, 2018); *Comerica Bank v. Pars Ice Cream Co.*, No. 338955, 2018 WL 6625171, at *9 (Mich. Ct. App. Dec. 18, 2018), appeal denied, 929 N.W.2d 350 (Mich. 2019); *Manufacturers & Traders Tr. Co. v. Justofin*, No. 2045 MDA 2016, 2017 WL 2684632, at *4 (Pa. Super. Ct. June 21, 2017).

¹¹ <https://www.federalreserve.gov/publications/files/scf17.pdf>.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW SUPREME
COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

MARK T. STANCIL
Counsel of Record
MATTHEW M. MADDEN
DONALD BURKE
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER &
SAUBER LLP
2000 K Street, NW
Washington, DC 20006
(202) 775-4500
mstancil@robbsrussell.com

DECEMBER 2019

APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 17-11736

REGIONS BANK, PLAINTIFF-COUNTER DEFENDANT-
APPELLEE

v.

LEGAL OUTSOURCE, PA; PERIWINKLE PARTNERS, LLC;
CHARLES PAUL-THOMAS PHOENIX; LISA M. PHOENIX,
DEFENDANTS-COUNTER CLAIMANTS-APPELLANTS

Argued: Jan. 29, 2019

Decided: Aug. 28, 2019

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

(2:14-cv-000476-PAM-MRM)

Paul A. Magnuson, District Judge, Presiding

Before: WILLIAM PRYOR and ROSENBAUM, Circuit Judges, and MOORE,* District Judge.

WILLIAM PRYOR, Circuit Judge:

The main issue presented by this appeal has divided our sister circuits: whether a guarantor constitutes an “applicant” under the Equal Credit Opportunity Act. *See* 15 U.S.C. §§ 1691(a), 1691a(b). *Compare Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *aff’d by an equally divided Court*, 136 S. Ct. 1072 (2016) (holding that a guarantor unambiguously is not an “applicant” under the Act), *and Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (opining the same), *with RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir. 2014) (holding that the term “applicant” is ambiguous and applying *Chevron* deference to an agency interpretation that a guarantor is an “applicant”). Legal Outsource PA, a law firm wholly owned by Charles Phoenix, defaulted on a loan from Regions Bank, which triggered the default of a loan and mortgage that Regions issued to Periwinkle Partners, LLC, an entity wholly owned by Charles’s wife, Lisa Phoenix. After the obligors refused to cure the defaults, Regions sued to enforce its rights under the loans and mortgage. The obligors filed several counterclaims asserting that Regions violated the Equal Credit Opportunity Act by discriminating against Lisa and Charles based on their marital status when it demanded that they and Legal Outsource guarantee the Periwinkle loan. The district court granted summary judgment in favor of

* Honorable K. Michael Moore, United States District Chief Judge for the Southern District of Florida, sitting by designation.

Regions. The district court ruled that Lisa Phoenix's counterclaims failed because she lacked standing as an "applicant" when she was instead a guarantor. Because we conclude that a guarantor is not an "applicant" under the Equal Credit Opportunity Act, we affirm the summary judgment in favor of Regions. But the parties agree that we must remand to correct an error in the judgment.

I. BACKGROUND

Beginning in 2005, Regions Bank extended a \$450,000 line of credit to Legal Outsource PA, a law firm owned by Charles Phoenix. Legal Outsource renewed the loan on a yearly or semi-yearly basis, and it was last renewed in May 2013 with a maturity date in February 2014. Charles Phoenix also guaranteed the 2013 Outsource loan.

In 2011, Regions lent nearly \$1.7 million to Periwinkle Partners, LLC, for the purchase of a shopping center on Sanibel Island, Florida. At that time, the sole member of Periwinkle Partners was a company owned by Charles Phoenix's wife, Lisa Phoenix. Charles Phoenix, Lisa Phoenix, and Legal Outsource all guaranteed the Periwinkle loan. Under the Periwinkle loan, a default by any of the parties, including the guarantors, on any other loans that they had with Regions constitutes a default under the Periwinkle loan.

In August 2013, Regions concluded that the Outsource and Periwinkle loans were in default based on the obligors' failure to provide requested financial information and based on Periwinkle's failure to pay its property taxes. Regions then warned the obligors several times that it would accelerate the loans if the obligors failed to cure the default. In February 2014,

the Outsource loan matured and Legal Outsource, which was no longer in operation, failed to pay it. Two months later, Regions declared the Outsource loan in default and demanded its full and immediate payment. According to the obligors, this declaration was a bad-faith attempt by Regions to coerce Lisa Phoenix into securing the Outsource loan with Periwinkle as collateral, but she refused to do so. After the Outsource loan default, Regions also declared the Periwinkle loan in default and demanded its full and immediate payment. The obligors never cured any of the defaults.

In August 2014, Regions filed a complaint against Charles and Lisa Phoenix, Legal Outsource, and Periwinkle Partners for breach of the Legal Outsource promissory note and guaranty, breach of the Periwinkle promissory note and guaranties, foreclosure of the Periwinkle mortgage, and receivership. The obligors answered the complaint and interposed 73 affirmative defenses and eight counterclaims.

The obligors twice amended the answer and added four new counterclaims that each asserted a violation of the Equal Credit Opportunity Act. The counterclaims—three of which were individually brought by Charles Phoenix, Lisa Phoenix, and Legal Outsource respectively, and one of which was brought by Lisa Phoenix and Periwinkle Partners—alleged that Regions discriminated on the basis of marital status when it required the Phoenixes and Legal Outsource to guarantee the Periwinkle loan. Regions then moved to dismiss the newly added counterclaims, and the district court granted that motion in part. The district court ruled that the

guarantors of the Periwinkle loan all lacked statutory standing because they were not “applicant[s]” under the Equal Credit Opportunity Act. But the court also ruled that one of the counterclaims, which was brought on behalf of Lisa Phoenix and Periwinkle Partners, had sufficiently alleged that Lisa Phoenix and Periwinkle Partners were “applicants” under the Act, so it denied the motion as to that count.

After Regions moved for summary judgment, the district court granted summary judgment in favor of Regions both for its claims for breach of the promissory notes and guaranties and against the obligors’ counterclaims. The district court ruled that the obligors “do not dispute that they were in default under the relevant notes and guaranties,” and it ruled that the counterclaims had “no merit.” With respect to the remaining counterclaim under the Equal Credit Opportunity Act—the joint claim by Lisa Phoenix and Periwinkle—the district court ruled that Periwinkle’s claim of discrimination was “frivolous” because, as an entity, it had no marital status. And the district court ruled that “[t]he claim fails as to Lisa Phoenix as well because, aside from the lack of any evidence to establish any alleged discrimination on the basis of marital status, she was not an ‘applicant’ for the Periwinkle loan[;] she was a guarantor.” The district court referred to its earlier order ruling that guarantors were not “applicants.”

The district court later issued a second summary judgment order granting foreclosure on the Periwinkle mortgage. The court then dismissed the matter with prejudice and directed the clerk to enter the judgment. The clerk entered the judgment, and the obligors filed their notice of appeal.

Regions moved to amend the judgment to state, among other things, the amounts due to Regions from the obligors. The district court granted Regions' motion in part, instructing the clerk to enter an amended judgment providing for the following relief:

[T]he Court will order the Clerk to amend the Judgment to provide that Regions Bank prevails on its claims against Defendants. The Judgment will further provide that Regions Bank is entitled to recover \$540,054.24 *from Defendants* for the Legal Outsource loan

The clerk then entered the amended judgment, and the obligors amended their notice of appeal to include the order granting Regions' motion to clarify and the amended judgment among the items subject to their appeal.

II. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1231 (11th Cir. 2011).

III. DISCUSSION

This appeal presents several issues about whether the obligors are liable for the default of the Legal Outsource loan and the Periwinkle loan and mortgage. Although the obligors raise a host of issues that seek to obscure the nature of their defaults, all but one of them lack any merit, and some border on being frivolous. We decline to address them any further.

We divide our discussion of the remaining issues in two parts. First, we explain that Lisa Phoenix's counterclaims under the Equal Credit Opportunity Act fail because a guarantor does not qualify as an

“applicant” under the Act. Second, we explain that a limited remand to correct erroneous language from the amended judgment is warranted.

A. The District Court Correctly Granted Summary Judgment Against the Equal Credit Opportunity Act Counterclaims by Lisa Phoenix.

The district court did not err when it granted summary judgment against the counterclaims by Lisa Phoenix under the Equal Credit Opportunity Act. As an initial matter, although the obligors briefly mention Periwinkle’s counterclaim in their argument about the Equal Credit Opportunity Act, they have failed to argue or cite caselaw in either the district court or on appeal to rebut the conclusion that its status as an entity defeats its claim, as the district court ruled, so we consider that issue abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) (“[A]n appellant must convince us that every stated ground for the judgment against him is incorrect.”). We discuss only our reasons for concluding that the district court correctly granted summary judgment against Lisa Phoenix’s counterclaims on the ground that a guarantor is not an “applicant” for credit within the meaning of the Act, *see* 15 U.S.C. § 1691a(b).

The Equal Credit Opportunity 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 . . . marital status.” *Id.* § 1691(a)–(a)(1). The Act defines an “applicant” as “any person who *applies* to a creditor directly for . . . credit, or *applies* to a creditor indirectly by use of an existing credit plan for an amount exceeding a

previously established credit limit.” *Id.* § 1691a(b) (emphases added). The Act initially required the Federal Reserve Board to promulgate regulations to enforce the Act. *See* 15 U.S.C. § 1691b (1974). And the Federal Reserve Board promulgated Regulation B, which defines an applicant as “any person who requests or who has received an extension of credit from a creditor,” which includes “any person who is or may become contractually liable regarding an extension of credit.” 12 C.F.R. § 202.2(e). That regulation further provides that the term “applicant” includes “*guarantors, sureties, endorsers, and similar parties.*” *Id.* (emphasis added). Regulation B also prohibits a creditor from requiring the signature of an applicant’s spouse, other than a joint applicant, on any credit instrument if the applicant independently qualifies as creditworthy. *Id.* § 202.7(d)(1).

The obligors rely on the definition of “applicant” in Regulation B to argue that Lisa Phoenix has statutory standing under the Act, so we must determine whether we should defer to this regulation under the two-step framework announced in *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Arevalo v. U.S. Att’y Gen.*, 872 F.3d 1184, 1187–88 (11th Cir. 2017). First, we ask whether, after applying the “traditional tools of statutory construction,” we can determine whether Congress has spoken clearly on the issue. *Barton v. U.S. Att’y Gen.*, 904 F.3d 1294, 1298 (11th Cir. 2018) (quoting *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1307 (11th Cir. 2011)). If the statute is unambiguous, we apply it according to its terms and give no deference to the administrative interpretation. *Arevalo*, 872 F.3d at 1188. Second, “if the statute is silent or ambiguous with respect to the specific issue presented, we must

then determine whether the agency’s interpretation is reasonable or based on a permissible construction of the statute.” *Id.* An interpretation is reasonable if it is “rational and consistent with the statute.” *Id.* (quoting *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990)).

In applying the “traditional tools of statutory construction,” we begin “with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.” *Barton*, 904 F.3d at 1298 (quoting *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 6, at 69 (2012) (“Words are to be understood in their ordinary, everyday meaning—unless the context indicates that they bear a technical sense.”). And we interpret the words of a statute based on their meaning at the time of enactment. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); Scalia & Garner, *Reading Law* § 7, at 78 (“Words must be given the meaning they had when the text was adopted.”).

The Act, which was adopted in 1974, defines an applicant as “any person who *applies* to a creditor directly for . . . 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) (emphases added). English-language dictionaries both before and after the enactment define the term “apply” to refer to a request for something. *See Apply*, 1 *The Oxford English Dictionary* 407 (corr. reprint 1961) (1933) (“To address oneself for information or aid, to have recourse, to make application to”); *Apply*, 1 *The Oxford English Dictionary* 577 (2d ed. 1989) (same); *Apply*, *Webster’s*

New International Dictionary of the English Language (*Webster's Second*) 132 (2d ed. 1961) (“To make request; to have recourse with a view to gain something; to solicit”); *Apply*, *Webster's New Collegiate Dictionary* 55 (1977) (“[T]o make an appeal or request esp[ecially] in the form of a written application”). So too do legal dictionaries. *See Apply*, *Black's Law Dictionary* 128 (rev. 4th ed. 1968) (“To make a formal request or petition, usually in writing, to a court, officer, board, or company, for the granting of some favor, or of some rule or order, which is within his or their power or discretion”); *Application*, *id.* at 127 (“The act of making a request for something”). The Sixth and Eighth Circuits have also both cited a definition of the term “apply” as meaning “a request . . . usually for something of benefit to oneself.” *See Hawkins*, 761 F.3d at 941 (alteration adopted) (emphasis added) (quoting *Webster's Third New Int'l Dictionary* 105 (2002)); *RL BB*, 754 F.3d at 385 (quoting *Webster's Third New Int'l Dictionary* 105 (1993)); *see also Apply*, *Webster's Third New Int'l Dictionary* 105 (1971) (defining “apply” as “to make an appeal or a request esp[ecially] formally and often in writing and usu[ally] for something of benefit to oneself”). So, taken together, these definitions suggest that the ordinary meaning of the term “applicant” is one who requests credit to benefit himself.

A guarantor does not fit within this definition. At the time of enactment, English-language dictionaries defined “guaranty” to mean a promise by a guarantor to answer for the payment of some debt if the person liable in the first instance is unable to pay. *See Guaranty*, 4 *The Oxford English Dictionary* 477 (corr. reprint 1961) (1933) (“a written undertaking made by a person (called the *guarantor*) to be answerable for

the payment of a debt or the performance of an obligation by another person, who is in the first instance liable to such payment or obligation”); *Guaranty*, 6 *The Oxford English Dictionary* 912 (2d ed. 1989) (same); *Guaranty*, *Webster’s Second* 1110 (“An undertaking to answer for the payment of some debt, or the performance of some duty, of another, in case of the failure of such other to pay or perform”); *Guaranty*, *Webster’s New Collegiate Dictionary* 509 (“[A]n undertaking to answer for the payment of a debt or the performance of a duty of another in case of the other’s default or miscarriage”). Legal dictionaries defined “guaranty” the same way. *See Guaranty*, *Black’s Law Dictionary* 833 (rev. 4th ed.) (“A promise to answer for payment of debt or the performance of obligation if person liable in the first instance fails to make payment or perform obligation”); *Guarantor*, *Black’s Law Dictionary* 634 (5th ed. 1979) (“One who becomes secondarily liable for another’s debt or performance”). Although a guarantor makes a promise related to an applicant’s request for credit, the guaranty is not itself a request for credit, and certainly not a request for credit for the guarantor. *See Hawkins*, 761 F.3d at 942 (“We find it to be unambiguous that assuming a secondary, contingent liability does not amount to a request for credit.”).

To be sure, as the dissent points out, a guarantor’s promise supports a would-be debtor’s loan application and ordinarily stems from the guarantor’s desire that the application be granted. *See Dissenting Op.* at 62-63. But to say that a guarantor requests credit by supporting another’s request for credit is to push the bounds of ordinary usage—at the very least, it is to use one word in two obviously different senses. And to say that the guarantor *applies* for credit by

supporting *another's* application is to leave ordinary usage behind entirely.

An example should make this point clear. Suppose a high-school senior is applying to her parents' alma mater, and her parents—who happen to be wealthy donors—promise the school that they will make a large gift if their daughter is admitted. The parents' promise supports the daughter's application for admission, just as a guarantor's promise supports a loan applicant's application for credit. The parents will be grateful if their daughter is admitted, as a guarantor ordinarily is grateful when the debtor's application for credit is granted. But it would be unnatural to say that the parents have “applied” for their daughter's admission or to call them “applicants” for admission. Under any ordinary use of the word, the student is the only “applicant” in this scenario.

Applying the whole-text and consistent-usage canons to the Act further confirms that the term “applicant” excludes guarantors. The whole-text canon refers to the principle that a “judicial interpreter [should] consider the entire text, in view of its structure and of the physical and logical relation of its many parts,” when interpreting any particular part of the text. Scalia & Garner, *Reading Law* § 24, at 167. “Properly applied, it typically establishes that only one of the possible meanings that a word or phrase can bear is compatible with use of the same word or phrase elsewhere in the statute . . .” *Id.* at 168. Closely related to the whole-text canon is the principle that “[a] word or phrase is presumed to bear the same meaning throughout a text” unless context requires otherwise. *Id.* § 25, at 170; *accord Atl.*

Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) (“Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”).

As Judge Colloton explained in his concurring opinion in *Hawkins*, three aspects of the statutory text strongly suggest that the term “applicant” is only compatible with “a first-party applicant who requests credit to benefit herself.” *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring). First, the Act uses the term “applicant” in several provisions that can only refer to a first-party applicant. For example, section 1691 speaks of a “completed application for credit,” 15 U.S.C. § 1691(d)(1), and of a creditor taking action in connection with the “applicant’s application for a loan,” *id.* § 1691(e)(1). We agree that “it would be unnatural to conclude that a third party who offers a promise in support of an applicant thereby submits what the statute describes as an ‘application for a loan,’ and a ‘completed application for credit.’” *Hawkins*, 761 F.3d at 943–44 (Colloton, J., concurring) (citations omitted). Similarly, the Act provides that within thirty days “after receipt of a completed application for credit, a creditor shall notify *the applicant* of its actions on the application.” 15 U.S.C. § 1691(d)(1) (emphasis added). “The statute’s use of the definite article shows that applicant is the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor.” *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring). In contrast with these provisions, we are aware of no instance in which the Act refers to an “applicant” in a context that would naturally suggest that a third-party guarantor could qualify.

Second, the statutory definition of “adverse action” on a credit application excludes from that phrase “a refusal to extend additional credit *under an existing credit arrangement where the applicant is delinquent or otherwise in default.*” 15 U.S.C. § 1691(d)(6) (emphasis added). This provision suggests that “the applicant” has received credit and is responsible for making payments on an existing loan. “A guarantor or other third-party requestor does not in ordinary usage become ‘delinquent’ or ‘in default’ on a loan or other existing credit arrangement.” *Hawkins*, 761 F.3d at 944 (Colloton, J., concurring). And “if a guarantor could be an ‘applicant,’ then the creditor’s refusal to extend additional credit to a delinquent borrower would be an ‘adverse action’ on the *guarantor’s* ‘application,’ thus entitling the third-party guarantor to a statement of reasons that the creditor need not furnish to the first-party applicant. [15 U.S.C.] § 1691(d)(2).” *Id.* As Judge Colloton concluded, “This is not a natural reading of the text.” *Id.*

Third, the Act recognizes that third parties can be involved in requesting an extension of credit to a first-party applicant, but it “distinguishes between the third-party requestor and the ‘applicant.’” *Id.* The Act provides that “[w]here 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.” *Id.* (alterations adopted) (quoting 15 U.S.C. § 1691(d)(4)). That Congress chose to use the term “applicant” to refer to the party receiving the credit and “third party”

to refer to a separate party who requests an extension of credit for the “applicant” is telling. In short, after examining the term “applicant” in the context of the statute as a whole, we conclude that there is ample evidence that the term bears the ordinary meaning of a person who requests a benefit for himself.

Two of the three of our sister circuits that have considered whether the administrative interpretation of the term “applicant” deserves *Chevron* deference have also concluded that the Act unambiguously excludes guarantors. *See Hawkins*, 761 F.3d at 942 (rejecting *Chevron* deference and explaining “[w]e find it to be unambiguous that assuming a secondary, contingent liability does not amount to a request for credit”); *Moran*, 476 F.3d at 441 (“[T]here is nothing ambiguous about ‘applicant’ and no way to confuse an applicant with a guarantor.”). *But see RL BB*, 754 F.3d at 385 (applying *Chevron* deference to section 202.2(e) on the theory that the term “applies” is ambiguous and that guarantors qualify as requesting credit because they “make formal requests for aid in the form of credit for a third party”). Because we agree with the Seventh and Eighth Circuits that the ordinary meaning of “applicant” does not encompass a guarantor, we hold that no deference is due section 202.2(e). So the district court correctly granted summary judgment against the counterclaim by Lisa Phoenix because she was not an “applicant” under the Act.

The dissenting opinion disagrees with our analysis of the meaning of the term “applicant” under the Act on three grounds. First, the dissent argues that the ordinary meaning of the word “applicant” reasonably includes guarantors. Dissenting Op. at

60–63. Second, the dissent contends that our analysis fails to reflect the “overriding national policy against discrimination that underlies the [ECOA].” *Id.* at 76 (alteration in original) (internal quotation marks omitted). Along the way to that conclusion, the dissent relies on two favorites of purposivists: the notion that the Act, as a remedial statute, must be construed broadly, *id.* at 49–51, 61, 65–71, 76, and the notion that the words of the Act must be construed in the light of the Act’s overall purpose, *id.* at 76. Finally, the dissent contends that Congress acquiesced to the Board’s definition of “applicant” by failing to amend the Act to expressly preclude the Board’s definition. *Id.* at 79–82. None of these reasons is persuasive.

The dissent’s analysis begins by focusing on how the word “any” appears four times in two relevant sentences of the Act. *Id.* at 60–61 (quoting 15 U.S.C. § 1691(a)(1) (making it “unlawful for *any* creditor to discriminate against *any* application, with respect to *any* aspect of a credit transaction” (emphases added)); *id.* § 1691a(b) (defining “applicant” to mean “*any* person who applies to a creditor directly for . . . credit” (emphasis added))). The dissent argues that the repeated use of the word “any” suggests that Congress intended for the statute to have expansive reach and that we should not “engraft artificial limitations” to curb the “expansive remedial purposes” of the Act. *Id.* at 61 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982)). If all the dissent is arguing is that we should not go beyond the ordinary meaning of the term “applicant” to narrow it artificially, we agree entirely.

But the use of the word “any” does not change the meaning of the term “applicant.” We have repeatedly

explained that when Congress uses the word “any” without “language limiting the breadth of that word, ‘any’ means all.” *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001) (alteration adopted) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997)). So when the Act speaks of an applicant as “*any* person who applies to a creditor directly for . . . credit,” the word “any” signifies only that *all* persons who apply to a creditor directly for credit qualify. The word or term that is modified by “any” is still defined by its ordinary meaning. *See, e.g., id.* (using dictionary definitions to interpret the word “termination” from “any termination”). So the relevant question remains what the ordinary meaning of the term “person who applies to a creditor directly for . . . credit” includes.

The dissent’s attempt to answer this question leans heavily on the definition of “apply” as “to make an appeal or request . . . *usually for something of benefit to oneself.*” Dissenting Op. at 62 (emphasis altered) (quoting *Hawkins*, 761 F.3d at 941 (quoting *Webster’s Third New Int’l Dictionary* at 105 (1993))). The dissent reasons, “[o]bviously, if something is ‘*usually for something of benefit to oneself,*’ it must *sometimes* be for something of benefit to another.” *Id.* (emphasis altered). So, the dissent concludes, the word “applicant” can fairly be interpreted to include a guarantor.

Yet the definition the dissent relies on proves the opposite. As Judge Colloton pointed out in his concurrence in *Hawkins*, “under th[e] usual meaning, an ‘applicant’ who ‘applies for credit’ is one who requests credit to benefit herself, not credit to benefit a third party. That there are unusual meanings of

‘apply’ that encompass making a request on behalf of another is not sufficient to make a term ambiguous for purposes of *Chevron*.” 761 F.3d at 943 (Colloton, J., concurring). The only circumstance in which it is reasonable to construe a term according to an unusual meaning is when the context makes the unusual meaning a natural one. But, as we have explained, there is nothing natural about calling a guarantor an applicant for credit, and the whole text of the Act makes that usage even less plausible.

The dissent charges that our reading of the Act fails to apply the whole-text canon, Dissenting Op. at 65–66, 66 n.20, but the dissent’s assertion is notably lacking in references to the text. According to the dissent, if we viewed the Act as a whole, we would see that “[t]he overriding national policy against discrimination that underlies the [Act]’ means that ‘we cannot give’ words in that statute a ‘narrow interpretation.’” *Id.* at 76 (quoting *Bros. v. First Leasing*, 724 F.2d 789, 793 (9th Cir. 1984)). But apart from its logically irrelevant reliance on the word “any,” the dissent fails to point to any other provisions of the Act that suggest that the term “applicant” includes a third party who requests a benefit for the first-party applicant. And it is hornbook abuse of the whole-text canon to argue “that since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored.” Scalia & Garner, *Reading Law* § 24, at 168.

The dissent also contends that we fail to reconcile our reading of the text with the “familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its

purposes.” Dissenting Op. at 65 (internal quotation marks omitted) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)). Indeed, we do not apply this so-called canon because it is of dubious value. An eight-member majority of the Supreme Court has ridiculed it as “th[e] last redoubt of losing causes,” *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995), and the Court has rejected applying it in a number of other decisions since 1995. *See, e.g., CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (“The Court of Appeals supported its interpretation of [section] 9658 by invoking the proposition that remedial statutes should be interpreted in a liberal manner. The Court of Appeals was in error when it treated this as a substitute for a conclusion grounded in the statute’s text and structure.”); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (rejecting argument based on remedial-purpose canon and explaining that although a statute’s remedial purpose was to benefit employees, “this remedial purpose [does not] require[] us to interpret every uncertainty in the Act in favor of employees”); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 237, 244 (2004) (reversing court of appeals that relied on remedial-purpose canon to broadly interpret the term “finance charge” from the Truth in Lending Act); *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 710–12 (2003) (rejecting argument based on the remedial-purpose canon that the term “person” should be construed broadly under a statute to include Native American tribes). As the Supreme Court has recently explained, the fundamental problem with this so-called canon is its indeterminate coverage, as “almost every statute

might be described as remedial in the sense that all statutes are designed to remedy some problem.” *CTS Corp.*, 573 U.S. at 12. And the “canon” too is of indeterminate effect because, “even if the Court [has] identified some subset of statutes as especially remedial, [it] has emphasized that no legislation pursues its purposes at all costs.” *Id.* (citation and internal quotation marks omitted).

Indeed, it is hard to imagine a more widely criticized “canon” of interpretation. A leading treatise has labeled it a “false” canon and has explained that it is “an open invitation to engage in ‘purposive’ rather than textual interpretation, and generally to engage in judicial improvisation.” Scalia & Garner, *Reading Law* § 64, at 364–66. And jurists as varied as Antonin Scalia and Richard Posner share the same view. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581 (1990) (calling the canon one of “the prime examples of lego-babble”); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 809 (1983) (explaining that the canon is “unrealistic about legislative objectives” because it assumes that legislatures pursue a single remedial purpose, when in reality a “statute [often] is a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective”). We agree with these authorities that we should not employ this false canon to contravene the text of the Act.

The dissent also insists that we must “construe the literal language of the [Act]” in the light of the “overriding national policy against discrimination

that underlies the [Act].” Dissenting Op. at 76 (quoting *First Leasing*, 724 F.2d at 793). We take no issue with the dissent’s explanation of the vital role that women have played in our nation’s history, of the discrimination they have faced in obtaining credit, and that one of the purposes of the Act was to remedy this discrimination. See Dissenting Op. at 51–60. But the dissent ignores that “[n]o legislation pursues its purposes at all costs,” and that “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)). When a statute includes limiting provisions, those provisions “are no less a reflection of the genuine ‘purpose’ of the statute than the operative provisions, and it is not the court’s function to alter the legislative compromise.” Scalia & Garner, *Reading Law* at 21. Here, Congress created a right that runs only to “applicants.” And as the Seventh Circuit explained in *Moran*, because the term “applicant” unambiguously does not encompass “guarantors,” reading the statute in the way the dissent does would frustrate the limitations that Congress imposed on statutory standing and “opens vistas of liability” that Congress did not envision. 476 F.3d at 441.

The dissent’s final substantive argument is that Congress has impliedly adopted the Board’s definition of “applicant” by amending the Act without changing the statutory definition during the 30 years since Regulation B was first promulgated. Dissenting Op. at 79–82. Although the Supreme Court has recognized that congressional inaction can, in limited

circumstances, support an inference that Congress has acquiesced to an agency or judicial interpretation, it has explained that “[l]egislative silence is a poor beacon to follow” in construing a statute. *Zuber v. Allen*, 396 U.S. 168, 185 (1969). And it has repeatedly warned that congressional silence alone is ordinarily not enough to infer acquiescence. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169 (2001) (“Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (“[W]e are chary of attributing significance to Congress’ failure to act”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (“Nonaction by Congress is not often a useful guide”).

The dissent cites *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), in arguing that we should infer congressional acquiescence, Dissenting Op. at 79–80, but this reliance is misplaced. There, the Supreme Court held that when Congress amended the Fair Housing Act in 1988, it was aware of and adopted the unanimous view of nine circuits that had considered the matter and concluded that the statute authorized disparate-impact claims. *See Texas Dep’t of Hous.*, 135 S. Ct. at 2519.

The dissenting opinion contends that until 2014, the “vast majority of courts” that had “examined” the issue held that guarantors had standing under the Equal Credit Opportunity Act, Dissenting Op. at 80 (quoting *RL BB*, 754 F.3d at 386), but this argument

is misleading. Before 2007, several federal and state courts applied Regulation B, but they did so without discussing whether it was entitled to deference. *See, e.g., Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 30–31 (3d Cir. 1995) (assuming without discussion that the Board's interpretation was valid); *Fed. Deposit Ins. Corp. v. Medmark, Inc.*, 897 F. Supp. 511, 514 (D. Kan. 1995) (same); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (explaining that a decision is not precedential with respect to an issue “not there raised in briefs or argument nor discussed in the opinion of the Court”). To our knowledge, the first court to “examine[.]” whether the Board's definition deserved deference was the Seventh Circuit in *Moran*, in 2007, and it concluded that it did not. *See* 476 F.3d. at 441. By the time Congress next amended the Act in July 2010, the only other courts to opine on the issue were a federal district court, which agreed with *Moran* and ruled that guarantors lack statutory standing, *see Champion Bank v. Reg'l Dev., LLC*, No. 4:08-cv-1807-CDP, 2009 WL 1351122, at *3 (E.D. Mo. May 13, 2009) (reasoning that “a guarantor does not, by definition, apply for anything”), and the Supreme Court of Iowa, which applied Regulation B without considering *Moran* or whether it was entitled to deference, *see Bank of the West v. Kline*, 782 N.W.2d 453, 458 (Iowa 2010). So when Congress amended the Act in 2010, the weight of reasoned authority was *against* the Board's definition of applicant. And Congress's prior amendments to the Act took place before any court had considered the validity of Regulation B. This situation obviously is nothing like the unanimous, reasoned precedent of nine circuits in favor of an agency interpretation featured in *Texas Department*

of *Housing*. We can hardly infer congressional acquiescence in this circumstance.

The dissent advances one other objection to our analysis: that it “opine[s] on an issue that . . . Lisa Phoenix and Periwinkle . . . never raised on appeal.” Dissenting Op. at 35. As the dissent sees it, Lisa Phoenix has abandoned both of her counterclaims by failing to raise them “plainly and prominently” enough in the obligors’ initial brief. *Id.* at 38 (quoting *Sapuppo*, 739 F.3d at 681). We disagree.

To be sure, the obligors’ briefing could most charitably be described as clumsy. We emphatically “do not condone the unartful way in which [the obligors] ha[ve] stated and argued the issues on this appeal.” *Fed. Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n.3 (11th Cir. 1987). Even so, reading their initial brief in the light of the record, the other briefs in this appeal, and the principle that “briefs should be read liberally to ascertain the issues raised on appeal,” *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994), we have no doubt that Lisa Phoenix has fairly presented the argument that the district court erred when it dismissed at least one of her counterclaims relating to the Periwinkle loan based on her status as a guarantor.

Consider what happened in the district court. The obligors pleaded four counterclaims under the Equal Credit Opportunity Act based on the Periwinkle loan: one by Charles Phoenix, one by Legal Outsource, one by Lisa Phoenix and Periwinkle Partners jointly, and one by Lisa Phoenix individually. Citing *Hawkins* for the proposition that guarantors are not applicants, the district court dismissed the claims by Charles Phoenix, Legal

Outsource, and Lisa Phoenix individually on the ground that those claims rested solely on guarantor standing. But the district court withheld judgment on the joint claim by Lisa Phoenix and Periwinkle because that claim—counterclaim 11—appeared to allege that both Lisa Phoenix and Periwinkle were applicants. After further considering the matter, the district court granted summary judgment against counterclaim 11 on the grounds that Lisa Phoenix lacked standing and that Periwinkle had no marital status. The district court also mentioned “the lack of any evidence to establish any alleged discrimination on the basis of marital status,” which was a sufficient alternative basis for the summary judgment, although the district court did not clearly designate it as such.

Now consider the briefs. In a discrete section of their initial brief, the obligors protest the district court’s “reli[ance] . . . on the Eighth Circuit’s ruling in *Hawkins*” “to substantiate dismissing Lisa Phoenix’s and Periwinkle’s claims” under the Equal Credit Opportunity Act. Initial Br. of Appellants at 30. And they argue that the regulation defining the term “applicant” to include guarantors, *see* 12 C.F.R. § 202.2(e), is a valid exercise of regulatory power to implement the Act. Initial Br. of Appellants at 31–32. They conclude that the claims by “Lisa Phoenix and Periwinkle” “fall squarely within ECOA’s protections.” *Id.* at 32.

Logically, this argument can relate only to counterclaim 11—the joint claim by Lisa Phoenix and Periwinkle—or counterclaim 12—Lisa Phoenix’s individual claim as a guarantor of the Periwinkle loan. That the brief refers to both Lisa Phoenix and Periwinkle suggests that the obligors might have

counterclaim 11 in mind, but the district court did not rely on *Hawkins* to dismiss any claim by Periwinkle. But, with respect to Lisa Phoenix, the argument responds squarely to the primary basis on which the district court dismissed her share of counterclaim 11 and the sole basis on which it dismissed her counterclaim 12. In this circumstance, we cannot agree with the dissent that “no claim is properly before us on appeal.” Dissenting Op. at 35.

Consider the consequences if we accepted the obligors’ argument—that is, if the obligors convinced us that the district court erred when it “relied . . . on the Eighth Circuit’s ruling in *Hawkins* to substantiate dismissing Lisa Phoenix’s and Periwinkle’s claims” because, contrary to *Hawkins*, guarantors are applicants under the Act. Initial Br. of Appellants at 30. In that case, they necessarily would have convinced us that “every stated ground for the judgment against [counterclaim 12] is incorrect,” which is exactly what we have said an appellant must do “[t]o obtain reversal of a district court judgment.” *Sapuppo*, 739 F.3d at 680. They also would have convinced us that the primary and arguably the only “stated ground for the judgment against [counterclaim 11] is incorrect.” *Id.* So, unless some alternative ground for affirmance appeared from Regions’ brief or from the record, accepting the obligors’ argument would require us to reverse the dismissal of counterclaim 12 at least and perhaps counterclaim 11 as well.

We consider it telling that Regions agrees with us, at least in part, that the obligors have raised the issue of guarantor standing. In its brief, Regions contends that the obligors “have waived or abandoned

any issue or argument with respect to the dismissal of [counterclaims] IX, X, and XII.” Br. of Appellee Regions Bank at 34. But Regions does *not* contend that the obligors have abandoned counterclaim 11 or the general issue of guarantor standing. On the contrary, it reads the obligors’ brief to “contend . . . that summary judgment for Regions on Counterclaim count XI was in error because, under the definition of ‘applicant’ supplied in Regulation B [the governing regulation], Mrs. Phoenix possessed standing to sue in her capacity as a guarantor of the Periwinkle loan.” *Id.* Regions proceeds to argue on the merits that the district court correctly granted summary judgment against counterclaim 11 because the obligors have produced no evidence of discrimination and because guarantors are not applicants. *See id.* at 35–42.

That Regions does not share the dissent’s view that Lisa Phoenix “indisputably abandoned” counterclaim 11 is relevant in two respects. Dissenting Op. at 41. First, even if Lisa Phoenix waived or forfeited counterclaim 11 in her initial brief, Regions has waived or forfeited the waiver or forfeiture by conceding in its own brief that she raised it. And nothing Regions said at oral argument can undo that concession. *See APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1269 (11th Cir. 2007) (“[W]e do not consider claims not raised in a party’s initial brief and made for the first time at oral argument.”).

The second way in which Regions’ concession matters is that the main principle that animates the abandonment rule is fair notice. As we have explained, “an appellee is entitled to rely on the content of an appellant’s brief for the scope of the

issues appealed.” *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) (quoting *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983)); accord *Haralson*, 813 F.2d at 373 n.3. That Regions thought the obligors raised counterclaim 11 in their brief—even as it concluded that they had abandoned other claims—suggests that the obligors’ brief gave Regions fair notice that counterclaim 11 was an issue.

To be sure, an appellee’s assertions about what is or is not abandoned do not bind us. Claims of abandonment may often be overstated; in this appeal, we are not sure we agree with Regions that Lisa Phoenix has abandoned counterclaim 12. And there are many reasons why appellees may fail to raise meritorious abandonment arguments. But the point remains: that Regions understood the obligors’ brief to present a live argument about counterclaim 11 and the general issue of guarantor standing is surely evidence that it is reasonably understood to do so.

Consider also that both amicus briefs—one by the Consumer Financial Protection Bureau and one by five bankers associations—fully briefed the issue of Lisa Phoenix’s guarantor standing under the Act. Neither brief ever hinted at the possibility that Lisa Phoenix abandoned her counterclaims. That all of the amici, like Regions, consider Lisa Phoenix to have adequately raised the issue of her statutory standing reinforces our conclusion that Lisa Phoenix did not abandon her argument about counterclaims 11 and 12.

Our dissenting colleague’s contention that Lisa Phoenix has abandoned her counterclaims turns on her reading—which we respectfully submit is an

overreading—of three sentences in the obligors’ brief, each of which seems to suggest that the Equal Credit Opportunity Act claim on appeal is that Regions violated the Act when it allegedly demanded that Lisa Phoenix guarantee the Outsource loan. See Dissenting Op. at 38–39. The obligors’ statement of the issues presents the question, “Does a wife who refuses to collateralize loans or guaranty *her husband’s unsecured business debt* have Equal Credit Opportunity Act (ECOA) standing as an ‘applicant’ . . . ?” Initial Br. of Appellants at 1 (emphasis added). Then, in their argument section, the obligors protest that excluding guarantors from the definition of “applicant” “gives lenders an untethered license to require spouses to collateralize and sign *for their husbands’ loans* with impunity,” and they contend that Lisa Phoenix was required “to sign for and collateralize *her husband’s business debts.*” *Id.* at 30, 32 (emphases added). As the dissent sees it, these phrases can mean only that Lisa Phoenix has replaced her counterclaims based on the Periwinkle claim with a wholly novel claim based on Regions’ alleged demand that she guarantee the Outsource loan, even though the obligors never pleaded such a claim in the district court and no such claim is concerned in the judgment on appeal, and even though it would be nonsensical for Lisa Phoenix to assert guarantor standing with respect to a loan she never guaranteed.

Although we certainly agree that the obligors’ brief is no model of clarity, we do not think that its references to the Outsource loan nullify Lisa Phoenix’s challenge to the ground on which her counterclaims were dismissed. In the obligors’ telling of the facts, Regions demanded that Lisa Phoenix collateralize the Outsource loan, she refused, and

Regions punished her refusal by declaring falsely that the Periwinkle loan was in default. We read the phrases on which the dissent leans as highlighting the crucial narrative role of Regions' demand and Lisa Phoenix's refusal in the obligors' version of the facts, not as obliterating her legal theory. And we do not see how we can read them any other way without violating the rule that "briefs should be read liberally to ascertain the issues raised on appeal." *Swann*, 27 F.3d at 1542. The abandonment rule would swell to a scope previously unimagined if we were to hold that an appellant abandons her legal theory whenever she places undue emphasis on one part of her factual narrative over another. We conclude that Lisa Phoenix has preserved at least one of her counterclaims under the Equal Credit Opportunity Act and that the issue of guarantor standing is before us. And, for the reasons we have explained, we hold that the district court correctly granted summary judgment against those counterclaims because a guarantor is not an "applicant" for credit under the Act.

B. The Amended Judgment Must Be Corrected on Remand.

The amended judgment states "that Regions Bank is entitled to recover \$540,054.24 from *Defendants* for the Legal Outsource loan." As both parties agreed at oral argument, the counts regarding the Legal Outsource loan name only Charles Phoenix and Legal Outsource as defendants, so the judgment erroneously states that Lisa Phoenix and Periwinkle Partners are also liable for the Outsource loan. We remand with instructions to correct the judgment to state that only Charles Phoenix and Legal Outsource

are liable for the damages owed for the default of the Outsource loan.

IV. CONCLUSION

We **AFFIRM** the summary judgment in favor of Regions, and we **REMAND** with instructions to correct the judgment.

ROSENBAUM, Circuit Judge, concurring in part and dissenting in part:

Today we opine on an issue that Appellants Lisa Phoenix and Periwinkle Partners LLC (“Periwinkle”) never raised on appeal. Courts have noted that deciding an issue no appellant raised is generally unwise. But the Majority Opinion nevertheless insists that we do so. And in following this course, it purports to constrict the Equal Credit Opportunity Act (“ECOA”) to preclude it from accomplishing one of its primary remedial goals: disentangling spouses’ financial intertwinement when such intertwinement is not necessary. I therefore feel it necessary to explain the problems with the Majority Opinion’s analysis.

Section I of this dissent demonstrates that no claim is properly before us on appeal. And Section II responds to the Majority Opinion’s incorrect conclusion that guarantors lack standing as “applicants” under the ECOA.

I.

At different points in this litigation, Defendants-Counterclaimants-Appellants Lisa Phoenix and Periwinkle have arguably raised two ECOA claims

possibly relevant to this appeal.¹ Each claim involves a separate Regions Bank loan.

The Majority Opinion construes the claim on appeal to concern a loan Regions made to Periwinkle, a company Lisa Phoenix indirectly owns. As the Majority Opinion interprets this claim, Lisa Phoenix invokes the ECOA to contest Regions's demand that her husband, Charles Phoenix, and his law firm, Legal Outsource PA, guaranty the Periwinkle loan ("Periwinkle Loan Claim").

The second potential ECOA claim possibly relevant on this appeal involves a loan Regions made to Legal Outsource. Under this potential claim, Lisa² asserts that Regions violated the ECOA when it required her (through her company Periwinkle) to guaranty a loan it had made to her husband Charles's business, Legal Outsource ("Legal Outsource Loan Claim").

But neither the Periwinkle Loan Claim nor the Legal Outsource Loan Claim is properly presented on appeal.

To understand why, it makes sense to start by looking at the sole ECOA claim Lisa identified in the issues she presented on appeal: "Does a wife who refuses to collateralize loans or *guaranty her husband's unsecured business debt* have [ECOA] standing as an 'applicant' to sue if the lender then forces over a dozen technical defaults as pretense to

¹ The other Defendants-Counterclaimants-Appellants' claims are not relevant to the ECOA analysis the Majority Opinion has chosen to conduct, so I do not address them here.

² To avoid confusion, I refer to Charles and Lisa Phoenix by their first names.

falsely accelerate and foreclose on her separate secured loan?” Appellants’ Br. at 1 (emphasis added). This language unambiguously seeks to assert Lisa’s status as an “applicant” on the Legal Outsource Loan Claim, as a result of Periwinkle’s legal status as a guarantor for that loan, since only the Legal Outsource Loan Claim involved an alleged demand by Regions to guaranty Lisa’s husband’s business debt. The language of the issue as Lisa has phrased it on appeal does not implicate the Periwinkle Loan Claim, since that was a loan involving Lisa’s own business, not her husband’s business.

Lisa’s actual argument in support of her ECOA claim also leaves no doubt that she challenges only Regions’s demand that she (through her company Periwinkle) guaranty her husband’s Legal Outsource Loan. Her argument is short; it’s less than three pages. But in that space she repeatedly argues that Regions violated the ECOA by trying to make her guaranty her husband’s loans. Appellants’ Br. at 30, 32. Unfortunately for Lisa, though, she did not raise the Legal Outsource Loan Claim in the district court.

As for the Periwinkle Loan Claim, Lisa never once argues it in this appeal. True, the loan to Periwinkle comes up in her briefs, but only in the context of arguments that the Majority Opinion (correctly) decides are meritless, if not “frivolous.” Maj. Op. at 7. Significantly, she never argues that the district court was wrong in finding she lacked standing as a guarantor to contest the Periwinkle Loan Claim.

So what exactly is properly on appeal?

Nothing.

We have repeatedly explained that “[a]ny issue that an appellant wants the Court to address should be specifically and clearly identified in the brief.” *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).³ Not only that, but “[a] party fails to adequately brief a claim when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims.” *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (citation and internal quotation marks omitted). When that happens, “the issue—even if properly preserved at trial—will be considered abandoned.” *Access Now*, 385 F.3d at 1330 (citation and internal quotation marks omitted).

Here, Lisa’s briefs certainly do not “plainly and prominently raise” her Periwinkle Loan Claim. For starters, her opening brief does not “devot[e] a discrete section of [the] argument” to it. In fact, as I have noted, it does not even identify the claim in an issue on appeal or ever expressly mention the Periwinkle Loan Claim in its ECOA arguments. And her reply brief does not address the issue at all.

Nor, contrary to the Majority Opinion’s suggestion, does Lisa’s mention of the district court’s reliance on *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *aff’d by an equally divided Court*, 136 S. Ct. 1072 (2016), justify the Majority Opinion’s determination of an issue that Lisa did not raise on appeal. To be sure, the district court did invoke *Hawkins* to dismiss counterclaims relating

³ The Federal Rules of Appellate Procedure similarly require an appellant’s brief to “contain, under appropriate headings and in the order indicated . . . a statement of the issues presented for review.” Fed. R. App. P. 28(a)(5).

to the Periwinkle Loan Claim. Maj. Op. at 27. But Lisa’s brief leaves no doubt that she raised the district court’s reliance on *Hawkins* for only an altogether different and unrelated point: she cited the district court’s mention of *Hawkins* solely to support her argument concerning the Legal Outsource Claim.⁴

In fact, in the very next paragraph following the general reference to *Hawkins* the Majority Opinion cites, *see* Maj. Op. at 27, Lisa characterized *Hawkins* as “grant[ing] lenders an untethered license to require spouses to collateralize and sign for their *husbands’ loans* with impunity.” Appellants’ Br. at 30 (emphasis added). And while Lisa argued that she and Periwinkle “fall squarely within ECOA’s protections,” Maj. Op. at 28 (quoting Appellants’ Br. at 32), she made clear that she meant that the ECOA protected her (through her ownership of Periwinkle) and Periwinkle *as guarantors of the Legal Outsource Loan*: she said that “Regions required [her through Periwinkle] to sign for and collateralize *her husband’s* business debts hence violating ECOA prohibitions.” Appellants’ Br. at 32 (emphasis added).

There’s no doubt that Lisa argued that guarantors have standing under the ECOA, but her brief makes clear that she made this argument in the context of the Legal Outsource Loan Claim—that is, that under the ECOA, Regions could not require her individually or through her company to guarantee her husband’s company Legal Outsource’s loan. But as I

⁴ Lest there be any question about what Lisa argued on appeal, I have included as an appendix to this opinion the statement of issues from Lisa’s opening brief, as well as the entirety of her ECOA argument.

have noted, the problem with that argument is Lisa never raised it in the district court.

As for the Periwinkle Loan Claim she did raise in the district court, the most we can say about that is that Lisa’s brief on appeal nakedly cites her Counterclaim 11, which in turn, alleged the Periwinkle Loan Claim in the district court. But significantly, Lisa’s brief cites Counterclaim 11 in the context of arguing the Legal Outsource Loan Claim, in an apparent effort to suggest that the Legal Outsource Loan Claim was properly raised in the district court. (It was not.)

And even if we ignore the context of the citations to Counterclaim 11, (literally) bare citations alone do not preserve an argument on appeal. We have found abandonment when litigants have done more to preserve their claims, such as “when [at least] passing references appear in the argument section of an opening brief,” and when “they are buried within . . . arguments.” *Sapuppo*, 739 F.3d at 682. As this Court has recently “remind[ed] the . . . bar[,] . . . *specific* factual and legal argumentation at every stage of . . . proceedings” is “importan[t]” to preserving issues on appeal. *United States v. Corbett*, 921 F.3d 1032, 1043 (11th Cir. 2019) (W. Pryor, Newsom, Vratil, JJ.).⁵ So

⁵ Indeed, this Court has consistently enforced the abandonment rule. See, e.g., *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1259 n.9 (11th Cir. 2019) (en banc); *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1302 n.2 (11th Cir. 2019) (Tjoflat, E. Carnes, W. Pryor, JJ.); *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1306 n.1 (11th Cir. 2018) (W. Pryor, Branch, Anderson, JJ.); *United States v. Wenxia Man*, 891 F.3d 1253, 1275 (11th Cir. 2018) (W. Pryor, J. Pryor, Black, JJ.); *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1345 (11th Cir. 2017) (W. Pryor, Jordan, Baldock, JJ.); *United States*

under our unequivocal precedent, Lisa’s briefing indisputably abandoned the Periwinkle Loan Claim.

Lisa’s counsel likewise did not raise the Periwinkle Loan Claim issue at all during his initial oral argument. And during his rebuttal, while Lisa’s counsel briefly addressed the “ECOA issue,” he argued only that Lisa had raised a triable issue of fact that Regions had required Lisa “to provide collateral *for her husband’s loan.*” Oral Argument at 24:04, 24:25, *Regions Bank v. Legal Outsource PA, et al.* (No. 17-11736), http://www.ca11.uscourts.gov/oral-argument-recordings?title=17-11736&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D= (“Oral Argument”).

v. Stein, 846 F.3d 1135, 1151 n.15 (11th Cir. 2017) (W. Pryor, J. Pryor, Story, JJ.); *Jeune v. U.S. Att’y Gen.*, 810 F.3d 792, 797 n.2 (11th Cir. 2016) (W. Pryor, J. Carnes, Siler, JJ.); *Sorrels v. NCL (Bah.) Ltd.*, 796 F.3d 1275, 1283 (11th Cir. 2015) (W. Pryor, Jordan, Jones, JJ.); *In re McFarland*, 790 F.3d 1182, 1191 n.10 (11th Cir. 2015) (Tjoflat, W. Pryor, Baldock, JJ.); *Perez v. U.S. Bureau of Citizenship & Immigration Servs.*, 774 F.3d 960, 964 (11th Cir. 2014) (per curiam) (Marcus, W. Pryor, Fay, JJ.). But puzzlingly, today, the Majority Opinion selectively applies the abandonment rule to correctly decline ruling on whether a corporation can be an “applicant” under the ECOA, since “the obligors briefly mention Periwinkle’s counterclaim in their argument about the Equal Credit Opportunity Act, [but] they have failed to argue or cite caselaw in either the district court or on appeal to rebut the conclusion that its status as an entity defeats its claim, as the district court ruled . . .” Maj. Op. at 7–8. Yet the Majority Opinion incorrectly stretches to “resolve” a specific claim Lisa does not even raise at all in her briefs on appeal—whether Lisa may rely on the ECOA to contest Regions’s demand that her husband, Charles, and his law firm, Legal Outsource PA, guaranty the loan to Periwinkle.

The only time during this appeal that either party raised Lisa's role as a guarantor of the Periwinkle Loan was in Regions's opposition brief. Appellee's Br. at 39–42. According to the Majority Opinion, this makes the argument fair game. Maj. Op. at 30–31. But here's the problem: Lisa never took the bait. She didn't adopt Regions's characterization of her argument. She didn't respond to Regions's argument in her reply brief. Her counsel did not agree with it during oral argument. And by the time Regions's counsel got to oral argument, Regions argued—over no claim to the contrary—that Lisa had abandoned the Periwinkle Loan Claim.⁶ So on appeal, no one ever argued in favor of Lisa and Periwinkle's position on the Periwinkle Loan Claim.

To recap, Lisa never argued in her opening brief that she had standing as a guarantor to challenge the loan made to Periwinkle. Regions raised that argument in its opposition brief, but Lisa did not respond to it in her reply brief. Lisa's counsel did not raise the argument during oral argument. Regions's counsel then argued that Lisa had abandoned this

⁶ See Oral Argument at 13:48 (“If you look at the counterclaim that was brought before the district court and what has been argued here in the briefs, *it's [a] completely different factual situation*. They haven't even advanced the right argument in our position. . . .”) (emphasis added), 18:02 (“[T]hey're arguing that there was discrimination because *when the Legal Outsource loan matured* and Regions Bank said we can't extend the maturity on this because Legal Outsource is defunct, it's not credit-worthy, you need to provide an additional source of repayment collateral—something to that effect—they're saying in the brief, which they never raised in front of Judge Magnuson, that *that* is the ECOA violation.”) (emphasis added).

argument. And Lisa’s counsel never disputed this. It’s not on appeal.

Perhaps for this reason, the Majority Opinion introduces the novel suggestion that amici can decide what issues are before us. Maj. Op. at 31–32. Amici frequently provide valuable insight to the court by “supplementing the efforts of private counsel and by drawing the court’s attention to law that might otherwise escape consideration[.]” *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (quoting 3-28 Moore’s Manual—Federal Practice and Procedure § 28.84 (2014)). We are grateful for their contribution. But we don’t let them select the issues.⁷

⁷ And besides, the Majority Opinion is wrong when it suggests that the amicus briefs support its conclusion that Appellants raised the ECOA standing issue in the context of the Periwinkle Loan claim. *See* Maj. Op. at 31–32. On the contrary, the banking associations’ amicus brief plainly understood Appellants to have raised the ECOA standing issue as it relates to only the Legal Outsource Loan Claim on appeal. Their brief describes the issue Appellants raise as follows: “Appellants incorrectly argue that the Equal Credit Opportunity Act affords ‘Lisa Phoenix and Perwinkle [sic] [Partners, LLC]’ a claim that Regions [Bank] required them to sign for and collateralize **her husband’s business debts**[.]” Bankers’ Br. at 10 (emphasis added) (alterations in original). Clearly, this pertains to only the Legal Outsource Loan Claim on appeal. It does not reference the Periwinkle Loan Claim. To be sure, the Bankers briefed the issue of whether a guarantor has standing, but according to their own words, they did so in the context of the Legal Outsource Loan Claim because that’s what they understood Appellants to argue in their brief. The Bankers obviously did not understand Appellants to raise the guarantor-standing issue as it relates to the Periwinkle Loan Claim. For good reason: on appeal, Appellants never argued that issue in the context of the Periwinkle Loan Claim. As for the other amicus brief, submitted by the Consumer Financial Protection Bureau, it focused on what it disagreed with in the district court’s opinion, as opposed to

See *Cellnet Commc'ns, Inc. v. F.C.C.*, 149 F.3d 429, 443 (6th Cir. 1998) (“To the extent that the amicus raises issues or make[s] arguments that exceed those properly raised by the parties, we may not consider such issues.”).

Other courts have identified only very limited circumstances warranting a court’s decision to overlook abandonment of an argument or issue and decide it, anyway. None applies here.

In *Silber v. United States*, 370 U.S. 717, 717–18 (1962), for example, the Supreme Court explained that when a party fails to raise an issue on appeal, courts “[i]n *exceptional* circumstances, *especially in criminal cases*, . . . in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are *obvious*, or if they otherwise *seriously affect the fairness, integrity, or public reputation of judicial proceedings*.” (emphasis added) (citation and quotation marks omitted). The Majority Opinion has offered no reason why this case presents “exceptional circumstances,” and I am aware of no such reason. This is also not a criminal case. Nor, in light of the fact that the Supreme Court recently split 4-4 on the issue the Majority insists on addressing today, *Hawkins*, 136 S. Ct. at 1072, and other circuits are similarly split two to one, can we say the answer to the unraised issue is “obvious.” And finally, since the Majority Opinion’s answer to the unraised issue results in precisely the same outcome as declaring the issue abandoned—either way, the district court is affirmed—I can see no way that the unraised issue “seriously affect[s]”—or, for that

characterizing Appellants’ argument on appeal.

matter, affects at all—“the fairness, integrity, or public reputation of judicial proceedings.”

Other Circuits have also identified extremely limited circumstances in which it might be appropriate for an appellate court to address an issue that no party raised. These other Circuits have reasoned that a court may determine an unraised issue where doing so would “enhanc[e] the efficiency of the decisionmaking process and the conservation of scarce judicial resources,” and “remand ‘would further postpone the ultimate resolution of the petitioner’s underlying claim for relief.” *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013) (quoting *LaBruna v. U.S. Marshal*, 665 F.2d 439, 442 (2d Cir. 1981)). Similarly, the Seventh Circuit has concluded it is appropriate to review an unraised issue only when these controlling factors decidedly favor review: the size and complexity of the record, the certainty of the resolution of the issue, and the need for “protracted, costly, and ultimately futile proceedings in the district court,” in the absence of addressing the forfeited issue. *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991).

Of course, not one of these circumstances describes this case. The record here is not particularly lengthy or complex; resolution of the issue here, as I have noted, is not cut and dry; and declining to reach the issue would not “result in protracted, costly, and ultimately futile proceedings in the district court.” *Id.* Whether we address the unraised issue or not, the result is the same: affirmance of the district court’s order granting summary judgment to Regions. In fact, ironically, deciding the unraised issue here makes today’s opinion unnecessarily lengthy and complex. So

it should go without saying that this case does not present an appropriate vehicle to justify a wholly unnecessary journey into the deeply debated question of whether “guarantors” can be “applicants,” when the claim as resolved by the Majority Opinion should be dismissed, regardless, since it was clearly abandoned.

Apparently recognizing the inadvisability of determining an issue no Appellant invoked and failing to convince even itself that Appellants have raised the Periwinkle Loan Claim on appeal, the Majority Opinion tries a different tack and insists that Appellants’ Legal Outsource Loan Claim arguments “logically . . . can relate only” to Counterclaims 11 or 12 (Lisa’s individual claim as a guarantor of the Periwinkle loan). Maj. Op. at 28. At the risk of repetition but for the avoidance of doubt, I offer a simpler explanation: on appeal, Lisa, for the first time in this case, has raised a new claim about Regions’s attempt to make her (through Periwinkle) guaranty the Legal Outsource Loan. She did not plead the claim in her Counterclaims—including Counterclaims 11 or 12—and she did not otherwise sufficiently develop it in the district court.

Perhaps it was “nonsensical” for Lisa to raise the Legal Outsource Loan Claim at this point, Maj. Op. at 33, but that was her prerogative, not ours. Our task here is to “decide . . . [the] questions presented by the parties.” *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (citation and quotation marks omitted). Our responsibility to construe briefs “liberally” does not grant us permission to recast what was appealed simply because we want to reach an issue that the parties left behind. See *Nat’l Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10 (2011) (“The

premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (opinion for the court by Scalia, J.)); *Greenlaw*, 554 U.S. at 243 (“In our adversary system . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”).

As for the Legal Outsource Loan Claim, this is hardly the first time a litigant has tried to raise a “wholly novel claim” for the first time on appeal. Maj. Op. at 33. When that happens, it has long been this Court’s practice to refuse to consider the issue. See *In re Holywell Corp.*, 874 F.2d 780, 782 (11th Cir. 1989) (refusing to consider claim that was not presented to the district court); *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530, 532 (11th Cir. 1983) (refusing to consider affirmative defense raised for the first time on appeal); see also *Access Now*, 385 F.3d at 1331 (“[W]e review claims of judicial error in the trial courts. If we were to regularly address questions—particularly fact-bound issues—that districts court never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.”).

Because Lisa raises the Legal Outsource Loan Claim for the first time on appeal, the better course would be to forgo considering it at this late hour. *Access Now*, 385 F.3d at 1330–35. We can, however, make exceptions to our general prohibition against considering new claims for the first time on appeal if

one of our limited exceptions to the rule applies.⁸ *See id.* at 1332. The only exception that could even possibly pertain here allows us to evaluate a new issue for the first time on appeal “if that issue presents significant questions of general impact or of great public concern.” *Id.* at 1332.

Perhaps we could rely on that exception to consider whether guarantors are considered “applicants” under the ECOA in the context of Lisa’s contentions arising out of the Legal Outsource Loan Claim. But if we are going to do that, we should say so and explain why the exception applies.

Unfortunately, though, that’s not what the Majority Opinion does. Instead, inexplicably, it simply considers whether guarantors have standing under the ECOA, in the context of “resolving” the Periwinkle Loan Claim, ignoring Lisa’s abandonment of that claim on appeal and Regions’s argument that Lisa has forsaken that claim for good by not appealing it. Because Lisa opted not to present the Periwinkle Loan Claim to us on appeal, it should be clear that that claim leaves nothing to be “resolved.”

II.

Nevertheless, because the Majority Opinion purports to improperly narrow the ECOA, I must

⁸ We have explained that we may consider an issue raised for the first time on appeal (1) “if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice”; (2) if “the appellant raises an objection to an order which he had no opportunity to raise at the district court level”; (3) if “the interest of substantial justice is at stake”; (4) if “the proper resolution is beyond any doubt”; or (5) “if that issue presents significant questions of general impact or of great public concern.” *Access Now*, 385 F.3d at 1332.

explain why its reasoning is wrong. I begin by setting forth the framework we apply to the question the Majority Opinion has chosen to address: whether guarantors are included within the meaning of “applicants” under the ECOA.

Since we are construing the meaning of a statute, we must start with the text. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). We consider whether the text plainly and unambiguously answers the particular question at issue. *Id.* In assessing the text, we keep in mind that “[a] word in a statute may or may not extend to the outer limits of its definitional possibilities.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). To determine the proper meaning, we evaluate “the whole statutory text, considering the purpose and context of the statute, and consult[] any precedents or authorities that inform the analysis.” *Id.*; see also *Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”). And when a statute is remedial in nature, we apply the well-established rule that requires us to construe the text “broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Stewart v. Kahn*, 78 U.S. 493, 504 (1870); *SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) (observing that remedial legislation “is entitled to a broad construction”) (citations omitted). If, after we apply these rules, the text is unambiguous, yielding but a single possible answer to the question at issue, our analysis ends. For we “must give effect to the unambiguously expressed intent of Congress.” *Cadet v. Bulger*, 377 F.3d 1173, 1185 (11th Cir. 2004) (citation and quotation marks omitted).

But if the text does not unambiguously answer the precise question we are examining, we must conduct an analysis under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, we determine whether the agency charged with filling in the ECOA’s gaps—originally the Federal Reserve Board but beginning in 2010, the Consumer Financial Protection Bureau⁹—has established a permissible answer to our question. The agency’s interpretation is permissible if it is “reasonable.” *Id.* at 844. And we must defer to an agency’s reasonable construction of a statute for which that agency enjoys rulemaking authority. *Id.* If, on the other hand, the agency’s interpretation of the statute as it concerns the precise issue in controversy is “arbitrary, capricious, or manifestly contrary to the statute,” the agency’s answer is entitled to no weight. *Id.*

With this framework in mind, I consider whether a guarantor qualifies as an “applicant” under the ECOA. I divide my discussion into three parts. In accordance with the Supreme Court’s guidance for construing statutory text, *see Dolan*, 546 U.S. at 486, and because the ECOA has “broad remedial goals,” *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1211 n.6

⁹ In 2010, Congress transferred the Federal Reserve’s rulemaking authority to the Consumer Financial Protection Bureau. 15 U.S.C. 1691b(a). The Bureau has since repromulgated Regulation B without making material changes. 12 C.F.R. Pt. 1002 & Supp. I; *see* Equal Credit Opportunity (Regulation B), 76 Fed. Reg. 79,442 (Dec. 21, 2011). Because Regulation B has remained materially the same since its original promulgation by the Federal Reserve, to avoid confusion, for the remainder of this opinion, I refer solely to the Federal Reserve as the administering body.

(6th Cir. 1997), Section A reviews the background, purpose, and broader context of the ECOA as a whole. *Cf. Zuni Pub. Sch. Dist. No.89 v. Dep't of Educ.*, 550 U.S. 81, 89–90 (2007) (departing from usual order of analysis for purposes of exposition). Section B examines the statutory text. And Section C considers the Federal Reserve's approach to answering the question of whether a guarantor qualifies as an "applicant" under the ECOA.

A.

Women were integral to the United States's World War II triumph through, among other ways, their efforts in the workforce.¹⁰ Buoyed by their experiences during the War, women helped detonate America's historic Post-War economic boom by flocking to workplaces in unprecedented droves.¹¹

But significant impediments to women's economic parity nonetheless persisted. A particularly important obstacle involved credit availability: creditors would not lend to women so they could start their own businesses or buy their own homes because creditors refused to consider women's applications on par with men's. And the increasing necessity of credit

¹⁰ Jone Johnson Lewis, *Women and World War II: Women at Work*, ThoughtCo, Mar. 5, 2019, available at <https://www.thoughtco.com/world-war-ii-women-at-work-3530690> (last visited Aug. 27, 2019).

¹¹ Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025*, Monthly Lab. Rev. 3 (Dec. 1999), available at <http://www.bls.gov/mlr/1999/12/art1full.pdf> (last visited Aug. 27, 2019).

to achieve economic security made this impediment particularly restrictive.¹²

That women faced rampant discrimination in accessing credit was no secret. In fact, in the early 1970s, the then-President of the American Bankers Association openly admitted that banks “do in fact discriminate against women when it comes to granting credit.”¹³ And in 1972, the National Commission on Consumer Finance found five systemic patterns of gender-based credit discrimination: (1) single women had more trouble obtaining credit than single men; (2) creditors required women to reapply for credit upon marriage, usually in the husband’s name; (3) creditors declined to extend credit to a married woman in her own name; (4) creditors often refused to count the wife’s income when the couple applied for credit; and (5) women who divorced or widowed had trouble reestablishing credit since the accounts were in the husband’s name. Nat’l Comm. On Consumer Fin., *Consumer Credit in the United States*, 152–53 (1972).

So before marriage, regardless of a woman’s wealth accumulation, creditors viewed women as poor credits risks because they considered them “inherently unstable and incapable of handling [their]

¹² Dubravka Ritter, *Do We Still Need the Equal Credit Opportunity Act?*, Fed. Res. Bank of Phila. (Sept. 2012), available at <https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2012/d-2012-equal-credit-opportunity-act.pdf?la=en> (last visited Aug. 27, 2019).

¹³ Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 Wis. L. Rev. 655, 657 (1981) (citation omitted).

own affairs . . . and likely to change [their] marital status.” Gail R. Reizenstein, *A Fresh Look at the Equal Credit Opportunity Act*, 14 Akron L. Rev. 215, 226 (1980) (citation omitted) (“Fresh Look”). Many creditors even demanded that women disclose the type of birth control they relied upon. *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 San Diego L. Rev. 960, 965 (1976). Some creditors took it yet a step further by making women choose between babies and credit by conditioning a woman’s credit approval on her “swear . . . that [she] would not endanger [her] ability to repay [her] debt[] by having children.” *Id.* (citations omitted).

Getting married usually didn’t improve women’s lots in credit markets because lenders often folded whatever credit women had before marriage into their husbands’ credit. For instance, after winning multiple Wimbledon championships and supporting her household with those earnings, Billie Jean King could not get a credit card in her own name; rather, she had to apply in the name of her husband, who at that time, was an unemployed law student. Gail Collins, *When Everything Changed: The Amazing Journey of American Women from 1960 to the Present*, 182 (Little, Brown & Co. ed., 2014). And bankers told the mayor of Davenport, Iowa, that they would give her a credit card only if her husband would sign for it. *Id.*

This state of affairs created a paradox for women: they couldn’t have their own credit during marriage, and if they divorced or became widowed, lenders would deny their applications because they lacked established credit of their own. *Economic Problems of Women: Hearings Before the Joint Economic*

Committee, 93d Cong. 152, 1st Sess. (1973) (“The irony of these credit practices is that when a woman is divorced, separated, or widowed she often is denied credit by these same credit companies on the grounds that she has no established credit record.”) (Statement of U.S. Rep. Griffiths, Member, Joint Econ. Comm.) (“*Economic Problems*”). And many women started post-marriage life even worse off than having no credit because lenders insisted on tying women’s financial fortunes to those of their ex-husbands, and their ex-husbands’ delinquent accounts often detracted from the women’s credit scores even after the marriage ended. *See Fresh Look* at 225.

This atmosphere evolved out of the wrong¹⁴ but “widely-held” presumptions that “probability of pregnancy, the subsequent termination of employment upon childbirth, and the general instability and inability of women to control their personal affairs (especially single and divorced women)” made women bad bets. *Fresh Look* at 216 (citation omitted).

Eventually, Congress began to recognize the inequities of tethering women’s economic prospects to their husbands and the risks this discrimination

¹⁴ Despite higher levels of unemployment than men at the time, women were, in fact, better credit risks than men, studies showed. A study commissioned in 1964 examined the possible correlation between consumer credit risk and sex. It found that out of 8,795 credit accounts established for single men, 176 defaulted (2%); while among 4,337 accounts established for single women, only 33 defaulted (0.75%). *See* Sharon Thornton, *The Not-So-Equal Credit Opportunity Act*, 5 Orange Cty. B.J. 363, 366 (1978).

posed to the new economy. So in the early 1970s, Congress addressed the problem.

Testimony before Congress established that at that time, to obtain credit, women needed a higher salary and more stable employment than men. See Senate Comm. On Banking, Housing & Urban Affairs, S. Rep. No. 93–278, 93rd Cong., 1st Sess. 16–17 (1973) (“Senate Rpt.”); see also *Economic Problems* at 197; *Credit Discrimination: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency on H.R. 14856 and H.R. 14908*, 93rd Cong., 2d Sess. 315, 636 (1974).¹⁵ Creditors operated under the assumption that women were economically dependent upon their husbands, even if in reality, the wife’s earnings outpaced her husband’s. See Senate Rpt. at 17–18. Creditors also usually altered a wife’s credit rating to match her husband’s and frequently refused to give married women separate accounts. See *id.* at 17.

The congressional hearings culminated in the Senate Subcommittee’s report that found thirteen different “widespread” ways creditors discriminated on the basis of sex and marital status:

- (1) Women were held to different standards than men in obtaining credit;
- (2) Creditors generally required a woman upon marriage to reapply for credit;

¹⁵ During the hearings, one person relayed that an employee of a credit institution had stated that it was “un-American to count a woman’s income and that the only way a woman’s income could be counted would be if she were to have a hysterectomy.” *Economic Problems* at 192 (quotation marks omitted).

- (3) Creditors often refused to extend credit to a married woman in her own name;
- (4) Creditors were usually unwilling to consider the wife's income when a married couple applied for credit;
- (5) Women who had separated had a particularly difficult time, since the accounts may still have been in the husband's name;
- (6) Creditors arbitrarily refused to consider alimony and child support as a valid source of income;
- (7) Creditors applied stricter standards to married applicants where the wife was the high earner;
- (8) Creditors used information about women's birth-control practices in evaluating credit applications;
- (9) Creditors used information concerning the creditworthiness of a spouse where an otherwise-creditworthy married person applied for credit;
- (10) Creditors refused to issue separate accounts to married persons;
- (11) Creditors considered women dependent upon their husbands even if the women were employed;
- (12) Creditors used credit-scoring systems that applied different values depending on sex or marital status; and
- (13) Creditors altered women's credit ratings to match their husbands' credit ratings.

Senate Rpt. at 16–17.

Against this background and in light of these findings, Congress enacted the ECOA in 1974. In doing so, Congress concluded sex and marital status “are, and must be, irrelevant to a credit judgment.” Senate Rep. (Banking Hous. and Urban Affairs Comm.), S. Rep. No. 94 – 589, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 405; *see also* 15 U.S.C. § 1691 (articulating the ECOA’s prohibition of credit discrimination based on gender or marital status).

So it is not surprising that the 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 . . . sex or marital status. . . .” 15 U.S.C. § 1691(a)(1).¹⁶ Indeed, the ECOA represents Congress’s resolve to “eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit,” *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982), and “to prevent loans from being conditioned automatically on the securing of the signature of the non-borrowing spouse,” *Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 676 (1st Cir. 1999).

Against the crazy quilt of discriminatory practices creditors were using at that time, Congress declined to spell out each methodology or action that amounts to impermissible discrimination. Instead, Congress rested on the ECOA’s broad language and

¹⁶ In 1976, Congress extended the ECOA to bar creditors from discriminating on the basis of race, color, religion and national origin. *See* 15 U.S.C. § 1691(a); Ritter, *supra*, at 2–3.

“entrust[ed] 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). Specifically, Congress delegated to the Federal Reserve the task of adopting “classifications, differentiation, or other provision[s],” that were, in the Federal Reserve’s judgment, “necessary or proper to effectuate the [ECOA’s] purposes. . . .” 15 U.S.C. § 1691b(a).

Shortly after Congress enacted the ECOA, the Federal Reserve took the baton from Congress and promulgated Regulation B to implement Congress’s directive to combat sex- and marital-status-based credit discrimination. 12 C.F.R. § 202.1(b) (stating that the purpose of Regulation B is “to promote the availability of credit to all creditworthy applicants without regard to . . . sex [or] marital status. . . .”). Included within Regulation B is the Spousal Guaranty Rule, which generally prohibits creditors from treating married people differently by requiring spouses to assume liability for each other’s debt obligations. 12 C.F.R. 202.7(d); Equal Credit Opportunity Final Rulemaking, 40 Fed. Reg. 49,308–09 (Oct. 22, 1975). Therefore, ever since 1977, Regulation B has prohibited creditors from obligating an individual to guaranty her spouse’s debts.

Some courts, though, interpreted Regulation B to mean that when a creditor violated the Spousal Guaranty Rule, the only “applicant” who suffered discrimination was the primary borrower, not the spouse who guaranteed the loan. *See, e.g., Morse v. Mut. Fed. Sav. & Loan Ass’n of Whitman*, 536 F. Supp. 1271, 1278 (D. Mass. 1982). The Federal Reserve recognized that this restrictive reading thwarted one

of the purposes of the ECOA—ensuring access to an independent credit profile by detangling spouses’ credit—since the guarantor spouse could be saddled with her husband’s bad debt with no recourse under the ECOA.

So in 1985, the Federal Reserve expressly construed the ECOA’s definition of “applicant”—“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)—to include “guarantors, sureties, endorsers, and similar parties” “[f]or purposes of” the Spousal Guaranty Rule. 12 C.F.R. 202.2(e). In doing so, the Federal Reserve emphasized that it was not imposing any new obligations, since in accordance with the ECOA, Regulation B had long prohibited creditors from requiring a guaranty from a borrower’s spouse. Rather, the Federal Reserve explained, it was just recognizing that the guarantor spouse also has standing when the creditor straps the spouses’ credit fortunes together. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018 (Nov. 20, 1985).¹⁷

B.

We begin our analysis of whether the ECOA includes guarantors within the definition of

¹⁷ The Federal Reserve made Regulation B firm but flexible. If a party is needed to support the loan request because the potential debtor husband’s credit is insufficient, the wife can guaranty the loan. Regulation B just bars lenders from “requir[ing] that the spouse be the additional party.” 12 C.F.R. 202.7(d)(5).

“applicants” by evaluating the statutory text. The 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 . . . marital status. . . .” 15 U.S.C. § 1691(a)(1) (emphasis added). In turn, the ECOA defines “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) (emphasis added).

Two aspects of this text immediately stand out.

First, Congress employed the word “any” four times in these two sentences. The Supreme Court has explained that “the word ‘any’ has an expansive meaning.” *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The Majority Opinion is correct that the word “any” does not change the definition of the word it modifies. Maj. Op. at 18–19. But when that word appears repeatedly over just a couple of sentences—here, four times in two sentences—“it begins to seem that Congress meant the statute to have expansive reach.” *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008).¹⁸

¹⁸ *See also Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (“A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of ‘any rights, privileges, or immunities secured by the Constitution and laws.’ Accordingly, we have repeatedly held that the coverage of [§ 1983] must be broadly construed.”) (citations and quotation marks omitted).

This would be true for any statutory provision that abundantly uses the word “any,” but it is especially so when dealing with remedial legislation. Where Congress uses the term “any” with a “lack of [accompanying] restrictive language,” the Supreme Court has instructed us to “refuse[] to engraft artificial limitations” that curb the “expansive remedial purpose[s]” connoted by such language. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *see id.* (broadly construing “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws”). So, for example, the text’s prohibition against marital-status discrimination “with respect to *any* aspect of a credit transaction,” 15 U.S.C. § 1691(a)(1) (emphasis added), purports to preclude marital-status discrimination in all aspects of credit transactions, including against guarantors.

Nevertheless, and second, the statutory provisions do not expressly answer the key question at issue here: must the applicant request credit for herself or may she request it for somebody else? As the Sixth Circuit has noted, “the applicant and the debtor are not always the same person.” *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385 (6th Cir. 2014). And the Majority Opinion’s listed common dictionary definitions of “apply” do not limit applicants to only the proposed debtor, because they do not foreclose the scenario where an applicant makes a request for credit on someone else’s behalf.

Similarly, both the Sixth and Eighth Circuits, in construing the text at issue, have relied on common dictionary definitions of “apply” as meaning “to make an appeal or request especially formally and often in

writing and *usually for something of benefit to oneself.*” *Hawkins*, 761 F.3d at 941 (quoting *Webster’s Third New Int’l Dictionary* at 105 (2002)) (quotation marks and alterations omitted) (emphasis added); *RL BB Acquisition*, 754 F.3d at 385 (quoting *Webster’s Third New Int’l Dictionary* at 105 (1993) (cleaned up)); see also *Webster’s Third New Int’l Dictionary* at 105 (1961) (same definition, cleaned up). Obviously, if something is “*usually* for something of benefit to oneself,” it must *sometimes* be for something of benefit to another.

So we must consider whether a guarantor may ever reasonably and naturally be viewed as requesting “something of benefit” to another—that is, credit for the benefit of the proposed debtor. As it turns out, under the plain meaning of “guarantor,” she may.

As Corbin on Contracts explains, “In most cases of guaranty contracts, the offer comes from the guarantor requesting the giving of credit to a principal debtor. . . .” See Timothy Murray, Corbin on Contracts § 3.14, at 467 (rev. ed. 2018).¹⁹ In fact, a guaranty is typically enforceable only because, in exchange for the creditor’s promise to extend credit to the debtor, the guarantor promises to repay the loan if the primary debtor defaults. See Restatement (Second) of Contracts § 71(2) (1981). Thus, guaranty contracts would be unenforceable absent the exchange of consideration by the guarantor—a promise to repay—and the creditor—the fulfillment of the guarantor’s “application” that it lends to the debtor. See

¹⁹ Additionally, other banking regulations provide that guarantors request and receive extensions of credit. See, e.g., 12 C.F.R. 215.3(a)(4).

Restatement (Third) of Suretyship and Guaranty § 9, cmt. a (1996); Joseph M. Perillo, Corbin on Corbin § 9.4, at 252–253 (rev. ed. 1996); *see also United States v. Burgreen*, 591 F.2d 291, 294 (5th Cir. 1979) (finding that guaranty was supported by consideration through the loan to the primary borrower).

The Majority Opinion charges that this definition of “apply” falls outside the word’s natural meaning. Maj. Op. at 20. But there are three problems with the Majority Opinion’s position.

First, in support of its argument, the Majority Opinion inexplicably invites readers to consider an incongruous hypothetical, arguing that parents who seek to bribe their daughter’s way into college by offering to “make a large gift if their daughter is admitted” are not “applicants.” Maj. Op. at 13. I agree. But nor are they analogous to guarantors. Unlike the parents in the Majority Opinion’s hypothetical, who can obtain admission for their daughter only by paying a bribe to the college, a guarantor does not bribe or otherwise pay the creditor for credit to be extended to another. And if the eventual debtor pays back the credit, the guarantor will never pay anything. So the Majority Opinion’s efforts to explain in tangible terms why a guarantor cannot fall within the meaning of “applicant” fail.

Second, none of the many definitions of the word “apply” that the Majority Opinion cites *excludes* the interpretation that the application was for someone else. Maj. Op. at 10–12. And that is significant to our analysis. In *Smith v. United States*, 508 U.S. 223, 225 (1993), for example, the Supreme Court had to determine whether the exchange of a gun for narcotics amounted to the “use” of a firearm “during and in

relation to . . . [a] drug trafficking crime,” within the meaning of 18 U.S.C. § 924(c)(1). The Court rejected the petitioner’s request to apply only the limited and most common meaning of the phrase. *Id.* at 229. Rather, the Court determined that trading a firearm for drugs also qualified as “use” of the firearm under the statute, explaining, “It is one thing to say that the ordinary meaning of ‘uses a firearm’ *includes* using a firearm as a weapon, since that is the intended purpose of a firearm and the example of ‘use’ that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use.” *Id.*

Applying *Smith*, we must conclude that the availability of a frequently used definition of “applicant”—one who seeks credit for herself—does not necessarily negate a less-common definition—one who seeks credit for others. That is so because the definitions of “applicant” do not exclude use of the word to refer to guarantors.

And third, the ECOA is a remedial statute that we must construe “broad[ly]” to effectuate its remedial goals. *Barney*, 110 F.3d at 1211 n.6; *see also Levin*, 849 F.3d at 1001 (observing that remedial legislation “is entitled to a broad construction”); *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1166 (11th Cir. 2003) (construing the remedial Migrant and Seasonal Agricultural Workers Protection Act “broadly to effect its . . . purpose”). Our task cannot begin and end with a definitional popularity contest. If it did, there would be no way to construe remedial legislation “broadly” to effectuate its purpose, because all words in all statutes would be read as conveying only a single potential meaning.

Notably, the Majority Opinion makes no attempt whatsoever to reconcile the “familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes,” *Tcherepnin*, 389 U.S. at 336, or the caveat that “[a] word in a statute may or may not extend to the outer limits of its definitional possibilities,” *Dolan*, 546 U.S. at 486, with the Majority Opinion’s the-words-can-have-only-a-single-meaning mantra.²⁰ Of course, if either or both of these doctrines apply, the Majority Opinion cannot be right.

So instead of responding substantively, the Majority Opinion asserts the Supreme Court has “rejected applying” the remedial-purpose doctrine. Maj. Op. at 12. And it has no answer at all to the Supreme Court’s instruction in *Dolan*.

But while the Majority Opinion pulls colorful language from context to suggest that the Supreme Court has determined that the remedial-purpose doctrine is no longer good law, there’s a problem with this response: the Supreme Court has not rejected the

²⁰ As Judge William Pryor explained last year, “the text must be construed as a whole. . . . Strict construction sequesters the words of a text from their context. That is one of the reasons why strict construction is foolish.” *Pictet Overseas Inc. v. Helvetia Trust*, 905 F.3d 1183, 1190 (11th Cir. 2018) (William Pryor, J., concurring) (cleaned up); see also *Deal v. United States*, 508 U.S. 129, 132–44 (1993) *superseded by statute as stated in United States v. Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) (it is a “fundamental principle of statutory construction (and indeed, of language itself), that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”). So we ought not to pluck words out of their context and define them narrowly just because a dictionary indicates that the narrower meaning is the more common one.

doctrine. Rather, the Court concluded the doctrine was simply inapplicable in the cases the Majority Opinion cites.

For example, there were multiple reasons why the doctrine would not apply to the Comprehensive Environmental Response, Compensation, and Liability Act, the statute at issue in *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014): (1) the Court held that the statute “d[id] not provide a complete remedial framework,” and so it was not necessarily a remedial statute, *see id.* at 18; (2) even if it was a remedial statute, the statute’s legislative history supported a construction of the statutory text at odds with the remedial purpose, *see id.* at 14–17; and (3) the statute, which would trump state law if the Court adopted the respondents’ argument, was subject to a competing presumption against preemption, *see id.* at 12.

Likewise, the respondents in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003), argued that the Bishop Paiute Tribe should be considered a “person” under 42 U.S.C. § 1983, a construction—according to respondents—that would be consistent with the law’s remedial purpose. *See Paiute-Shoshone Indians*, 538 U.S. at 710. The Court rejected this bid, holding that “Section 1983 was designed to secure private rights against government encroachment, not to advance a sovereign’s prerogative to withhold evidence relevant to a criminal investigation.” *See id.* at 711–12 (citation omitted). So rather than rejecting the doctrine, the Court disagreed that the statute was meant to remedy the harms that the respondents addressed.

Norfolk Southern Railway Co. v. Sorrell, 549 U.S. 158 (2007), is similarly uninformative here. *Norfolk* involved the Federal Employers' Liability Act ("FELA"), which makes railroads liable to their employees for injuries "resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51. 549 U.S. at 160. In that case, the Court considered whether the statute permitted different standards of causation for railroad and employee contributory negligence. *Id.* Although the Court recognized that FELA was "enacted to benefit railroad employees" and that a more lenient standard of causation for employee contributory negligence would favor employees, it held that FELA required application of a single negligence standard, stating that FELA's "remedial purpose [does not] require[] us to interpret every uncertainty in the Act in favor of employees." *Id.* at 171. But what's important for this case is that the Court decided that the "system of comparative fault" would not "work" if "the basis of comparison [meaning the standard for contributory negligence] [were not] the same." *Id.* at 170, 171 (citations omitted). In other words, the Court left open the possibility that the remedial-purpose doctrine would apply in cases where the object of interpretation makes the difference between accomplishing the statute's central purposes at all and not.

This is just such a case. First, unlike the situation with FELA in *Norfolk*, construing "applicant" to include guarantors under § 1691(a)(1) does not prevent the ECOA's mechanisms from working. And unlike whether the contributory negligence standard is the same for employees and employers under the FELA—a question that impacts only the amount of the recovery but not entitlement to recovery—

whether “applicant” encompasses guarantors under § 1691(a)(1) does not involve just some random “uncertainty in the Act,” *Norfolk*, 549 U.S. at 171. Rather, the answer to that question determines whether the ECOA will effect one of its central purposes at all—that is, whether the ECOA will allow spouses to disentangle their credit, or whether it will permit lenders to require such entanglement.

The Majority Opinion’s reliance on *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004), fares no better. In that case, the Supreme Court concluded that the statutory language of the Truth in Lending Act was ambiguous on the question at issue there, so it noted that the agency’s regulation answering the question was “binding” unless, among other things, “manifestly contrary to the statute.” *Id.* at 242 (citation omitted). The Court then concluded that the regulation was “in no way manifestly contrary” to the statute. *Id.*

As was the case with the statute in *Household Credit*, here, the ECOA is ambiguous on the precise question at issue. And when we turn to the agency’s interpretation—Regulation B—as in *Household Credit*, that regulation is not “manifestly contrary to the statute.” *Id.* Rather, as in *Household Credit*, it furthers one of the “primary goals” of the statute, *see id.* at 243, as I have explained.

Finally, turning to *Director, Office of Workers’ Compensation Programs, Department of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995), which the Majority Opinion suggests “ridiculed” the remedial-purpose doctrine and rendered it no longer good law, Maj. Op. at 21 (citing *Newport News*, 514 U.S. at 135), that’s not an accurate

description of that case. Rather, the Court ridiculed the petitioner's attempt to rely on the doctrine in that case, when the Court was not even analyzing a remedial statute. In fact, the Court discussed—at some length—that the statute's "goal" was not clear. *See id.* at 131. Not only did the Court not invalidate the remedial-purpose doctrine, the Court recognized that the principle of construing any statute broadly to achieve its purposes could be invoked "in case of ambiguity," *id.* at 135, which I submit is the case here. And finally, the Court in *Newport News* went on to construe the statute at issue "as liberally as can be." *Id.* at 136.

But you don't have to take it from me; you can take it from the Court itself. Seven years after issuing *Newport News*, the Supreme Court unanimously applied the remedial-purpose doctrine in *S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002) ("[W]e have explained that [Section 10(b) of the Securities Exchange Act] should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes.") (citation and internal quotation marks omitted).

Instead of addressing the substance of this argument on the remedial-purpose doctrine and *Dolan's* instruction that "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities," 546 U.S. at 486, the Majority Opinion accuses this dissent of engaging in "hornbook abuse of the whole-text canon" and mischaracterizes my argument as "since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored." Maj. Op. at 20.

But it's not that the Majority Opinion's interpretation of "applicant" "limits the achieving" of the ECOA's purpose of disentangling spouses' financial fortunes, *see* Senate Rpt. at 16–17;²¹ it's that it is antithetical to that reason for the ECOA.

The guarantor spouse often suffers a unique economic injury that the primary debtor spouse does not. Say the creditor refuses to extend the loan unless the wife guarantees it, so the wife agrees to do so. But the husband—the direct debtor—may have no complaints, since he received the loan he was after. And even if he did, he may well not have economic damages to assert in a lawsuit. *See, e.g., Mayes*, 167 F.3d at 678 (“[The husband] has no claim for damages or injunctive relief under ECOA for harm done to his wife. If anyone was injured by requiring [the wife] to sign the guarantee, it was she and not [the husband], who after all received the loan he had sought.”). Without the potential for redress, he would lack standing.

By contrast, the wife who guaranteed the loan may have a separate injury stemming from the fact that her credit score is likely lower because she agreed to be secondarily liable for the loan. *See* Mechel Glass, Equifax, *Should I Co-Sign On a Loan for a Family Member?*, available <https://blog.equifax.com/tag/credit-score/page/4/> (last visited Aug. 27, 2019). So she may have suffered an injury if she sought credit and was unable to obtain it, or if any credit she did receive either was more limited or bore a higher interest rate

²¹ *See also Mayes*, 167 F.3d at 676 (Congress also set out “to prevent loans from being conditioned automatically on the securing of the signature of the non-borrowing spouse.”).

than it would have had she not been required to guaranty her husband's loan. Yet construing "applicants" to exclude guarantors would mean nobody in this scenario would have standing to pursue the creditor's flagrant violation of the ECOA.

And worse yet, allowing lenders to, with impunity, require wives to guaranty their husbands' debts actually creates the same financial intertwinement problems that arose when lenders demanded that women like Billie Jean King obtain their husbands' guaranties before lenders would extend credit to them. In both cases, the wives' credit is forever tied to the husbands' credit fortunes.

As a result, guaranteeing the husband's loan can "negatively impact [the wife's] credit report and creditworthiness," since guaranteeing a loan shows up on credit reports immediately. Glass, *supra*, at 26. And if the husband "miss[es] payments or default[s] on the loan, [the wife's] credit reports will show the delinquencies," ruining her credit history and ability to secure future credit. TransUnion, *The Benefits & Issues of Co-Signing a Loan*, available at <http://www.transunion.com/personal-credit/credit-issues-bad-credit/cosigning-a-loan.page> (last visited Aug. 27, 2019).

So far from "open[ing] vistas of liability' that Congress did not envision," Maj. Op. at 24 (quoting *Moran Foods, Inc. v. Mid-Atl. Market Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007)), construing "applicants" to include guarantors actually effectuates Congress's goal of disentangling spouses' credit. In contrast, the interpretation the Majority Opinion and the Eighth Circuit in *Hawkins* offer creates the very entanglement of spouses' credit

Congress sought to eradicate. That Congress would have prohibited one form of enforced credit entanglement and unworthiness only to allow another to fully replace it makes about as much sense as ice-hockey cleats. See *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 133 (1987) (“[I]llogical results . . . argue strongly against the conclusion that Congress intended” a particular statutory construction).

The Majority Opinion’s reliance on Judge Colloton’s *Hawkins* concurrence—where Judge Colloton argued that the word “application” should have only one meaning throughout the ECOA—is similarly misplaced. Maj. Op. at 14–16. I understand Judge Colloton’s concern. After all, we “ordinarily assume[] that identical words used in different parts of the same act are intended to have the same meaning.” *Utility Air Reg. Grp. v. E.P.A.*, 573 U.S. 302, 319-20 (2014) (citations omitted). But that assumption is not absolute. It “readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.” *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); see also *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (“In law as in life . . . the same words, placed in different contexts, sometimes mean different things.”). This is one of those times, or else the ECOA ensures the existence of the very problem it seeks to eliminate.

Even assuming some parts of the ECOA suggest—or even require—a narrow interpretation of the word “applicant,” that does not mean that the

term as used in 15 U.S.C. § 1691(a)(1) must be similarly construed, since “a characterization fitting in certain contexts may be unsuitable in others.” See *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). For instance, to make his point, Judge Colloton primarily invokes 15 U.S.C. § 1691(d), titled, “Reason for adverse action; procedure applicable; ‘adverse action’ defined.” That subsection articulates what happens when a lender denies or revokes credit to a debtor. It therefore makes sense that it applies to the person who would have received or actually received the loan.

Section 1691(a), on the other hand, is the statute’s vehicle for proscribing discrimination on the basis of marital status. By both its terms and its function, it has broader application than the provisions to which Judge Colloton points. *Cf. Atl. Cleaners*, 286 U.S. at 435 (“A consideration of the history [of the ECOA] . . . sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting” from discrimination). Indeed, it directly effects Congress’s purposes in enacting the ECOA in the first place—preventing credit discrimination on the basis of marital status and allowing spouses to disentangle their credit from one another. And its text, as I have noted, makes it applicable to “*any* aspect” of a credit transaction.

That Judge Colloton’s citations are exclusively to other provisions of 15 U.S.C. § 1691 does not change this fact. See *Hawkins*, 761 F.3d at 943–44 (Colloton, J., concurring). “Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different

statutes, but when used more than once in the same statute *or even in the same section.*” *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (emphasis added) (citation and alteration omitted); *accord Gen. Dynamics*, 540 U.S. at 595-97 (“age” has different meanings in 29 U.S.C. § 623(a) and § 623(f) of the Age Discrimination in Employment Act of 1967); *Robinson*, 519 U.S. at 342–43 (“employee” has different meanings in different parts of 42 U.S.C. § 2000e–16(b) of Title VII of the Civil Rights Act of 1964); *see also Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313–14 (2006) (“located” has different meanings in different sections of the National Bank Act).

But even if we were to hold that the term “applicant” as used throughout the statute includes guarantors, that is a better answer than the Majority Opinion’s conclusion. Judge Colloton’s examples suggest that such an interpretation could create unexpected benefits for guarantors. That is preferable to gutting the statute’s reason for being. The Majority Opinion’s interpretation does not simply “limit[] the achieving” of what Congress sought with the ECOA, *Maj. Op.* at 20 (citation omitted); as I have explained, it “would be destructive of [the law’s] purpose. . . .” *Robinson*, 519 U.S. at 346.

So the Majority Opinion’s analysis cannot carry the day. “[T]he overriding national policy against discrimination that underlies the [ECOA]” means that “we cannot give” words in that statute a “narrow interpretation.” *Bros. v. First Leasing*, 724 F.2d 789, 793 (9th Cir. 1984). Instead, we must “construe the literal language of the ECOA in light of the clear, strong purpose evidenced by the Act and adopt an

interpretation that will serve to effectuate that purpose.” *Id.*; see also *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (“[W]hen the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole[,]’ this Court has followed that purpose, rather than the literal words.”) (citation omitted). Considering Congress’s remedial purposes in enacting the ECOA, as well as that the many definitions of “applicant” do not exclude the possibility that an “applicant” includes a guarantor, we must conclude that Congress’s employment of the term “applicant” is ambiguous with respect to whether it covers guarantors. For this reason, we must conduct a *Chevron* analysis of the Federal Reserve’s answer to our question of whether the ECOA includes guarantors within the definition of “applicants.”

C.

Under *Chevron*, “we may not disturb an agency rule unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’” *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 53 (2011) (quoting *Pfennig*, 541 U.S. at 242). At bottom, then, we must ask whether the Federal Reserve’s inclusion of guarantors in the ECOA’s definition of “applicant” is a “reasonable interpretation” of the ECOA’s text. *Chevron*, 467 U.S. at 844. The Federal Reserve’s interpretation is reasonable for at least three reasons: it accords with the ECOA’s text; it furthers a primary purpose of the ECOA; and, Congress has tacitly approved of the Federal Reserve’s interpretation.

1. The Federal Reserve's inclusion of guarantors within the meaning of "applicants" is consistent with the ECOA's text.

First, guarantors fit within the plain meaning of "applicants." As I have noted, leading authorities recognize that guarantors apply to the creditor by asking it to extend credit to the primary debtor. *See supra* at 63.

The Majority Opinion's conclusion to the contrary rests on its premise that "[a]lthough a guarantor makes a promise related to an applicant's request for credit, the guaranty is not itself a request for credit." Maj. Op. at 12. But the Majority Opinion offers no support (beyond the Eighth Circuit's erroneous conclusion in *Hawkins*) for the notion that the guarantor is not requesting that the creditor extend credit to the primary borrower. Not a treatise. Not an industry source. Not another statute. Not a dictionary. Not even something from the remote reaches of the internet. Instead, the Majority Opinion relies on its own understanding of credit markets.

But the Majority Opinion's own view—regardless of how learned and reasonable—of how terms are used in credit markets, does not control if the agency's interpretation is also reasonable. Indeed, "[t]he reviewing court may not substitute its judgment for that of the agency but must, instead, defer to the agency's technical expertise" if its interpretation is within the range of reasonableness. *Miami-Dade Cty. v. E.P.A.*, 529 F.3d 1049, 1065 (11th Cir. 2008) (citation and quotation marks omitted). And here, as I have noted, leading treatises and industry sources recognize that guarantors request credit. *See supra* at 63. Since the Federal Reserve's interpretation of the

text is reasonable—not to mention well-supported—we must defer to it.

2. The Federal Reserve’s inclusion of guarantors within the meaning of “applicants” is consistent with primary purposes of the ECOA.

Second, the Federal Reserve’s interpretation is reasonable because covering “guarantors” fits squarely within the wheelhouse of the ECOA’s aims. As I have noted, in enacting the ECOA, Congress sought to disentangle sex and marital status from credit. *See* Senate Rpt. at 16–17. Congress also set out “to prevent loans from being conditioned automatically on the securing of the signature of the non-borrowing spouse.” *Mayes*, 167 F.3d at 676.

The Federal Reserve’s interpretation accounts for and respects these primary goals of the ECOA. But not including guarantors within the definition of “applicants” yanks the teeth out of the ECOA. *See supra* at 71–73.

3. The Federal Reserve’s inclusion of guarantors within the meaning of “applicants” is consistent with congressional abstention from amending the ECOA to preclude that interpretation, despite Congress’s other amendments to the ECOA.

Third, the Federal Reserve’s interpretation of “applicants” to include guarantors is reasonable, in view of congressional action on the ECOA since its enactment in 1974. The Supreme Court has instructed us to tread lightly where Congress has amended a statute but declined to disturb the agency’s interpretation.

For instance, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the Court considered whether the statutory language authorized disparate-impact claims under the Fair Housing Act. In conducting its analysis, the Court found it significant that Congress declined to alter the language at issue to preclude such claims, even though Congress had amended the statute after several Circuits had determined that the statute authorized such claims. *Id.* at 2519. Congress’s inaction, the Court explained, was “convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability.” *Id.* at 2520; *see also Gen. Dynamics*, 540 U.S. at 593–94 & n.6 (noting that the two federal appellate courts and nearly all the district courts to consider the issue held that the Age Discrimination in Employment Act of 1967 did not prohibit favoring older employees over younger ones: “The very strength of this consensus is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view.”).

Here, Congress has tinkered with the ECOA no fewer than three times since 1985, when the Federal Reserve began construing the ECOA to include guarantors within the term “applicants.” *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 1071, 1474, 124 Stat. 1376, 2056–57, 2199–2200 (2010); Omnibus Consolidated Appropriation Act, 1997, Pub. L. 104-208, § 2302, 110 Stat. 3009 (1996); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, §§ 212(d), 223, 105 Stat. 2236 (1991).

And up until 2014, when the Eighth Circuit issued *Hawkins*, the “vast majority of courts” that examined the issue found that guarantors had standing under the ECOA. *See RL BB*, 754 F.3d at 386. True, as the Majority Opinion notes, many of the cases deciding this issue offered little reasoning for their decisions. Maj. Op. at 25–26. But the Supreme Court does not require otherwise. While the Court acknowledged the judicial consensus of the interpretation of the Fair Housing Act in *Texas Department of Housing*, contrary to the Majority Opinion’s characterization, it did not require the lower courts’ decisions to be “reasoned.” Maj. Op. at 26. It noted simply that the courts that had “addressed” the issue had consistently come out the same way. *Tex. Dep’t of Hous.*, 135 S. Ct. at 2519. And most of the cases the Court referenced were *not* particularly well-reasoned; they just adopted what other circuits had done. *See, e.g., Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986) (noting and adopting analysis from other circuits that Fair Housing Act violations can be proven with a showing of discriminatory effect); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574–75 (6th Cir. 1986) (same); *United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1559, n.20 (11th Cir. 1984) (same); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982) (same); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982) (same).

The more important point, though, is that Congress has long been on notice as to how federal courts have interpreted the ECOA and Regulation B. And with that knowledge in hand, Congress amended the law multiple times and never considered tweaking the ECOA to abrogate these courts’ approval of the

Federal Reserve's interpretation. Even after the Seventh Circuit issued *Moran*, in which a Court of Appeals—for the first time—voiced doubts in dicta about the Federal Reserve's interpretation, Congress left the ECOA's definition of "applicant" the same, even though it substantively amended the ECOA three years later, in 2010. So Congress declined to take the Seventh Circuit up on its invitation to cap the supposed "vistas of liability" that the Seventh Circuit concluded Congress was "unlikely to accept." *Moran*, 476 F.3d at 441. Congressional inaction on this point in the face of thirty years of uniformity "supports adherence to the traditional view," *Gen. Dynamics*, 540 U.S. at 594, that the Federal Reserve's inclusion of guarantors within the term "applicants" is valid.

III.

We should dismiss this case because it is not properly before us. The Majority Opinion's insistence on "resolving" a claim that no Appellant has presented to us renders its discussion of the ECOA unnecessary. But because that discussion incorrectly purports to truncate the ECOA's broad reach, it leaves me no choice but to respond. Unfortunately, the Majority Opinion's analysis artificially limits the definitions of "applicant" and "guaranty"; it conflicts with congressional aims in enacting the ECOA; and it is rebutted by Congress's failure to amend the ECOA to make guarantors fall outside the meaning of "applicants," in the 34 years since the Federal Reserve has construed the term "applicants" to include guarantors. Ultimately, the Majority Opinion's interpretation of the ECOA ironically allows lenders to get away with discriminating on the basis of sex or

77a

marital status, the very thing the ECOA meant to eliminate. I therefore respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

Civ. No. 2:14-476-FtM-PAM-MRM

REGIONS BANK, PLAINTIFF

v.

LEGAL OUTSOURCE, PA, PERIWINKLE PARTNERS, LLC,
CHARLES PAUL-THOMAS PHOENIX, LISA M. PHOENIX,
DEFENDANTS

Filed: Feb. 6, 2017

AMENDED MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Motion for Summary Judgment. For the following reasons, the Motion is granted in part and denied in part.

BACKGROUND

Beginning in 2005, Defendant Legal Outsource, P.A., had a revolving line of credit of \$450,000 with Plaintiff Regions Bank, renewed on a yearly or semi-yearly basis. The loan agreement was signed on May 30, 2013, by Legal Outsource and guaranteed by Defendant Charles Paul-Thomas Phoenix, who is also acting as counsel for all Defendants here. (Compl. Exs. A, B, D.) The 2013 loan matured in February 2014, and Legal Outsource did not pay it. On April 4, 2014,

Regions demanded full payment under the loan. (Id. Ex. E.)

In 2011, Regions lent nearly \$1.7 million to Periwinkle Partners LLC, for the purchase of a shopping center on Sanibel Island. (Id. Exs. F-O.) At the time of the loan transaction, the sole member of Periwinkle Partners was a company owned by Charles Phoenix's wife, Lisa Phoenix, called the AT Phoenix Company. Charles Phoenix signed the promissory note as manager of Periwinkle. (Id. Ex. F.) Charles Phoenix, Lisa Phoenix, and Legal Outsource all provided guaranties for the Periwinkle loan. (Id. Ex. M-O.)

Under the terms of the Periwinkle loan, a default of any other loan between the parties constituted an event of default under the Periwinkle loan. (Id. Ex. F.) After the Legal Outsource loan default, Regions declared a default of the Periwinkle loan and sought to accelerate that loan and for full payment of the loan balance. Several months later, Regions amended its default claims for the Periwinkle loan to include as events of default that the AT Phoenix Company transferred its interest in Periwinkle to a third party (1st Am. Answer Ex. 11), and that Periwinkle had failed to pay ad valorem taxes in 2013 (id. Ex. 12).

Defendants claim that Regions decided it wanted the shopping center as collateral for the Legal Outsource line of credit, and began demanding unreasonable documentation from Defendants in 2013. They contend that the Legal Outsource credit line had been renewed yearly since 2005 with no issues, and thus that the "default" in 2014 was a manufactured default to attempt to force Defendants to collateralize the shopping center. Defendants do

not contend, however, that they are not in default under the Legal Outsource loan, and cannot dispute that this default constitutes an event of default under the Periwinkle loan as well.

The Complaint contains six counts. Count I claims breach of the Legal Outsource note, Count II claims a breach of the guaranties for the Legal Outsource loan, Count III claims breach of the Periwinkle note, Count IV claims a breach of the guaranties for the Periwinkle loan, Count V seeks a foreclosure of the Periwinkle property, and Count VI seeks a receivership.

Defendants answered the Complaint and interposed numerous counterclaims. As relevant to Regions's Motion, Counterclaims 1, 3, 4, and 5 assert breach-of-contract, constructive fraud, breach of good faith and fair dealing, and breach of fiduciary duty on behalf of Periwinkle. Counterclaim 6 contends that Charles Phoenix's signature on the Legal Outsource loan guaranty is a forgery, and Counterclaim 7 claims constructive fraud on behalf of Charles Phoenix. Finally, Counterclaim 11 raises a claim for violation of the Equal Credit Opportunity Act on behalf of Periwinkle Partners and Lisa Phoenix.¹

On July 27, 2016, the Hon. John E. Steele bifurcated the forgery counterclaim (Counterclaim Count 6) from the remaining claims at issue and determined that a jury trial is available only as to the forgery counterclaim. (Docket No. 278.)

¹ Counterclaims 2, 8, 9, 10, and 12 were dismissed by prior Orders. (Docket Nos. 99, 278.)

DISCUSSION

Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Burton v. City of Belle Glade, 178 F.3d 1175, 1187 (11th Cir. 1999).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. O’Ferrell v. United States, 253 F.3d 1257, 1265 (11th Cir. 2001). When opposing a motion for summary judgment, the nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials and must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Defendants appear to be confused about the proper standard of review for summary judgment motions. Defendants insist repeatedly that Regions cannot rely on any fact other than what is pled in the Complaint. (E.g., Defs.’ Opp’n Mem.) (Docket No. 350) at 28 (“The Court should disregard ‘supposedly new factual support and look only to the factual allegations in the complaint’ subject to the summary judgment motion.” (quoting Samuels v. Wilder, 871 F.2d 1346 (7th Cir. 1989)).) But the case on which Defendants

rely involved allegations of fraud, which must be pled with particularity under Rule 9(b). And indeed, in Samuels, the new factual allegations were unrelated to the fraud claim as pled, leading the court to describe the plaintiff's conduct as an "attempted bypass of Rule 9(b)." Samuels, 871 F.2d at 1349-50. The claims here, by contrast, are breach-of-contract claims that can be pled generally. The failure to include a fact in the Complaint does not preclude summary judgment.

A. Breach of Note/Guaranties

Under Florida law, a claim for breach of a note or breach of a loan guaranty has the same elements as a claim for breach of contract. Fifth Third Bank v. Alaedin & Majdi Invs., Inc., No. 8:11-cv-2206, 2013 WL 623895, at *3 (M.D. Fla. Feb. 20, 2013). To establish that it is entitled to summary judgment on its breach-of-contract claims, Regions must show that there is no genuine issue of material fact as to (1) the existence of a valid contract; (2) a material breach of that contract; and (3) damages. Beck v. Lazard Freres & Co., LLC, 175 F.3d 913, 914 (11th Cir. 1999).

With the exception of their forgery claim, discussed below, Defendants do not dispute that they were in default under the relevant notes and guaranties. Rather, Defendants claim that Regions had an ulterior motive in pursuing default under the various notes and guaranties. But Regions's motives are irrelevant to establishing the elements of its claims. At most, the motive goes only to the relief to which Regions is entitled. Summary judgment is appropriate on the breach claims (Counts I-IV.)

B. Foreclosure

Count V seeks to foreclose on the Periwinkle property. But as Defendants note, foreclosure is an equitable remedy and equity requires clean hands. Moreover, the Periwinkle default was a technical default—there is no allegation that Defendants failed to make their payments under that loan—and it is an open question whether foreclosure will lie for a technical loan default under Florida law. “[E]quity requires that a defendant in foreclosure be excused where, as here, the defendant is technically in default . . . , the default is cured by the defendant . . . , and the default has not resulted in an impairment of the security.” Nazzaro v. Moksell, 483 So. 2d 884, 884 (Fla. Dist. Ct. App. 1986); see also Pezzimenti v. Cirou, 466 So. 2d 274, 276 (Fla. Dist. Ct. App. 1985) (“The general rule in Florida is that there must be impairment of the security before foreclosure is granted and foreclosure must not be unconscionable or inequitable.”).

Regions does not address the equitable nature of this remedy, merely arguing that because it is the undisputed holder of the Periwinkle note and mortgage, and the Periwinkle loan is in default, it is entitled to foreclose. Florida law requires that Regions establish that the default impaired the security, something Regions has not done. Summary judgment on the foreclosure claim is not warranted.

C. Counterclaims

Defendants’ only argument in response to Regions’s Motion for Summary Judgment on the Counterclaims is that Regions’s Answer to those Counterclaims was filed several days too late and should be stricken. But such a drastic remedy for a slightly late filing is simply not appropriate.

Defendants do not offer any other substantive argument regarding their Counterclaims, and Regions has established that those Counterclaims have no merit. Defendants have no evidence that Regions breached the loan agreements, and the breach-Counterclaim thus fails. Nor do Defendants have any evidence that Regions breached the covenant of good faith and fair dealing. Even if such evidence existed, under Florida law a breach of the covenant of good faith and fair dealing must be founded on a breach of an express term of the parties' contract. Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc., 785 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 2001). Without evidence of any breach of the loan agreements, Defendants have no claim for breach of the covenant of good faith and fair dealing.

Defendants fiduciary-duty claim fails because there was no fiduciary relationship here as a matter of law. See Jaffe v. Bank of Am., N.A., 667 F. Supp. 2d 1299, 1319 (S.D. Fla. 2009) (“[I]n an arms-length transaction [] there is no duty imposed on either party to act for the benefit or protection of the other party . . .”). And although Defendants do not even attempt to establish the elements of their claim for constructive fraud, such a claim fails in any event because there was no confidential or fiduciary relationship between Defendants and Regions. “Under Florida law, constructive fraud occurs ‘when a duty under a confidential or fiduciary relationship has been abused or where an unconscionable advantage has been taken.’” Am. Honda Motor Co. v. Motorcycle Info. Network, Inc., 390 F. Supp. 2d 1170, 1179 (M.D. Fla. 2005) (quoting Levy v. Levy, 862 So. 2d 48, 53 (Fla. Dist. Ct. App. 2003)).

Defendants' ECOA counterclaim as to Periwinkle Partners is frivolous. The ECOA prohibits a creditor from discriminating against an "applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . marital status." 15 U.S.C. § 1691. Periwinkle Partners cannot avail itself of the protections of this Act because it is a company, not an individual, and it cannot have a marital status. The claim fails as to Lisa Phoenix as well because, aside from the lack of any evidence to establish any alleged discrimination on the basis of marital status, she was not an "applicant" for the Periwinkle loan, she was a guarantor. Defendants contend that a guarantor can be an applicant under the Federal Reserve's interpretation of the ECOA, but Judge Steele specifically held the opposite in this case: "[T]his Court holds that to the extent that defendants are asserting their counterclaims for violation of the ECOA in their capacities as guarantors, those claims are due to be dismissed." (Order (Docket No. 278) at 10.) The remaining ECOA counterclaim is dismissed.

Finally, Defendants do not address the substance of their forgery counterclaim, and Regions has established that this claim is without merit. In his deposition, Charles Phoenix admitted that the signature he now challenges was his. (C. Phoenix Dep. (Docket No. 313) at 104-05.) Moreover, Defendants' handwriting expert did not opine that the relevant signature was forged. Rather, she opined that a signature on a different document altogether was not legitimate. (Hoetzel Decl. (Docket No. 137-2) ¶ 5 (stating that C. Phoenix's signature on "Agreement to Waive Garnishment" is a forgery).) In opposing Regions's Motion for Summary Judgment, Defendants must come forward with evidence to establish that

there are questions of fact as to their forgery claim. They have utterly failed to do so. Summary judgment is therefore granted as to the forgery counterclaim.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED that:**

1. Plaintiff's Motion for Summary Judgment (Docket No. 307) is **GRANTED in part** and **DENIED in part**;
2. Plaintiff is entitled to judgment on Counts I, II, III, and IV of its Complaint (Docket No. 1); and
3. Counterclaim Counts 1, 3, 4, 5, 6, 7, and 11 are **DISMISSED with prejudice**.

Dated: February 6, 2017

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

Civ. No. 2:14-476-FtM-PAM-MRM

REGIONS BANK, PLAINTIFF

v.

LEGAL OUTSOURCE, PA, PERIWINKLE PARTNERS, LLC,
CHARLES PAUL-THOMAS PHOENIX, LISA M. PHOENIX,
DEFENDANTS

Filed: July 27, 2016

OPINION AND ORDER

This matter comes before the Court on review of plaintiff/counter-defendant Region Bank's Motion to Dismiss Second Amended Counterclaim, Motion to Strike Demand for Trial by Jury, and Incorporated Memorandum of Law (Doc. #141) filed on February 23, 2016. Defendants/counter-plaintiffs filed a Response (Doc. #218) on April 21, 2016. Also before the Court is plaintiff/counter-defendant Regions Bank's Motion to Bifurcate for Purposes of Trial Count VI of Counterclaim, the Forgery Count (Doc. #84) filed November 30, 2015, to which defendants/counter-plaintiffs filed a Response (Docs. ## 113, 114) on December 18, 2015.

I.

Plaintiff Regions Bank (“plaintiff” or “Regions Bank”) initiated this foreclosure action on August 20, 2014, by filing a Verified Complaint against Legal Outsource PA (“Legal Outsource”), Periwinkle Partners LLC (“Periwinkle”), Charles Paul-Thomas Phoenix (“C. Phoenix”), and Lisa M. Phoenix (“L. Phoenix”) (collectively, “defendants”). (Doc. #1.) On October 6, 2014, each defendant filed a motion to dismiss and motion to strike the Verified Complaint. (Docs. ##24-28.) The Court denied the motions on December 11, 2014 (Doc. #38), and defendants subsequently filed an Answer and Affirmative Defenses to Verified Complaint, Counterclaims, and Demand for Trial by Jury, (Doc. #41). On February 6, 2015, plaintiff moved to dismiss the counterclaims and to strike defendants’ demand for jury trial. (Doc. #45.) The Court granted in part and denied in part the motion (Doc. #68), and defendants filed an Amended Counterclaim on July 27, 2015, (Doc. #70). On August 20, 2015, plaintiff filed a Motion to Dismiss Amended Counterclaim, Motion to Strike Demand for Jury Trial, and Incorporated Memorandum of Law. (Doc. #72.) On December 3, 2015, the Court granted in part and denied in part plaintiff’s Motion to Dismiss Amended Counterclaim. (Doc. #99.) Defendant moved for leave to file a Second Amended Counterclaim, which was granted, and defendant filed their First Amended Answer and Affirmative Defenses and Second Amended Counterclaim (Doc. #137) on February 9, 2016.

Periwinkle asserts counterclaims against Regions Bank for breach of implied covenant of good faith and fair dealing (counterclaim I), breach of

contract (counterclaim III), constructive fraud (counterclaim IV), and breach of fiduciary duty (counterclaim V).¹ (Doc. #137, pp. 41-46, 53-53.) Charles Phoenix asserts counterclaims for declaratory judgment (counterclaim VI) and constructive fraud (counterclaim VII).² (Id. at 46-47.) All defendants assert counterclaims for violation of the Equal Credit Opportunity Act (counterclaims IX, X, XI, XII). (Id. at 47-59.) Plaintiff now moves to dismiss counterclaims IX, X, XI, and XII for violations of the Equal Credit Opportunity Act and to strike defendants' demands for jury trial as to counterclaims VI, IX, X, XI, and XII. (Doc. #141.)

II. Motion to Dismiss

A. Standard of Review

“A motion to dismiss a counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6) is evaluated in the same manner as a motion to dismiss a complaint.” Great Am. Assurance Co. v. Sanchuk, LLC, No. 8:10-cv-2568-T-33AEP, 2012 WL 195526, at *2 (M.D. Fla. Jan. 23, 2012) (citation omitted). Under Federal Rule of Civil Procedure 8(a)(2), a Complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This obligation “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted). To survive dismissal, the factual allegations must be “plausible” and “must be enough to raise a right to relief above the speculative level.” Id. at 555.

¹ Counterclaim II was previously dismissed by this Court.

² Counterclaim VIII was previously dismissed by this Court.

See also Edwards v. Prime Inc., 602 F.3d 1276, 1291 (11th Cir. 2010). This requires “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted).

In deciding a Rule 12(b)(6) motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff, Erickson v. Pardus, 551 U.S. 89 (2007), but “[l]egal conclusions without adequate factual support are entitled to no assumption of truth,” Mamani v. Berzain, 654 F.3d 1148, 1153 (11th Cir. 2011) (citations omitted). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 678. “Factual allegations that are merely consistent with a defendant’s liability fall short of being facially plausible.” Chaparro v. Carnival Corp., 693 F.3d 1333, 1337 (11th Cir. 2012) (internal quotation marks and citations omitted). Thus, the Court engages in a two-step approach: “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Iqbal, 556 U.S. at 679.

B. Facts

The facts alleged in the Second Amended Counterclaim are as follows: In 2005, Regions Bank provided Legal Outsource with a \$450,000 revolving line of credit pursuant to the terms of several written loan documents (the “Legal Outsource Loan”). (Doc. #137, ¶ 8.) The obligation secured by the line of credit matured on February 1, 2014, and was not paid in full. (Id. ¶ 22.) Prior to the default, the course of dealing between Regions Bank and Legal Outsource was such

that Regions Bank historically renewed the loan upon maturity. (Id. ¶ 10.)

Plaintiff asserts that C. Phoenix executed and delivered a Commercial Guaranty to Regions Bank on May 30, 2013, absolutely and unconditionally guaranteeing repayment of the Legal Outsource Loan. (Id. ¶ 11.) Defendants allege that the signature on the Commercial Guaranty is a forgery. (Id. ¶¶ 11-16.)

In 2011, Regions Bank and Periwinkle executed a loan agreement related to real estate (the “Periwinkle Loan”) located at 2407 Periwinkle Way, Sanibel, Florida (the “Property”). (Id. ¶ 17.) Both L. Phoenix and C. Phoenix provided plaintiff with written guaranties of the Periwinkle Loan pursuant to a “Business Loan Agreement.” (Id.) Legal Outsource also executed a Commercial Guaranty absolutely and unconditionally guaranteeing repayment of the Periwinkle Loan.³ (See id. ¶ 22.) The

³ The “Periwinkle Loan Documents,” as identified in plaintiff’s Verified Complaint, consist of a Promissory Note in the original principal amount of \$1,680,000, executed and delivered by Periwinkle to plaintiff on August 26, 2011 (Doc. #1-6); a Business Loan Agreement executed and delivered by Periwinkle to plaintiff on August 26, 2011 (Doc. #1-7); a Promissory Note in the original principal amount of \$1,621,528, executed and delivered by Periwinkle to plaintiff on February 1, 2013 (Doc. #1-8); an Amendment to Promissory Note (Doc. #1-9); a Mortgage executed and delivered by Periwinkle to plaintiff on August 26, 2011 and granting Regions Bank a security interest and mortgage lien in certain collateral located at 2407 Periwinkle Way, Sanibel, Florida 33957 (Doc. #1-10); an Assignment of Rents, executed and delivered by Periwinkle to secure the obligation (Doc. #1-11); a Commercial Security Agreement executed and delivered by Periwinkle to plaintiff on August 26, 2011 (Doc. #1-12); a Commercial Guaranty executed and delivered by Legal Outsource to Regions Bank on August 26, 2011, absolutely and

Periwinkle Loan matures on November 26, 2018, and Periwinkle has never missed a scheduled payment. (Id. ¶¶ 17-18.)

After it obtained the Periwinkle Loan in August 2011, Periwinkle improved the Property by replacing the roofs, painting the exterior of the buildings, making minor repairs, significantly improving the lift station, and completely remodeling one of the buildings. (Id. ¶ 23.) As a result of the improvements, the Property's fair market value exceeds the balance due on the Periwinkle Loan. (Id. ¶ 25.)

In 2013, Regions Bank started causing defendants operational and financial difficulty by repeatedly demanding financial information that had already been provided. (Id. ¶ 29.) Regions Bank also maintained that Periwinkle violated the "debt service coverage ratio" covenants in October 2013, and asserted a default under the Periwinkle Loan Documents. (Id. ¶ 30.) After Periwinkle demonstrated that Regions Bank's internal calculations did not follow the formula expressed in the loan documents, Regions Bank discontinued its pursuit of this alleged default. (Id.)

On several occasions, Regions Bank asked Periwinkle to collateralize the Legal Outsource Loan

unconditionally guaranteeing repayment of the obligation incurred by Periwinkle (Doc. #1-13); a Commercial Guaranty executed and delivered by C. Phoenix to Regions Bank on August 26, 2011, absolutely and unconditionally guaranteeing repayment of the obligation incurred by Periwinkle (Doc. #1-14); and a Commercial Guaranty executed and delivered by L. Phoenix to Regions Bank on August 26, 2011, absolutely and unconditionally guaranteeing repayment of the obligation incurred by Periwinkle (Doc. #1-15).

with the Property and pressured Periwinkle to pay off the Periwinkle Loan prior to its November 26, 2018 maturity date. (Id. ¶ 32.) Regions Bank also asked Legal Outsource and Periwinkle to refinance their respective loans with another lender. (Id.)

The Legal Outsource Loan matured on February 1, 2014, and was not paid in full, constituting an event of default. (Id. ¶ 22.) Regions Bank notified Legal Outsource and C. Phoenix of the default and demanded payment in full via a demand letter dated April 4, 2014. (Doc. #137-8.) Legal Outsource and C. Phoenix, however, did not cure the default.

On April 24, 2014, Regions Bank, by way of letter, notified Periwinkle of the maturity of the Legal Outsource Loan and stated that neither Legal Outsource nor C. Phoenix had paid off the debt. (Doc. #137-9.) The letter further stated that Legal Outsource and C. Phoenix are guarantors of a loan between Regions Bank and Periwinkle and that their default on the Legal Outsource Loan is an event of default pursuant to the terms of the Periwinkle Loan. (Id.) Regions Bank indicated that it would not initiate litigation as result of the alleged default if it was provided with a term sheet from another lender indicating its willingness to refinance the debt on or before May 9, 2014. (Id.)

In a subsequent letter to Periwinkle, dated June 17, 2014, Regions Bank falsely asserted that “an additional event of default exists in that The AT Phoenix Company, which was represented to the Bank as the sole member of Periwinkle Partners LLC, has apparently transferred its interest to third parties.” (Doc. #137-11.) Another event of default was identified in a letter dated June 20, 2014, specifically

that Periwinkle failed to pay the 2013 ad valorem taxes on the Property. (Doc. #137-12.) Defendants allege that Regions Bank's position with regard to the 2013 ad valorem taxes on the Property differed from its position as to the 2011 and 2012 ad valorem taxes on the Property. (Doc. #137, ¶ 34.) Defendants have yet to cure the alleged defaults, prompting the initiation of this action.

C. Equal Credit Opportunity Act

Plaintiff moves to dismiss counterclaims nine through twelve of defendants' Second Amended Counterclaim for failure to state a claim under the Equal Credit Opportunity Act ("ECOA"). (Doc. #141, pp. 5-7.) Plaintiff asserts that counterclaims 9-12 "are all brought by guarantors of the Periwinkle Obligation, none of whom is an 'applicant' within the ambit of the ECOA." (*Id.* at 7.)

The 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 . . . marital status." 15 U.S.C. § 1691. The statute defines "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 account exceeding a previously established credit limit." 15 U.S.C. § 1691a(b).

Defendants rely on the Federal Reserve's interpretation of the statutory definition which defines an applicant as "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.” 12 C.F.R. § 202.2(e) (emphasis added).

As was the precise issue in Hawkins v. Community Bank of Raymore, 761 F.3d 937 (8th Cir. 2015), aff’d, 136 S. Ct. 1072 (2016) (Mem.), “[t]his case turns on, then, whether we should apply § 202.2(e)’s definition of applicant, which would permit [defendants] to pursue an ECOA claim as applicants solely because they executed guarantees to secure [the] loan[s].” Id. at 940. The Eighth Circuit applied the two-step framework laid out in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), and held that “[b]ecause the text of the ECOA is unambiguous regarding whether a guarantor constitutes an applicant, we will not defer to the Federal Reserve’s interpretation of an applicant” Hawkins, 761 F.3d at 942. Accordingly, the Eighth Circuit held that “a guarantor is not protected from marital-status discrimination by the ECOA.” Id. The Supreme Court affirmed the decision on appeal. Hawkins v. Cmty. Bank of Raymore, 136 S. Ct. 1072 (2016) (Mem.). As such, this Court holds that to the extent that defendants are asserting their counterclaims for violation of the ECOA in their capacities as guarantors, those claims are due to be dismissed.

Counterclaim IX is asserted by C. Phoenix in his capacity as a guarantor to the loan made by plaintiff to Periwinkle Partners. (Doc. #137, pp. 47-50.) Accordingly, the Court dismisses counterclaim IX with prejudice. Counterclaim X is asserted by Legal Outsource as a guarantor to the loan made by plaintiff to Periwinkle Partners. (Id. at 50-53.) Accordingly, the

Court dismisses counterclaim X with prejudice. Counterclaim XI is asserted by L. Phoenix and Periwinkle Partners. (Id. at 53-56.) The Second Amended Counterclaim alleges that L. Phoenix and Periwinkle Partners were applicants for the loan at issue. (Id. ¶ 112.) Pursuant to the Periwinkle loan documents,⁴ it appears that the Periwinkle loan was solely between Periwinkle Partners and plaintiff, and L. Phoenix was merely a guarantor. (Docs. ##1-6 – 1-15.) However, to the extent that L. Phoenix is an applicant under 15 U.S.C. § 1691a(b), as alleged, the Court denies plaintiff's motion to dismiss. At this stage of the proceedings, the Court finds that L. Phoenix and Periwinkle Partners have sufficiently alleged that they are applicants under the ECOA. Accordingly, plaintiff's motion to dismiss counterclaim XI is denied. Counterclaim XII is asserted by L. Phoenix as a guarantor to the loan made by plaintiff to Periwinkle Partners. (Doc. #137, pp. 56-59.) Accordingly, the Court dismisses counterclaim XII with prejudice.

D. Jury Trial Waiver

Defendants' Second Amended Counterclaim demands trial by jury for counterclaims VI, IX, X, XI, and XII. (Id. at 29.) Plaintiff moves to strike the

⁴ Although the loan documents are attached to the complaint and not to the counterclaim, the counterclaim seeks damages for violations of the ECOA arising out of the loan documents. Thus, the Court may properly consider the terms of the loan documents without converting the motion to dismiss into a motion for summary judgment when ruling on plaintiff's motion to dismiss. FSC Franchise Co. v. Express Corp. Apparel, LLC, No. 8:09-cv-454-T-23TGW, 2009 WL 3200656, at *1 n. 1 (M.D. Fla. Oct. 2, 2009) (citing Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000)).

demands for jury trial on the basis that counterclaimants have knowingly, voluntarily, and intelligently waived any right to trial by jury. (Doc. #141, pp. 7-11.) In response, defendants assert that a waiver cannot be based on guarantees that were obtained in violation of the ECOA and that the Court has declined to strike defendants' jury demand in counterclaim VI on two previous occasions. (Doc. #218, p. 11.)

“A party may validly waive its Seventh Amendment right to a jury trial so long as the waiver is knowing and voluntary.” Bakrac, Inc. v. Villager Franchise Sys., Inc., 164 F. App'x 820, 823 (11th Cir. 2006). To determine whether a jury trial waiver is knowing and voluntary, courts consider, among other factors: (1) the conspicuousness of the provision of the contract; (2) the level of sophistication and experience of the parties entering into the contract; (3) the opportunity to negotiate terms of the contract; (4) the relative bargaining power of each party; and (5) whether the waiving party was represented by counsel. See Collins v. Countrywide Home Loans, Inc., 680 F. Supp. 2d 1287, 1294 (M.D. Fla. 2010); Allyn v. W. United Life Assurance Co., 347 F. Supp. 2d 1246, 1251 (M.D. Fla. 2004). No single factor is determinative; rather, the Court must determine “whether, in light of all the circumstances, the Court finds the waiver to be unconscionable, contrary to public policy, or simply unfair.” Allyn, 347 F. Supp. 2d at 1252.

As previously held (Doc. #68, p. 14; Doc. #99, pp. 15-16), the Court declines to strike defendants' demand for jury trial in counterclaim VI on account of the forgery allegations.

As to counterclaim XI, plaintiff argues that defendants have knowingly and voluntarily waived their right to a jury trial with respect to the claims arising out of the contracts at issue. (Doc. #141, pp. 7-10.) In response, defendants assert that they have not waived their right to a jury trial because the guarantees were obtained in violation of the ECOA. (Doc. #218, pp. 11-12.)

Assuming a right to a jury trial under the ECOA,⁵ courts have held that a party can validly waive its right to a jury trial under the ECOA. Boyd v. U.S. Bank Nat'l Ass'n, No. 06-2115-KGS, 2007 WL 2822518, at *17 (D. Kas. Sept. 26, 2007) (“[T]he court has no reason to believe that the general presumption that a right to a jury trial afforded by the Seventh Amendment can be waived if done so knowingly and voluntarily would be any different in an ECOA case.”). Accordingly, for the reasons articulated by the Court previously (Doc. #68, pp. 14-16), the Court finds that defendants knowingly and intelligently waived their right to a jury trial as to counterclaim XI.

⁵ The “ECOA does not provide the right to a jury trial,” Anato v. USDA Rural Dev., No. CV 12-103-GF-SHE, 2013 WL 3279534, at *5 (D. Mont. June 27, 2013), and courts have had non-jury trials on ECOA claims, see Mayes v. Chrysler Credit Corp., 37 F.3d 9, 10 (1st Cir. 1994) (“A non-jury trial was held in the district court. . .”).

III. Motion to Bifurcate

Plaintiff requests a separate trial on Count VI of the Counterclaim,⁶ the Forgery Count. (Doc. #84.) Plaintiff asserts that the witnesses likely to testify in connection with the Forgery Count are limited and specific to the Forgery Count — with the exception of C. Phoenix. (*Id.* at 5.) Further, plaintiff alleges that if it is successful on the other counts, and if the collateral exceeds the amount awarded, the Forgery Count may become moot. (*Id.* at 7.) Defendants argue against bifurcation by asserting that the witnesses identified by plaintiff are relevant to other issues in the case and will likely have to be re-called and many issues relevant to count II of plaintiff's Complaint overlap with the issues relevant to counterclaim VI — specifically relating to the authenticity of C. Phoenix's signature. (Doc. #113, pp. 3-8.)

Under Rule 42(b) of the Federal Rules of Civil Procedure, “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third party claims.” The standard under Rule 42(b) is not high and the district court has broad discretion when ruling on a motion to bifurcate. Harrington v. Cleburne Cty. Bd. of Educ., 251 F.3d 935, 938 (11th Cir. 2001). “The predominant consideration is a fair and impartial trial through a balance of benefits and prejudice.”

⁶ Plaintiff filed its Motion to Bifurcate before the Court ruled on plaintiff's Motion to Dismiss Amended Counterclaim, the filing of the Second Amended Counterclaim, and before the Motion to Dismiss Second Amended Counterclaim currently before the Court. The Court deems the arguments presented are applicable to the Second Amended Counterclaim and will rule accordingly.

Gilbert v. State Farm Mut. Auto. Ins. Co., 311 F.R.D. 685, 686 (M.D. Fla. 2015) (quoting Medtronic Xomed, Inc. v. Gyrus ENT LLC, 440 F. Supp. 2d 1333, 1334 (M.D. Fla. 2006)).

In addition to the more general factors set forth in Rule 42(b); i.e., (1) convenience; (2) prejudice; (3) expedition; and (4) economy; a court reviewing a motion for separate trials may properly consider (5) whether the issues sought to be tried separately are significantly different; (6) whether they are triable by jury or the court; (7) whether discovery has been directed to a single trial of all issues; (8) whether the evidence required for each issue is substantially different; (9) whether one party would gain some unfair advantage from separate trials; (10) whether a single trial of all issues would create the potential for jury bias or confusion; and (11) whether bifurcation would enhance or reduce the possibility of a pretrial settlement.

Kimberly-Clark Corp. v. James River Corp. of Va., 131 F.R.D. 607, 608 (N.D. Ga. 1989) (citation omitted).

Applying the relevant factors, the Court grants plaintiff's Motion to Bifurcate. Plaintiff's Complaint (Doc. #1) and defendants' Answer and Affirmative Defenses (Doc. #41, pp. 1-21) do not contain jury demands, and the parties' case management report provided the trial would be non-jury, (Doc. #33, p. 3). Defendants' demands for jury trial as to its counterclaims have been stricken as to all counts except for counterclaim VI — the Forgery Count. (Doc. #41, pp. 22-42; Doc. #68, pp. 13-16; Doc. #99, pp. 14-17.) While the Court agrees that some issues overlap between the forgery count and the other counts,

parties frequently have to re-call witnesses and present evidence on more than one occasion during the course of a trial. Here, defendants/counter-plaintiffs have waived their right to a jury trial in all but one count. Denying the Motion to Bifurcate would require a jury to sit through countless hours of irrelevant testimony and evidence that does not pertain to the single count that they are deciding. The Court finds the economies that would be achieved by denying the Motion to Bifurcate do not justify the waste of time, and potential confusion, to the jurors. Accordingly, the Court grants plaintiff's Motion to Bifurcate.

Accordingly, it is now

ORDERED:

1. Plaintiff Region Bank's Motion to Dismiss Second Amended Counterclaim, Motion to Strike Demand for Trial by Jury, and Incorporated Memorandum of Law (Doc. #141) is **GRANTED in part and DENIED in part**.

2. Counterclaims IX, X, and XII are dismissed with prejudice.

3. Plaintiff's Motion to Strike Demand for Trial by Jury is **DENIED** as to counterclaim VI and **GRANTED** as to counterclaim XI.

4. Plaintiff shall have **FOURTEEN (14) days** from the date of this Opinion and Order to file a responsive pleading to defendants' Second Amended Counterclaim.

5. Plaintiff's Motion to Bifurcate, for Purposes of Trial Count VI of Counterclaim, the Forgery Count (Doc. #84) is **GRANTED**.

102a

DONE AND ORDERED at Fort Myers, Florida,
this 27th day of July, 2016.

/s/ John E. Steele

JOHN E. STEELE

SENIOR UNITED STATES DISTRICT JUDGE

Copies: Counsel of record

APPENDIX D

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 social 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

* * * * *

(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. § 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

¹ So in original. Probably should be “subsection,”.

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.

* * * * *

5. 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.

* * * * *

6. 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 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) *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.

* * * * *