No. 19-815

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

REPLY BRIEF FOR THE PETITIONER

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
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
mstancil@willkie.com

MATTHEW M. MADDEN
DONALD BURKE
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500

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In the decision below, a divided panel of the court of appeals invalidated Regulation B's definition of the term "applicant," which has long ensured that the applicants protected from discrimination by the Equal Credit Opportunity Act (ECOA) include guarantors. This Court's intervention is needed, just as it was in *Hawkins* v. *Community Bank of Raymore*, 136 S. Ct. 1072 (2016), where the Court granted certiorari to resolve the same question that is presented here before ultimately dividing 4-4. Indeed, the question presented is so manifestly worthy of this Court's review that respondent hardly contends otherwise. Respondents instead devotes the bulk of its brief in opposition to arguing that this case is not a suitable vehicle for resolving the question presented. See Br. in Opp. 7-18. But the court of appeals' judgment rests exclusively on the panel majority's conclusion that "a guarantor is not an 'applicant' for credit within the meaning of" ECOA. Pet. App. 7a; see also *id.* at 30a. Although respondent now contends (Br. in Opp. 8)

that the majority "recognized" a potential alternative ground for the *district court's* decision, that contention rests on a selective quotation of the majority's opinion, and respondent does not even urge that *the court of appeals'* judgment rests on any alternative ground of the sort that could impede review by this Court.

The validity of Regulation B's definition of "applicant" is squarely presented in this case. This Court should grant review to resolve that important question.

A. The Question Presented Warrants Review

The court of appeals' decision invalidating Regulation B's definition of "applicant" warrants review by this Court because it deepens a circuit conflict, is incorrect, and presents an important and recurring issue of federal law. Pet. 8-22. Respondent's contrary arguments lack merit.

1. Respondent acknowledges (Br. in Opp. 18) that the decision below conflicts with the Sixth Circuit's decision in *RL BB Acquisition, LLC* v. *Bridgemill Commons Development Group, LLC*, 754 F.3d 380 (2014). Respondent nevertheless contends that review is unwarranted because the circuit conflict is "shallow." Br. in Opp. 18. But the same could have been said, with added force, when this Court granted certiorari in *Hawkins*. See Pet. 8-9 (describing 1-1 circuit split, between the Sixth and Eighth Circuits, when this Court granted review in *Hawkins*). Respondent does not even attempt to explain how, if this Court's review was warranted then, it would not be even more necessary now that the circuit conflict has deepened.

Respondent errs in contending (Br. in Opp. 19) that the circuit conflict is too "lopsided" to warrant review. Respondent reaches that conclusion by counting the Seventh Circuit among those courts of appeals

that have refused to defer to Regulation B's definition of "applicant." *Id.* at 15, 18 (citing *Moran Foods, Inc.* v. *Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007)). But respondent fails to address, let alone rebut, our explanation that the Seventh Circuit's comments in *Moran* regarding Regulation B's definition were dicta. See Pet. 9 n.5. In any event, respondent does not offer any basis to conclude that a 3-1 circuit conflict would not warrant this Court's review.

Nor is there any basis for respondent's suggestion (Br. in Opp. 18) that the Sixth Circuit might someday reconsider its position on the question presented to align it with other circuits. The possibility of en banc review is always highly speculative, and respondent provides no reason to believe that the Sixth Circuit is likely to revisit the issue en banc. To the contrary, this Court's equally divided decision in *Hawkins* suggests that, if anything, this issue is a particularly *unlikely* candidate for en banc review, given that the merits of the Sixth Circuit's position were strong enough to attract the votes of four Justices of this Court.

2. Respondent briefly defends (Br. in Opp. 19-22) the panel majority's holding that ECOA's definition of "applicant" unambiguously excludes guarantors. But respondent's preview of its merits-stage arguments offers no basis to deny plenary review, especially in light of this Court's equally divided decision in *Hawkins*. That finely poised disposition confirms that the question presented here poses a substantial issue on the merits that should be resolved by this Court.

Respondent's merits arguments are also unpersuasive. ECOA defines an "applicant" as a person who "applies" for credit, 15 U.S.C. § 1961a(b), and to "apply" for something ordinarily means to make a request

for it, see Pet. 11-12. Like the panel majority, respondent errs in asserting (Br. in Opp. 20) that a guarantor does not request credit. As the petition explains (Pet. 12), it has long been understood that a guarantor impliedly requests the extension of credit to the primary borrower. See, *e.g.*, 38A C.J.S. *Guaranty* § 26 (2008). There is no requirement that, to qualify as an "applicant," one must not only request credit but must also request credit *for oneself*. Contra Br. in Opp. 20. That erroneous understanding rests on a single dictionary's idiosyncratic definition of "apply," see Pet. 14-15, and thus violates respondent's own admonition that a statutory term ordinarily should not be given an "unusual meaning," Br. in Opp. 21 (quoting Pet. App. 18a).

3. This Court's grant of review in *Hawkins* also refutes respondent's suggestion (Br. in Opp. 19) that the question presented lacks sufficient practical importance to warrant review. As the petition explains, moreover, the question presented arises frequently, and the court of appeals' invalidation of an important federal regulation independently warrants review. See Pet. 21-22 & n.10.*

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* Contrary to respondent's contention (Br. in Opp. 19 n.6), the examples collected in the petition (Pet. 21-22 n.10) show that courts have repeatedly confronted the question presented here in the few years since *Hawkins*. In *Kaminsky* v. *Equity Bank*, No. 17-CV-573-TCK-FHM, 2018 WL 6011658 (N.D. Okla. Nov. 16, 2018), the court's disposition of the motion to transfer venue turned on its conclusion that the transferee district court had deferred to Regulation B's definition of "applicant." See *id.* at *3 n.1. The court in *Comerica Bank* v. *Pars Ice Cream Co.*, No. 338955, 2018 WL 6625171 (Mich. Ct. App. Dec. 18, 2018), appeal denied, 929 N.W.2d 350 (Mich. 2019), expressly "follow[ed] the Sixth Circuit's" decision deferring to Regulation B's definition of "applicant," albeit before rejecting the plaintiff's claim on evidentiary grounds. *Id.* at *9 n.9. And in *Mares* v. *Outsource Receivables Management, Inc.*, No. 1:19-cv-0004, 2019 WL 2248106 (D.

4. Contrary to respondent's contention (Br. in Opp. 22-23), certiorari is warranted regardless of any doubts that may exist about the continuing viability of this Court's decision in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As respondent acknowledges, the question whether *Chevron* should be reconsidered "was not raised, briefed, or decided below." Br. in Opp. 22. This case therefore does not present any occasion to address that question. See *Timbs* v. *Indiana*, 139 S. Ct. 682, 690 (2019) (declining to address an argument that was "neither pressed nor passed upon below"). And respondent's implicit speculation that *Chevron* may one day be reconsidered *in some other case* does not counsel against a grant of certiorari to correct the court of appeals' misapplication of *Chevron* deference in this one.

B. This Case Is A Sound Vehicle

1. This case provides a sound vehicle for resolving the question presented. See Pet. 22. In the decision below, the panel majority held "that the district court correctly granted summary judgment against [petitioner's] counterclaims because a guarantor is not an 'applicant' for credit under" ECOA. Pet. App. 30a. The majority did not advance any other ground for its decision. Because the court of appeals' judgment rests exclusively on the majority's conclusion that a guarantor cannot qualify as an "applicant" protected by ECOA, the validity of Regulation B's definition is squarely presented for this Court's review.

Utah May 24, 2019), the court carefully parsed whether the plaintiff qualified as a guarantor, *id.* at *3, an inquiry that would have been irrelevant if, as respondent contends, a guarantor cannot pursue a claim under ECOA.

2. Respondent presses a series of vehicle arguments, but none establishes any impediment to this Court's review.

a. Respondent first contends (Br. in Opp. 7-9) that resolution of the question presented would not affect the outcome of this case because, in respondent's view, petitioner failed to challenge an alternative basis for the district court's decision in her briefing before the court of appeals. That argument is premised on the district court's statement that petitioner's ECOA claim failed "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." Pet. App. 85a. According to respondent, the district court's comment about the evidentiary record—in a single, prefatory clause to its ruling on the validity of Regulation B's definition—offers an alternative ground for that court's judgment.

Notably, however, respondent does not contend that the court of appeals rested *its* judgment on a conclusion that petitioner had not presented sufficient evidence of discrimination. Respondent had advanced that argument as an alternative ground for affirmance, see Resp. C.A. Br. 35-39, but the panel majority did not reach it because the majority concluded that, as a guarantor, petitioner could not pursue a claim under ECOA, see Pet. App. 7a, 30a. To state the obvious, this Court routinely grants review of cases in which the court of appeals has not reached one or more alternative arguments pressed by the respondent below. The Court's usual procedure in such cases is to resolve the question presented and, if the petitioner prevails, to remand for the court of appeals to

address any alternative arguments in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); see also, *e.g.*, *United States* v. *Stitt*, 139 S. Ct. 399, 407-408 (2018); *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 922 (2017). No different approach is warranted here.

In an effort to establish that the outcome of this case is a foregone conclusion regardless of this Court's resolution of the question presented, respondent suggests that the panel majority "recognized" the district court's comment about the evidentiary record as a "'sufficient alternative basis for the summary judgment.'" Br. in Opp. 8 (quoting Pet. App. 25a). But the very next clause of the majority's opinion—which respondent conspicuously fails to quote—observed that "the district court did not clearly designate it as such." Pet. App. 25a. And elsewhere in its opinion, the majority explained that, if petitioner had prevailed on her argument that a guarantor qualifies as an applicant under ECOA, she "would have convinced us that the primary and *arguably the only* 'stated ground for the judgment * * * is incorrect'" as to counterclaim 11, which alleged that respondent violated ECOA by requiring petitioner's husband and his business to guarantee a loan to petitioner's business. *Id.* at 26a (emphasis added) (quoting *Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014)). In other words, although the majority adverted to the *possibility* that there could be an alternative ground for the district court's decision, the majority's opinion suggests considerable skepticism on that point. In all events, the majority did not endorse any conclusion that petitioner had not presented sufficient evidence of discrimination. Respondent's confidence (Br. in

Opp. 7) that "review of the question presented will not affect the outcome of this case" is therefore misplaced.

b. There is no merit to respondent's suggestion (Br. in Opp. 9-14) that certiorari should be denied because of a supposed lack of clarity in the decision below or in petitioner's briefing before the court of appeals. Respondent asserts that it is "unclear" whether the panel majority addressed petitioner's counterclaim 11, which underlies the petition for certiorari in this case. *Id.* at 12. But in fact the majority's opinion is crystal clear. It held that petitioner "did *not* abandon her argument about counterclaims 11 and 12." Pet. App. 28a (emphasis added).

At bottom, respondent quarrels with the panel majority's decision to reach the question presented. Invoking Judge Rosenbaum's dissent, respondent contends that petitioner did not properly preserve a challenge to the district court's ruling that guarantors cannot qualify as applicants within the meaning of ECOA. Br. in Opp. 11, 13. But the panel majority carefully considered—and rejected—the dissent's suggestion that petitioner had forfeited the issue. See Pet. App. 24a-30a. And, in all events, that intramural debate between the panel majority and the dissent has no bearing on the scope of the issues that are properly presented for *this Court's* review, which extends to all issues that were "pressed *or* passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis added). Indeed, the panel majority's conclusion that guarantors cannot qualify as applicants under ECOA would be squarely presented for this Court's review even if, contrary to fact, the majority had raised the issue entirely sua sponte. See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8

(1991); Stephen M. Shapiro et al., *Supreme Court Practice* § 6.26(b), at 6-104 (11th ed. 2019).

c. Respondent urges (Br. in Opp. 14) that review is unwarranted because this case involves a supposedly "uncharacteristic" fact pattern, in the sense that petitioner suffered harm because respondent, in violation of ECOA, required that her husband and his business serve as co-guarantors of a loan to petitioner's business, rather than because of the requirement that petitioner herself guarantee the loan. Respondent is correct that, in the other court of appeals decisions that have considered whether a guarantor can qualify as an applicant under ECOA, the plaintiffs' claims were premised on the defendant creditor's insistence that the plaintiff serve as a guarantor. See *Hawkins* v. *Community Bank of Raymore*, 761 F.3d 937, 939 (8th Cir. 2014), aff'd by an equally divided Court, 136 S. Ct. 1072 (2016); *RL BB Acquisition*, 754 F.3d at 381-382. But respondent does not explain how that factual distinction could have any bearing on the proper resolution of the question presented. Nor could it, given that the question presented is a pure issue of statutory interpretation.

Respondent is also wrong to suggest (Br. in Opp. 17) that this case poses a distinct "threshold issue" as to whether, apart from her status as a guarantor, petitioner "is the proper party to bring" a challenge under ECOA. As an initial matter, respondent did not even raise that argument below. In the court of appeals, respondent argued that petitioner's ECOA claim was barred because of her status as a guarantor, but it never contended that petitioner's claim was barred because it was premised on respondent's insistence that petitioner's husband and his business

serve as co-guarantors. See Resp. C.A. Br. 39-42. Likewise, the panel majority rejected petitioner's ECOA claim on the categorical ground that a guarantor is not an applicant under ECOA. Pet. App. 7a. It did not rest its decision on any other aspect of petitioner's claim. Respondent's belated speculation about another "threshold issue" therefore cannot insulate the decision below from review. See *Timbs*, 139 S. Ct. at 690.

Respondent's speculation is meritless in any event. When respondent required petitioner's husband and his business to serve as co-guarantors of the loan to petitioner's business, that violation of ECOA harmed petitioner. Respondent appears to recognize that requiring the additional, interlocking guarantees harmed petitioner by increasing the risk of a cross-default that would trigger petitioner's obligations under her own guarantee. See Br. in Opp. 17. Indeed, that is precisely what came to pass when her husband's business failed to make a required payment under a separate loan with respondent, and respondent then declared the loan to petitioner's business to be in default. See Pet. 5; Pet. App. 3a-4a. Moreover, respondent's ECOA violation denied petitioner the opportunity to obtain credit for her business on non-discriminatory terms, and it led to precisely the sort of entanglement of spouses' credit histories that ECOA was enacted to prevent. See Pet. 18-19. Petitioner is therefore a proper party to pursue a claim under ECOA.

Finally, even assuming that respondent's additional argument was preserved and had some potential merit, this Court would not need to address it in the first instance to correct the court of appeals' error in invalidating Regulation B's definition of "applicant." Consistent with its ordinary practice, the Court could resolve the question presented and then remand

for consideration of any other issues as necessary. See *Cutter*, 544 U.S. at 718 n.7; see also pp. 6-7, *supra*.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition 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
WILLKIE FARR & GALLAGHER
LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
mstancil@willkie.com

MATTHEW M. MADDEN
DONALD BURKE
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER &
SAUBER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500

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