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IN THE SUPREME COURT OF THE UNITED STATES

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VALERIE J. HAWKINS AND :

JANICE A. PATTERSON, :

Petitioners : No. 14-520

v. :

COMMUNITY BANK OF RAYMORE. :

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Washington, D.C.

Monday, October 5, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

JOHN M. DUGGAN, ESQ., Overland Park, Kan.; on behalf of Petitioners.

BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of United States, as amicus curiae, supporting petitioners.

STEPHEN R. McALLISTER, ESQ., Lawrence, Kan.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 14-520, Hawkins v. the Community Bank of  
5 Raymore.

6 Mr. Duggan.

7 ORAL ARGUMENT OF MR. DUGGAN

8 ON BEHALF OF THE PETITIONERS

9 MR. DUGGAN: Mr. Chief Justice, and may it  
10 please the Court:

11 Persons who jointly and severely agree to  
12 repay the applied-for debts are applicants under a ECOA.  
13 And that is precisely what occurred here. My clients  
14 were required in violation of Regulation B in a ECOA as  
15 supposedly guarantors to become jointly and severely  
16 liable to repay the debts of their husbands' business,  
17 which clearly qualifies them as applicants both under  
18 the straightforward language of ECOA as well as the  
19 Regulation B that was adopted by the regulators.

20 In this particular instance, as in many  
21 credit transactions, the real applicants in this  
22 transaction are not a to-be formed limited liability  
23 company or corporation, but the persons that will stand  
24 as guarantors behind that company.

25 JUSTICE GINSBURG: Didn't the Federal

1 Reserve Board originally, I think, in 1977 take the  
2 opposite position and said explicitly that applicant  
3 excludes guarantors.

4 MR. DUGGAN: Your Honor -- Your Honor, with  
5 regard to that position that was taken by the FDIC in  
6 1977, they were responding to claims by the industry  
7 that they did not want applicants broadly defined to  
8 include guarantors for notice provisions. And in  
9 response to that, the regulation was crafted in a way  
10 that did, in fact, address that concern, but it was  
11 never intended to eliminate the potential claims for  
12 spousal guarantors. When the case law came down and  
13 said we're relying on the Regulation B of 1977,  
14 according to what the regulators adopted then in 1985  
15 they said, we were mistaken. We've been misinterpreted  
16 about what our intent was. We -- we now need to modify  
17 the regulation and make it clear that those persons who  
18 were discriminated against based on marital status have  
19 the right to bring the claim.

20 JUSTICE SCALIA: Do you have to give notice  
21 to guarantors now?

22 MR. DUGGAN: No, you do not, Your Honor.

23 JUSTICE SCALIA: Well, how can that be? I  
24 mean, they're either applicants or they're not  
25 applicants --

1 MR. DUGGAN: Well, I think --

2 JUSTICE SCALIA: If they're applicants, you  
3 have to give them notice --

4 MR. DUGGAN: I think the --

5 JUSTICE SCALIA: -- saying they're  
6 applicants for one purpose, they're not applicants for  
7 another?

8 MR. DUGGAN: Yeah, in this case --

9 JUSTICE SCALIA: The agency can make that  
10 up?

11 MR. DUGGAN: Well, I think the Court has  
12 already ruled in the Duke Energy case that regulators,  
13 in appropriate circumstances, can even take a defined  
14 term under the statute, in that case the term  
15 "modification," and cause it to mean different things in  
16 different subsections.

17 JUSTICE SCALIA: I never liked that case.

18 MR. DUGGAN: My apologies.

19 What -- what happened in this case, Your  
20 Honor, was very, very reasonable by the regulators.  
21 They came out in 1985 --

22 JUSTICE ALITO: Just out of curiosity, why  
23 -- well, everybody agrees that PHC Development is an  
24 applicant, right?

25 MR. DUGGAN: Agreed.

1 JUSTICE ALITO: Why didn't PHC Development  
2 sue and claim that requiring the guaranties was in  
3 violation of the law?

4 MR. DUGGAN: At that point in time, the case  
5 law that had developed so far, and the Regulation B made  
6 it clear that the spouses had standing to bring the  
7 claim, and the spouses were the ones that asserted the  
8 claim.

9 JUSTICE KAGAN: Why does it matter, if  
10 there's always somebody to bring a claim? In what set  
11 of cases does the answer to this question matter?

12 MR. DUGGAN: I think it's important for  
13 several reasons. First of all, spouses who are required  
14 to sign jointly and severally with their husbands'  
15 businesses and their husbands are going to undertake  
16 potential adverse credit consequences in the future.

17 Let me give you an example. Divorce or  
18 death of the primary operator of the business, if the  
19 wife has become jointly and severally liable to repay  
20 the husband's debt, she then is going to be strapped  
21 with his credit profile in a business that she had never  
22 had any operational authority, that she never was  
23 involved in, and she wasn't an investor on. She was  
24 simply required to sign, because she was the spouse of  
25 the husband. And what's important to understand in

1 these cases --

2 JUSTICE SCALIA: Wait, wait, wait. You say  
3 she was required to sign. She wasn't required to sign.  
4 Somebody put a gun to her head? She wanted the husband  
5 to get the loan, and this was the deal.

6 MR. DUGGAN: And I think that's exactly what  
7 the regulators --

8 JUSTICE SCALIA: Oh, but don't talk about it  
9 as she was required to sign. She was not required to  
10 sign.

11 MR. DUGGAN: There was a requirement placed  
12 upon --

13 JUSTICE SCALIA: If he -- if he was to get  
14 the loan, he had to get her to sign, but she was not  
15 required to sign.

16 MR. DUGGAN: I agree. She signed the  
17 guaranty by virtue of a condition being placed upon the  
18 extension of credit to her husband and the lend -- and  
19 the borrowing entity. And what's important to  
20 understand is that in these cases, these borrowing  
21 entities, and in this very case, which typifies these  
22 small business organizations, that, in fact, it's never  
23 really the "to be formed limited liability company"  
24 that's the borrower, it's always the guarantors.

25 We need to look no farther than Doc 79-7,

1 Page 1 to 3, which is the bank's actual approval of this  
2 credit application. In that document, which was a part  
3 of the trial court record, the bank, in responding to  
4 its own internal write-up on the operating history and  
5 the potential for the entity to pay back the debt, it  
6 said "nonapplicable." Financial projections of the  
7 borrowing entity? "Nonapplicable."

8 The precise reason to approve the loan, "I  
9 recommend approval of this loan request based on the  
10 financial strength of the guarantors and our collateral  
11 position." The only collateral that was ever taken in  
12 that transaction was the collateral of the guarantors.  
13 To suggest that guarantors are not the real applicants  
14 in these loan transactions is to be divorced from  
15 reality. They are the true applicants.

16 JUSTICE SCALIA: Let's -- let's -- let's  
17 assume that I -- I write a letter of recommendation for  
18 some -- some young woman who is applying to a law  
19 school, or to a college. I would really like her to be  
20 admitted, and I've written a letter of recommendation to  
21 sort of put my judgment, my reputation on the line on  
22 her behalf. Am I an applicant to the law school?

23 MR. DUGGAN: No.

24 JUSTICE SCALIA: Would anybody use the  
25 English language that way?

1 MR. DUGGAN: Well, I believe, in that  
2 context, that person is not agreeing to become jointly  
3 and severally liable to pay the tuition. They're not --

4 JUSTICE SCALIA: What difference does it  
5 make? Instead of putting my financial solvency on the  
6 line, I put my reputation on the line.

7 MR. DUGGAN: Well, I think it's very  
8 important, because the regulators made a reasonable  
9 interpretation under their broad grant of authority that  
10 when they're required, when a condition is placed upon  
11 the approval, that they have to come forward and be  
12 contractually obligated to repay to applied-for debt,  
13 they are an applicant.

14 JUSTICE SCALIA: They are not applying.  
15 It's their husband who is applying, and they don't have  
16 to -- or it's a company that's applying. They don't  
17 have to go in. It's up to them.

18 MR. DUGGAN: The guaranties in this case  
19 have specific requirements for independent performance  
20 by the guarantors, such as providing financial  
21 statements, repaying the debt, paying their debts on  
22 time, honoring all their obligations with the lender.  
23 If they breach one single obligation that's independent  
24 to their guaranty, they're obligated to repay the debt  
25 in full, and --

1 JUSTICE SCALIA: That doesn't show --

2 JUSTICE BREYER: What if I have a child, and  
3 I apply for that child to be admitted to the XYZ public  
4 school for which I will pay -- a private school, for  
5 which I will pay the tuition. Am I an applicant?

6 MR. DUGGAN: I don't think so.

7 JUSTICE BREYER: You don't think so?

8 MR. DUGGAN: I think in part you may be, but  
9 my contention --

10 JUSTICE BREYER: Wait, wait, wait. This was  
11 a favorable question. I thought it's obvious that when  
12 a parent applies --

13 JUSTICE SCALIA: Well, you shouldn't -- you  
14 shouldn't have asked that.

15 JUSTICE BREYER: I have a parent applies for  
16 --

17 JUSTICE SCALIA: You and I share that  
18 concern.

19 JUSTICE BREYER: What? Wait. A parent  
20 applies for a child, her child, to be admitted to a  
21 school which she will pay. The child is seven years old  
22 and has a hard time writing the application. Isn't it  
23 normal for us to refer to the parent as the applicant,  
24 even though the child doesn't.

25 MR. DUGGAN: Yes.

1 JUSTICE BREYER: And it is not normal for us  
2 to refer to the applicant for college as the parent,  
3 even though unfortunately the parent foots the bill?

4 JUSTICE SCALIA: Was this corporation a  
5 minor?

6 MR. DUGGAN: What?

7 JUSTICE SCALIA: The corporation that  
8 applied, was it a minor?

9 MR. DUGGAN: No, but the point --

10 JUSTICE SCALIA: Change the seven-year-old  
11 to a young man who is applying to law school, who is  
12 already shaving, for Pete's sake.

13 JUSTICE BREYER: But my point --

14 JUSTICE SCALIA: Is Justice Breyer the  
15 applicant?

16 MR. DUGGAN: He may.

17 JUSTICE BREYER: I think our point for both  
18 of us is that how we use the word "applicant" depends  
19 upon the context.

20 MR. DUGGAN: Very true.

21 JUSTICE BREYER: And, therefore, what is it  
22 about the context of the guarantor of a loan that makes  
23 it reasonable in that context to call that person an  
24 applicant?

25 MR. DUGGAN: Let me answer that question

1 directly.

2 JUSTICE SCALIA: Well, I don't agree with  
3 the hypothesis. Why do you accept the hypothesis? What  
4 it means depends upon the context? It means what it  
5 means. Now, whether the person is an applicant within  
6 the understood meaning of "applicant," that depends upon  
7 the context, but the meaning of the word doesn't change.

8 MR. DUGGAN: May I address the questions,  
9 Mr. Chief Justice?

10 CHIEF JUSTICE ROBERTS: That's all right  
11 with me.

12 MR. DUGGAN: Thank you so much.

13 The definition of the word "apply" is to  
14 appeal to a request. And in this particular case, I  
15 believe that anybody who signs a written contract that  
16 says, "I have independent obligations to perform under  
17 my guaranty that make me jointly and severally liable to  
18 repay the debt in full, and if I fail to perform, I  
19 agree to repay the applied-for debt in totality," I  
20 don't know how in the world that person is not somebody  
21 who is appealing to and requesting that credit be  
22 extended by putting their own financial wherewithal and  
23 capacity to repay the loan on the line, based on their  
24 own independent requirement to perform.

25 JUSTICE KENNEDY: Under your view, let me

1 understand the theory of the case, let's say that you  
2 prevail, that a guarantor is an applicant. And that  
3 there is a violation of the duty to the guarantor and  
4 that there are five guarantors, can each of the five  
5 guarantors bring a separate suit for punitive damages?  
6 And also -- this is also part of my question -- can the  
7 loan be declared unenforceable?

8 MR. DUGGAN: No, the loan cannot be declared  
9 unenforceable under the laws that exist today. The only  
10 thing that could be declared unenforceable would be the  
11 spousal guaranties which are deemed illegal under  
12 Regulation B. Not all of the guarantors can bring a  
13 claim. The husbands can only bring a claim to the  
14 extent they suffer damage as a result of their wives  
15 being required to be guarantors on the case.

16 Mr. Chief Justice, I see that my time is  
17 limited. I may like to reserve the remainder for  
18 rebuttal, if there are no further questions.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

20 MR. DUGGAN: Thank you so much.

21 ORAL ARGUMENT OF BRIAN H. FLETCHER

22 ON BEHALF OF THE RESPONDENT

23 MR. FLETCHER: Thank you, Mr. Chief Justice,  
24 and may it please the Court:

25 For 30 years, Regulation B has provided that

1 guarantors, co-signers, and other similar parties to  
2 credit transactions, qualify as applicants, are entitled  
3 to protection from discrimination under the Equal Credit  
4 Opportunity Act and the Additional Parties rule. That  
5 longstanding regulation is reasonable, and it reflects a  
6 reasonable interpretation of the Act's broad definition  
7 of the term "applicant."

8 CHIEF JUSTICE ROBERTS: Well, we've been  
9 talking about applicants -- is it -- is the person an  
10 applicant in the abstract? But one of the important  
11 things about context here is there are two terms,  
12 "applicant" and "guarantor." And that's the way it's  
13 always worked in the industry. Somebody in the industry  
14 would not call a guarantor an applicant. The person is  
15 a guarantor. So I just wonder how we can pluck  
16 "applicant" out. Obviously, in some sense, anybody who  
17 is supporting the loan, you know, you can describe,  
18 well, they are applying for it. But there's a separate  
19 term, "guarantor." And if you ask somebody, well, what  
20 is this person, is this person an applicant, they would  
21 say, no, it's a guarantor.

22 MR. FLETCHER: Well, Mr. Chief Justice, the  
23 term guarantor doesn't appear in the statute. And I  
24 don't think it's true that the term applicant and  
25 guarantor have fixed meanings in the industry and that

1 you could never construe a guarantor to be an applicant.  
2 I think, in fact, often, as we explain in our brief,  
3 guarantors and cosigners might fill out the same  
4 application and join together in the same application  
5 that they submit to the borrower in seeking the loan.  
6 And so I -- I don't think there is an industry  
7 understanding that you can't reasonably regard a  
8 guarantor or a cosigner or another secondary obligor who  
9 is playing that sort of --

10 CHIEF JUSTICE ROBERTS: Wait. Do you think  
11 there's an industry understanding that there are  
12 guarantors and there are applicants? I mean, if you  
13 were in the industry and you're looking at this, you  
14 wouldn't call the petitioner an applicant. You'd call  
15 her a guarantor.

16 MR. FLETCHER: I think you -- in  
17 some -- certainly, in some context, you might use the  
18 two terms differently.

19 JUSTICE SOTOMAYOR: Wouldn't you  
20 call -- wouldn't you use the word borrower instead of  
21 applicant?

22 MR. FLETCHER: I think certainly after the  
23 loan had been extended, you would -- you would use the  
24 term borrower. But I think if you look at the -- the  
25 context in which Congress used the term, it wrote a very

1 broad statute. It said, "It shall be unlawful for any  
2 creditor to discriminate against any applicant with  
3 respect to any aspect of a credit transaction." And  
4 then it defined an applicant to be any person who  
5 applies to a creditor directly for an extension,  
6 renewal, or continuation of credit.

7 JUSTICE ALITO: Would you disagree that in  
8 ordinary speech, an applicant is understood, as  
9 Judge Colloton said, to be someone who is asking for  
10 something for himself or herself? And if you don't  
11 agree with that, could you give me your best example of  
12 the situation in ordinary speech in which the term  
13 applicant is used to refer to someone who is not asking  
14 for something personally?

15 MR. FLETCHER: Justice Alito, I agree that  
16 very often, applicant refers to the person who is going  
17 to receive the thing that's being sought. I don't  
18 think, though -- and this is what the other side has to  
19 convince you of -- that it unambiguously excludes any  
20 other meaning. And in terms of my best examples in  
21 terms of ordinary speech, I think the one that  
22 Justice Breyer gave earlier was a good one.

23 JUSTICE ALITO: Well, let me come back to  
24 that. Suppose that this child is rejected for  
25 kindergarten, and then the parent is glum the next day

1 at work. And someone says, why are you down today?  
2 Would the -- would the parent say, well, I'm down today  
3 because I was just rejected for this fancy kindergarten?

4 MR. FLETCHER: I think you wouldn't say I  
5 was rejected, but you might --

6 JUSTICE ALITO: My application was rejected.

7 MR. FLETCHER: I think you very well might.  
8 I think if you filled out the application, and you made  
9 the request, and you were upset that it was denied, I  
10 think it would be perfectly sensible to say my  
11 application was denied.

12 JUSTICE KAGAN: Mr. Fletcher, in -- in some  
13 ways, the Agency itself has admitted that this is not  
14 the most natural reading of the term. When the Agency  
15 explained why it was articulating this rule, it said,  
16 well, the problem is that Section 706 of the Act confers  
17 standing to sue only upon an aggrieved applicant. And  
18 so we have to come in and kind of fix that.

19 And -- and so, too, the regulation itself  
20 talks about applicants and additional parties as though  
21 the two are different. And then the regulation, as I  
22 think Justice Scalia said, says, well, this -- this is  
23 our definition of applicant, but it's really only for  
24 this purpose, not throughout the statute. And all of  
25 those, it seems to me, are quasi-admissions that this is

1 not the most natural way to read the word applicant.

2 MR. FLETCHER: Justice Kagan, I'm glad you  
3 brought that up because I very much disagree that that's  
4 how the Agency has viewed this. I think in particular,  
5 you referred to the way that the Agency described the  
6 change it was making in 1985 when it amended the  
7 regulation to expressly include guarantors for certain  
8 purposes. And you're right. They said, we're doing  
9 this because courts have ruled guarantors out of court.  
10 But the reason that it said that was not that it  
11 believed that guarantors were unambiguously excluded by  
12 the statute or that it was rewriting the statute. It  
13 did that because between 1977 and 1985, the Agency's own  
14 regulation had expressly said that applicants do not  
15 include guarantors, cosigners, and other similar  
16 parties. And so the courts that had said that  
17 guarantors didn't get to bring a suit were pointing to  
18 the Agency's regulation and says this statute only  
19 protects applicants. And the Agency is telling us  
20 expressly that you as a guarantor aren't an applicant.

21 And so the Agency came in in 1985, and it  
22 said, our own regulation, our previous version of our  
23 regulation, which excluded guarantors, is creating this  
24 problem, and we want to fix it by defining them to be  
25 applicants.

1 JUSTICE SCALIA: But you -- you don't -- you  
2 don't solve a problem by -- by fixing a definition. I  
3 mean, why was it a problem? It -- it was not a problem  
4 if applicant meant what the prior regulation said it  
5 meant. Why was that a problem?

6 MR. FLETCHER: Well, I think -- I think it  
7 was a problem because it left guarantors who had been  
8 improperly required to sign loan documents without a  
9 remedy.

10 JUSTICE SCALIA: Yeah. But that's what the  
11 law read. I mean, if that's a problem, it was a problem  
12 with the law.

13 MR. FLETCHER: Well, that was a problem with  
14 the Agency's own prior regulation, which expressly  
15 excluded guarantors. When the Agency -- and let me step  
16 back.

17 JUSTICE SOTOMAYOR: Can I just start? Why  
18 did you have to pass the first regulation at all? What  
19 caused you -- if it was as clear as Justice Scalia  
20 believes, why did you need the regulation at all saying  
21 it doesn't include?

22 MR. FLETCHER: So if I could just give you a  
23 little bit of the history of how the regulation  
24 developed, the Equal Credit Opportunity Act was passed  
25 in 1974. When the Agency, the Federal Reserve Board,

1 first passed regulations in 1975, it just incorporated  
2 the statutory definition of applicant in relevant part.  
3 It didn't speak to the guarantor question one way or  
4 another.

5 But in 1976, just a year later, it added a  
6 substantive provision that made clear that at that time  
7 in 1976, it regarded guarantors as applicants. It said  
8 that for purposes of a provision of the  
9 regulation -- and this is something we cite at Page 7 of  
10 our brief -- for purposes of a provision of the  
11 regulation, it required creditors to give notice of  
12 their credit decisions to applicants. If you have  
13 multiple applicants, creditor, you can just give notice  
14 to one of them. But then the regulation provided you  
15 may not give that notice to an applicant who is a  
16 secondary obligor, such as a surety or a guarantor.

17 So the Agency's first interpretation was  
18 actually that the plain language of the statute, which  
19 had been incorporated into the regulation, included  
20 guarantors.

21 JUSTICE ALITO: Isn't it correct that this  
22 issue matters only where there are adverse -- where  
23 the -- the borrower and the guarantor have adverse  
24 interests? And if that's correct, how often does that  
25 arise?

1           MR. FLETCHER:           So Justice Alito, I think  
2   it's particularly important where the borrower and the  
3   guarantor have adverse interests, for the -- for  
4   instance, if there's been a divorce. And so the  
5   spouses' interests are no longer aligned. Then I think  
6   it's very, very important. But I don't think it matters  
7   only in those cases. And this goes to -- to the  
8   question that Justice Kagan raised earlier, which is why  
9   does this matter.

10           And the reason that it matters is that a  
11   guarantor who is improperly required to provide a  
12   guaranty suffers a unique economic injury that is not  
13   suffered by the applicant. So in a common case, the  
14   lender says, I won't extend this loan without a  
15   signature from your spouse. And everyone agrees that  
16   that's a violation of Regulation B, and everyone agrees  
17   that that's not permitted.

18           And if, in that case, the spouse provides  
19   the signature, as often happens, then the primary  
20   applicant, the borrower, hasn't suffered any harm at  
21   all. They've gotten the loan they wanted. So they have  
22   suffered discrimination in some sense, and they would  
23   have a claim in some sense. But in many cases, they're  
24   not going to have economic damages to assert in court.

25           The guarantor, on the other hand, oftentimes

1 will have that obligation on her credit report  
2 immediately. It could adversely affect her credit  
3 scores immediately. And as we explain in our brief, if  
4 there is a default on the underlying loan, then that's  
5 going to be a black mark that's going to tarnish the  
6 guarantor or the co-signer's credit going forward even  
7 if she ultimately pays the debt.

8 JUSTICE KAGAN: One of the things that  
9 Judge Posner said against your interpretation is that  
10 this actually creates liability on a scale that Congress  
11 wouldn't have expected because if you are right, the  
12 guarantor can come in and -- and declare the entire loan  
13 invalid, and -- and the damages would be much higher  
14 than it is for the borrower himself. I mean,  
15 what's -- what's the answer to that?

16 MR. FLETCHER: So I think --

17 JUSTICE KAGAN: Is there an answer? It's  
18 just like, well, that's what it is.

19 MR. FLETCHER: Well, I think the -- the  
20 first answer is that that -- the availability of that  
21 remedy of allowing a guarantor to assert and actually  
22 invalidate the guaranty that's been illegally required,  
23 that won't be resolved one way or the other by the way  
24 you answered this question today, which is just are  
25 guarantors reasonably regarded as applicants as they've

1    been defined for 30 years?

2           But -- but I understand, though, why you  
3    would be interested because it is a related question of  
4    what remedies might guarantors have available. And we  
5    think the answer to Judge Posner's question in that case  
6    is that there's nothing at all unreasonable about  
7    requiring a lender that has improperly demanded a  
8    guaranty to not be able to enjoy the benefit of that  
9    guaranty. As we explained at the end of our brief,  
10   that's been the enforcing agency's longstanding policy  
11   when the FDIC or the Federal Reserve Board or other  
12   agencies conduct examinations of the books of banks and  
13   when they find violations of the additional party's rule  
14   like this.

15           The remedy that they apply is to require the  
16   bank to release the improper guaranty or in cases -- and  
17   I think this is another important point -- Regulation B  
18   doesn't prohibit spousal signatures under all  
19   circumstances. To the extent that what the bank wants  
20   to do is ensure that in the event of a default, it's  
21   going to be able to reach specific property that the  
22   primary applicant is relying on, it can require a  
23   signature from the spouse, not for personal liability,  
24   but just to allow it reach the property that is being  
25   relied upon to support the loan.

1           And so if --

2           JUSTICE BREYER:           So --

3           MR. FLETCHER:           I was just going to say so in  
4   that case, I think the proper remedy wouldn't be to void  
5   the loan altogether. It would be to give the lender  
6   what it had the right to demand, which is a more limited  
7   instrument.

8           I'm sorry, Justice Breyer.

9           JUSTICE BREYER:           Can -- can you explain  
10   quickly -- I know -- uncertain. I accept the point that  
11   I could be a rejected application for kindergarten on  
12   behalf of my -- I've said -- I've got that. But what is  
13   this actually about?

14           The law says you cannot discriminate against  
15   a borrower for example -- for example -- by saying that  
16   you, the borrower, has -- have to have a guarantor from  
17   someone you're married to.

18           MR. FLETCHER:           Right.

19           JUSTICE BREYER:           That's what the law says.

20           MR. FLETCHER:           It says you can't  
21   discriminate against any applicant with respect to any  
22   aspect of a credit transaction. Yes.

23           JUSTICE BREYER:           And this has been  
24   interpreted to include you cannot say to a married  
25   person you have to have the marriage -- the spouse sign.

1 MR. FLETCHER: That's correct.

2 JUSTICE BREYER: All right. So that's where  
3 we start. Now, if the applicant were just the applicant  
4 for the credit himself, what would be wrong with that?  
5 Then you'd say, well, the person who is hurt here among  
6 the people -- just as if, for example, when you run a  
7 train into a -- into a wall, there are a lot of people  
8 hurt. So if the person -- namely, the spouse -- really  
9 is hurt, why does -- why does she have to be an  
10 applicant? Why can't you just sue for harm as a  
11 result -- caused as a result of the forbidden  
12 discrimination?

13 MR. FLETCHER: So the statutory cause of  
14 action gives any applicant a right to sue.

15 JUSTICE BREYER: I know. But why wouldn't  
16 you sue, if you're -- if you're -- if you're directly  
17 injured as a result of a -- of an unlawful act? Which  
18 is what the regulation --

19 MR. FLETCHER: So -- and I think the  
20 Petitioner has suggested that there might be State law  
21 causes of action, but I think in terms of having the  
22 right --

23 JUSTICE BREYER: Not State, just right under  
24 this statute, you say I have suffered harm, I was about  
25 to take this ticket, and everyone admits I would have

1 taken the money, invested in the lottery, and would  
2 today be a millionaire. Hard to prove, but nonetheless,  
3 if proved, maybe she was hurt. So why can't she sue?

4 MR. FLETCHER: Because the statute gives the  
5 right to sue to applicant.

6 JUSTICE KENNEDY: But it doesn't say --  
7 okay. So you're --

8 JUSTICE BREYER: To an aggrieved -- to an  
9 aggrieved --

10 JUSTICE KENNEDY: To have gotten too far,  
11 and so your whole idea here is, say, she's an applicant,  
12 too.

13 MR. FLETCHER: Right.

14 JUSTICE BREYER: And then they can sue.

15 MR. FLETCHER: She's an applicant.

16 JUSTICE BREYER: Now -- now, it seems to me  
17 maybe you're pushing the edge of the word applicant as  
18 they didn't intend it in the statute. That's -- that is  
19 a problem.

20 JUSTICE KENNEDY: On that point --

21 JUSTICE BREYER: Can you give an example?

22 JUSTICE KENNEDY: -- are there places in  
23 the -- in this statute where guarantor and applicant,  
24 there is a distinction that has to be made? In other  
25 words, under your view, does applicant include guarantor

1 in every part of the statute?

2 MR. FLETCHER: So in our view, there is no  
3 place where reading applicant to include guarantor  
4 wouldn't work, would create a problem. What the agency  
5 has done when it amended its regulation to include  
6 guarantors is it asked for comments on whether there are  
7 specific provisions of the regulation that guarantors  
8 should be exempted from. And in response to those  
9 comments, it decided to exercise its broad rulemaking  
10 authority to exempt them and to not treat them as  
11 applicants for purposes of other provisions of the  
12 statute. So I don't think --

13 JUSTICE SCALIA: Where does it get that  
14 discretion? I mean, it says applicant in the statute.  
15 When it says applicant, the agency has discretion to  
16 say, oh, yeah, it says applicant, but sometimes we're  
17 going to ignore that.

18 MR. FLETCHER: Yes, Justice Scalia. It's  
19 under the grant of a rulemaking authority which is in  
20 Section 1691(b), subsection (A).

21 JUSTICE SCALIA: Which says what?

22 MR. FLETCHER: Which says that the bureau  
23 shall prescribe regulations to carry out the purposes  
24 of this -- this subchapter, and the regulations may  
25 contain, but are not limited to such classifications,

1 differentiation, or other provision and may provide for  
2 such adjustments and exceptions for any class of  
3 transaction.

4 JUSTICE BREYER: But have you got an  
5 example? Any example at all from a magazine having to  
6 do with finance, from anything you can find where, in  
7 fact, in the context of financial transactions, there  
8 are references to a surety, a guarantor, or a mortgage  
9 insurance, there is a reference to such a person with  
10 the word applicant?

11 MR. FLETCHER: So here's my best example,  
12 Justice Breyer. They're on Page 24 of their brief -- my  
13 brief. And they don't use the word applicant, but they  
14 talk about who is regarded as receiving an extension of  
15 credit. And this is our secondary argument,  
16 Justice Alito.

17 Even if you think that an applicant is only  
18 someone who seeks something for themselves, we think a  
19 guarantor is reasonably regarded as seeking an extension  
20 of credit for themselves. As we explain on Page 24 of  
21 our brief, for purposes of the Fair Credit Reporting  
22 Act, lenders and other banks rely every day on reading  
23 the Fair Credit Reporting Act to mean that the same  
24 definition of credit -- of credit, which refers to the  
25 extension of credit, includes a guaranty. The authority

1 in the Fair Credit Reporting Act that allows a lender  
2 who has a prospective guarantor before him to look at  
3 that guarantor's credit report is a provision of the  
4 Fair Credit Reporting Act that says you can pull the  
5 credit report of someone who is going to receive an  
6 extension of credit in connection with the transaction.

7 And we cite there a 2001 letter from all of  
8 the banking regulators that explains in detail why it is  
9 reasonable to regard guarantors and other secondary  
10 obligors as receiving an extension of credit, and why,  
11 in fact, that's essential to the effective  
12 administration of the Fair Credit Reporting Act. Thank  
13 you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 Mr. McAllister.

16 ORAL ARGUMENT OF STEPHEN R. McALLISTER  
17 ON BEHALF OF THE RESPONDENT

18 MR. McALLISTER: Mr. Chief Justice, and may  
19 it please the Court:

20 This is a Chevron step one case. The FRB  
21 gets to be the sorcerer's apprentice but not the  
22 sorcerer. It's trying to rewrite the statute here, not  
23 define ambiguous terms. The Government takes the view  
24 that the statute has to unambiguously exclude  
25 guarantors. That's the wrong starting point.

1           The question is simply:           Is the statute  
2           ambiguous with respect to whom it covers? Under the  
3           Government's view, every statutory definition would have  
4           to have two parts; the part that defines who is an  
5           applicant, and part two that says who is not an  
6           applicant.

7           JUSTICE KAGAN:           Mr. McAllister, I take it if  
8           there were two borrowers, you would include both of  
9           them, both would have a cause of action --

10          MR. McALLISTER:           Absolutely. They're -- if  
11          they're -- if they're joint applicants, the statute --

12          JUSTICE KAGAN:           They're joint applicants.

13          MR. McALLISTER:           Covers them.

14          JUSTICE KAGAN:           How about if they're  
15          co-signers? I take it that -- is -- a co-signer is  
16          somebody who is jointly and severally liable, but is  
17          not himself --

18          MR. McALLISTER:           Is not an applicant.

19          JUSTICE KAGAN:           -- receiving the money.

20          MR. McALLISTER:           Exactly. So --

21          JUSTICE KAGAN:           You would -- you would count  
22          that out?

23          MR. McALLISTER:           Count that out. They --  
24          they are not an applicant. So the statute refers to  
25          applicants, and certainly, the regs and the statute

1 contemplate the joint applicants who go in together.  
2 They want the credit together, and they have an  
3 obligation to make the repayments either, or both. But  
4 a co-signer is different.

5 JUSTICE KAGAN: And this is so even if the  
6 co-signer had to file the exact same kind of papers and  
7 do everything else that the borrower himself had to do?

8 MR. McALLISTER: Exactly. And -- and part  
9 of that is because of the statute's definition of  
10 credit, which no one has talked about. But the  
11 statute's definition of credit, that is defined  
12 explicitly just like applicant. And it's part of the  
13 applicant definition. And credit means a right to defer  
14 payment of debt. A co-signer and a guarantor never have  
15 a right to defer payment of debt. If they become  
16 responsible, they're responsible then. So what that is  
17 contemplating, in our view, is the borrower. It's the  
18 person who is making the regular payments. That's  
19 what's encompassed in the statutory definition.

20 I would refer the Court also to comparable  
21 Civil Rights statutes of this era. In particular, the  
22 Truth in Lending Act, the Fair Housing Act, the AIDS  
23 Discrimination and Employment Act. All of them use the  
24 word person to describe who can bring a claim. In the  
25 ECOA, Congress very deliberately chose something

1 narrower, and not only did it choose it, but it  
2 expressly defined it in the statute.

3 And we describe this as a gateway provision.  
4 We don't argue that the Fed doesn't have broad authority  
5 in many respects in implementing the ECOA. But what it  
6 does not have the authority to do is to rewrite the  
7 statutory definition that Congress very deliberately and  
8 precisely put in the statute.

9 JUSTICE KAGAN: So suppose -- suppose that I  
10 have a credit card, and now I get married, and I'd like  
11 a secondary credit card for my spouse, and I apply to  
12 the credit card company for a secondary credit card.  
13 Who's -- who's the applicant there?

14 MR. McALLISTER: Well, I think you are still  
15 the applicant there.

16 JUSTICE KAGAN: So even though I receive no  
17 direct benefit, the credit is actually given to my  
18 spouse now?

19 MR. McALLISTER: Well, if they have the  
20 ability to charge on the account same as you, then I  
21 guess they would, in effect, become a joint applicant at  
22 that point in time.

23 JUSTICE KAGAN: They would effectively  
24 become a joint applicant, even though I'm the only one  
25 who's filling out the -- the -- all the papers?

1           MR. McALLISTER:           But the statute  
2     contemplates that there can be situations in which a  
3     third-party requests credit on behalf of another, and  
4     that's another reason why we think guarantors are not  
5     included because it is contemplating, for example, the  
6     parent who goes in, says I want to arrange a loan for my  
7     son or daughter to buy their first car. The son or  
8     daughter is actually ultimately going to be the  
9     applicant. The parent may well be a co-signer. The  
10    parent may initiate the transaction, but the -- the  
11    recipient of the credit, the right to defer payment of  
12    the debt, is an applicant.

13           JUSTICE KAGAN:           I guess -- I guess -- you  
14    know -- and this is a -- a functional point for sure.  
15    But it doesn't seem to make a whole lot of sense that  
16    suppose a lender doesn't want to provide credit to a  
17    married woman because it has all these sex, gender  
18    stereotypes in the lender's head or -- and the lender  
19    couldn't require that the -- that the husband be listed  
20    as a -- a joint applicant but could require that the  
21    husband be listed as a co-signer, even though the effect  
22    of those two things are exactly the same, which is that  
23    it's a requirement that the spouse essentially become  
24    joint and severally liable for the loan.

25           MR. McALLISTER:           Well, I -- I don't think

1 there is a difference. I think the co-signer is in the  
2 same category as the guarantor. But here's -- here's my  
3 fundamental answer to your question, Justice Kagan, is  
4 the purpose of this statute is abundantly evident. The  
5 language we think, but if you look at the legislative  
6 history, the point was to get the credit in the hands of  
7 people who were being denied, in particular, women.  
8 That is the applicant. So the way the statute is  
9 intended to work, and works just fine with the  
10 definition of applicant we use, is to say when that  
11 person shows up, and the bank says, oh, no credit for  
12 you unless a spouse signs, the violation has occurred  
13 then. And the discrimination is against the person who  
14 wanted to borrow the money.

15 The government may wish that the  
16 discriminatory provisions were broader than that, but  
17 that's the way the statute works.

18 So the applicant has a claim, the borrower  
19 who is told you need more signatures -- otherwise you  
20 could imagine scenarios -- I think one of the amicus  
21 briefs spins out one where say the person comes in and  
22 the bank says, I need -- because you're of a certain  
23 religion or a certain race, I need 15 guarantors for  
24 your --

25 Well, all 15 guarantors can simply say no,

1 but under their view, all 15 guarantors actually have a  
2 claim under the ECOA. And that just makes no sense.  
3 That's far beyond what Congress --

4 JUSTICE SOTOMAYOR: That's not -- that's not  
5 quite accurate, because the only person who's given a  
6 right not to be discriminated against is the  
7 applicant -- an applicant on the basis of marital  
8 status.

9 MR. McALLISTER: No, Your Honor. No, that's  
10 not true. I mean, the statute covers -- covers marital  
11 status, sex, religion, race, age, even. So there are a  
12 number of prohibited bases. The original statute was  
13 sex and marital status, but then in 1976, it was  
14 expanded to cover other --

15 JUSTICE BREYER: Mr. McAllister, why -- why  
16 does it matter? A person sitting at the table says,  
17 please lend me \$10,000. Now, the -- the lender says, I  
18 want you to have someone from a forbidden category as a  
19 guarantor. So he's outside, he walks in and he says,  
20 I'll guaranty this loan. I want you to lend him \$10,000  
21 and I'll guaranty it.

22 Well, why hasn't that guarantor applied for  
23 a loan for another person?

24 MR. McALLISTER: It is -- it --

25 JUSTICE BREYER: What is it, because who are

1 the ones you said do fall within applicants? It's not  
2 just --

3 MR. McALLISTER: So it's --

4 JUSTICE BREYER: It's the person sitting at  
5 the table, then others come up, and they have to get --  
6 there's like sureties, they're like guarantors, there  
7 are a bunch of different things.

8 MR. McALLISTER: None of them --

9 JUSTICE BREYER: It seemed to me some of  
10 them you thought might.

11 MR. McALLISTER: None of them actually  
12 should be included. And if I suggested that -- ours is  
13 a straightforward definition adhering to the statute.  
14 You can certainly have joint applicants, joint  
15 borrowers, but that means they are receiving the benefit  
16 of the credit directly, credit is flowing to them --

17 JUSTICE BREYER: Why? I mean, the thing I  
18 don't get is why can't you apply? An applicant means a  
19 person who applies for something, so why can't you apply  
20 for the thing, and give some money to this other person?

21 MR. McALLISTER: Because, again, I come back  
22 to the statutory definition, Justice Breyer, which says  
23 you are applying for credit. And the statute defines  
24 credit. So it says credit is the right to defer payment  
25 of a debt.

1           And the person who has asked for --

2           JUSTICE BREYER:           Yes.  And you say, I am  
3   applying for just that -- and I am applying for just  
4   that.  My application, here it is, in writing, is that I  
5   want you to do just that for Smith, who's sitting at the  
6   table.

7           MR. McALLISTER:           And in our view, the  
8   statute means Smith is the applicant.

9           JUSTICE BREYER:           Because?

10          MR. McALLISTER:           Because, again, the -- the  
11   --

12          JUSTICE BREYER:           The person who filled -- I  
13   don't want you to repeat yourself.  You don't have to.

14          MR. McALLISTER:           Okay.

15          JUSTICE BREYER:           But I mean, you see where  
16   I'm having the problem, that Jones, who came in, he  
17   fills out the papers, he signs the signature, he puts in  
18   all the things and he says, please, please, please give  
19   that credit to Smith.

20          MR. McALLISTER:           Well, again, I don't think  
21   that --

22          JUSTICE BREYER:           Why hasn't -- he's applied.  
23   He's applied for the credit to go to Smith.  I mean, in  
24   English, hasn't he?  Why not?

25          MR. McALLISTER:           Well, I -- I think that's

1 in a sense, contrary, really, to the -- the most  
2 ordinary understandings of the word "applicant." Of  
3 course, we've got a statutory definition.

4 If we go back to the university admissions  
5 process --

6 JUSTICE SOTOMAYOR: I'm sorry. The -- the  
7 definition, the common law definition, the Chief has  
8 defined it that way, but the only dictionary that uses  
9 it in the way you want is Webster's Third. Every other  
10 dictionary -- and Webster's Third has been criticized by  
11 at least one of my colleagues, if not more, all right?

12 MR. McALLISTER: I'm aware of that.

13 JUSTICE SCALIA: It's a terrible dictionary.

14 (Laughter.)

15 MR. McALLISTER: I'm aware of that.

16 JUSTICE SOTOMAYOR: All the others don't use  
17 a direct benefit language. They all say you're just  
18 asking for an extension of credit. And they don't  
19 suggest it has to be for yourself, it could be -- you're  
20 asking for an extension of credit for anyone.

21 So I -- I mean, I'm -- I'm quarreling with  
22 the -- with your reliance on some common understanding  
23 of a word.

24 MR. McALLISTER: Well, I come back --

25 JUSTICE SOTOMAYOR: You've got co-signers,

1 you've got parents who -- who sign as co-signers rental  
2 agreements for their kids. They're not getting the  
3 benefit of the apartment. Nobody believes that they are  
4 using the apartment. They're doing it to bolster up the  
5 credit of their child.

6 So I don't know why "applicant" can't mean,  
7 in common parlance, that you're asking for credit to be  
8 extended to anyone, whether it's you or -- or another  
9 person.

10 MR. McALLISTER: Perhaps that's the key,  
11 Justice Sotomayor, is that you're talking common  
12 parlance. In my view, "common parlance" is the  
13 definition that -- that we assert and that the statute  
14 asserts. Judge --

15 JUSTICE GINSBURG: Then why did -- why did  
16 the Federal Reserve Board initially -- specifically  
17 exclude guarantors? If it was so clear that "applicant"  
18 excludes guarantors, why did the Federal Reserve Board  
19 do something so unnecessary to specifically exclude  
20 them?

21 MR. McALLISTER: Because I think they  
22 created confusion, Justice Ginsburg. So I agree with my  
23 colleague, Mr. Fletcher, that there was a reg for a  
24 short period of time that suggested in one particular  
25 setting, multiple applicants, who do you give notice to?

1           The Fed put in a -- some language that said,  
2 well, don't give to -- notice to applicants such as  
3 secondary obligors, such as guarantors.

4           The Fed then, a couple minutes later,  
5 proposed, maybe we should just make this a general rule  
6 that guarantors are included. They took in notice and  
7 comment, and a few months later they said, oh, we've  
8 really sort of stirred up the pot here. Let's just make  
9 clear that guarantors and secondary obligors are not  
10 included. And that's why we got the 1976 version.

11           JUSTICE KAGAN:           Mr. -- Mr. McAllister in  
12 Corbin on Contracts, when they talk about guaranties,  
13 they say, in most cases of guaranty contracts, the offer  
14 comes from the guarantor requesting the giving of credit  
15 to a principal debtor.

16           So Corbin on Contracts is -- clearly thinks  
17 that the guarantor is a requestor, is an applicant for  
18 credit, and just to a third-party, to the principal  
19 debtor.

20           But why -- why -- I mean, that's a pretty,  
21 you know, credit-specific definition of what it means to  
22 apply for credit. And including, pretty clearly,  
23 guarantors.

24           MR. McALLISTER:           Well, that's -- that --  
25 that is a -- what Corbin says, but again, I would come

1 back to guarantors do not sign the same document as the  
2 borrower, they are not liable in the same way, they have  
3 a separate contract with the lender, which the borrower  
4 is not even party to the guarantor's contract.

5 JUSTICE KAGAN: Well, do you think that it's  
6 really contingent on that, on exactly which contract you  
7 signed? I mean, these folks give you a lot of  
8 information, they sign their names to a lot of  
9 information, and -- I mean, unlike the usual guarantor  
10 case where the guarantor is only liable if there's a  
11 default, here the guarantor is jointly and severally  
12 liable, much like a co-signer is.

13 At any rate, co-signers are jointly and  
14 severally --

15 MR. McALLISTER: That's -- co-signers are  
16 jointly and severally liable.

17 JUSTICE KAGAN: And you want to put them in  
18 the same box, too, so it doesn't really matter --

19 MR. McALLISTER: Right. But that is a  
20 mischaracterization. These are guaranties --

21 JUSTICE KAGAN: Doesn't matter.

22 MR. McALLISTER: -- that are not joined and  
23 severed liability.

24 JUSTICE BREYER: I bet we could find 50 like  
25 that. This is the collegiate dictionary. Maybe that

1 makes it too simple-minded.

2 (Laughter.)

3 JUSTICE BREYER: But the -- the -- it says,  
4 an applicant -- this is very helpful -- an applicant is  
5 a person who applies for something, all right? We're  
6 not making too much progress.

7 But then when we go to "apply," the second  
8 definition down here, is to make an appeal or request.

9 Does the guarantor make an appeal or  
10 request? Yes. Especially in the form of written  
11 application. Even writes it, e.g., for a job. No,  
12 doesn't apply for a job, doesn't have to be a job.

13 Do you see, it's a general kind of thing,  
14 and we're at step one of Chevron, and we're only talking  
15 about what --

16 MR. McALLISTER: And we're talking --

17 JUSTICE BREYER: -- the meaning.

18 JUSTICE SCALIA: I assume that that  
19 definition would -- would cover my letter to somebody  
20 urging that person to hire somebody else.

21 MR. McALLISTER: I think that's  
22 exactly right. Yep.

23 JUSTICE SCALIA: I would be -- I would be an  
24 applicant under that definition, which is, of course,  
25 absurd.

1 MR. McALLISTER: And two -- two things about  
2 that absurdity, Justice Scalia, one absurdity is that --

3 JUSTICE SOTOMAYOR: He's not asking for  
4 money.

5 MR. McALLISTER: Pardon?

6 JUSTICE SOTOMAYOR: He's recommending  
7 someone, but this is about an extension of credit.

8 MR. McALLISTER: Right. But still you'd be  
9 asking for the same result that the applicant is  
10 seeking. So I mean, I take the question in that  
11 fashion.

12 But, two -- two things about that --

13 JUSTICE SOTOMAYOR: Well, it would be a  
14 different thing if the statute said, don't discriminate  
15 on the basis of someone being a Justice. That -- that's  
16 what you --

17 MR. McALLISTER: It should say that, but --

18 JUSTICE SOTOMAYOR: The analogy would work  
19 only if you did that, right?

20 MR. McALLISTER: But -- but what I was going  
21 to say is the Government concedes that the statute uses  
22 -- well, in fact, they didn't say this, but I believe  
23 the statute uses the word "applicant" something like 50  
24 times, and only for one purpose do they say this  
25 definition should apply. That runs counter to

1 presumptions this Court has long stated. The statute is  
2 used repeatedly --

3 JUSTICE KENNEDY: I thought that the  
4 Government answered that question differently. I -- I  
5 thought their position was that if they prevail, their  
6 definition of the word "applicant" to include guarantor  
7 apply -- A, applies across the board 50 times, and B,  
8 makes the Act perfectly workable.

9 Did -- did --

10 MR. McALLISTER: Neither one is -- I don't  
11 think either one is true --

12 JUSTICE KENNEDY: You may disagree --

13 MR. McALLISTER: -- Justice Kennedy.

14 JUSTICE KENNEDY: Maybe I misunderstood  
15 their answer.

16 MR. McALLISTER: Oh, I don't think they say  
17 it would apply across all 50 uses. They said we could  
18 change it -- and actually, they're suggesting they could  
19 have 49 other definitions of "applicant." Every time  
20 it's used somewhere else in the statute, they could  
21 define it differently for that purpose.

22 JUSTICE KENNEDY: And can you give me an  
23 example of where it would be really contrary to a  
24 sensible interpretation of the Act to use the term  
25 "guarantor" and --

1 MR. McALLISTER: For example.

2 JUSTICE KENNEDY: -- "applicant" as  
3 synonymous, other than for what we're talking about  
4 here?

5 MR. McALLISTER: Well, for example, giving  
6 notice of adverse action. I mean, the agency itself has  
7 said a guarantor cannot be subject to adverse action,  
8 and.

9 JUSTICE SOTOMAYOR: I frankly -- I frankly  
10 don't believe why that makes the statute unworkable. If  
11 I'm a guarantor of someone's debt, I want to know when  
12 they're in default because I'm going to call them up and  
13 start -- if it's my child, I'm going to start  
14 browbeating them meaning -- I don't know what the  
15 rationale for that was, whether I agree with it or not.  
16 But why does it make it unworkable?

17 MR. McALLISTER: Well, it would -- it is not  
18 just that, Justice Sotomayor. It's not just at some  
19 point down the road. Usually, this is focused on the  
20 application itself. So again, if you have the case of  
21 multiple guarantors, the bank turns down the borrower,  
22 then they're under obligation, if you take that view of  
23 the statute, to notify everyone who had any connection  
24 to the transaction. But the agency has long said that  
25 is not required. The agency's commenter -- if you look

1 at -- if you look at supplement one, the interpretations  
2 of the regs and other commentary by the agencies, except  
3 for this purpose, the agency always talks about  
4 guarantors as different than joint applicants,  
5 co-borrowers. No one in the industry would think of  
6 these two things as the same.

7 To come back to the Chief -- Mr. Chief  
8 Justice's point, a bank would not say a borrower is  
9 equivalent to a guarantor. Not even close. They're two  
10 very different things.

11 JUSTICE KAGAN: No. They certainly wouldn't  
12 say a borrower is equivalent to a guarantor. But the  
13 question is whether an applicant is equivalent to --

14 MR. McALLISTER: They would say the person  
15 who wants the credit, the applicant, is not the same as  
16 a guarantor.

17 JUSTICE SOTOMAYOR: So what -- what --

18 JUSTICE KAGAN: The entire idea of a  
19 guaranty contract, right, why is a guaranty agreement  
20 even enforceable? Is it there is consideration, and the  
21 consideration has to do with the fact that credit is  
22 going to a third-party, right? And so the guarantor is  
23 stepping in and saying I'm asking for something, and I'm  
24 getting something when I enter into this contract, and  
25 that's that credit will go not to me but to a

1 third-party.

2 So the question I think is, like, why should  
3 that be, you know -- just because it's to a third-party,  
4 the appeal, the request to the application is as to a  
5 third-party rather than to yourself, why that should  
6 make any difference if the question is just what does  
7 applicant mean? Applicant doesn't have to be for  
8 yourself.

9 MR. McALLISTER: Well, I -- I agree that's  
10 the consideration for the guaranty. But what that opens  
11 the door to, Your Honor, is there had been 60 or 70  
12 reported ECOA decisions since the change in 1985. More  
13 than half of those are within the last five years.  
14 After the 2008 crash, massive defaults, this is coming  
15 up more and more for banks as a defense.

16 And if I can just have one minute, I'll tell  
17 you where this leads for banks. So if the rule is a  
18 spousal guaranty can be voided -- and that's what the  
19 relief sought. They're not asking for damages. They  
20 want to invalidate, void, the guaranty. That was Judge  
21 Posner's point. So if that is the rule, what is a bank  
22 to do when a married person comes in and seeks credit?  
23 Well, one thing the bank may do is say only secured  
24 credit because I cannot rely on any guaranty. I can't  
25 even rely on a spousal guaranty if the spouse says I

1 want to give the guaranty because when this goes in a  
2 bad direction and it's time to collect, then years  
3 later, that spouse may do what these spouses have done  
4 and say I was required to do this, this was a violation  
5 of the statute. And at a minimum, the lender is then  
6 engaged, as this lender has been, in extensive  
7 litigation costs just to even try to resolve the  
8 situation. All of that leads to lenders are going to be  
9 less likely to want to -- to lend to married couples  
10 except if they are secure in their loans. And that may  
11 mean you have to put up assets, a guaranty no longer  
12 suffices, and it may mean you have to get more  
13 guarantors because they can't rely on the spouse. None  
14 of that furthers the purpose of the ECOA, which was to  
15 get the credit in the hands of the people who were at  
16 that time being discriminated against.

17 So the fundamental problem with reg B is it  
18 opens the door, and now that the lawyers have discovered  
19 this provision and are bringing it up regularly, it will  
20 have a dramatic impact on the credit industry.

21 JUSTICE SCALIA: On the -- on the question  
22 of the guarantor entering a contract just as the  
23 borrower enters a contract, the two contracts are quite  
24 different. The borrower enters a bilateral contract, I  
25 promise to pay back the money if you -- with interest if

1 you promise to lend me the money. The guarantor  
2 is -- is asking for a unilateral contract. The  
3 guarantor is just saying, I make no promises, but if you  
4 lend money to this person that I'm guarantying and that  
5 person defaults, I'll make good. That's -- that's a  
6 unilateral contract which doesn't bind the -- the lender  
7 at all. It's if the lender chooses to do that, I'll  
8 stand good for the -- for the default.

9 The two contracts are quite different. And  
10 in that respect, you can't call both -- both of them  
11 applicants just because they both -- they both have  
12 contracts. Of course they both have contracts.

13 MR. McALLISTER: I agree with that,  
14 Justice Scalia.

15 And unless the Court has further questions,  
16 I would ask that you affirm the decision of the Eighth  
17 Circuit.

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

19 Mr. Duggan, you have four minutes.

20 REBUTTAL ARGUMENT OF JOHN M. DUGGAN

21 ON BEHALF OF THE PETITIONERS

22 MR. DUGGAN: Thank you, Mr. Chief Justice,  
23 and may it please the Court:

24 I think the primary answer to talk about, to  
25 start with, is these guaranties are not simply

1 guaranties of the performance of the borrower. They are  
2 separate, independent performance required by the  
3 guarantor under the guaranty. The guarantor must pay  
4 its creditors on time. The guarantor must provide  
5 financial statements to the lender. The guarantor must  
6 fulfill all other obligations and any other agreement  
7 that the guarantor has with the lender. If the  
8 guarantor fails to perform any one of those single,  
9 independent requirements of performance under the  
10 guaranty, the guarantor agrees to repay the debt in  
11 full. There is separate performance under the guaranty.

12 JUSTICE SCALIA: Could you ask -- could you  
13 respond to counsel's last point? Why would a bank ever  
14 decide to give a loan with a spousal guaranty?

15 MR. DUGGAN: I'm not sure I --

16 JUSTICE SCALIA: Why would -- why would a  
17 bank do that?

18 MR. DUGGAN: There's several circumstances.  
19 Number one, husbands and wives can come under the  
20 regulation safe harbors as joint applicants  
21 contemporaneously and say we want joint credit. It's  
22 only a violation of the act if the lender, once an  
23 independent spouse comes forward and says I want a  
24 credit, says as a condition to me extending you the  
25 credit you want, you must bring your spouse along.

1           The second thing is I think this regulation  
2 has got to be the easiest regulation to comply with. A,  
3 B, C, one, two, three. There's safe harbors under the  
4 regulation. If a lender is relying upon jointly owned  
5 assets of a husband and wife, the regulation and the  
6 statute, 1691 D, create a specific safe harbor that says  
7 get a security interest in the asset and don't get a  
8 guaranty, or simply ask the spouse to waive her marital  
9 interest in the jointly owned property so that if in  
10 fact you have to execute on that jointly owned property  
11 to collect the debt, you're permitted to do that. Two  
12 very simple safe harbors to comply with. What they  
13 don't want you to do is to strap the spouse with the  
14 potential adverse credit in the future where she has to  
15 use her income or her earnings or her ability to get  
16 future credit to pay off either a divorced or deceased  
17 spouse. One of the rationales. Makes a ton of sense.

18           Back to the other points that were made, the  
19 application here, the dictionary definitions run the  
20 gamut, but they all have two specific statements.  
21 Appeal or request. And the statute here says they  
22 repeal -- applies for an extension renewal of credit.  
23 Doesn't say of credit to the borrower. Doesn't say of a  
24 loan to the borrower. It says of credit generically.

25           And back to Justice Breyer's comments, in

1 fact, why in the world that somebody who becomes  
2 contractually, jointly and severely liable to repay the  
3 debt in full and says, I have my independent obligations  
4 under my guaranty, and if I don't perform, you can  
5 collect the entire debt from me? How is that person in  
6 that context not saying to the lender, I am appealing to  
7 you and requesting an extension of credit? I'll go so  
8 far as to say I'll stand behind the loan, and I have in  
9 my independent obligations to perform under the  
10 guaranty. And if I don't perform, I'll pay. That, to  
11 me, can be nothing but an applicant.

12 Thank you so much for your time. I'm happy  
13 to answer any questions if there are any.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

15 MR. DUGGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: The case is  
17 submitted.

18 (Whereupon, at 11:54 a.m., the case in the  
19 above-entitled matter was submitted.)  
20  
21  
22  
23  
24  
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