No. 19- 815

IN THE

Supreme Court of the United States

LISA M. PHOENIX, *Petitioner*,

v.

REGIONS BANK, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Equal Credit Opportunity Act (ECOA or "the Act") makes it unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction," on the basis of sex, marital status, and other designated characteristics. 15 U.S.C. § 1691(a)(1). ECOA, in turn, 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). By regulation, the Board of Governors of the Federal Reserve System—and, later, the Consumer Financial Protection Bureau (CFPB)—expanded the definition of "applicants" under ECOA to include guarantors. *See* 12 C.F.R. § 202.2(e).

The question presented is:

Whether a guarantor constitutes an "applicant" protected from discrimination by ECOA, such that Petitioner—as a guarantor of a loan to a business she owned—can sue for a purported ECOA violation that her husband and his business should not have been required to co-guarantee the loan.

RULE 29.6 STATEMENT

Respondent Regions Bank is a wholly owned subsidiary of Regions Financial Corporation. There is no publicly held corporation that owns ten (10%) percent or more of Regions's stock.

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INTRODUCTION

This Court should deny the petition. Petitioner Lisa Phoenix offers little support for why this case "presents a sound vehicle for resolving the question presented," Pet. at 21, other than this Court's previous certiorari grant in *Hawkins v. Community Bank of Raymore*, 574 U.S. at _; 135 S. Ct. 1492 (2015). In *Hawkins*, this Court divided 4–4 on the question whether spousal guarantors are "applicants" under the Equal Credit Opportunity Act (ECOA) such that they can bring suit for alleged marital-status discrimination. 577 U.S., at __; 136 S. Ct. 1072 (2016).

But this case is not *Hawkins*. And it is a particularly poor vehicle for resolving the underlying question of guarantor standing under ECOA.

First, and most critically, a decision from this Court will have no actual effect on this case. The district court granted summary judgment on an alternative ground—namely, that Petitioner had shown no evidence of discrimination—and Petitioner did not challenge that ruling (indeed, she abandoned any argument against it) in the court of appeals. That dispositive, unchallenged ground for dismissal means that answering the question presented in this case would be an academic exercise.

Second, this case is a poor vehicle because Petitioner's brief below was a maze of vague, abandoned, and never-before-raised arguments. Because of this lack of clarity, the majority and dissent below spent many pages addressing the question whether the statutory interpretation question was even properly presented. And the

confusion led to competing opinions from the court of appeals that address the ECOA question in the context of different claims. Moreover, on the claim that the petition raises here—namely, whether Petitioner can bring an ECOA claim related to the so-called "Periwinkle Loan"—the court of appeals unanimously agreed that Petitioner has no claim.

Third, this case presents an uncharacteristic fact pattern. Petitioner alleges only *indirect* harm, that Respondent violated ECOA by purportedly requiring her husband and his business to co-guarantee a loan to a business she owned and on which she also was a co-guarantor. Among the handful of cases that have considered guarantor standing under ECOA, Petitioner's fact pattern is unique—*none* has involved a claim brought by a guarantor with an actual interest in the underlying obligation, asserting a purported ECOA violation on behalf of a co-guarantor spouse.

Finally, although Petitioner trumpets a circuit split, the split is shallow and has only gotten more lopsided since *Hawkins*. The Eleventh Circuit's decision below joins the Seventh and Eighth Circuits; the Sixth Circuit is the lone outlier on the other side. What's more, the Eleventh Circuit's decision is correct—ECOA confers statutory standing only upon "applicants," which, by its plain meaning, unambiguously excludes a guarantor, who does not apply for any benefit.

The Court should deny the petition.

STATEMENT

A. Background

Congress enacted ECOA "to protect consumers from discrimination by financial institutions." *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 699 (3d Cir. 1995). Accordingly, 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)-(a)(1) (emphasis added). An "applicant," in turn, is defined 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) (emphasis added).

In enacting ECOA, Congress initially granted to the Federal Reserve Board (the Board) the authority to promulgate regulations to enforce the Act. *See* 15 U.S.C. § 1691b (1974). (The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 later transferred this authority to the Consumer Financial Protection Bureau (CFPB).) Invoking that authority, the Board (and later, the CFPB) promulgated 12 C.F.R. § 202.2(e), commonly known as Regulation B. Similar to ECOA, Regulation B defines an "applicant" as "any person who requests or who has received an extension of credit from a creditor." *Id.* But Regulation B expands ECOA's statutory definition in a key respect—it defines "applicant" to "mean[ ] any person who is or may become contractually liable regarding an extension of credit," "includ[ing] guarantors, sureties, endorsers, and similar parties." *Id.*

B. Facts and Procedural History

1. In 2005, Legal Outsource, PA, a now-defunct law firm owned by Petitioner's then-husband, Charles Phoenix, applied for and obtained a revolving line of credit from Respondent Regions Bank (the "Legal Outsource Loan"). Six years later, Periwinkle Partners, LLC applied for and received a loan to purchase a shopping center on Sanibel Island, Florida (the "Periwinkle Loan"). Legal Outsource would be the primary tenant of the property subject to the Periwinkle Loan. Petitioner was at the time the sole indirect owner of Periwinkle, through a Delaware corporation. Charles Phoenix executed the relevant loan documents as the manager of Periwinkle. Petitioner, Charles Phoenix, and Legal Outsource all personally guaranteed the Periwinkle Loan.

2. In August 2013, Respondent concluded that the Legal Outsource Loan and the Periwinkle Loan were both in default based, in part, on the guarantors' failure to provide requested financial information and Periwinkle's failure to pay property taxes. Respondent initiated foreclosure on both loans. Periwinkle and the three guarantors (together, "the obligors") interposed 73 affirmative defenses and an eight-count counterclaim. After several amendments, the obligors' operative counterclaim ultimately included four causes of action under ECOA—Counts IX, X, XI, and XII. Each count pressed a different

theory on behalf of one or more different guarantor(s).[1]

3. The district court dismissed Counts IX, X, and XII on the pleadings, holding that each claim failed because guarantors are not "applicants" under ECOA and so necessarily lack standing to sue under the Act. Pet. App. at 95a-96a. At summary judgment, the district court dismissed Count XI, both for lack of ECOA standing and on the merits. *Id.* at 85a. In particular, the district court found a "lack of any evidence to establish any alleged discrimination on the basis of marital status." *Id.*

4. The court of appeals, in a divided opinion, affirmed.[2] *Id.* at 31a. Judge William H. Pryor Jr., writing for the majority, pointed out that the obligors "raise[d] a host of issues that s[ought] to obscure the nature of their defaults," but held that "all but one of them" lacked merit, with "some border[ing] on being frivolous." *Id.* at 6a. The majority thus declined to address many of the issues that the obligors purported to raise. *Id.*

Even with respect to the issue of guarantor standing under ECOA, Petitioner's briefing created a

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[1] Counterclaims IX, X, XI, and XII involved claims by Charles Phoenix, Legal Outsource, and Petitioner in their capacities as guarantors of the Periwinkle Loan.

[2] While their appeal was pending, the Phoenixes moved to recuse the district judge as "pervasively biased against them." The district court denied the motion as "utterly without merit," and the court of appeals recently affirmed. __ Fed. App'x __, 2020 WL 468417 (11th Cir. Jan. 29, 2020).

threshold question whether that issue was properly before the court at all. *Id.* at 24a. After six pages of discussion, the majority answered yes. *Id.* at 24a-30a. Although the majority described the obligors' briefing as "clumsy" and "unartful," it concluded that, read "liberally," Petitioner's briefing "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." *Id.* at 24a.

On the merits, the majority determined that "Congress has spoken clearly on the issue" and declined to defer to Regulation B's definition of an applicant as including a guarantor. *Id.* at 7a-8a. Applying "traditional tools of statutory construction," the majority held that "the ordinary meaning of the term 'applicant' is one who requests credit to benefit himself." *Id.* at 9a-10a. A guarantor, the court explained, does not meet that definition because 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." *Id.* at 11a. And although the court addressed the issue of guarantor standing, it also observed that "'the lack of any evidence to establish any alleged discrimination on the basis of marital status . . . was a sufficient alternative basis for the summary judgment.'" *Id.* at 25a.

5. Judge Rosenbaum concurred in part and dissented in part. *Id.* at 31a. The dissent first opined that "no claim" was "properly before [the court] on appeal." *Id.* In Judge Rosenbaum's view, Petitioner's briefing raised claims related only to Petitioner's

guaranty of the Legal Outsource Loan, to her then-husband's law firm. *Id.* at 33a. But that claim, the dissent explained, had never been raised in the district court. *Id.* As to the Periwinkle Loan claim, which the majority addressed, Petitioner "never once argue[d] it in this appeal," except "in the context of arguments that the Majority Opinion (correctly) decides are meritless, if not 'frivolous.'" *Id.*

After—and despite—finding that no claim was properly before the court, the dissent reasoned that guarantors (like Petitioner in the context of the Legal Outsource Loan) have standing to sue under ECOA. *Id.* at 76a-77a. Relying on "Congress's remedial purposes in enacting the ECOA" and on its view that "many definitions of 'applicant' do not exclude the possibility that an 'applicant' includes a guarantor," Judge Rosenbaum concluded that the term "applicant" is ambiguous. *Id.* at 44a-71a. And accordingly, the dissent concluded that the Board's interpretation of ECOA as applying to guarantors was reasonable and entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* at 71a-76a.

ARGUMENT

I. This Court's review will not affect the outcome of this case.

The Court should deny the petition because review of the question presented will not affect the outcome of this case.

The petition addresses only Count XI, in which Petitioner alleged that Mr. Phoenix (as her spouse)

and Legal Outsource (as her spouse's law firm) should not have been required to guarantee the Periwinkle Loan. In dismissing that ECOA claim, the district court held that Petitioner lacked ECOA standing because she was a guarantor, not an applicant. Pet. App. at 85a. But, importantly, the district court also held that Petitioner "lack[ed] . . . any evidence to establish any alleged discrimination on the basis of marital status." *Id.* Respondent did not deny credit on the Periwinkle Loan and performed no adverse action in administering the loan. Moreover, Petitioner presented no evidence that Respondent treated similarly-situated unmarried persons more favorably than it treated Petitioner.

Before the Eleventh Circuit, Petitioner did not challenge the district court's merits conclusion and failed to offer any evidence of alleged discrimination on the basis of marital status. Even when pressed at oral argument, Petitioner was unable to "present any evidence that a person who was similarly situated to [Petitioner was] treated more favorably." Tr. 21-22 (Jan. 29, 2019). And the court of appeals recognized that evidentiary finding as a "sufficient alternative basis for the summary judgment." Pet. App. at 25a. Petitioner does not challenge that conclusion now.

The district court's unchallenged evidentiary finding resolves the only ECOA claim at issue here, meaning this Court's review of the legal question presented would not affect the outcome of this case. That makes this case an inappropriate vehicle to resolve the question presented. After all, this Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or

ministerial," so it must "decide[ ]" questions "in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). Here, resolution of the question whether a guarantor has standing under ECOA "can await a day when the issue is posed less abstractly." *Id.*

II. This case is an inappropriate vehicle to resolve the question presented.

Certiorari also should be denied because this case presents at least two significant vehicle problems: (a) the panel below could not agree on the question presented because of Petitioner's briefing; and (b) this case presents unique facts that distinguish it from *Hawkins* and other ECOA decisions.

A. The opinions below address different claims.

Below, Petitioner failed to clearly brief the issue presented, which led the Eleventh Circuit to disagree even as to what claims were presented and whether they were preserved. Indeed, the majority spent pages justifying the decision to reach the question of guarantor standing. Pet. App. at 24a-30a. And the dissent's principal argument was that the question was not even properly presented. *Id.* at 31a-44a.

But putting aside that deficiency, on the key question presented here—whether Respondent "violated ECOA's prohibition of marital-status discrimination by requiring [Petitioner's] husband and his business, Legal Outsource, to guarantee the

Periwinkle Loan solely because petitioner and her husband were married to one another" (Pet. at 5-6)—the court below *unanimously agreed* that Petitioner could not challenge under ECOA the decision to require certain guarantors of the Periwinkle Loan.

1. Petitioner has shifted arguments throughout this case. In the district court, Petitioner principally pressed the argument that is the subject of her petition—that Respondent violated ECOA by requiring that Petitioner's husband and his law firm guarantee the Periwinkle Loan. Pet. App. at 85a, 96a. But at the Eleventh Circuit, Petitioner abandoned that argument; according to Judge Rosenbaum, who wrote separately to concur in part and dissent in part, she "never once argue[d] it" there. Pet. App. at 33a; *id.* at 38a ("So on appeal, no one ever argued in favor of Lisa and Periwinkle's position on the Periwinkle Loan Claim."); *id.* at 41a-42a ("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.").

Petitioner instead shifted course and pressed a different (and entirely new) claim—that Respondent violated ECOA by requiring Petitioner, as Charles Phoenix's spouse, to guarantee *the Legal Outsource Loan*, a completely different loan. That argument had procedural problems as well because she had never pleaded such a claim or otherwise pressed it in the district court. *Id.* at 32a-33a, 35a-36a; *id.* at 28a-29a.

And that issue, of course, is not the claim at issue in the petition for certiorari. Pet. at 5-6.

Faced with those procedurally problematic shifting positions—and with briefing that the court of appeals "most charitably" "described as clumsy" and "no model of clarity," Pet. App. at 24a, 29a—the Eleventh Circuit issued essentially competing advisory opinions opining on entirely different claims. Although the majority, taking a "liberal[]" reading of the briefing, concluded that Petitioner had preserved "at least one of her counterclaims relating to the Periwinkle loan based on her status as a guarantor," *id.* at 24a, the dissent reasoned that "[n]othing" was "properly on appeal," *id.* at 33a, and faulted the majority's "insistence on 'resolving' a claim that no Appellant ha[d] presented," *id.* at 76a.

2. Judge Pryor's majority opinion was never even clear what claim it was addressing, precisely, other than a claim "relating to the Periwinkle loan." Pet. App. at 24a. The majority stated that "[t]his 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." *Id.* at 6a.

The majority opinion never identifies which of the issues was the "one" that had "merit," other than that it was addressing "Lisa Phoenix's counterclaims under" ECOA. *Id.* at 6a-7a. Indeed, the majority later opined that Petitioner "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." *Id.* at 24a (emphasis added); *see also id.* at 30a ("We conclude that Lisa Phoenix has preserved *at least one of* her counterclaims under [ECOA] and that the issue of guarantor standing is before us." (emphasis added)).

The only two claims that the majority suggests were viable—and that it may have addressed—were counterclaims XI and XII. *See id.* at 26a ("[W]ith 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."). So it is unclear whether the majority opinion addressed the argument that Petitioner makes before this Court now (counterclaim XI—*i.e.*, that Respondent violated ECOA by requiring Petitioner's husband to guarantee the Periwinkle Loan) or a claim that Petitioner has now waived (counterclaim XII—*i.e.*, that Petitioner should not have been required to guarantee the Periwinkle Loan). The majority held simply that "the district court correctly granted summary judgment against those counterclaims because a guarantor is not an 'applicant' for credit under the Act." *Id.* at 30a.

3. Whatever ECOA counterclaim the majority was resolving, the Eleventh Circuit *unanimously held* that such a claim must fail. In her opinion concurring in part and dissenting in part, Judge Rosenbaum found that any counterclaim by Petitioner regarding the Periwinkle Loan had been abandoned. Pet. App. at 31a-44a. But, critically, Judge Rosenbaum also concluded that Petitioner's counterclaims regarding

the Periwinkle Loan were "meritless, if not 'frivolous.'" *Id.* at 33a.

Instead, Judge Rosenbaum decided to address the question "whether guarantors are included within the meaning of 'applicants' under the ECOA" from an entirely different perspective—and one that the majority (and Judge Rosenbaum) concluded that Petitioner had never raised on appeal. Pet. App. at 44a-77a; *see also id.* at 28a-29a. Judge Rosenbaum answered the question whether Petitioner had statutory standing to challenge Respondent's purported requirement that Petitioner guarantee the Legal Outsource Loan as Charles Phoenix's wife. *Id.* at 42a-44a. But that is a claim that Petitioner has expressly abandoned for purposes of the pending petition.

* * *

Petitioner's shifting positions may explain why the Eleventh Circuit could not agree as to what claims Petitioner presented. And those disagreements make this case an inappropriate vehicle to resolve the important question whether a guarantor has statutory standing under ECOA. *See Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) ("[T]he record is not sufficiently clear and specific to permit decision of the important . . . questions involved in this case.").

In any event, what Petitioner properly raised—and at what point—is largely academic: on the claim now before the Court, both the majority and the dissent agreed that Petitioner's claim must fail. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (holding that federal courts have "no

authority 'to give opinions upon . . . abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [them]"). And if the circuit split does not resolve itself, *see infra*, the Court can consider the question of guarantor standing under ECOA in a case where the issue is cleanly and indisputably preserved.

B. The petition presents an uncharacteristic fact pattern on the question of ECOA guarantor standing.

Petitioner contends that the Eleventh Circuit's decision "squarely—and openly—deepens the circuit conflict that led this Court to grant certiorari in *Hawkins*," Pet. at 9, but that is not so. The claim at issue here is uncharacteristic of all other cases that have presented the guarantor-standing question.

Here, Petitioner alleges only a "secondary" harm—*i.e.*, that she was harmed because Respondent purportedly required her husband and his law firm to co-guarantee a loan to her company. But every other case that Petitioner cites in support of her petition has involved a more direct alleged harm—*i.e.*, that the guarantor was harmed because the financial institution required the guarantor *herself* to guarantee the loan of her spouse. And in none of the other cases did the guarantor have an interest in the company to whom the funds had been loaned. These uncharacteristic facts make this case a particularly ill-suited vehicle to consider the question presented.

1. For instance, in *Hawkins*, Community Bank of Raymore requested that Valerie Hawkins and

Janice Patterson execute guarantees to secure the loans of PHC Development, LLC, a limited liability company owned by each of their husbands. 761 F.3d 937, 939 (8th Cir. 2014). Neither Hawkins nor Patterson held any legal interest, or otherwise were involved, in the PHC business. *Id.* After PHC failed to make payments due under the loans, the bank declared the loans in default, accelerated them, and demanded payment from PHC and the guarantors. *Id.* Hawkins and Patterson sued, contending that they were required to execute the guarantees only because they were married to PHC's owners. *Id.*

2. In *Moran*, Moran Foods, Inc. was a franchisor of grocery stores as well as a supplier of many of the groceries the franchises would need. *Moran v. Mid-Atlantic Mkt. Dev. Co., LLC*, 476 F.3d 436, 437 (7th Cir. 2007). Mid-Atlantic Market Development Co., LLC was one such franchisee, owned by Roger Camp. *Id.* To secure groceries from Moran on credit, Camp and his wife both guaranteed Mid-Atlantic's debts to Moran. *Id.* When the Camps both refused to honor their guaranties, Moran filed suit, and Mrs. Camp claimed that Moran violated ECOA by requiring her to guarantee the debt of Mid-Atlantic, her husband's company and a business in which she was not involved. *Id.* at 441.

3. In *RL BB*, RL BB Acquisition, LLC ("RLBB") acquired a note originally issued by BB&T to Bridgemill Commons Development Group, LLC ("BCDG"). *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 383 (6th Cir. 2014). BCDG, owned by H. Bernard Dixon, was a failed residential development project in the Atlanta

area. *Id.* at 381. In obtaining the loan, Dixon and his wife executed personal guaranties. *Id.* at 382. After RLBB initiated litigation to enforce the note, Mrs. Dixon claimed that her guaranty violated ECOA because she was required to execute it only because of her marital status. *Id.* at 383.

* * *

Each of these other cases presents different facts from Petitioner's claim here. In those cases, the party asserting the ECOA claim was a guarantor-spouse who had no interest in the underlying business or obligation. And in each case, the guarantor-spouse argued that the lender violated ECOA to require a guarantee from her *personally*.

Here, by contrast, Petitioner, was the sole (indirect) owner of the entity that applied for and obtained the Periwinkle Loan. Pet. at 5 & n.2. Petitioner does not contend, nor could she, that her personal guaranty of the Periwinkle Loan is invalid.[3] Instead, Petitioner, as a co-guarantor of the Periwinkle Loan, contends that Respondent violated ECOA by "requiring" a guaranty from her husband (who also was Periwinkle's manager) and his law firm.[4] This claim—a co-guarantor raising a purported

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[3] It is not a violation of ECOA for a creditor to require the personal guarantee of the partners, directors, or officers of a business, even if the business or corporation is creditworthy. *See* 76 Fed. Reg. 794471, 79477 (Dec. 21, 2011) (comment 7(d)(6)-1, concerning guarantors of closely held corporations).

[4] Charles Phoenix and Legal Outsource have renounced any continuing claims and "Petitioner respectfully submits that they

ECOA violation on behalf of other co-guarantors—creates a threshold issue of whether Petitioner even is the proper party to bring this challenge.

But even if Petitioner's claim is that requiring a guaranty from her husband and his business harmed her because any credit default on their part caused (or could have caused) a technical default of the Periwinkle Loan—and, to be clear, she has not spelled out that argument—the point still stands: Her claim is uncharacteristic of the other ECOA claims that have presented the guarantor-standing question. And that uncharacteristic claim makes this a poor vehicle to resolve the question presented—considering how Congress intended ECOA to apply is especially abstract in this case given the case's unconventional posture.

Indeed, Petitioner's novel argument would upend ECOA jurisprudence. Every participant in a credit request—whether an applicant, co-signor, or guarantor—could well bring suit not only on their own behalf, but to lodge complaints against lenders pertaining to the guaranties of others. That was not Congress's intent and would derail ECOA's goal.

* * *

This case is not one in which a spouse unaffiliated with the applicant-business seeks relief under ECOA in relation to her own guaranty, *see Hawkins*, 761 F.3d at 937; *RL BB*, 754 F.3d at 380, or

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do not have any interest in the outcome of this petition." Pet. at II n.*.

a case in which the applicant-entity was denied credit for failure to provide a spousal guaranty and has thus sought relief under ECOA. The Court should not grant certiorari in this uncharacteristic case.

III. The circuit split is shallow.

Even setting aside that the question presented is an abstract one in the context of this case (see Part I *supra*), is not cleanly presented (see Part II.A *supra*), and involves a claim that is uncharacteristic of other cases that have presented the question (see Part II.B *supra*), Petitioner's characterization of the decision below as "deepen[ing] the circuit conflict that led this Court to grant certiorari in *Hawkins*" (Pet. at 9) is misleading.

In rejecting guarantor standing under ECOA, the Eleventh Circuit below joined the Seventh and Eighth Circuits. *See* Pet. App. at 7a-30a; *Hawkins*, 761 F.3d 937, 940-43 (8th Cir. 2014); *Moran*, 476 F.3d 436, 441 (7th Cir. 2007).[5] Only the Sixth Circuit has agreed with Petitioner's reading of ECOA. *See RL BB*, 754 F.3d 380, 386 (6th Cir. 2014). As the only court of appeals to have adopted Petitioner's view, the Sixth Circuit may yet correct course in light of these later decisions.

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[5] In *Alexander v. AmeriPro Funding, Inc.*, the Fifth Circuit referred to the disagreement on the question in dicta but did not otherwise substantively address the issue. 848 F.3d 698, 707 n.9 (5th Cir. 2017).

At all events, resolving this split is not urgent because the question arises only rarely.[6] Since the *Hawkins* decision in 2014 and this Court's grant of certiorari review in 2016, the question presented appears to have reached the federal appellate courts only one time—*in this case*. In light of the lopsided conflict, there is no pressing need to resolve the question presented at this time, particularly on this *sui generis* and convoluted record.

IV. The decision below is correct.

Certiorari review is also unwarranted because the decision below is correct.

1. The court of appeals held that ECOA's use of the term "applicant" is unambiguous and does not encompass a guarantor. Pet. App. at 7a-16a. Accordingly, the court of appeals held that a guarantor is not entitled to protection—and cannot

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[6] Petitioner contends that "several other federal and state courts have confronted the question presented in the few years since this Court's equally divided decision in *Hawkins*" (Pet. at 21 & n.10), but several of the cases to which Petitioner points did not turn on any holding regarding Regulation B. *See Mares v. Outsource Receivables Mgmt., Inc.*, No. 1:19-CV-0004, 2019 WL 2248106, at *3 (D. Utah May 24, 2019) (holding that the plaintiff never "signed a guaranty agreement, made an oral guaranty, or engaged in any conduct that would qualify him as a guarantor"); *Kaminsky v. Equity Bank*, No. 17-CV-573-TCK-FHM, 2018 WL 6011658 (N.D. Okla. Nov. 16, 2018) (granting motion to transfer venue); *Comerica Bank v. Pars Ice Cream Co.*, No. 338955, 2018 WL 6625171, at *10 (Mich. Ct. App. Dec. 18, 2018), appeal denied, 504 Mich. 902, 929 N.W.2d 350 (2019) (holding that guarantor "did not carry her burden of providing any evidence tending to support her ECOA claim").

file suit—under ECOA. There were several reasons for that holding.

First, the common meaning of "applicant"—in both common-usage English and in dictionaries—is someone who *applies* for (or requests) something "to benefit [one]self." *Id.* at 9a-10a. That use of the term also fits squarely within ECOA's legislative history. *See, e.g.*, Equal Credit Opportunity Act Amendments of 1976, S. Rep. No. 94-589, 94th Cong. 2d Sess. 3. *Second*, when ECOA was enacted, dictionaries defined "guaranty" as a promise "to answer for the payment of some debt if the person liable in the first instance is unable to pay." Pet. App. at 10a. In other words, it relates to "an *applicant's* request for credit" but "is not itself a *request* for credit, and certainly not a request for credit *for the guarantor*." *Id.* at 11a. *Third*, other 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.'" *Id.* at 13a (quoting *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring)). "[I]t 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'"; a "guarantor does not in ordinary usage become 'delinquent' or 'in default' on [that same] loan or other existing credit arrangement"; and ECOA "'distinguishes between the third-party requestor [for an extension of credit] and the 'applicant.'" Pet. App. at 13a-14a (quoting *Hawkins*, 761 F.3d at 944 (Colloton, J. concurring)).

In short, the court of appeals correctly began and ended its analysis with ECOA's plain language.

See Conn. Nat'l Bank. v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

2. Petitioner instead strains to find ambiguity where none exists. By focusing on "the role a guarantor plays in a credit transaction" (Pet. at 12–13), Petitioner ignores the context in which the term "applicant" is used in ECOA. By the Act's express terms, "applicant" is limited to someone who "applies to a creditor *directly*." 15 U.S.C. § 1691a(b) (emphasis added). Petitioner also ignores that ECOA's definition of "credit"—*i.e.*, "to defer payment of debt or to incur debts and defer its payment," *id.* § 1691a(d)—does not apply to guarantors.

Petitioner criticizes the court of appeals for using the dictionary definition of "apply" that means "to make an appeal or request . . . usually for something of benefit to oneself," Pet. at 14, even though both opinions below agreed on that point, *see* Pet. App. at 10a, 17a, 57a-58a. Petitioner contends that there are other applicable definitions and that courts should "defer to the regulators' reasonable choice among" them. Pet. at 15. But, as the court of appeals explained, the fact 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*." Pet. App. at 17a-18a (internal quotation marks omitted). Instead, "[t]he 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," and "there is nothing natural about

calling a guarantor an applicant for credit, and the whole text of the [ECOA] makes that usage even less plausible." *Id.* at 18a.

3. There is no reason to extend ECOA's reach, beyond what Congress intended. Doing so would lead to circular and illogical results in this case. ECOA prohibits denying (or offering on less favorable terms) credit to someone on account of gender or marital status. *See, e.g.*, *Capitol Indem. Corp. v. Aulakh*, 313 F.3d 200, 202 (4th Cir. 2002). Congress meant to protect would-be *borrowers*. *See, e.g.*, *Markham v. Colonial Mortg. Serv. Co.*, 605 F.2d 566, 569 (D.C. Cir. 1979) ("[O]ne, perhaps even the main, purpose of the [ECOA] was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit."). Here, instead of using ECOA as a shield to block discriminatory lending practices, Petitioner seeks to use it as a tactical sword. Congress never intended such a perversion of ECOA.

4. Even if ECOA's use of the word "applicant" were ambiguous, deference to the definition in Regulation B would be warranted only if *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), remains good law. If the Court is inclined to grant the petition, it also should address that question—*i.e.*, whether *Chevron* remains good law or should be overturned. This issue was not raised, briefed, or decided below in light of the procedural posture, but it is an important question in the context of this case. That serious doubts exist

about the continuing viability of *Chevron* renders the question presented even more academic.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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