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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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P R O C E E D I N G S

(11:07 a.m.)

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

Mr. Duggan.

ORAL ARGUMENT OF MR. DUGGAN  
ON BEHALF OF THE PETITIONERS

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

Persons who jointly and severally agree to repay the applied-for debt are applicants under ECOA. And that is precisely what occurred here. My clients were required, in violation of Regulation B in ECOA as spousal guarantors, to become jointly and severally liable to repay the debts of their husbands' business, which clearly qualifies them as applicants both under the straightforward language of ECOA, as well as the Regulation B that was adopted by the regulators.

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

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.

13 When the case law came down and said we're  
14 relying on the Regulation B of 1977, according to what  
15 the regulators adopted then in 1985 they said, we were  
16 mistaken. We've been misinterpreted about what our  
17 intent was. We -- we now need to modify the regulation  
18 and make it clear that those persons who were  
19 discriminated against based on marital status have the  
20 right to bring the claim.

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

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

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

1 applicants.

2 MR. DUGGAN: Well, I think --

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

5 MR. DUGGAN: I think the --

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

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

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

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

18 JUSTICE SCALIA: I never liked that case.

19 MR. DUGGAN: My apologies.

20 (Laughter.)

21 MR. DUGGAN: What -- what happened in this  
22 case, Your Honor, was very, very reasonable by the  
23 regulators. They came out in 1985 --

24 JUSTICE ALITO: Just out of curiosity, why  
25 -- well, everybody agrees that PHC Development is an

1 applicant, right?

2 MR. DUGGAN: Agreed.

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

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

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

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

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

1 required to sign because she was the spouse of the  
2 husband. And what's important to understand in these  
3 cases --

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

8 MR. DUGGAN: And I think that's exactly what  
9 the regulators --

10 JUSTICE SCALIA: Well, but don't talk about  
11 it as she was required to sign. She was not required to  
12 sign.

13 MR. DUGGAN: There was a requirement placed  
14 upon --

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

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

1 that's the borrower, it's always the guarantors.

2 We need to look no farther than Doc 79-7,  
3 Page 1 to 3, which is the bank's actual approval of this  
4 credit application. In that document, which was a part  
5 of the trial court record, the bank, in responding to  
6 its own internal write-up on the operating history and  
7 the potential for the entity to pay back the debt, it  
8 said "nonapplicable." Financial projections of the  
9 borrowing entity? "Nonapplicable."

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

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

25 MR. DUGGAN: No.



1 JUSTICE SCALIA: Would anybody use the  
2 English language that way?

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

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

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

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

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

1 to their guaranty, they're obligated to repay the debt  
2 in full, and --

3 JUSTICE SCALIA: That doesn't show --

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

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

9 JUSTICE BREYER: You don't think so?

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

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

15 JUSTICE SCALIA: Well, you shouldn't -- you  
16 shouldn't have asked that.

17 (Laughter.)

18 JUSTICE BREYER: I have a parent that  
19 applies for --

20 JUSTICE SCALIA: You and I share that  
21 concern.

22 JUSTICE BREYER: What? Wait. A parent  
23 applies for a child, her child, to be admitted to a  
24 school which she will pay. The child is seven years old  
25 and has a hard time writing the application.

1 (Laughter.)

2 JUSTICE BREYER: Isn't it normal for us to  
3 refer to the parent as the applicant, even though the  
4 child doesn't?

5 MR. DUGGAN: Yes.

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

9 JUSTICE SCALIA: Was this corporation a  
10 minor?

11 MR. DUGGAN: What?

12 JUSTICE SCALIA: The corporation that  
13 applied, was it a minor?

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

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

18 JUSTICE BREYER: But my point --

19 JUSTICE SCALIA: Is Justice Breyer the  
20 applicant?

21 MR. DUGGAN: He may.

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

25 MR. DUGGAN: Very true.

1 JUSTICE BREYER: And, therefore, what is it  
2 about the context of the guarantor of a loan that makes  
3 it reasonable in that context to call that person an  
4 applicant?

5 MR. DUGGAN: Let me answer that question  
6 directly.

7 JUSTICE SCALIA: Well, I don't agree with  
8 the hypothesis. Why do you accept the hypothesis? What  
9 it means depends upon the -- upon the context? It means  
10 what it means. Now, whether the person is an applicant  
11 within the understood meaning of "applicant," that  
12 depends upon the context, but the meaning of the word  
13 doesn't change.

14 MR. DUGGAN: May I address the questions,  
15 Mr. Chief Justice?

16 CHIEF JUSTICE ROBERTS: That's all right  
17 with me.

18 (Laughter.)

19 MR. DUGGAN: Thank you so much.

20 The definition of the word "apply" is to  
21 appeal to a request. And in this particular case, I  
22 believe that anybody who signs a written contract that  
23 says, I have independent obligations to perform under my  
24 guaranty that make me jointly and severally liable to  
25 repay the debt in full, and if I fail to perform, I

1 agree to repay the applied-for debt in totality, I don't  
2 know how in the world that person is not somebody who is  
3 appealing to and requesting that credit be extended by  
4 putting their own financial wherewithal and capacity to  
5 repay the loan on the line based on their own  
6 independent requirement to perform.

7 JUSTICE KENNEDY: Under your -- under your  
8 view -- let me understand the theory of the case. Let's  
9 say that you prevail, that a guarantor is an applicant  
10 and that there is a violation of the duty to the  
11 guarantor and that there are five guarantors. Can each  
12 of the five guarantors bring a separate suit for  
13 punitive damages? And also -- this is also part of my  
14 question -- can the loan be declared unenforceable?

15 MR. DUGGAN: No, the loan cannot be declared  
16 unenforceable under the laws that exist today. The only  
17 thing that could be declared unenforceable would be the  
18 spousal guaranties which are deemed illegal under  
19 Regulation B. Not all of the guarantors can bring a  
20 claim. The husbands can only bring a claim to the  
21 extent they suffer damage as a result of their wives  
22 being required to be guarantors on the case.

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

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

2 MR. DUGGAN: Thank you so much.

3 ORAL ARGUMENT OF BRIAN H. FLETCHER

4 ON BEHALF OF THE RESPONDENT

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

7 For 30 years, Regulation B has provided that  
8 guarantors, cosigners, and other similar parties to  
9 credit transactions, qualify as applicants, are entitled  
10 to protection from discrimination under the Equal Credit  
11 Opportunity Act and the Additional Parties rule. That  
12 longstanding regulation is reasonable, and it reflects a  
13 reasonable interpretation of the Act's broad definition  
14 of the term "applicant."

15 CHIEF JUSTICE ROBERTS: Well, we've been  
16 talking about applicants -- is it -- is the person an  
17 applicant in the abstract? But one of the important  
18 things about context here is there are two terms,  
19 "applicant" and "guarantor." And that's the way it's  
20 always worked in the industry. Somebody in the industry  
21 would not call a guarantor an applicant. The person is  
22 a guarantor. So I just wonder how we can pluck  
23 "applicant" out. Obviously, in some sense, anybody who  
24 is supporting the loan, you know, you can describe,  
25 well, they're applying for it. But there's a separate

1 term, "guarantor." And if you ask somebody, well, what  
2 is this person? Is this person an applicant? They  
3 would say, no, it's a guarantor.

4 MR. FLETCHER: Well, Mr. Chief Justice, the  
5 term "guarantor" doesn't appear in the statute. And I  
6 don't think it's true that the term "applicant" and  
7 "guarantor" have fixed meanings in the industry and that  
8 you could never construe a guarantor to be an applicant.  
9 I think, in fact, often, as we explain in our brief,  
10 guarantors and cosigners might fill out the same  
11 application and join together in the same application  
12 that they submit to the borrower in seeking the loan.  
13 And so I -- I don't think there's an industry  
14 understanding that you can't reasonably regard a  
15 guarantor or a cosigner or another secondary obligor  
16 who's playing that sort of --

17 CHIEF JUSTICE ROBERTS: Wait. Do you think  
18 there's an industry understanding that there are  
19 guarantors and there are applicants? I mean, if you  
20 weren't in the industry and you're looking at this, you  
21 wouldn't call the Petitioner an applicant. You'd call  
22 her a guarantor.

23 MR. FLETCHER: I think you -- in  
24 some -- certainly, in some context, you might use the  
25 two terms differently.

1 JUSTICE SOTOMAYOR: Wouldn't you  
2 call -- wouldn't you use the word "borrower" instead of  
3 applicant?

4 MR. FLETCHER: I think certainly after the  
5 loan had been extended, you would -- you would use the  
6 term "borrower." But I think if you look at the -- the  
7 context in which Congress used the term, it wrote a very  
8 broad statute. It said, "It shall be unlawful for any  
9 creditor to discriminate against any applicant with  
10 respect to any aspect of a credit transaction." And  
11 then it defined an applicant to be any person who  
12 applies to a creditor directly for an extension,  
13 renewal, or continuation of credit.

14 JUSTICE ALITO: Would you disagree that in  
15 ordinary speech, an applicant is understood, as  
16 Judge Colloton said, to be someone who is asking for  
17 something for himself or herself? And if you don't  
18 agree with that, could you give me your best example of  
19 the situation in ordinary speech in which the term  
20 "applicant" is used to refer to someone who is not  
21 asking for something personally?

22 MR. FLETCHER: Justice Alito, I agree that  
23 very often, applicant refers to the person who's going  
24 to receive the thing that's being sought. I don't  
25 think, though -- and this is what the other side has to



1 convince you of -- that it unambiguously excludes any  
2 other meaning. And in terms of my best examples in  
3 terms of ordinary speech, I think the one that  
4 Justice Breyer gave earlier was a good one.

5 JUSTICE ALITO: Well, let me come back to  
6 that. Suppose that this child is rejected for  
7 kindergarten, and then the parent is glum the next day  
8 at work. And someone says, why are you down today?  
9 Would the -- would the parent say, well, I'm down today  
10 because I was just rejected for this fancy kindergarten?

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

13 JUSTICE ALITO: My application was rejected.

14 MR. FLETCHER: I think you very well might.  
15 I think if you filled out the application, and you made  
16 the request, and you were upset that it was denied, I  
17 think it would be perfectly sensible to say my  
18 application was denied.

19 JUSTICE KAGAN: Mr. Fletcher, in -- in some  
20 ways, the Agency itself has admitted that this is not  
21 the most natural reading of the term. When the Agency  
22 explained why it was articulating this rule, it said,  
23 well, the problem is that Section 706 of the Act confers  
24 standing to sue only upon an aggrieved applicant. And  
25 so we have to come in and kind of fix that.

1           And -- and so, too, the regulation itself  
2 talks about applicants and additional parties as though  
3 the two are different. And then the regulation, as I  
4 think Justice Scalia said, says, well, this -- this is  
5 our definition of applicant, but it's really only for  
6 this purpose, not throughout the statute. And all of  
7 those, it seems to me, are quasi-admissions that this is  
8 not the most natural way to read the word "applicant."

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

1 protects applicants. And the Agency is telling us  
2 expressly that you as a guarantor aren't an applicant.

3 And so the Agency came in in 1985, and it  
4 said, our own regulation, our previous version of our  
5 regulation, which excluded guarantors, is creating this  
6 problem, and we want to fix it by defining them to be  
7 applicants.

8 JUSTICE SCALIA: But you -- you don't -- you  
9 don't solve a problem by -- by fixing a definition. I  
10 mean, why was it a problem? It -- it was not a problem  
11 if applicant meant what the prior regulation said it  
12 meant. Why was that a problem?

13 MR. FLETCHER: Well, I think -- I think it  
14 was a problem because it left guarantors who had been  
15 improperly required to sign loan documents without a  
16 remedy.

17 JUSTICE SCALIA: Yeah. But that's what the  
18 law read. I mean, if that's a problem, it was a problem  
19 with the law.

20 MR. FLETCHER: Well, that was a problem with  
21 the Agency's own prior regulation, which expressly  
22 excluded guarantors. When the Agency -- and let me step  
23 back.

24 JUSTICE SOTOMAYOR: Can I just start? Why  
25 did you have to pass the first regulation at all? What

1 caused you -- if it was as clear as Justice Scalia  
2 believes, why did you need the regulation at all saying  
3 it doesn't include?

4 MR. FLETCHER: So if I could just give you a  
5 little bit of the history of how the regulation  
6 developed. The Equal Credit Opportunity Act was passed  
7 in 1974. When the Agency, the Federal Reserve Board,  
8 first passed regulations in 1975, it just incorporated  
9 the statutory definition of applicant in relevant part.  
10 It didn't speak to the guarantor question one way or  
11 another.

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

24 So the Agency's first interpretation was  
25 actually that the -- the plain language of the statute,

1 which had been incorporated into the regulation,  
2 included guarantors.

3 JUSTICE ALITO: Isn't it correct that this  
4 issue matters only where there are adverse -- where  
5 the -- the borrower and the guarantor have adverse  
6 interests? And if that's correct, how often does that  
7 arise?

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

17 And the reason that it matters is that a  
18 guarantor who's improperly required to provide a  
19 guaranty suffers a unique economic injury that is not  
20 suffered by the applicant. So in -- in a common case,  
21 the lender says, I won't extend this loan without a  
22 signature from your spouse. And everyone agrees that  
23 that's a violation of Regulation B, and everyone agrees  
24 that that's not permitted.

25 And if, in that case, the spouse provides

1 the signature, as often happens, then the primary  
2 applicant, the borrower, hasn't suffered any harm at  
3 all. They've gotten the loan that they wanted. So they  
4 have suffered discrimination in some sense, and they  
5 would have a claim in some sense. But in many cases,  
6 they're not going to have economic damages to assert in  
7 court.

8 The guarantor, on the other hand, oftentimes  
9 will have that obligation on her credit report  
10 immediately. It could adversely affect her credit  
11 scores immediately. And as we explain in our brief, if  
12 there's a default on the underlying loan, then that's  
13 going to be a black mark that's going to tarnish the  
14 guarantor or the cosigner's credit going forward even if  
15 she ultimately pays the debt.

16 JUSTICE KAGAN: One of the things that  
17 Judge Posner said against your interpretation is that  
18 this actually creates liability on a scale that Congress  
19 wouldn't have expected because if you are right, the  
20 guarantor can come in and -- and declare the entire loan  
21 invalid, and -- and the damages would be much higher  
22 than it is for the borrower himself. I mean,  
23 what's -- what's the answer to that?

24 MR. FLETCHER: So I think --

25 JUSTICE KAGAN: Is there an answer? It's

1 just like, well, that's what it is.

2 MR. FLETCHER: Well, I think the -- the  
3 first answer is that that -- the availability of that  
4 remedy of allowing a guarantor to assert and actually  
5 invalidate the guaranty that's been illegally required,  
6 that won't be resolved one way or the other by the way  
7 you answered this question today, which is just are  
8 guarantors reasonably regarded as applicants as they've  
9 been defined for 30 years?

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

23 The remedy that they apply is to require the  
24 bank to release the improper guaranty, or in cases --  
25 and I think this is another important point --

1 Regulation B doesn't prohibit spousal signatures under  
2 all circumstances. To the extent that what the bank  
3 wants to do is ensure that in the event of a default,  
4 it's going to be able to reach specific property that  
5 the primary applicant is relying on, it can require a  
6 signature from the spouse, not for personal liability,  
7 but just to allow it to reach the property that is being  
8 relied upon to support the loan.

9 And so if --

10 JUSTICE BREYER: So --

11 MR. FLETCHER: I was just going to say, so  
12 in that case, I think the proper remedy wouldn't be to  
13 void the loan altogether. It would be to give the  
14 lender what it had the right to demand, which was a more  
15 limited instrument.

16 I'm sorry, Justice Breyer.

17 JUSTICE BREYER: Can -- can you explain  
18 quickly -- I know -- uncertain. I accept the point that  
19 I could be a rejected application for kindergarten on  
20 behalf of my -- I've said -- I've got that. But what is  
21 this actually about?

22 The law says you cannot discriminate against  
23 a borrower, for example -- for example -- by saying that  
24 you, the borrower, has to -- have to have a guarantor  
25 from someone you're married to.



1 MR. FLETCHER: Right.

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

3 MR. FLETCHER: It says you can't  
4 discriminate against any applicant with respect to any  
5 aspect of a credit transaction. Yes.

6 JUSTICE BREYER: And this has been  
7 interpreted to include you cannot say to a married  
8 person you have to have the marriage -- the spouse sign.

9 MR. FLETCHER: That's correct.

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

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

23 JUSTICE BREYER: I know. But why wouldn't  
24 you sue if you're -- if you're -- if you're directly  
25 injured as a result of a -- of an unlawful act? Which

1 is what the regulation --

2 MR. FLETCHER: So -- and I think the  
3 Petitioner has suggested that there might be State law  
4 causes of action, but I think in terms of having the  
5 right --

6 JUSTICE BREYER: Not State, just right under  
7 this statute, you say I have suffered harm, I was about  
8 to take this ticket, and everyone admits I would have  
9 taken the money, invested in the lottery, and would  
10 today be a millionaire. Hard to prove, but nonetheless,  
11 if proved, maybe she was hurt. So why can't she sue?

12 MR. FLETCHER: Because the statute gives the  
13 right to sue to applicant.

14 JUSTICE KENNEDY: But it doesn't say --  
15 okay. So you're --

16 JUSTICE BREYER: To an aggrieved -- to an  
17 aggrieved --

18 JUSTICE KENNEDY: To have gotten too far,  
19 and so your whole idea here is say she's an applicant,  
20 too.

21 MR. FLETCHER: Right.

22 JUSTICE BREYER: And then she can sue.

23 MR. FLETCHER: She's an applicant.

24 JUSTICE BREYER: Now -- now, it seems to me  
25 maybe you're pushing the edge of the word "applicant" as

1 they did intend it in the statute. That's -- that is a  
2 problem.

3 JUSTICE KENNEDY: On that point --

4 JUSTICE BREYER: Can you give an example?

5 JUSTICE KENNEDY: -- are there places in  
6 the -- in this statute where guarantor and applicant is  
7 a distinction that has to be made? In other words,  
8 under your view, does applicant include guarantor in  
9 every part of the statute?

10 MR. FLETCHER: So in our view, there's no  
11 place where reading applicant to include guarantor  
12 wouldn't work or would create a problem. What the  
13 Agency has done, when it amended its regulation to  
14 include guarantors, is it asked for comments on whether  
15 there are specific provisions of the regulation that  
16 guarantors should be exempted from. And in response to  
17 those comments, it decided to exercise its broad  
18 rulemaking authority to exempt them and to not treat  
19 them as applicants for purposes of other provisions of  
20 the statute. So I don't think --

21 JUSTICE SCALIA: Where -- where does it get  
22 that discretion? I mean, it says applicant in the  
23 statute. When it says applicant, the Agency has  
24 discretion to say, oh, yeah, it says applicant, but  
25 sometimes we're going to ignore that.

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

4           JUSTICE SCALIA: Which says what?

5           MR. FLETCHER: Which says that, "The bureau  
6 shall prescribe regulations to carry out the purposes  
7 of this" -- "this subchapter, and the regulations may  
8 contain, but are not limited to, such classifications,  
9 differentiation, or other provision and may provide for  
10 such adjustments and exceptions for any class of  
11 transaction."

12           JUSTICE BREYER: But have you got an  
13 example? Any example at all from a magazine having to  
14 do with finance, from anything you can find where, in  
15 fact, in the context of financial transactions, there  
16 are references to a surety, a guarantor, or a mortgage  
17 insurance, there is a reference to such a person with  
18 the word "applicant"?

19           MR. FLETCHER: So here's my best example,  
20 Justice Breyer. They're on Page 24 of their brief -- my  
21 brief. And they don't use the word "applicant," but  
22 they talk about who's regarded as receiving an extension  
23 of credit. And this is our secondary argument,  
24 Justice Alito.

25           Even if you think that an applicant is only

1 someone who seeks something for themselves, we think a  
2 guarantor is reasonably regarded as seeking an extension  
3 of credit for themselves. As we explain on page 24 of  
4 our brief, for purposes of the Fair Credit Reporting  
5 Act, lenders and other banks rely every day on reading  
6 the Fair Credit Reporting Act to mean that the same  
7 definition of credit -- of credit, which refers to the  
8 extension of credit, includes a guaranty.

9           The authority in the Fair Credit Reporting  
10 Act that allows a lender, who has a prospective  
11 guarantor before him, to look at that guarantor's credit  
12 report is a provision of the Fair Credit Reporting Act  
13 that says you can pull the credit report of someone  
14 who's going to receive an extension of credit in  
15 connection with the transaction.

16           And we cite there a 2001 letter from all of  
17 the banking regulators that explains in detail why it is  
18 reasonable to regard guarantors and other secondary  
19 obligors as receiving an extension of credit, and why,  
20 in fact, that's essential to the effective  
21 administration of the Fair Credit Reporting Act.

22           Thank you.

23           CHIEF JUSTICE ROBERTS: Thank you, counsel.

24           Mr. McAllister.

25           ORAL ARGUMENT OF STEPHEN R. McALLISTER

1 ON BEHALF OF THE RESPONDENT

2 MR. McALLISTER: Mr. Chief Justice, and may  
3 it please the Court:

4 This is a Chevron step one case. The FRB  
5 gets to be the sorcerer's apprentice, but not the  
6 sorcerer. It's trying to rewrite the statute here, not  
7 define ambiguous terms. The government takes the view  
8 that the statute has to unambiguously exclude  
9 guarantors. That's the wrong starting point.

10 The question is simply: Is the statute  
11 ambiguous with respect to whom it covers? Under the  
12 government's view, every statutory definition would have  
13 to have two parts; the part that defines who is an  
14 applicant, and part two that says who's not an  
15 applicant.

16 JUSTICE KAGAN: Mr. McAllister, I take it if  
17 there were two borrowers, you would include both of  
18 them, both would have a cause of action?

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

21 JUSTICE KAGAN: They're joint applicants.

22 MR. McALLISTER: -- covers them.

23 JUSTICE KAGAN: How about if they're  
24 cosigners? I take it that -- is -- a co-signer is  
25 somebody who's jointly and severally liable, but is

1 not himself --

2 MR. McALLISTER: Is not an applicant.

3 JUSTICE KAGAN: -- receiving the money.

4 MR. McALLISTER: Exactly. So --

5 JUSTICE KAGAN: You would -- you would count  
6 that out.

7 MR. McALLISTER: Count that out. They --  
8 they are not an applicant. So the statute refers to  
9 applicants, and certainly, the regs and the statute  
10 contemplate the joint applicants who go in together.  
11 They want the credit together, and they have an  
12 obligation to make the repayments, either or both. But  
13 a cosigner is different.

14 JUSTICE KAGAN: And this is so even if the  
15 cosigner had to file the exact same kind of papers and  
16 do everything else that the borrower himself had to do?

17 MR. McALLISTER: Exactly. And -- and part  
18 of that is because of the statute's definition of  
19 credit, which no one has talked about. But the  
20 statute's definition of credit, that is defined  
21 explicitly just like applicant. And it's part of the  
22 applicant definition. And credit means a right to defer  
23 payment of debt. A cosigner and a guarantor never have  
24 a right to defer payment of debt. If they become  
25 responsible, they were responsible then. So what that

1 is contemplating, in our view, is the borrower. It's  
2 the person who's making the regular payments. That's  
3 what's encompassed in the statutory definition.

4 I would refer the Court also to comparable  
5 civil rights statutes of this era. In particular, the  
6 Truth in Lending Act, the Fair Housing Act, the AIDS  
7 Discrimination and Employment Act. All of them use the  
8 word "person" to describe who can bring a claim. In the  
9 ECOA, Congress very deliberately chose something  
10 narrower, and not only did it choose it, but it  
11 expressly defined it in the statute.

12 And we describe this as a gateway provision.  
13 We don't argue that the Fed doesn't have broad authority  
14 in many respects in implementing the ECOA. But what it  
15 does not have the authority to do is to rewrite the  
16 statutory definition that Congress very deliberately and  
17 precisely put in the statute.

18 JUSTICE KAGAN: So suppose -- suppose that I  
19 have a credit card, and now I get married, and I'd like  
20 a secondary credit card for my spouse, and I apply to  
21 the credit card company for a secondary credit card.  
22 Who's -- who's the applicant there?

23 MR. McALLISTER: Well, I think you are still  
24 the applicant there.

25 JUSTICE KAGAN: So even though I receive no



1 direct benefit, the credit is actually given to my  
2 spouse now?

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

7 JUSTICE KAGAN: They would effectively  
8 become a joint applicant, even though I'm the only one  
9 who's filling out the -- the -- all the papers.

10 MR. McALLISTER: But the statute  
11 contemplates that there can be situations in which a  
12 third-party requests credit on behalf of another, and  
13 that's another reason why we think guarantors are not  
14 included because it is contemplating, for example, the  
15 parent who goes in, says I want to arrange a loan for my  
16 son or daughter to buy their first car. The son or  
17 daughter is actually ultimately going to be the  
18 applicant. The parent may well be a cosigner. The  
19 parent may initiate the transaction, but the -- the  
20 recipient of the credit, the right to defer payment of  
21 the debt, is an applicant.

22 JUSTICE KAGAN: I guess -- I guess -- you  
23 know -- and this is a -- a functional point for sure.  
24 But it doesn't seem to make a whole lot of sense that  
25 suppose a lender doesn't want to provide credit to a

1 married woman because it has all these sex, gender  
2 stereotypes in the lender's head or -- and the lender  
3 couldn't require that the -- that the husband be listed  
4 as a -- a joint applicant, but could require that the  
5 husband be listed as a cosigner, even though the effect  
6 of those two things are exactly the same, which is that  
7 it's a requirement that the spouse essentially become  
8 joint and severally liable for the loan.

9 MR. McALLISTER: Well, I -- I don't think  
10 there is a difference. I think the cosigner is in the  
11 same category as the guarantor. But here's -- here's my  
12 fundamental answer to your question, Justice Kagan, is  
13 the purpose of this statute is abundantly evident. The  
14 language we think, but if you look at the legislative  
15 history, the point was to get the credit in the hands of  
16 people who were being denied, in particular, women.  
17 That is the applicant. So the way the statute is  
18 intended to work, and works just fine with the  
19 definition of applicant we use, is to say when that  
20 person shows up, and the bank says, oh, no credit for  
21 you unless a spouse signs, the violation has occurred  
22 then. And the discrimination is against the person who  
23 wanted to borrow the money. The government may wish  
24 that the discriminatory provisions were broader than  
25 that, but that's the way the statute works.

1           So the applicant has a claim, the borrower  
2 who is told you need more signatures -- otherwise, you  
3 could imagine scenarios -- I think one of the amicus  
4 briefs spins out one where, say, the person comes in and  
5 the bank says, I need -- because you're of a certain  
6 religion or a certain race, I need 15 guarantors for  
7 your -- well, all 15 guarantors can simply say no, but  
8 under their view, all 15 guarantors actually have a  
9 claim under the ECOA. And that just makes no sense.  
10 That's far beyond what Congress --

11           JUSTICE SOTOMAYOR: That's not -- that's not  
12 quite accurate, because the only person who's given a  
13 right not to be discriminated against is the  
14 applicant -- an applicant on the basis of marital  
15 status.

16           MR. McALLISTER: No, Your Honor. No, that's  
17 not true. I mean, the statute covers -- covers marital  
18 status, sex, religion, race, age even. So there are a  
19 number of prohibited bases. The original statute was  
20 sex and marital status, but then in 1976, it was  
21 expanded to cover other --

22           JUSTICE BREYER: Mr. McAllister, why -- why  
23 does it matter? A person sitting at the table says,  
24 please lend me \$10,000. Now, the -- the lender says, I  
25 want you to have someone from a forbidden category as a

1 guarantor. So he's outside, he walks in and he says,  
2 I'll guaranty this loan. I want you to lend him \$10,000  
3 and I'll guaranty it.

4 Well, why hasn't that guarantor applied for  
5 a loan for another person?

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

7 JUSTICE BREYER: What is it -- because who  
8 are the ones you said do fall within applicants? It's  
9 not just --

10 MR. McALLISTER: So it's --

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

15 MR. McALLISTER: None of them --

16 JUSTICE BREYER: It seemed to me some of  
17 them you thought might.

18 MR. McALLISTER: None of them actually  
19 should be included. And if I suggested that -- ours is  
20 a straightforward definition adhering to the statute.  
21 You can certainly have joint applicants, joint  
22 borrowers, but that means they are receiving the benefit  
23 of the credit directly. Credit is flowing to them.

24 JUSTICE BREYER: Why? I mean, the thing I  
25 don't get is why can't you apply? An applicant means a

1 person who applies for something. So why can't you  
2 apply for the thing being give some money to this other  
3 person?

4 MR. McALLISTER: Because, again, I come back  
5 to the statutory definition, Justice Breyer, which says  
6 you are applying for credit. And the statute defines  
7 credit. So it says credit is the right to defer payment  
8 of a debt.

9 And the person who has asked for --

10 JUSTICE BREYER: Yes. And you say, I am  
11 applying for just that. And I am applying for just  
12 that. My application, here it is, in writing, is that I  
13 want you to do just that for Smith, who's sitting at the  
14 table.

15 MR. McALLISTER: And in our view, the  
16 statute means Smith is the applicant.

17 JUSTICE BREYER: Because?

18 MR. McALLISTER: Because, again, the -- the  
19 --

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

22 MR. McALLISTER: Okay.

23 JUSTICE BREYER: But I mean, you see where  
24 I'm having the problem, that Jones, who came in, he  
25 fills out the papers and he signs the signature, he puts

1 in all the things and he says, please, please, please  
2 give that credit to Smith.

3 MR. McALLISTER: Well, again, I don't think  
4 that --

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

8 MR. McALLISTER: Well, I -- I think that's  
9 in a sense contrary, really, to the -- the most ordinary  
10 understandings of the word "applicant." Of course,  
11 we've got a statutory definition.

12 If I go back to the university admissions  
13 process --

14 JUSTICE SOTOMAYOR: I'm sorry. The -- the  
15 definition, the common definition, the Chief has defined  
16 it that way, but the only dictionary that uses it in the  
17 way you want is Webster's Third. Every other  
18 dictionary -- and Webster's Third has been criticized by  
19 at least one of my colleagues, if not more. All right?

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

21 JUSTICE SCALIA: It's a terrible dictionary.  
22 (Laughter.)

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

24 JUSTICE SOTOMAYOR: All the others don't use  
25 a direct benefit language. They all say you're just

1 asking for an extension of credit. And they don't  
2 suggest it has to be for yourself, it could be -- you're  
3 asking for an extension of credit for anyone.

4 So I -- I mean, I'm -- I'm quarreling with  
5 the -- with your reliance on some common understanding  
6 of a word.

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

8 JUSTICE SOTOMAYOR: You've got cosigners,  
9 you've got parents who -- who sign as cosigners rental  
10 agreements for their kids. They're not getting the  
11 benefit of the apartment. Nobody believes that they are  
12 using the apartment. They're doing it to bolster up the  
13 credit of their child.

14 So I don't know why applicant can't mean, in  
15 common parlance, that you're asking for credit to be  
16 extended to anyone, whether it's you or -- or another  
17 person.

18 MR. McALLISTER: Perhaps that's the key,  
19 Justice Sotomayor, is that you're talking common  
20 parlance. In my view, common parlance is the definition  
21 that -- that we assert and that the statute asserts.  
22 Judge --

23 JUSTICE GINSBURG: Then why did -- why did  
24 the Federal Reserve Board initially -- specifically  
25 exclude guarantors? If it was so clear that applicant

1 excludes guarantors, why did the Federal Reserve Board  
2 do something so unnecessary to specifically exclude  
3 them?

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

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

12 The Fed then, a couple minutes later,  
13 proposed maybe we should just make this a general rule  
14 that guarantors are included. They took in notice and  
15 comment, and a few months later they said, oh, we've  
16 really sort of stirred up the pot here. Let's just make  
17 clear that guarantors and secondary obligors are not  
18 included. And that's why we got the 1976 version.

19 JUSTICE KAGAN: Mr. -- Mr. McAllister, in  
20 Corbin on Contracts, when they talk about guaranties,  
21 they say, in most cases of guaranty contracts, the offer  
22 comes from the guarantor requesting the giving of credit  
23 to a principal debtor.

24 So Corbin on Contracts is -- clearly thinks  
25 that the guarantor is a requestor, is an applicant for



1 credit, and just to a third-party, to the principal  
2 debtor.

3 But why -- why -- I mean, that's a pretty,  
4 you know, credit-specific definition of what it means to  
5 apply for credit. And including, pretty clearly,  
6 guarantors.

7 MR. McALLISTER: Well, that's -- that --  
8 that is a -- what Corbin says. But again, I would come  
9 back to guarantors do not sign the same document as the  
10 borrower. They are not liable in the same way. They  
11 have a separate contract with the lender, which the  
12 borrower is not even party to the guarantor's contract.

13 JUSTICE KAGAN: Well, do you think that it's  
14 really contingent on that, on exactly which contract you  
15 signed? I mean, these folks give you a lot of  
16 information, they sign their names to a lot of  
17 information, and -- I mean, unlike the usual guarantor  
18 case where the guarantor is only liable if there's a  
19 default, here the guarantor is jointly and severally  
20 liable, much like a cosigner is.

21 At any rate, cosigners are jointly and  
22 severally --

23 MR. McALLISTER: That's -- cosigners are  
24 jointly and severally liable.

25 JUSTICE KAGAN: And you want to put them in

1 the same box, too. So it doesn't really matter --

2 MR. McALLISTER: Right. But that is a  
3 mischaracterization. These are guaranties --

4 JUSTICE KAGAN: It doesn't matter.

5 MR. McALLISTER: -- that are not joint and  
6 severally liable.

7 JUSTICE BREYER: I bet we could find 50 like  
8 that. This is the collegiate dictionary. Maybe that  
9 makes it too simpleminded.

10 (Laughter.)

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

15 But then when we go to apply, the second  
16 definition down here, is to make an appeal or request.  
17 Does the guarantor make an appeal or request? Yes.  
18 Especially in the form of written application. Even  
19 writes it, e.g., for a job. No, doesn't apply for a  
20 job, doesn't have to be a job.

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

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

25 JUSTICE BREYER: -- the meaning.

1 JUSTICE SCALIA: I assume that that  
2 definition would -- would cover my letter to somebody  
3 urging that person to hire somebody else.

4 MR. McALLISTER: I think that's  
5 exactly right. Yep.

6 JUSTICE SCALIA: I would be -- I would be an  
7 applicant under -- under that definition, which is, of  
8 course, absurd.

9 MR. McALLISTER: And two -- two things about  
10 that absurdity, Justice Scalia. One absurdity is this  
11 --

12 JUSTICE SOTOMAYOR: Well, he's not asking  
13 for money.

14 MR. McALLISTER: Pardon?

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

17 MR. McALLISTER: Right. But still, you'd be  
18 asking for the same result that the applicant is  
19 seeking. So I mean, I take the question in that  
20 fashion.

21 But, two -- two things about that --

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

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

2 JUSTICE SOTOMAYOR: The analogy would work  
3 only if you did that, right?

4 MR. McALLISTER: But -- but what I was going  
5 to say is the government concedes that the statute uses  
6 -- well, in fact, they didn't say this, but I believe  
7 the statute uses the word "applicant" something like 50  
8 times, and only for one purpose do they say this  
9 definition should apply. That runs counter to  
10 presumptions this Court has long stated. The statute is  
11 used repeatedly --

12 JUSTICE KENNEDY: I thought that the  
13 government answered that question differently. I -- I  
14 thought their position was that if they prevail, their  
15 definition of the word "applicant" to include guarantor  
16 apply -- A, applies across the board 50 times, and B,  
17 makes the Act perfectly workable.

18 Did -- did --

19 MR. McALLISTER: Neither one is -- I don't  
20 think either one is true --

21 JUSTICE KENNEDY: You may disagree --

22 MR. McALLISTER: -- Justice Kennedy.

23 JUSTICE KENNEDY: Maybe I misunderstood  
24 their answer.

25 MR. McALLISTER: Oh, I don't think they say

1 that it would apply across all 50 uses. They said we  
2 could change it -- and actually, they're suggesting they  
3 could have 49 other definitions of applicant. Every  
4 time it's used somewhere else in the statute, they could  
5 define it differently for that purpose.

6 JUSTICE KENNEDY: And can you give me an  
7 example of where it would be really contrary to a  
8 sensible interpretation of the Act to use the term  
9 "guarantor" and --

10 MR. McALLISTER: For example --

11 JUSTICE KENNEDY: -- "applicant" as  
12 synonymous, other than for what we're talking about  
13 here?

14 MR. McALLISTER: Well, for example, giving  
15 notice of adverse action. I mean, the Agency itself has  
16 said a guarantor cannot be subject to adverse action,  
17 and yet you would have --

18 JUSTICE SOTOMAYOR: I frankly -- I frankly  
19 don't believe why that makes the statute unworkable. If  
20 I'm a guarantor of someone's debt, I want to know when  
21 they're in default because I'm going to call them up and  
22 start -- if it's my child, I'm going to start  
23 browbeating them, meaning -- I don't know what the  
24 rationale for that was, whether I agree with it or not.  
25 But why does it make it unworkable?

1           MR. McALLISTER: Well, it would -- it is not  
2 just that, Justice Sotomayor. It's not just at some  
3 point down the road. Usually, this is focused on the  
4 application itself. So again, if you have the case of  
5 multiple guarantors, the bank turns down the borrower,  
6 then they're under obligation, if you take that view of  
7 the statute, to notify everyone who had any connection  
8 to the transaction. But the Agency has long said that  
9 is not required. The Agency's commenter -- if you look  
10 at -- if you look at supplement one, the interpretations  
11 of the regs and other commentary by the agencies, except  
12 for this purpose, the Agency always talks about  
13 guarantors as different than joint applicants,  
14 co-borrowers. No one in the industry would think of  
15 these two things as the same.

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

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

23           MR. McALLISTER: They would say the person  
24 who wants the credit, the applicant, is not the same as  
25 a guarantor.

1 JUSTICE SOTOMAYOR: So what -- what --

2 JUSTICE KAGAN: The entire idea of a  
3 guaranty contract, right, why is a guaranty agreement  
4 even enforceable? Is it there is consideration, and the  
5 consideration has to do with the fact that credit is  
6 going to a third-party, right? And so the guarantor is  
7 stepping in and saying, I'm asking for something and I'm  
8 getting something when I enter into this contract, and  
9 that's the credit will go not to me, but to a third  
10 party.

11 So the question I think is, like, why should  
12 that be, you know -- just because it's to a third party,  
13 the appeal, the request to the application is as to a  
14 third party rather than to yourself, why that should  
15 make any difference if the question is just what does  
16 applicant mean? Applicant doesn't have to be for  
17 yourself.

18 MR. McALLISTER: Well, I -- I agree that's  
19 the consideration for the guaranty. But what that opens  
20 the door to, Your Honor, is there have been 60 or 70  
21 reported ECOA decisions since the change in 1985. More  
22 than half of those are within the last five years.  
23 After the 2008 crash, massive defaults, this is coming  
24 up more and more for banks as a defense.

25 And if I can just have one minute, I'll tell

1 you where this leads for banks. So if the rule is a  
2 spousal guaranty can be voided -- and that's what -- the  
3 relief sought. They're not asking for damages. They  
4 want to invalidate, void the entire guaranty. That was  
5 Judge Posner's point. So if that is the rule, what is a  
6 bank to do when a married person comes in and seeks  
7 credit?

8 Well, one thing the bank may do is say only  
9 secured credit because I cannot rely on any guaranty. I  
10 can't even rely on a spousal guaranty if the spouse says  
11 I want to give the guaranty, because when this goes in a  
12 bad direction and it's time to collect, then years  
13 later, that spouse may do what these spouses have done  
14 and say I was required to do this, this was a violation  
15 of the statute. And at a minimum, the lender is then  
16 engaged, as this lender has been, in extensive  
17 litigation costs just to even try to resolve the  
18 situation.

19 All of that leads to lenders are going to be  
20 less likely to want to -- to lend to married couples  
21 except if they are secure in their loans. And that may  
22 mean you have to put up assets, a guaranty no longer  
23 suffices, and it may mean you have to get more  
24 guarantors because they can't rely on the spouse. None  
25 of that furthers the purpose of the ECOA, which was to



1 get the credit in the hands of people who were at that  
2 time being discriminated against.

3 So the fundamental problem with Reg B is it  
4 opens the door. And now that the lawyers have  
5 discovered this provision and are bringing it up  
6 regularly, it will have a dramatic impact on the credit  
7 industry.

8 JUSTICE SCALIA: On the -- on the question  
9 of the guarantor entering a contract just as the  
10 borrower enters a contract, the two contracts are quite  
11 different. The borrower enters a bilateral contract, I  
12 promise to pay back the money if you -- with interest if  
13 you promise to lend me the money. The guarantor  
14 is -- is asking for a unilateral contract. The  
15 guarantor is just saying, I make no promises, but if you  
16 lend money to this person that I'm guarantying and that  
17 person defaults, I'll make good. That's -- that's a  
18 unilateral contract, which doesn't bind the -- the  
19 lender at all. It's if the lender chooses to do that,  
20 I'll stand good for the -- for the default.

21 The two contracts are quite different. And  
22 in that respect, you can't call both -- both of them  
23 applicants just because they both -- they both have  
24 contracts. Of course they both have contracts.

25 MR. McALLISTER: I agree with that,

1 Justice Scalia.

2 And unless the Court has further questions,  
3 I would ask that you affirm the decision of the Eighth  
4 Circuit.

5 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
6 Mr. Duggan, you have four minutes.

7 REBUTTAL ARGUMENT OF JOHN M. DUGGAN  
8 ON BEHALF OF THE PETITIONERS

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

11 I think the primary answer to talk about, to  
12 start with, is these guaranties are not simply  
13 guaranties of the performance of the borrower. They are  
14 separate, independent performance required by the  
15 guarantor under the guaranty. The guarantor must pay  
16 its creditors on time. The guarantor must provide  
17 financial statements to the lender. The guarantor must  
18 fulfill all other obligations and any other agreement  
19 that the guarantor has with the lender. If the  
20 guarantor fails to perform any one of those single,  
21 independent requirements of performance under the  
22 guaranty, the guarantor agrees to repay the debt in  
23 full. There is separate performance under the guaranty.

24 JUSTICE SCALIA: Could you ask -- could you  
25 respond to counsel's last point? Why would a bank ever

1 decide to give a loan with a spousal guaranty?

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

3 JUSTICE SCALIA: Why would -- why would a  
4 bank do that?

5 MR. DUGGAN: There's several circumstances.  
6 Number one, husbands and wives can come under the  
7 regulation safe harbors as joint applicants  
8 contemporaneously and say we want joint credit. It's  
9 only a violation of the Act if the lender, once an  
10 independent spouse comes forward and says I want credit,  
11 says as a condition to me extending you the credit you  
12 want, you must bring your spouse along.

13 The second thing is I think this regulation  
14 has got to be the easiest regulation to comply with. A,  
15 B, C, 1, 2, 3. There's safe harbors under the  
16 regulation. If a lender is relying upon jointly owned  
17 assets of a husband and wife, the regulation and the  
18 statute, 1691(d), create a specific safe harbor that  
19 says get a security interest in the asset and don't get  
20 a guaranty, or simply ask the spouse to waive her  
21 marital interest in the jointly-owned property so that  
22 if in fact you have to execute on that jointly-owned  
23 property to collect the debt, you're permitted to do  
24 that. Two very simple safe harbors to comply with.

25 What they don't want you to do is to strap

1 the spouse with the potential adverse credit in the  
2 future where she has to use her income or her earnings  
3 or her ability to get future credit to pay off either a  
4 divorced or deceased spouse. One of the rationales.  
5 Makes a ton of sense.

6 Back to the other points that were made.  
7 The application here, the dictionary definitions run the  
8 gamut, but they all have two specific statements.  
9 Appeal or request. And the statute here says they  
10 repeal -- applies for an extension renewal of credit.  
11 Doesn't say of credit to the borrower. Doesn't say of a  
12 loan to the borrower. It says of credit generically.

13 And back to Justice Breyer's comments, in  
14 fact, why in the world that somebody who becomes  
15 contractually, jointly and severally liable to repay the  
16 debt in full and says, I have my independent obligations  
17 under my guaranty, and if I don't perform, you can  
18 collect the entire debt from me, how is that person in  
19 that context not saying to the lender, I am appealing to  
20 you and requesting an extension of credit? I'll go so  
21 far as to say I'll stand behind the loan, and I have my  
22 independent obligations to perform under the guaranty.  
23 And if I don't perform, I'll pay. That, to me, can be  
24 nothing but an applicant.

25 Thank you so much for your time. I'm happy

1 to answer any questions if there are any.

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 MR. DUGGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: The case is  
5 submitted.

6 (Whereupon, at 11:57 a.m., the case in the  
7 above-entitled matter was submitted.)

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