Nos. 21-2846 (L), 21-2999

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN FRALISH,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

On Appeal From the United States District Court
For the Northern District of Indiana
Hon. Robert J. Miller, Jr.
Case No. 3:20-cv-418

BRIEF OF AMICI CURIAE CONSUMER FINANCIAL PROTECTION BUREAU, DEPARTMENT OF JUSTICE, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, and FEDERAL TRADE COMMISSION IN SUPPORT OF APPELLANT AND REVERSAL

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INTEREST OF AMICI CURIAE

Amici are four federal agencies with responsibilities to implement and enforce the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq*. The Consumer Financial Protection Bureau interprets and promulgates rules under ECOA and enforces the Act's requirements. *See id*. §§ 1691b, 1691c(a)(9). Its rules implementing ECOA are known as Regulation B. *See* 12 C.F.R. pt. 1002. The Department of Justice also enforces the Act, either upon referral of a matter by certain federal regulatory agencies or when the Attorney General has reason to believe that a creditor is engaged in a pattern or practice of violating ECOA. 15 U.S.C. § 1691e(g)-(h). The Board of Governors of the Federal Reserve System enforces and supervises for compliance with ECOA, *id*. § 1691c(a)(1), and prescribes rules under ECOA with respect to auto dealers excluded from the Bureau's authority, *id*. § 1691b(f). *See* 12 C.F.R. pt. 202. The Federal Trade Commission is the federal agency with principal responsibility for protecting consumers from deceptive or unfair trade practices. It enforces ECOA using all of the Commission's functions and powers under the FTC Act. 15 U.S.C. § 1691c(c).

ECOA requires that when creditors revoke or change the terms of an existing extension of credit, they must provide the "applicant" whose credit

account they have revoked or modified with a statement of reasons explaining the action. *Id.* § 1691(d). The Act's core prohibition on discrimination in "any aspect" of a credit transaction likewise applies to "applicants." *Id.* § 1691(a).

The question presented here is whether ECOA and Regulation B protect individuals and businesses not only while they are requesting credit but also after they have received credit. The district court held that the Act's protections apply only during the process of requesting credit and do not protect those with existing credit accounts. But that interpretation is contradicted by the text and structure of ECOA and Regulation B and would seriously undermine their important purposes. Accordingly, amici have a substantial interest in the Court's resolution of the question presented.

STATEMENT

A. The Equal Credit Opportunity Act and Regulation B

1. The Equal Credit Opportunity Act is a landmark civil rights law that protects individuals and businesses against discrimination in accessing and using credit—"a virtual necessity of life" for most Americans, S. Rep. No. 94-589, at 3-4 (1976).

Congress enacted ECOA in 1974 to address "widespread discrimination … in the granting of credit to women." S. Rep. No. 93-278, at

16 (1973). ECOA thus made it unlawful for "any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction." Pub. L. No. 93-495, § 503, 88 Stat. 1521, 1521 (1974). Then as now, ECOA defined "applicant" to mean "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).

The drafters of these provisions emphasized that ECOA's prohibition on discrimination "applies to all credit transactions including the approval, denial, renewal, continuation, *or revocation* of any open-end consumer credit account." S. Rep. No. 93-278, at 27 (emphasis added). As an example of the discrimination against "applicants" that the Act prohibits, the Senate drafters described a lender requiring a borrower with an existing credit account to reapply for that account upon getting married. *Id.* at 16-17.

Congress granted the Board of Governors of the Federal Reserve System ("Board") authority to prescribe rules to "carry out the purposes of [the Act]." Pub. L. No. 93-495, § 503, 88 Stat. at 1522 (codified as amended at 15 U.S.C. § 1691b(a)). It provided that such rules could contain, among other things, "such classifications, differentiation, or other provision … as

in the judgment of the Board are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." *Id.* And it provided that a violation of these rules is treated as a violation of ECOA itself. *See* 15 U.S.C. § 1691a(g) ("Any reference to any requirement imposed under [ECOA] or any provision thereof includes reference to" the implementing rule and its provisions).

2. The Board issued those rules, known as Regulation B, the year after ECOA was enacted and shortly before the Act's effective date. *See* 40 Fed. Reg. 49298 (Oct. 22, 1975) (promulgating 12 C.F.R. pt. 202). Then as now, Regulation B made clear that ECOA's protections apply not only to those actively seeking credit but also to those who previously sought and have received credit. It did so by defining "applicant" to include, "[w]ith respect to any creditor[,] … any person to whom credit is or has been extended by that creditor." *Id.* at 49306 (codified at 12 C.F.R. § 202.3(c) (1976)). In explaining that provision, the Board noted that ECOA's text and legislative history "demonstrate that Congress intended to reach discrimination … 'in any aspect of a credit transaction.'" *Id.* at 49298 (quoting 15 U.S.C. § 1691(a)).

3. Two years after it enacted ECOA, Congress broadened the Act's scope to prohibit discrimination on bases other than sex and marital status. *See* ECOA Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251. These bases now include: "race, color, religion, national origin, sex or marital status, or age"; the receipt of public-assistance income; and the exercise of rights under the Consumer Credit Protection Act, 15 U.S.C. ch. 41. Pub. L. No. 94-239, § 2, 90 Stat. at 251 (codified at 15 U.S.C. § 1691(a)).

In what the Senate drafters called "one of [the amendments'] most important provisions," S. Rep. No. 94-589, at 2, the amendments also provided that "[e]ach applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor" and that such statement must explain "the specific reasons for the adverse action taken." 15 U.S.C. § 1691(d)(2)-(3).[1]

The amendments defined "adverse action" as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested." *Id.* § 1691(d)(6). Thus, since 1976, ECOA has provided

[1] In lieu of providing this statement of reasons, a creditor may instead disclose the applicant's right to receive such a statement. 15 U.S.C. § 1691(d)(2)(B); 12 C.F.R. § 1002.9(a)(2)(ii).

that "applicants" are entitled to an explanation when, *inter alia*, their existing credit accounts are "change[d]" or "revo[ked]" outright.

This important disclosure requirement "serves two purposes: it discourages discrimination and it educates consumers as to the deficiencies in their credit status." *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 977 (7th Cir. 2004). "Congress described this requirement as 'a strong and necessary adjunct to the antidiscrimination purpose of the legislation, for only if creditors know they must explain their decisions will they effectively be discouraged from discriminatory practices.'" *Id.* (quoting S. Rep. No. 94-589, at 4). In this way, ECOA's information-forcing regime serves to "prevent discrimination *ex ante*." *Id.* at 978. So too, it ensures that individuals and businesses that have been discriminated against will receive substantive information—to which they likely would not otherwise have access—that might help reveal whether the adverse action was taken on a prohibited basis. "[I]f an applicant never receives notice, it will be difficult for her to ever determine that she was the victim of discrimination. … [Lenders] could throw the credit report of every minority applicant in the 'circular file' and none would be the wiser." *Id.* at 977.

The notice requirement "fulfills a broader need" as well: It allows applicants "to learn where and how their credit status is deficient,"

something that Congress expected would "have a pervasive and valuable educational benefit." *Id.* (quoting S. Rep. No. 94-589, at 4). "In those cases where the creditor may have acted on misinformation or inadequate information, the statement of reasons gives the applicant a chance to rectify the mistake." *Id.* (quoting S. Rep. No. 94-589, at 4). In other cases, knowing the reason for the adverse action may allow applicants to take steps to improve their creditworthiness going forward. *Id.* In either scenario, the disclosure requirement ensures that applicants receive substantive information about the reason for the credit decision that they likely could not obtain otherwise.

4. Following the ECOA Amendments of 1976, the Board amended Regulation B, including by adding provisions to implement the Act's requirements for adverse actions. 42 Fed. Reg. 1242 (Jan. 6, 1977); *see also* 12 C.F.R. § 1002.2(c)(1)(ii) (defining "adverse action"); *id.* § 1002.9(a)-(b) (describing requirements for notices, including that they "be specific and indicate the principal reason(s) for the adverse action"). The Board also included a "minor editorial change" to the definition of "applicant" to make that provision "more succinct[]." 41 Fed. Reg. 29870, 29871 (July 20, 1976) (proposed rule). The revised definition states that "applicant" includes "any

person who … has received an extension of credit from a creditor." 12 C.F.R. § 1002.2(e).

5. The Dodd-Frank Wall Street Reform and Consumer Protection Act established the Bureau and transferred to it primary rulemaking responsibility under ECOA. Pub. L. No. 111-203, § 1085, 124 Stat. 1376, 2083-84 (2010); *see also* 15 U.S.C. § 1691b. The Bureau subsequently reissued the Board's ECOA regulations, including the definition of "applicant," without material change. 76 Fed. Reg. 79442 (Dec. 21, 2011) (promulgating 12 C.F.R. pt. 1002).

B. Factual and Procedural Background

Plaintiff-Appellant John Fralish is an Indiana resident. Compl. ¶ 4. Defendant-Appellee Bank of America, N.A., is a national bank. *Id.* ¶ 5.

Mr. Fralish had a credit card account with the bank. *Id.* ¶ 16. The bank closed that account. *Id.* ¶ 19. When it did, the bank sent Mr. Fralish a letter that did not include a statement of reasons for the closure or a notice of his right to receive a statement of reasons. *Id.* ¶¶ 20-22; *id.*, Ex. A. Mr. Fralish thus was denied information that could reveal whether the bank closed his account for a prohibited reason, based on a mistake, or because of deficiencies in his credit he might take steps to repair. *See id.* ¶¶ 23, 30.

Mr. Fralish sued the bank, alleging that it violated ECOA and Regulation B by failing to provide a statement of reasons for the adverse action. *Id.* ¶¶ 25-31. The bank moved for judgment on the pleadings. It did not dispute that it was a "creditor" under ECOA, *see* 15 U.S.C. § 1691(e); that its revocation of Mr. Fralish's credit card was an "adverse action," *see id.* § 1691(d)(6); or that it failed to provide a statement of reasons for that action. The bank's sole argument was that, because Mr. Fralish did not allege he was actively applying for credit when the bank revoked his card, he was not an "applicant" under ECOA and could not pursue his claim.

The district court agreed. *See* ECF No. 37 at 5-6. It held that "the statutory definition of 'applicant' is not ambiguous" and could not be read to include those who previously applied for and received credit. *Id.* at 6. It rejected the definition in Regulation B as not "based on a permissible construction of the statute." *Id.* at 5. The court construed the bank's request as a motion to dismiss and granted it.[2]

[2] Although the dismissal was without prejudice, it is a final appealable order. *See, e.g.*, *Hoskins v. Poelstra*, 320 F.3d 761, 763 (7th Cir. 2003) ("[I]f an amendment would be unavailing, then the case is dead in the district court and may proceed to the next tier.").

SUMMARY OF ARGUMENT

The Equal Credit Opportunity Act and Regulation B prohibit discriminating against "applicants" with respect to "any aspect" of a credit transaction on the basis of sex, race, or other enumerated factors. They further require that creditors provide "applicants" with an explanation when they take certain "adverse actions," including revoking or changing the terms of an existing credit account. These important protections do not end the moment an extension of credit begins. Instead, ECOA and Regulation B establish that the "applicants" they protect include both those currently seeking credit and those who previously sought and have since received credit.

This is the best reading of the statute itself. While ECOA's definition of "applicant," read in isolation, could be susceptible to varying interpretations, the unduly narrow interpretation urged by Bank of America makes little sense when read alongside the rest of the statute. ECOA's prohibition on discrimination, for example, applies "with respect to any aspect of a credit transaction"—not just during the process of applying for credit. ECOA also requires that creditors provide a statement of reasons to an "applicant" when the creditor revokes or modifies the applicant's existing credit arrangement. Bank of America's interpretation of

"applicant" would render that requirement meaningless. In addition to its textual difficulties, the bank's reading would seriously undermine ECOA's protections by cabining them to only certain aspects of a credit transaction and opening broad avenues for creditor evasion.

Any doubt regarding the scope of the term "applicant" is put to rest by ECOA's implementing rule, Regulation B. For the 46 years that ECOA has been in effect, Regulation B has made explicit through its definition of "applicant" that the law protects those who have applied for and received credit. That provision resolves the statute's ambiguity on this point and is a reasonable exercise of rulemaking authority by the expert agencies (first the Federal Reserve Board and now the Bureau) that Congress empowered to issue rules to carry out ECOA's purposes, including by preventing evasion. Regulation B's definition is thus entitled to substantial deference, and it requires reversal of the district court's decision.

ARGUMENT

ECOA AND REGULATION B PROTECT THOSE SEEKING CREDIT BOTH BEFORE AND AFTER THEY RECEIVE IT

A. ECOA's Text, History, and Purpose Make Clear That the Act's Protections Against Credit Discrimination Do Not Disappear the Moment Credit Is Extended

As used in ECOA, the term "applicant" includes not only those seeking credit but also those who sought and have since received credit.

This interpretation is by far the best reading of the statutory text itself, including ECOA's requirement that "applicants" receive an explanation when their existing credit accounts are revoked or modified. It finds direct support in Congress's history of amending ECOA. It is consistent with the Act's central purposes of preventing discrimination and educating consumers—while, in contrast, Bank of America's interpretation would significantly undermine those purposes. And it has been adopted by the only court of appeals to have addressed the issue.

1. *Statutory text*. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (quotation marks omitted); *accord Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 683 (7th Cir. 2018) ("A word or phrase in a statute should not be interpreted in a vacuum…"). Reading together the relevant provisions of ECOA makes clear that the term "applicant" includes those who applied for and received credit.

ECOA defines "applicant" as "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). The Act thus designates persons who request credit as "applicants" without regard for how their requests are eventually resolved. Nor does it expressly limit that category to persons who are still in the process of applying.

The Supreme Court's analysis in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), is instructive. In that case, the Court held that the term "employees" in Section 704(a) of Title VII includes those who were *former* employees when the discrimination occurred. Writing for a unanimous Court, Justice Thomas explained that although "[a]t first blush, the term 'employees' … would seem to refer to those having an existing employment relationship with the employer in question," that "initial impression … does not withstand scrutiny in the context of § 704(a)." *Id.* at 341.

For one thing, the Court observed, there is "no temporal qualifier in the statute such as would make plain that § 704(a) protects only persons still employed at the time of the retaliation." *Id.* The same reasoning applies to the term "applicant" in ECOA, which again is not expressly limited to those currently in the process of seeking credit. The Court further noted that "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.'" *Id.* at 342. The same reasoning applies to the term "applicant" here.

Reading ECOA's definition of "applicant" alongside the Act's other provisions makes clear that the term includes existing borrowers. For example, ECOA's disclosure provision requires that creditors give a statement of reasons to "[e]ach applicant" against whom they take "adverse action." 15 U.S.C. § 1691(d)(2). ECOA defines "adverse action" to include a "revocation of credit" as well as a "change in the terms of an existing credit arrangement." *Id.* § 1691(d)(6). These are actions that can be taken only with respect to persons who have already received credit. That ECOA requires lenders to give such "applicants" a statement of reasons shows that the term "applicant" includes current borrowers. These provisions would make little sense if "applicant" was read to exclude them.

Similarly, ECOA's core anti-discrimination provision protects "applicant[s]" from discrimination "with respect to *any aspect* of a credit transaction"—not just during the application process itself. *Id.* § 1691(a) (emphasis added). The phrase "any aspect of a credit transaction" is most naturally read to include both the initial formation of a credit agreement as well as the performance of that agreement. *See, e.g.*, *Black's Law Dictionary* 1668 (rev. 4th ed. 1968) (defining "transaction" to include the "[a]ct of transacting or conducting any business" and defining "transact" as

"equivalent to 'carry on,' when used with reference to business").[3] The expansive language of this provision shows an intent to sweep broadly, beyond just the initial process of requesting credit, to bar discrimination in all parts of a credit arrangement. Indeed, the main Senate report accompanying ECOA specifically noted that "[t]he prohibition applies to all credit transactions including … revocation of any open-end consumer credit account." S. Rep. No. 93-278, at 27. That observation makes sense only if the term "applicant" includes current borrowers.

ECOA's private right of action points in the same direction. It allows an aggrieved "applicant" to bring suit against creditors who fail to comply with ECOA or Regulation B. 15 U.S.C. § 1691e(a); *see also id.* § 1691e(b) (a "creditor, other than a government or governmental subdivision or agency," shall be liable to the aggrieved "applicant" for punitive damages); *id.* § 1691e(c) (aggrieved "applicant" may seek relief in district court). These references to "applicant[s]" cannot be understood to refer only to those with pending credit applications. Otherwise, a person whose application

[3] Consistent with this ordinary meaning, Regulation B has always defined the term "credit transaction" to encompass "every aspect of an applicant's dealings with a creditor," including elements of the transaction that take place *after* credit has been extended. 12 C.F.R. § 1002.2(m) (defining "credit transaction" to include the "revocation, alteration, or termination of credit"); *id.* § 202.3(k) (1976) (defining "credit transaction" to include the "furnishing of credit information and collection procedures").

was denied on a prohibited basis would have no recourse under ECOA's private right of action, which Congress intended would be the Act's "chief enforcement tool." S. Rep. No. 94-589, at 13. Instead, these references further confirm that the term "applicant" is not limited to those currently applying for credit. *Cf. Robinson*, 519 U.S. at 343 (similarly concluding that the reference to aggrieved "employees" in Title VII's private right of action shows that that term is not limited to *current* employees).

2. *Statutory amendments.* Congress's history of amending the statute strongly supports reading the statute to include existing borrowers. As noted, the Board issued Regulation B in 1975, shortly before ECOA took effect. The rule defined "applicant" to include "any person to whom credit is or has been extended." 12 C.F.R. § 202.3(c) (1976). If Congress thought this definition an unreasonable departure from the statute it had just passed, it would surely have given some sign of that when it amended and expanded ECOA the following year. Nor is there any doubt that the drafters of those statutory amendments were generally aware of the new Regulation B, as they cited parts of it in explaining their bill. *See* S. Rep. No. 94-589, at 2 (citing the Board's rules and noting that the amendments expanded the Board's rulemaking authority).

But the 1976 amendments did not limit the reasonable definition of "applicant" that the Board had promulgated just months before. To the contrary, the 1976 amendments added new provisions—such as the ones entitling "applicants" to a statement of reasons when their credit is revoked or modified—that make sense only if "applicant" is understood to include existing borrowers, as stated in Regulation B. Nor has Congress ever amended the statutory definition of "applicant" or otherwise expressed disapproval of the understanding of that term in Regulation B, despite revising the statute multiple times since 1976. *See* FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 223, 105 Stat. 2306-07; Dodd-Frank Act, Pub. L. No. 111-203, §§ 1071, 1474, 124 Stat. 2056-57, 2199-2200.

"[W]hen," as here, "Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)). That maxim applies with particular force here: The first time Congress revisited the statute after the Board defined "applicant" to include existing borrowers, Congress enacted new provisions that implicitly approved the Board's interpretation by

requiring that creditors provide an explanation for adverse actions that can be taken only with respect to existing borrowers.

3. *Statutory purpose*. Interpreting ECOA to protect "applicants" both before and after they receive credit is consistent with the clear purposes of the Act: to address discrimination with respect to "any aspect" of a credit transaction and to educate borrowers when, *inter alia*, their credit has been revoked or modified.

The contrary reading of "applicant" urged by Bank of America is directly at odds with those purposes. Under the bank's reading, ECOA would protect individuals and businesses only during the process of requesting credit. But once credit is extended, the Act's protections would evaporate. Thus, Bank of America's interpretation would mean that ECOA would not prevent a creditor from canceling an existing account because of a borrower's race. It would not bar a creditor from modifying the terms of an existing account—perhaps by lowering the amount available on a line of credit—because of a borrower's national origin. It would not stop a creditor from requiring women with existing accounts to reapply for their credit upon getting married. *But see* S. Rep. No. 93-278, at 17 (citing this very scenario as an example of the discrimination against "applicants" that ECOA prohibits). Nor, in Bank of America's view, would a statement of

reasons generally be required in any of these situations. This is not a plausible interpretation of the statute.

Moreover, even where ECOA would otherwise apply under the bank's interpretation of "applicant"—*i.e.*, during the process of requesting credit—the bank's interpretation would open obvious paths to evasion. A creditor that wished to deny credit applications on a prohibited basis, or to offer credit on inferior terms for the same prohibited reason, could do so by simply extending credit on the terms requested and later revoking or amending the terms of the credit arrangement. By similar means, a creditor could avoid ever having to explain the reasons for an adverse action. The bank's flawed interpretation of ECOA would, therefore, introduce a loophole that effectively swallowed most of the statute. *Cf. Treadway*, 362 F.3d at 977-78 (rejecting interpretation of ECOA that "would run contrary to the purpose of the strict notice requirement" and "thwart[] the educational purpose of the statute").

4. *Judicial precedent*. Those courts that have properly read the term "applicant" in its statutory context, including the only court of appeals to have addressed the issue, have agreed that the statute protects existing borrowers. Although some district courts have reached a contrary conclusion, their reasoning is not persuasive.

In *Kinnell v. Convenient Loan Co.*, 77 F.3d 492 (10th Cir. 1996) (unpublished table decision), the Tenth Circuit considered a claim that a creditor discriminated in violation of ECOA when it refused to accept a late payment on an existing loan and instead accelerated the remaining balance due. The court rejected the argument that the plaintiff was not an "applicant" under ECOA because he was no longer actively seeking credit. *Id.* at *2. ECOA, the court explained, prohibits discrimination "with respect to any aspect of a credit transaction," *id.* (quoting 15 U.S.C. § 1691(a)), and was meant "to protect people from the 'denial *or termination* of credit'" on a prohibited basis, *id.* (emphasis added) (quoting *Miller v. American Express Co.*, 688 F.2d 1235, 1239 (9th Cir. 1982)). The lender's reading of "applicant" would mean that "any sua sponte action on the part of the creditor … would not be actionable. Such an interpretation improperly narrows the scope of the ECOA." *Id.* The court noted that its reading of "applicant" was directly supported by Regulation B. *Id.*

At least one district court in this Circuit has reached the same conclusion. In *Powell v. Pentagon Fed. Credit Union*, No. 10-cv-785, 2010 WL 3732195 (N.D. Ill. Sept. 17, 2010), the court held that the plaintiff, who alleged that his existing credit plan was terminated on a prohibited basis, was an "applicant" under ECOA. The court relied on ECOA's requirement

that "applicants" receive notice when their credit is revoked and on the longstanding definition in Regulation B. *Id.* at *4-5. The court observed that the contrary interpretation would be wholly at odds with ECOA's purposes because it "would preclude a plaintiff with an existing account from bringing a claim for the discriminatory revocation of that account." *Id.* at *4. The court found nothing to "suggest[] that Congress' intent to discourage discrimination against applicants somehow ceases when the alleged discrimination is against existing credit customers." *Id.* at *4 n.2.

Bank of America has pointed to other district court decisions that interpreted "applicant" to include only persons actively seeking credit, but this Court should reject that interpretation.[4] No court of appeals has endorsed these district courts' narrow reading, and for good reason. These district court decisions, like the district court's in this case, failed to heed the Supreme Court's repeated instructions that statutory terms must be read in context. Instead, they read "applicant" in isolation. For example,

[4] *See TeWinkle v. Capital One, N.A.*, No. 1:19-cv-01002, 2019 WL 8918731, at *4-5 (W.D.N.Y. Dec. 11, 2019); *Kalisz v. Bank of America, N.A.*, No. 1:18-cv-00516, 2018 WL 4356768, at *2-3 (E.D. Va. Sept. 11, 2018); *Stefanowicz v. SunTrust Mortg.*, No. 3:16-cv-00368, 2017 WL 1103183, at *8 (M.D. Pa. Jan. 9, 2017), *aff'd on other grounds*, 765 F. App'x 766 (3d Cir. 2019); *Gorham-DiMaggio v. Countrywide Home Loans, Inc.*, 592 F. Supp. 2d 283, 291 (N.D.N.Y. 2008), *aff'd on other grounds*, 421 F. App'x 97 (2d Cir. 2011); *Clark v. Capital One Bank*, No. 1:07-cv-00393, 2008 WL 508440, at *2 (D. Idaho Feb. 19, 2008).

these decisions did not attempt to square their interpretation with ECOA's requirement that "applicants" receive an explanation when their existing credit is terminated or modified. Nor did they grapple with the clear loophole their interpretation would create or the degree to which it would frustrate the Act's remedial purposes. These cases therefore shed no additional light on the question presented in this case.

The Court has previously discussed the term "applicant" in two published opinions, but that discussion does not resolve this case. In *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007), the Court expressed "doubt" that the term "applicant" could be read to include guarantors. The Court did not, however, resolve that issue because it held that the plaintiff had not shown she was discriminated against. *See id.* at 441-42 ("[E]ven if the Federal Reserve Board's interpretation is authorized, [the plaintiff] must lose…"). Moreover, whether the term "applicant" includes guarantors is a very different question from the one raised here and turns on different statutory arguments.[5] And in addition, the reason the Court gave for questioning

[5] For this reason, other cases involving guarantors that the district court cited are not germane here. *See* ECF No. 37 at 5 (citing *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184 (11th Cir. 2019), and *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *judgment aff'd by an equally divided Court*, 136 S. Ct. 1072 (2016)).

whether "applicants" includes guarantors—*i.e.*, that the consequence of an unlawful guaranty might mean an entire debt is uncollectible, whereas the damages for discriminating against persons requesting credit for their own use will be more limited, *see id.*—is not implicated by the different question in this case. In general, the damages available when a credit account is revoked or modified should not differ dramatically, if at all, from the damages available when an application for credit is denied.

More recently, in *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529 (7th Cir. 2011), the Court confirmed that *Moran* had not resolved any issue concerning the term of "applicant." *See id.* at 538 (describing *Moran* as "finding no need to resolve [this] threshold issue"). Going on to apply "the broad regulatory definition[]" in Regulation B, the Court concluded that the plaintiff had sufficiently alleged she was an "applicant." *Id.* Because she received an offer from the defendants to modify the terms of her loan, she had "'received an extension of credit' and thus became an 'applicant.'" *Id.* (quoting 12 C.F.R. § 202.2(e)). Although *Estate of Davis* involved certain facts—such as the modification offer—not present here, its reasoning shows that a person need not still be requesting credit at the time of the violation to qualify as an "applicant" and that courts should apply the regulatory definition when facing similar questions.

* * *

ECOA's text, history, purposes, and judicial interpretation thus all point the same way: As used in ECOA, the term "applicant" includes persons who applied for and have received credit.

B. Regulation B Removes Any Doubt That ECOA Reaches Existing Borrowers

Any uncertainty about ECOA's protection for existing borrowers is dispelled by Regulation B. For decades, that rule has expressly defined the term "applicant" to include those who applied for and have received credit. Regulation B thus directly and definitively answers the question presented in this case. Its provisions represent a reasonable and consistent exercise of the Board's and the Bureau's expertise and authority under ECOA to issue rules to carry out the statute's purposes, including by resolving ambiguities in the statute and preventing evasion. Regulation B is therefore entitled to substantial deference.

1. Regulation B expressly defines "applicant" to include those who have received credit.

Regulation B has always defined the term "applicant" to include those who applied for and have received credit. *See* 12 C.F.R. § 1002.2(e) (including in the definition "any person … who has received an extension of credit from a creditor"); *see also* 12 C.F.R. § 202.3(c) (1976) (including in

the definition "any person to whom credit is or has been extended by [a] creditor"). Other provisions reflect the same interpretation. *See, e.g.*, 12 C.F.R. § 1002.2(m) (defining "credit transaction" to mean "every aspect of *an applicant's* dealings with a creditor regarding an application for credit *or an existing extension of credit*" (emphasis added)). Neither the Board nor the Bureau has ever amended the rule to reflect a contrary understanding of the term.

There is thus no question that under Regulation B, Mr. Fralish is an applicant. It is equally clear that he can rely on this regulatory definition in pursuing his claim because ECOA expressly incorporates the requirements imposed by Regulation B into the statute. *See* 15 U.S.C. § 1691a(g) ("Any reference to any requirement imposed under [ECOA] or any provision thereof includes reference to" the implementing rule and its provisions). Thus, ECOA provides a private right of action for violations of the Act or of Regulation B. *See* 15 U.S.C. §§ 1691a(g), 1691e(a) (providing for civil liability against a creditor that fails to comply "with any requirement imposed under this subchapter"); *see also RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 386 (6th Cir. 2014) ("A creditor who violates Regulation B necessarily violates ECOA itself.").

2. Regulation B is a reasonable means of implementing ECOA and as such is entitled to deference.

Congress tasked first the Board and now the Bureau to "prescribe regulations to carry out the purposes of [ECOA]," including by resolving ambiguities in the Act, and "to prevent circumvention or evasion thereof." 15 U.S.C. § 1691b(a). Regulation B's definition of "applicant" is a reasonable exercise of that authority. It is entitled to substantial deference under *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984). *See, e.g.*, *Chicago Bd. Options Exch., Inc. v. SEC*, 889 F.3d 837, 840-42 (7th Cir. 2018).

As described in Part A, the best interpretation of ECOA is that the term "applicant" includes existing borrowers. It was thus reasonable to adopt that interpretation in Regulation B. Adopting the contrary reading urged by the bank in this case would have led to the serious textual inconsistencies described above and run directly contrary to the statute's purposes. Regulation B's definition avoids those difficulties and, in the process, serves to "carry out" and "effectuate" the purposes of ECOA. 15 U.S.C. § 1691b(a). And because the bank's erroneous interpretation would open a glaring loophole in ECOA, Regulation B's definition is "necessary or proper … to prevent circumvention or evasion" of the Act. *Id.* Thus, even if the Court disagreed that the definition of "applicant" advanced here, and reflected in Regulation B, is the *best* way to read ECOA itself, the Court

should conclude that the regulatory definition constitutes, at minimum, a reasonable and permissible exercise of the Bureau's broad authority to issue rules to implement the Act. As such, it controls the outcome here.

Notably, Regulation B has expressly included existing borrowers as applicants since the rule was first promulgated in 1975. Courts often "accord particular deference to an agency interpretation of 'longstanding' duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (citation omitted). Deference is especially appropriate in such circumstances because the regulatory provisions do not create any "unfair surprise to regulated parties." *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (discussing the practice of deference in the context of ambiguous agency regulations) (quotation marks omitted).

Indeed, the interpretation of "applicant" discussed here has been confirmed by numerous federal agencies for decades. For example, nine separate agencies or offices, including the Department of Justice, FTC, and the Board, previously published a statement confirming their view that ECOA prohibits discrimination in the treatment of existing borrowers, such as by "[t]reat[ing] a borrower differently in servicing a loan or invoking default remedies" or "[using] different standards for pooling or packaging a loan in the secondary market." Policy Statement on Discrimination in

Lending, 59 Fed. Reg. 18266, 18268 (Apr. 15, 1994). The same view is reflected in the manual used by the FDIC, Office of the Comptroller of the Currency, and other financial regulators to conduct examinations of financial institutions for compliance with fair lending laws. *See* Interagency Fair Lending Examination Procedures, at *ii* (Aug. 2009), *available at* https://go.usa.gov/xeY37. The Bureau has consistently taken the same view of "applicant," including by reissuing the Board's original definition; issuing guidance that Regulation B "covers creditor activities before, during, and after the extension of credit," CFPB, Equal Credit Opportunity Act Examination Procedures, at 1 (Oct. 2015), *available at* https://go.usa.gov/xekcN; and taking enforcement action to address violations of ECOA against existing borrowers.[6]

In short, the interpretation advanced here is longstanding and well established. The Court should reject Bank of America's attempt to upend that established understanding and to radically restrict the protections that ECOA has provided to borrowers for nearly half a century.

[6] *See, e.g.*, *In re American Express Centurion Bank and American Express Bank, FSB*, No. 2017-CFPB-0016, 2017 WL 7520638 (Aug. 23, 2017) (consent order resolving claims that creditors discriminated against existing borrowers on the basis of race and national origin by, for example, subjecting certain borrowers to more aggressive collection practices).

C. The Bank's Contrary Interpretation Is Incorrect

In the district court, Bank of America offered a number of arguments why ECOA does not protect existing borrowers. These arguments are mistaken, and regardless do not render Regulation B's definition of "applicant" unreasonable.

The bank argued that its reading of "applicant" as limited to those actively seeking credit could be reconciled with ECOA's requirement that "applicants" receive an explanation when their credit is revoked or modified because it is possible for an existing accountholder to apply for additional credit or for a continuation of a current credit arrangement. As an example, the bank cited a credit card borrower applying for a credit-limit increase and the creditor responding to that request by closing the account altogether. In the bank's view, ECOA requires that the borrower in that situation receive a statement of reasons for the revocation (the borrower would already be entitled to one for the denial of the application for a higher credit limit); but a borrower whose account is closed without the borrower having sought a higher credit limit would be left in the dark.

That interpretation makes little sense. Congress defined "adverse action" in broad terms to include "a denial or revocation of credit" and "a change in the terms of an existing credit arrangement." 15 U.S.C.

§ 1691(d)(6). (And it did so just months after the Board adopted an interpretation of "applicant" in Regulation B that specifically includes current borrowers.) That would have been an exceedingly odd way for Congress to have targeted the specific scenario the bank describes. Nor is there any reason to think that Congress meant to so limit the scope of ECOA—particularly given the Act's focus on discrimination in "any aspect" of a credit transaction, and the fact that the risk of discrimination against an existing borrower has no connection at all to whether the borrower is seeking additional credit. *See Powell*, 2010 WL 3732195, at *4 n.2 (concluding that the statute "in no way distinguishes persons whose credit has been revoked upon the filing of a formal application with a current or different creditor from those who have their current credit revoked without the associated filing of an application").

The bank also noted that certain provisions in ECOA use the term "applicant" together with the term "application." *See, e.g.*, 15 U.S.C. § 1691(d)(1) (within 30 days of receiving a "completed application for credit," creditors must notify the "applicant" of its decision on the application). But there is no dispute that "applicant" includes, among others, those with pending applications for credit. The fact that some of the Act's provisions provide specific rules for the handling of applications does

not mean that the Act as a whole provides no protections for existing borrowers. *Cf. Robinson*, 519 U.S. at 343 (the fact that some provisions of Title VII provide specific rules for *current* employees does not mean that the statute provides no protections for *former* employees). Thus, Section 1691(d)(1) requires creditors to substantively respond to a credit application within 30 days. But that provision in no way limits the scope of the requirement in Section 1691(d)(2) that creditors provide a statement of reasons to an applicant when the creditor takes an "adverse action"—including actions, such as revoking an existing credit account, that can be taken only against current borrowers.

The bank further noted that ECOA's definition of "applicant" includes those seeking a "renewal" or "continuation" of credit. 15 U.S.C. § 1691a(b). Thus, the bank argued, Congress meant to exclude those with an existing credit arrangement who have not expressly requested to renew or continue that arrangement. To the contrary, the definition's sweeping language—covering "any person" who applies for "an extension, renewal, or continuation of credit"—evinces an intent to *include*, not exclude. Given the statutory context, the part of the definition on which the bank focused is best understood as "Congress employ[ing] a belt and suspenders approach" to ensure that the definition is read broadly. *See Atlantic Richfield Co. v.*

Christian, 140 S. Ct. 1335, 1350 n.5 (2020); *see also Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019).

The bank's arguments in favor of its preferred reading of "applicant" are mistaken—and certainly do not demonstrate that the definition in Regulation B is unambiguously foreclosed by ECOA, as the bank would have to show to prevail.

CONCLUSION

For these reasons, the Court should reverse the judgment in this case.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 29 and Circuit Rule 29. It contains 6,901 words, excluding the portions exempted by Federal Rule 32(f).

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