No. 14-520

In The
Supreme Court of the United States

VALERIE J. HAWKINS and
JANICE A. PATTERSON,

Petitioners,

v.

COMMUNITY BANK OF RAYMORE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF THE ARGUMENT

The Equal Credit Opportunity Act ("ECOA") makes it "unlawful for any creditor to discriminate against ***any applicant***, with respect to ***any aspect*** of a credit transaction." 15 U.S.C. § 1691 (emphasis added). ECOA's text fails to "speak with the precision necessary to say definitively" that "applicant" includes or excludes co-borrowers, co-makers, etc. *Cf. Mayo Found. for Med. Ed. & Research v. United States*, 562 U.S. 44, 53 (2011). ECOA leaves the precise question unanswered on where Congress definitively drew the line on this spectrum of credit relationships traditionally part of ECOA credit transactions. All these persons request and agree to repay the applied-for debt, but ECOA's text lacks the precision to definitively say who is an "applicant" and who is not.

Courts know all too well that "[t]hose who apply the rule to particular cases must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.). The governing text's words convey by their surrounding context what the text means. *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154 (1932) ("Thus far we have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute." (Cardozo, J.)).

Yet, Community Bank of Raymore ("CBR") disregards the context in which words are used, violates basic interpretive canons, and ignores the conclusions those canons require. First, CBR advances an

unconventional, definite-indefinite-article interpretive rule. CBR urges that use of the definite article "the" unambiguously shows ECOA's text means a single "borrower-applicant." CBR overlooks the obvious: ECOA frequently uses indefinite articles, *i.e.* "an applicant," "any applicant," and the plural "applicants." CBR ignores that ECOA even uses the indefinite article "an" and the definite article "the" to modify "applicant" in the same sentence. 15 U.S.C. § 1691(e)(1). Simply put, CBR's urged position dangles, untethered by ECOA's text.

CBR uses this awkward definite-indefinite-article assertion to springboard grafting the word "borrower" onto the word "applicant," disregarding this Court's admonition that supplying words to a statute's text violates the Court's function. CBR understandably and rightly exhorts that statutes "mean what they say, and say what they mean." Yet, CBR omits from the refrain the equally important corollary that "a statute does not mean what it does not say."

Here, ECOA doesn't use the word "borrower" anywhere including to modify "applicant." ECOA does not mean something it does not say.

Next, CBR discards convention and urges the Court to adopt a radically new interpretive canon: isolating words from their surrounding context. Here, CBR proposes construction by isolation for "apply," "directly," and "credit." CBR's ungainly and unconventional offering urges the Court to determine ECOA's meaning by isolating words, divorcing them

from their context, and pedantically arguing their meaning from sterile dictionary definitions. This finds little support in any accepted interpretive canon.

Finally, CBR urges a holding limited to secondarily-liable guarantors, ignoring the seemingly infinite relationships common on ECOA's spectrum of credit transactions. These must be decided by future litigation resulting in much uncertainty. That is, CBR's pretext for its urged holding that this case must be decided narrowly on the basis of secondarily-liable guarantors (ignoring CBR's own admission that the Wives here are primarily, absolutely, and unconditionally-liable) fails to explain how its proposed ECOA reading will be applied to co-borrowers, co-makers, co-signers, etc. Is a wife who is required to sign as a "co-borrower" or "co-maker" of a note for her husband's separate business an "applicant" under CBR's proposed narrow "borrower-applicant" ECOA reading? There is no serious argument here – she must be as urged under CBR's "borrower-applicant" construction.

And how does the illegally-required, co-borrower wife's position differ from Valerie Hawkins' position? Both are liable to repay the applied-for debt without the lender seeking recourse from any other person or any collateral. To state the obvious, there is no difference.

Yet, by slicing the distinctions as thin as CBR urges, the nagging question remains: where is the

objective ECOA text showing the co-borrower wife is an "applicant" as CBR urges she must be, but the "primarily, absolutely, and unconditionally liable" wife is not? Congress failed to wield the ECOA text with the precision required to slice the distinctions as razor-thin as CBR suggests. In fact, CBR points to no ECOA text showing where Congress precisely and definitively intended to draw the line. There is no such ECOA text. It simply is not there.

The fact is, the number of interrelated contractual obligations traditional in any given ECOA credit transaction is only limited by the parties' ingenuity to create them. Congress provided no precise answer to the question on where to draw that line.

The Federal Reserve Board ("FRB") reasonably rejected a fact-intensive, case-by-case inquiry in favor of a rule that treats all guarantors and similar parties as "applicants" for purposes of the Additional Parties Rule, providing clarity for creditors and consumers. Yet, CBR suggests that the Wives and the Government are claiming "a wide-ranging and virtually unlimited class of anyone and everyone who might in some way be connected to the lending transaction." Respondent's Brief at 14. CBR's rhetoric overstates the case: the Wives and the Government only advocate the clarity and predictability provided by Regulation B for the last thirty years.

What CBR proposes in their narrow, secondarily-liable guarantor holding is "a recipe for uncertainty, unpredictability, and endless litigation." *United*

States v. Mead Corp., 533 U.S. 218, 250 (2011) (Scalia, J., dissenting). This Court should "have none of it." *Id.* at 249.

ARGUMENT

A. CBR's untenable definite-indefinite-article interpretive rule urging the Court to rewrite ECOA to mean "borrower-applicant" collapses under the weight CBR thrusts on it.

1. Courts determining a statute's meaning refuse to graft words onto a statute's text. CBR urges this Court to graft the word "borrower" onto ECOA's "applicant" definition, rewriting the text to say "borrower-applicant."

This Court's function does not include "engraft[ing] on a statute additions which [the Court] think[s] the legislature logically might or should have made." *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941) *superseded by statute on other grounds as recognized in U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 736 (2004). CBR ignores that courts may not add to what the statute's text states or reasonably implies. Matters the statute does not cover are simply not covered. *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959).

Here, CBR urges the Court to do just what the Court says it won't do by repeatedly arguing that

Congress intended "applicant" to mean "borrower-applicant." *See, e.g.*, Respondent's Brief at 24 ("Certainly, the borrower-applicant is the individual or entity that 'applies' 'directly' for 'credit'. . . ."); *id.* at 26 (referring to "an 'applicant,' *i.e.*, a borrower"); *id.* at 30 ("[T]he ECOA contemplates that there often, if not usually, will be a single applicant-borrower. . . .").

Yet, ECOA failed to precisely restrict "applicants" to a single "borrower." ECOA never even uses the word "borrower." The "plain text of the statute" does not "'speak[ ] with the precision necessary to say definitively'" that "applicant" is limited to only the "borrower." *See Mayo*, 562 U.S. at 53 (quoting *United States v. Eurodif S.A.*, 555 U.S. 305, 319 (2009)). Nevertheless, CBR invites this Court to graft onto ECOA a term Congress did not use, but which CBR believes "logically might or should have" been used to redefine "applicants."

2. Statutory words importing the singular include and apply to multiple persons. ECOA uses "the applicant," "applicants," "an applicant," "any applicants," and "each applicant" in the same subsections and sometimes even in the same sentence. ECOA's broadly-defined "applicant" does not mean a single borrower-applicant.

CBR claims ECOA's references to "the applicant" (using a definite "singular article") as opposed to plural "applicants" (or ECOA's use of indefinite articles)

shows ECOA only protects a single borrower-applicant. *See* Respondent's Brief at 30. CBR's urgings violate the Dictionary Act and ignore common sense.

The Dictionary Act, 1 U.S.C. § 1, states "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things." ECOA's linguistic context shows no intention that by using a "definite" article such as "the" means only one "borrower-applicant" is protected. Multiple persons may be an ECOA credit "applicant" in any one transaction. *See* 15 U.S.C. § 1691(a).

Obviously, two individuals jointly owning a business without forming a corporation or limited liability company and "applying" for a single loan may sign as co-borrowers. Both qualify as "applicants." Other examples include a business owner who signs a limited liability company's note as co-borrower. She also qualifies as an "applicant."

Under either circumstance and countless others, "several persons, parties, or things" qualify as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit." Accepting CBR's unnatural ECOA reading means only one "borrower-applicant" possesses standing to sue when "several persons, parties, or things" constitute co-borrowers, co-makers, etc., who requested credit and agreed to repay the applied-for debt.

Yet, CBR persists asserting that ECOA refers to "the applicant" in "almost every instance." ECOA uses the term "applicant" (or "applicants") fifty-two times. While ECOA refers to "the applicant" twenty-eight times, it uses "an applicant" (eleven occasions), "any applicant" (seven occasions), "each applicant" (once), and "applicants" (four occasions). Indeed, ECOA frequently uses indefinite articles to describe any "applicant" such as ECOA's chief provision prohibiting discrimination against "any applicant," and not "the applicant." 15 U.S.C. § 1691(a). ECOA even uses definite and indefinite articles to modify "applicant" in the same sentence. *See* § 1691(e)(1).

Likewise, ECOA uses the same definite and indefinite article mix with the term "creditor." ECOA uses "any creditor" (four times), "a creditor" (fifteen times), "the creditor" (seventeen times), and "each creditor" (once). Courts have held that any single ECOA credit transaction can include more than one creditor. *See United States v. Am. Future Sys., Inc.*, 743 F.2d 169, 182 (3d Cir. 1984) (affirming district court holding that a creditor company's wholly-owned subsidiary and chief operating officer were both ECOA "creditors").

Clearly, ECOA's text leaves CBR's urged, definite-article, "borrower-applicant" conclusion dangling without ECOA textual support. ECOA's text does not use "the applicant" in "almost every instance." Rather, ECOA's indefinite articles and references to plural "applicants" show more than one person

qualifies as an ECOA applicant under any single credit transaction.

3. Congress made it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction." Congress placed no limits on ECOA standing to a singular applicant.

Congress stated "[i]t shall be unlawful for any creditor to discriminate against *any* applicant, with respect to *any* aspect of a credit transaction." 15 U.S.C. § 1691(a) (emphasis added). CBR admits "[t]here will always be *at least one* 'applicant' in *every* lending transaction, and that 'applicant' can always assert an ECOA claim if a lender discriminates on a prohibited basis." Respondent's Brief at 15 (first emphasis added).

ECOA's text did not precisely say unlawful acts under 15 U.S.C. § 1691(a) occur against "the" applicant, "an" applicant, "the borrower-applicant," or only "one" applicant. ECOA broadly prohibits discrimination against "*any* applicant, with respect to *any* aspect of a credit transaction." § 1691(a) (emphasis added). CBR insists that only "the aggrieved applicant" may bring a claim for actual and punitive damages and that this means only the singular "borrower-applicant." Respondent's Brief at 32. But this language is also consistent with the conclusion that any one credit transaction contains more than one applicant – some may be aggrieved and some

may not. Only "the aggrieved applicant" may pursue claims.

The text CBR clings to simply lacks the precision required to say definitively there is only one applicant per credit transaction. Congress chose language too blunt to answer the precise question on whether spouses are definitively excluded from ECOA's protection as "applicants" when they sign as co-borrowers, co-makers, co-signers, guarantors, etc. The Court deplores being asked to file down Congress's blunt instruments to make them more useful to one parties' liking. This case presents no exception.

B. CBR's construction by isolation ignores the context of "applies," "directly," and "credit."

1. Isolating words from their surrounding context distorts a statute's meaning. Yet, CBR urges isolating words and ignoring their context. CBR's narrow reading overlooks that "directly" is modified by the phrase "for an extension, renewal, or continuation of credit," turning a blind eye to the Wives' position at each loan renewal.

A "fundamental principle of statutory construction (and, indeed, of language itself) [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 131 (1993);

see also King v. Burwell, 135 S. Ct. 2480, 2489-90 (2015).

Yet, CBR implores a narrow ECOA definition of "applicant" by isolating "applies," "credit," and "directly." *See, e.g.*, Respondent's Brief at 17, 18, 19. Indeed the Court knows all too well, for instance, that context determines whether the word "sharp" describes the cutting razor's edge, the manner in which one is dressed, or a keen intellect on display. Likewise, quarantining ECOA's words to determine its meaning ignores the context provided by the entire definition:

> The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C. § 1691a(b).

Here, ECOA clarifies who the "persons" are that comprise applicants by the first phrase "who applies to a creditor directly." Similarly, ECOA further modifies who these persons are with the second phrase "for an extension, renewal, or continuation of credit."

2. Primarily, absolutely, and unconditionally liable guarantors "appl[y] to a creditor directly" upon "renewal" or "continuation" of the guaranteed debt.

As stated, ECOA's text "who applies to a creditor directly" is further modified by "for an extension,

renewal, or continuation of credit." 15 U.S.C. § 1691a(b). Thus, "applicant" covers a time continuum not limited temporally to those "persons" who applied only at the initial credit extension. Just as there is a spectrum of "persons" traditionally involved in ECOA credit transactions, there is a time continuum over which ECOA violations can occur: (1) initial extensions, (2) renewals, or (3) continuations of credit. That is, the time continuum includes, for example, a discriminatory credit decision denying the initial extension of credit or granting credit on discriminatory terms. It can also later include renewing or continuing credit on the same discriminatory terms or different discriminatory terms.

For instance, racial minorities initially granted credit at higher interest rates than non-minorities based on race still suffer credit discrimination. If the credit is then "renewed" or "continued" on different discriminatory terms such as requiring more collateral, a separate discriminatory act occurs at renewal.

Obviously, "persons" applying for credit "renewals" are also "applicants" who can suffer discrimination. By way of further example, if a loan matures unpaid, a primarily, absolutely, and unconditionally liable guarantor faces two options: (1) pay the debt, or (2) seek a renewal or continuation. ECOA's protected "applicants" includes guarantors seeking renewal. That is, a guarantor facing repayment after maturity who seeks renewal to avoid paying the debt necessarily "applies to a creditor directly for a[ ] . . . renewal[ ] or continuation of credit." § 1691a(b). Simply stated,

even if a guarantor is deemed not an "applicant" at the loan's inception, a guarantor unmistakably "applies to a creditor directly for a[ ] . . . renewal[ ] or continuation of credit" when the guarantor seeks a renewal to avoid repaying after maturity.

Here, PHC's loans often matured before CBR approved any renewal. At these renewals, Valerie Hawkins, who CBR claims is "primarily and unconditionally" liable for over $2 million, certainly wanted "an extension, renewal, or continuation of credit," just not on discriminatory terms. § 1691a(b). As a primarily and unconditionally liable spousal guarantor after maturity, Valerie Hawkins encountered marital discrimination violating the Additional Parties Rule by automatically requiring her guaranty. Obviously, spousal guarantors make an "appeal" or "request" "of benefit" to the spousal guarantor at such post-maturity renewals.

3. ECOA's own text must be used to interpret the statute. Under ECOA's definition of "credit," a guarantor-debtor is any "person who applies to a creditor directly."

In analyzing the first phrase "who applies to a creditor directly," we must note that "applies" and "directly" are not defined terms, but ECOA does define "creditor." ECOA defines "creditor" as "any person who regularly extends, renews, or continues credit." § 1691a(e). Thus, those "persons" who are

"applicants" includes persons who seek to reach, or in fact reach, agreements to repay the applied-for debt with "creditors."

The meaning of "credit" provides guidance on those "persons" who are "applicants." Under ECOA, the relevant definition of "credit" is "the right granted by a creditor ***to a debtor*** to defer payment of debt or to incur debts and defer its payment." § 1691a(d) (emphasis added). "Debtor" is not defined by ECOA, but use of the statutory and common law terms "debtor" helps define the scope of both "applicant" and "credit."

Black's Law Dictionary in effect at ECOA's enactment defined debtor as "[o]ne who owes a debt; he who may be compelled to pay a claim or demand. Anyone liable on a claim, whether due or to become due." BLACK'S LAW DICTIONARY (rev. 4th ed. 1968); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY (1965) (defining "debtor" as "one indebted to another"; "one under obligation to another"; and "one owing money to another"). Here, Guarantors are one of many "persons" who "owe a debt," who "may be compelled to pay a claim," or who "are liable on a claim," as alleged in CBR's counterclaims to collect. Guarantors, like co-borrowers, co-makers, endorsers, etc., all agree to repay the applied-for debts.

A statute using an undefined common law term utilizes the term's common law meaning. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 23 (1999); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322

(1992). Here, absent an express contrary intent, ECOA failed to alter the common law meaning of "debtor." Primarily-liable spousal guarantors are common law "debtors" and, using ECOA definitions, "debtors" who requested and agreed to repay the applied-for credit. ECOA's text fails to precisely and definitively exclude guarantors from being applicants.

4. Construction by isolation of the word "apply" disregards that courts assume the ordinary meaning of the language accurately expresses legislative purpose. The ordinary definition of "apply" is not restricted to someone who requests something only for his or her own benefit.

In construing a statute, courts assume the ordinary meaning of statutory language accurately expresses legislative purpose. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013). CBR urges a guarantor cannot be an ECOA "applicant" because a guarantor "neither 'applies' for nor obtains 'credit' for itself." *See* Respondent's Brief at 14.

First, the ordinary meaning of "apply" does not exclude requests for benefits to others. Most standard definitions omit that limitation. *See* Brief for the United States at 18 (collecting dictionary definitions of "apply"). Even the dictionary cited in the Eighth Circuit's concurrence specifies only that the term "usu[ally]" refers to a request for something that benefits the requester – not that the relevant

meaning excludes requests that benefit someone else. WEBSTER'S THIRD NEW INT'L DICTIONARY 105 (1971). And, as the Government points out, even if it supported a more restrictive interpretation, a single dictionary could not demonstrate that ECOA *unambiguously* excludes a broader meaning. To the contrary, "[t]he existence of alternative dictionary definitions . . . , each making some sense under the statute, itself indicates that the statute is open to interpretation." *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992).

Yet, CBR persists in quoting the 1965, 1973, and 1981 versions of Webster's Third New International Dictionary entries for "apply": "to make an appeal or a request esp. formally and often in writing and ***usu***. for something *of benefit to oneself*." Respondent's Brief at 23-24 (first emphasis added). Although CBR highlights the "benefit" language, CBR ignores "usu."

The cited dictionaries did not define "apply" as "to make an appeal or a request for something of benefit to oneself." Instead, they specifically indicated that "to apply" ***usually*** means to request something for one's benefit. Obviously one can ***sometimes*** "apply" even though one does not seek something of benefit to oneself.

Moreover, Regulation B would be a permissible interpretation of "applicant" even if the term encompassed only an individual who requests something to

benefit herself.[1] As the Eighth Circuit recognized, guarantors typically offer a guarantee precisely because they "desire[ ] for a lender to extend credit to a borrower." Pet. App. 6-7. As claimed by CBR, the guarantees in this case for example, stated that petitioners "expect[ed] to derive substantial benefits" from the loans. Doc. 4-1, at 24, 27 (Exhibits D and E to *Community Bank of Raymore's Counterclaims for Breach of Guarantees* at 24, 27). CBR thus must limit

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[1] CBR suggests that the FRB took a "180-degree turn from the position the FRB adopted in both 1975 and 1976." Respondent's Brief at 41. CBR misapprehends the FRB's actions. As noted by the Government, 1975 Regulation B simply repeated ECOA's statutory definition of "applicant" "without explicitly addressing the status of guarantors." Brief for the United States at 6. The 1976 Regulation B "added a substantive provision indicating that the term included 'an applicant who is secondarily liable such as an endorser, co-maker . . . or guarantor.' " *Id.* at 6-7 (discussing notice requirements).

CBR ignores that since 1977, Regulation B "has recognized that a creditor engages in discrimination prohibited by the Additional Parties Rule and ECOA when it improperly requires an individual to guarantee or cosign her spouse's debt obligations – both when the primary borrower is the spouse and when the primary borrower is instead a business owned or operated by the spouse." *Id*. at 6. The 1985 Regulation B amendment shows the FRB intended to resolve unresolved ECOA questions stating that it "clarified that violation of [the Additional Parties Rule] constitute[s] discrimination not only against the primary borrower, but also against the guarantor spouse." *Id.* at 8-9.

Clarifying who can seek relief for a creditor's discriminatory conduct is hardly an "about face." Rather, FRB's clarifying amendment was a permissible exercise of FRB's Congressionally delegated authority to "elucidate a specific provision of [ECOA] by regulation." *Mead*, 533 U.S. at 227 (internal citation omitted).

the term "apply" further: it is not enough that an individual requests an extension of credit that will benefit her; she must also *receive* the credit herself. But CBR cited no authority supporting that further limitation.

Moreover, there is no serious argument that a guarantor who, at maturity, seeks a "renewal" or "continuation" of his or her obligations to pay the applied-for debt is seeking "something of benefit to" the guarantor. At maturity, the guarantor has an obligation to repay the debt; the renewal sought by the guarantor gives her the option to repay the debt at a later date. Clearly, the "renewal" is a benefit to the guarantor.

There also is no serious dispute that some guarantors do seek something of benefit to themselves at the loan's initiation. For instance, where an LLC or other entity borrows money for business purposes, the entity's owners who are required to guaranty the loan seek something of benefit to them.

It has long been recognized a guarantor requests the extension of credit to the borrower. 38A C.J.S. *Guaranty* § 26 (2006); *see* 1 Joseph M. Perrillo, Corbin on Contracts § 3.14, at 381 (rev. ed. 1993) ("In most cases of guaranty contracts, the offer comes from the guarantor requesting the giving of credit to a principal debtor."). Here, that is precisely what happened:

- Prior to the March 31, 2005, initial credit extension, PHC had no assets, no prior income history, no credit history. It was a

new start-up business just recently formed. Doc. 79-17 at 50-51 (Exhibit 5 to *Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses* at 185:3-13, 190:4-19).

- CBR only relied on the Guarantors' credit history, assets, and prior earnings to underwrite the initial credit extension. *See* Doc. 79-7 at 3.
- CBR required no collateral from PHC, but only took a security interest in the Guarantors' collateral. Doc. 79-13 at 14-23.

There is no serious argument that PHC had nothing upon which to realistically base a credit request. The real request came from its owners Chris Patterson (as trustee), and Gary Hawkins, both guarantors.

Simply put, CBR's construction by isolation of the word "applies" is unworkable at best. It leaves the Court with pedantic choices from sterile dictionary definitions divorced from ECOA's context. Even under CBR's clinical, sterile dictionary definitions, the Court must reach the untenable conclusion that guarantors never "apply" for credit ("making an appeal or request") where the guarantor-owners of a start-up business "*usually*," for their own benefit, offer their personal credit histories, income, and assets to support the applied-for debt because the

start-up "borrower" has no such information, history, or assets.

CBR again has invited this Court to cross the threshold into the absurd, and engage in a linguistic wordplay to rewrite ECOA's text which the Court deplores. Here, the Court has sufficient interpretive tools defining the strike zone to make the call on whether Congress definitively answered the precise question on who is and who is not an applicant. Simply put, CBR has thrown a wild pitch with its construction by isolation of the word "apply." There is no reason through linguistic license to call it a strike.

5. General words are not to be arbitrarily limited, but given their general meaning and effect. Literally construing isolated words can "strangle meaning."

General words are not to be arbitrarily limited but given their general meaning and effect. For instance, the Eighth Circuit determined that "any property" included real property in a federal statute that provides for the seizure of "[a]ny property, including money" used in gambling operations. *See United States v. S. Half of Lot 7 & Lot 8, Block 14, Kountze's 3rd Addition to City of Omaha*, 910 F.2d 488, 489 (8th Cir. 1990).

This canon applies even where the legislature may have enacted a law with a particular intent but used general terms to accomplish that intent. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72

(1872) ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter."). Similarly, in *Oncale v. Sundowner Offshore Servs., Inc.*, this Court determined whether 42 U.S.C. § 2000e-2(a)(1) prohibited male-on-male sexual discrimination finding that the statute does prohibit this conduct, even though male-on-male discrimination "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. 75, 79 (1998).

"But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* "All construction is the ascertainment of meaning. And literalness may strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). Indeed, "a sterile literalism . . . loses sight of the forest for the trees." *See New York Trust Co. v. Comm'r of Internal Revenue*, 68 F.2d 19, 20 (2d Cir. 1933) (Hand, J.). Here, Congress used the general words "applicant" and "applies" and there is no textual basis to arbitrarily limit them to "borrowers" only.

6. CBR's urged holding does nothing to answer the second disjunctive under ECOA's applicant definition where an applicant applies "indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit."

CBR's construction by isolation also provides an oblique, nondescript definition of "directly," failing to analyze how this clinical review guides any firm conclusions that ECOA's text definitively says there is only one "borrower-applicant" for each ECOA credit transaction. Just as conspicuously absent from CBR's argument is any analysis of the second disjunctive under § 1691a(b)'s definition of "applicant" which provides "or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit."

ECOA's second disjunctive differs in two ways from the first: (1) applying to a creditor "indirectly" as opposed to "directly"; and (2) use of an existing credit plan seeking an increased credit limit, not an initial extension or subsequent renewal. CBR provides the Court with no guidance on how its urged narrow holding that ECOA's text precisely and definitively excludes secondarily-liable guarantors as applicants under the first disjunctive can be squared with the second disjunctive's text.

For instance, when an LLC has a previously-established credit plan with an established limit guaranteed by the owners, and the LLC and its

guarantor-owners request the credit limit be increased, are the guarantor-owners applying "indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit" so as to be applicants? Would such guarantor-owners meet the Eighth Circuit's "sufficiently involved" threshold? Are such guarantor-owners "directly" or "indirectly" involved in such a request? If neither directly nor indirectly involved, then how are they involved?

CBR's vague reference to the word "directly" and complete silence on the second disjunctive regarding who applies "indirectly" leaves its proposed holding untethered to ECOA's text. Neither the Eighth Circuit nor CBR offers any guidance to assist bankers, customers, and the courts as to what involvement qualifies a person as "directly" or "indirectly" applying under ECOA.

CBR's proposed holding that ECOA precisely and definitively states that secondarily-liable guarantors are not applicants under the first disjunctive requires the Court to wade into waters that have a very powerful undercurrent, likely to pull under the superficial pretext offered as holding by CBR. Reaching the narrow secondarily-liable guarantor holding urged by CBR will only leave the lower courts drowning in fact-intensive lawsuits determining who are applicants under the first disjunctive, scratching their heads trying to apply an unworkable rule, and at a loss on how "applicant" under the first disjunctive

may guide who is an applicant under the second disjunctive.[2]

This Court traditionally grants certiorari when important issues are raised concerning a federal statute's scope. *See Arroyo v. United States*, 359 U.S. 419, 421 (1959); *Palermo v. United States*, 360 U.S. 343, 345 (1959); *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) (granting review is proper in "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties"). Here, answering the artificially-narrow question CBR poses accomplishes nothing. The clarity and predictability offered by Regulation B is much preferred.

[2] CBR's unfounded "vistas of liability" argument relying on *dicta* from *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) pales in comparison to the litigation that will be unleashed by rejecting the clarity and predictability offered by Regulation B. More importantly, Regulation B provides legal means for a lender underwriting a loan to obtain security from a non-owner spouse without violating the Additional Parties Rule thus ameliorating policy concerns raised by community bankers. *See* 12 C.F.R. § 202.7(d)(4).

C. CBR's urged holding limited to secondarily-liable guarantors is inapposite to the facts presented here and only unleashes a storm of litigation which will follow the uncertainty and unpredictability caused by such a holding.

Creditors often require spouses to sign loan documents in capacities other than guarantor such as a co-borrower, co-maker, co-signer, endorser, or as a "similar party." 12 C.F.R. § 202.2(e). The possible credit relationships spouses assume are limited only by the imagination employed to draft the papers. CBR's urged secondarily-liable guarantor holding breeds uncertainty inviting extensive future litigation.[3]

CBR admits that the Wives signed "absolute and unconditional" guaranties. *See* Respondent's Brief at 3-4. Despite its admission, CBR asks this Court to find the Wives are not "applicants" because secondarily-liable guarantors cannot qualify as "applicants." *See*

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[3] CBR urges the Court to adopt an unduly narrow view of the issues presented, ignoring that even if the Court determines that spousal guarantors do not have standing under ECOA to bring claims, spousal guarantors could challenge the illegality of their guaranties through traditional declaratory actions.

That is, CBR has not challenged the Additional Parties Rule. Thus, regardless of whether spousal guarantors have ECOA standing as applicants, requiring spousal guaranties violates ECOA. *See, e.g.*, Brief for the United States at 6. Such guaranties are unenforceable as illegal, and the would-be guarantor could assert such illegality as a defense, whether in response to a claim to enforce the guaranty or affirmatively as a declaratory action. *See* 28 U.S.C. § 2201(a).

id. at 26-27. CBR's urged holding is so narrow it would not even resolve this case.

To that end, CBR ignores the seemingly infinite relationships common on ECOA's spectrum of credit transactions. That is, CBR's pretext for its urged holding on the basis of secondarily-liable guarantors fails to explain how its proposed ECOA reading will be applied to co-borrowers, co-makers, co-signers, etc. As previously queried, is a wife who is required to sign as a "co-borrower" of a note for her husband's separate business an "applicant" under CBR's proposed narrow "borrower-applicant" ECOA reading? There is no serious argument here – she must be as urged under CBR's "borrower-applicant" construction.

And how does the illegally-required, co-borrower wife's position differ from Valerie Hawkins' position? Both are liable to repay the applied-for debt without the lender seeking recourse from any other person or any collateral. To state the obvious, there is no difference.

Yet, by slicing the distinctions as thin as CBR urges, the nagging question remains: where is the objective ECOA text showing the co-borrower wife is an "applicant" as CBR urges she must be, but the "primarily, absolutely, and unconditionally liable" wife is not? Simply put, no such ECOA text exists.

The FRB reasonably rejected a fact-intensive, case-by-case inquiry in favor of a rule that treats all guarantors and similar parties as "applicants" for

purposes of the Additional Parties Rule. That approach provides clarity for creditors and consumers, which is especially important given the number and variety of transactions covered by ECOA.

CONCLUSION

CBR places its proposed narrow holding on a three-legged stool which cannot bear the extraordinary weight placed on it. First, the definite-indefinite-article leg is untethered by ECOA's text, leaving CBR's graft of the word "borrower" onto ECOA's "applicant" untenable. Second, construction by isolation of the word "applies" ignores ECOA's context, particularly the Wives' position at renewal and leaves this Court only with a pedantic reading of one dictionary definition to reach an untenable conclusion that some guarantors seeking a benefit to themselves are applicants, but others less involved may not be.

But the third leg of the stool is so wobbly the stool cannot even bear its own weight. That is, CBR's proposed, narrow, secondarily-liable-guarantor holding does nothing to resolve the instant case and only unleashes a flood of lawsuits to drown the lower courts who will be scratching their heads on how to decide them. Regulation B's Additional Parties Rule providing clarity and predictability for over thirty years is a reasonable interpretation of ECOA's broad language which does not precisely or definitively say

spousal co-borrowers, co-signers, guarantors, etc., are not "applicants."

For the foregoing reasons and those articulated in Petitioners' merits brief, Petitioners request this Court reverse the Eighth Circuit's holding that ECOA's definition of "applicant" unambiguously excludes guarantors, and reverse the District Court's ruling in all respects including that Petitioners have no standing to seek ECOA civil remedies and defenses such as challenging the Guaranties' legality. Petitioners also request remand of this proceeding to the District Court for resolution on the merits.

Respectfully submitted,

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