20-2049

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRADLEY TEWINKLE,

Plaintiff-Appellant,

v.

CAPITAL ONE, N.A.,

Defendant-Appellee.

DOES 1-100,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE
CONSUMER FINANCIAL PROTECTION BUREAU and
FEDERAL TRADE COMMISSION
IN SUPPORT OF APPELLANT AND REVERSAL

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INTERESTS OF AMICI CURIAE

The Consumer Financial Protection Bureau is a federal agency charged with promulgating rules and issuing interpretations under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*, as well as enforcing compliance with ECOA's requirements, *see id.* § 1691c(a); *see also* 12 U.S.C. § 5481(12), (14) (including ECOA in the list of "Federal consumer financial laws" that the Bureau administers).

The Federal Trade Commission is the federal agency with principal responsibility for protecting consumers from deceptive or unfair trade practices. ECOA specifically empowers the Commission to enforce ECOA and its implementing rule, Regulation B, using all of the Commission's functions and powers under the FTC Act. 15 U.S.C. § 1691c(c). In such actions, violations of ECOA are deemed violations of the FTC Act. *Id.* The Commission has brought multiple law enforcement actions pursuant to ECOA and Regulation B.

ECOA requires that when creditors take "adverse action" with respect to a credit "applicant"—including by revoking or changing the terms of an existing extension of credit—the "applicant" is entitled to a statement of reasons for the action. *Id.* § 1691(d). The Act's core prohibition on credit discrimination likewise protects "applicants." *Id.* § 1691(a).

This case presents the question whether a person ceases to be an "applicant" under ECOA and its implementing regulation after receiving (or being denied) an extension of credit. The district court thought so. But that interpretation is inconsistent with ECOA and Regulation B and would significantly undermine their important protections for borrowers. Accordingly, the Bureau and the Commission have substantial interests 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, 15 U.S.C. §§ 1691 *et seq.*, 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, initially to address "widespread discrimination … in the granting of credit to women." S. Rep. No. 93-278, at 16 (1973). The Act 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." *Id.* § 503, 88 Stat. at 1522 (codified at 15 U.S.C. § 1691a(b)). Among other examples of the sort of discrimination against "applicants" that ECOA would bar, its drafters cited a scenario in which a lender required a "newly married woman whose creditworthiness has otherwise remained the same" to reapply for her existing credit arrangement as a new applicant. S. Rep. No. 93-278, at 17.

The Act also created a private right of action under which aggrieved "applicant[s]" can hold liable a creditor that fails to comply with "any requirement imposed under this subchapter [i.e., ECOA]." 15 U.S.C. § 1691e(a). And it provided that this private right of action extends to violations of any requirement imposed under ECOA's implementing regulations. *Id.* § 1691a(g) ("Any reference to any requirement imposed under this subchapter … includes reference to the regulations of the Bureau under this subchapter … .").

Congress originally tasked the Board of Governors of the Federal Reserve System with prescribing those regulations. Pub. L. No. 93-495,

§ 503, 88 Stat. at 1522. Its grant of rulemaking authority was expansive. ECOA provided that the Board may issue rules to "carry out the purposes of the Act" and that those rules may 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]" and "to prevent circumvention or evasion thereof." *Id.*; *see also* 15 U.S.C. § 1691b(a).

The Board issued those rules, known as Regulation B, the year after ECOA was enacted and several days before the statute took effect. *See* 40 Fed. Reg. 49,298 (Oct. 22, 1975) (promulgating 12 C.F.R. pt. 202). From the first, Regulation B made clear that the new law's protections against credit discrimination cover both those currently applying to receive credit and those who have already received it. It did so by defining "applicant" to expressly include not only "any person who applies to a creditor directly for an extension, renewal or continuation of credit" but also, "[w]ith respect to any creditor[,] … any person to whom credit is or has been extended by that creditor." 12 C.F.R. § 202.3(c) (1976); *see also* 40 Fed. Reg. at 49,306. In explaining this provision, the Board noted that ECOA's express terms and its legislative history "demonstrate that Congress intended to reach

discrimination … 'in any aspect of a credit transaction.'" 40 Fed. Reg. at 49,298 (quoting 15 U.S.C. § 1691(a)).

2. Two years after enacting ECOA, Congress significantly broadened the statute 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 generally include "race, color, religion, national origin, sex or marital status, or age" as well as the receipt of public-assistance income. *Id.* § 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 (1976), 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." 15 U.S.C. § 1691(d)(2); *see also id.* § 1691(d)(3) ("A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.").[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

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

terms requested." *Id.* § 1691(d)(6). Thus, since 1976, ECOA has provided that "applicants" are entitled to an explanation when the terms of an existing credit arrangement are altered or the credit cancelled outright, among other circumstances.

ECOA's new notice requirements "were designed to fulfill the twin goals of consumer protection and education." *Fischl v. Gen. Motors Acceptance Corp.*, 708 F.2d 143, 146 (5th Cir. 1983); *see also id.* (calling these provisions "[p]erhaps the most significant of the 1976 amendments to the ECOA"). In terms of consumer protection, "the notice requirement is intended to prevent discrimination *ex ante* because 'if creditors know they must explain their decisions … they [will] effectively be discouraged' from discriminatory practices." *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 977–78 (7th Cir. 2004) (quoting *Fischl*, 708 F.2d at 146); *see also* S. Rep. No. 94-589, at 4 (calling the notice requirement "a strong and necessary adjunct to the antidiscrimination purpose of the legislation").

The notice requirement "fulfills a broader need" as well by educating consumers about the reasons for the creditor's action. S. Rep. No. 94-589, at 4. As a result of being informed of the specific reasons for the adverse action, consumers can take steps to try to improve their credit status or, in

cases "where the creditor may have acted on misinformation or inadequate information[,] … to rectify the mistake." *Id.*

Following the ECOA Amendments of 1976, the Board amended Regulation B, including by adding new provisions to implement ECOA's notice requirement. 42 Fed. Reg. 1242 (Jan. 6, 1977). The amended rule defined "adverse action" to include "[a] termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts." 12 C.F.R. § 1002.2(c)(1)(ii). And it required that adverse-action notices give a "statement of reasons" for the action that is "specific" and "indicate[s] the principal reason(s) for the adverse action." *Id.* § 1002.9(b)(2).

The Board's amendments to Regulation B also imposed a number of content requirements on adverse-action notices. *Id.* § 1002.9(a)(2). As subsequently amended, this part of Regulation B now requires that an adverse-action notice include a statement of the action taken, the name and address of the creditor, a statement of the provisions of 15 U.S.C. § 1691(a), and the name and address of the relevant federal regulatory agency. 12 C.F.R. § 1002.9(a)(2); *see also* 50 Fed. Reg. 48,018, 48,022 (Nov. 20, 1985) (adding requirement that notices include the creditor's name and address).

Finally, the Board made a "minor editorial change" to Regulation B's definition of "applicant" in order to "express more succinctly the fact that the term includes both a person who requests credit and a debtor"—i.e., one who has already requested and received credit. 41 Fed. Reg. 29,870, 29,871 (July 20, 1976) (proposed rule). Whereas Regulation B originally defined "applicant" to include one who "applies to a creditor directly for an extension, renewal or continuation of credit" as well as, "[w]ith respect to any creditor[,] … any person to whom credit is or has been extended by that creditor," 12 C.F.R. § 202.3(c) (1976), the revised definition simply stated that "applicant" includes "any person who requests *or who has received* an extension of credit from a creditor." 12 C.F.R. § 202.2(e) (1978) (emphasis added); *see also* 42 Fed. Reg. 1242, 1252 (Jan. 6, 1977) (final rule). Although the Board revised other parts of the definition over the years, it never departed from the bedrock understanding of the term "applicant" as including any person "who has received" an extension of credit. *See* 12 C.F.R. § 1002.2(e).

3. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, established the Bureau and transferred to it primary rulemaking responsibility under ECOA. Pub. L. 111-203, § 1085, 124 Stat.

1376, 2083-84.[2] Shortly thereafter, the Bureau republished the Board's ECOA regulations, including the definition of "applicant," without material change. *See* 76 Fed. Reg. 79,442 (Dec. 21, 2011) (promulgating 12 C.F.R. pt. 1002 & Supp. I).

B. Factual and Procedural Background

Plaintiff Bradley TeWinkle was a New York resident at the time of the events alleged in his complaint. Defendant Capital One is a national bank.

TeWinkle had a checking account and an overdraft line of credit with Capital One. JA10, 17. Capital One sent TeWinkle an email in December 2015 notifying him that it was terminating his checking account and his overdraft line of credit. JA11. The email included a notice describing the protections offered by ECOA and identifying the Bureau as the federal agency "that administers compliance with [ECOA] concerning this creditor." JA17. It announced the closure of TeWinkle's line of credit thusly:

> When you opened your accounts, you agreed to the Account Disclosures reserving our right to close your accounts at any time, for any reason. We closed your 360 Savings on 12/22/15. We closed your 360 Checking, including your Overdraft Line of Credit and Debit MasterCard®.

[2] The Board retains the authority to prescribe rules under ECOA with respect to auto dealers excluded from the Bureau's authority by 12 U.S.C. § 5519. *See* 15 U.S.C. § 1691b(f).

JA17. TeWinkle received no other correspondence about the revocation of his line of credit. JA11.

TeWinkle filed suit under ECOA, alleging that Capital One violated the adverse-action notice requirement in ECOA and Regulation B. JA14. Specifically, TeWinkle alleged that the email he received from Capital One upon closure of his line of credit failed to include (1) "the address of the creditor" and (2) either a "statement of specific reasons for the action taken" or a disclosure of his "right to a statement of specific reasons." JA11.

Capital One moved to dismiss, primarily on the ground that TeWinkle was not an "applicant" entitled to protection under ECOA because he was not applying for credit at the time his account was closed.

The magistrate judge to whom the matter was assigned agreed with Capital One and concluded that the complaint should be dismissed because TeWinkle had not plausibly alleged he was an "applicant" under ECOA. JA30-31. The court appeared to acknowledge that TeWinkle *was* an "applicant" as defined in Regulation B. JA29. And it further concluded that the definition in the rule was "permissible." JA29. But the court also held that it need not consider Regulation B at all, because ECOA spoke unambiguously to the question at hand. JA30-31.

The court went on to conclude that TeWinkle had suffered no "injury in fact" because the email he received "provided the reason for the closing of the line of credit": "[I]t was closed with the associated checking account," which Capital One could close "at any time, for any reason." JA32.

The district judge adopted the magistrate judge's recommendation, over TeWinkle's objection, without change or additional explanation. JA36.

SUMMARY OF ARGUMENT

The Equal Credit Opportunity Act and Regulation B prohibit discrimination in any aspect of a credit transaction on the basis of sex, race, or other enumerated factors. They further require that creditors give borrowers an explanation when they take certain "adverse actions," including revoking or changing the terms of a credit arrangement. 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 who are currently seeking credit and those who sought and have now received credit.

This is the best reading of the statute itself. Although ECOA's definition of "applicant," read in isolation, could be susceptible to the narrow interpretation adopted by the district court, that interpretation makes little sense when read alongside the rest of the statute. ECOA's

prohibition on credit 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 terms of the applicant's existing credit arrangement. That requirement would cease to function sensibly under the district court's interpretation of "applicant" as being limited to those who are presently in the process of applying for credit. In addition to its textual difficulties, the district court's reading would undermine ECOA's protections by cabining them to only certain aspects of a credit transaction and opening broad avenues for evasion.

Any doubt regarding the proper scope of the term "applicant" is put to rest by ECOA's implementing rule, Regulation B. For the 45 years that ECOA has been in effect, Regulation B has made explicit that the "applicants" the law protects include those who have 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 and to prevent evasion. Regulation B's definition is therefore entitled to substantial deference, and the district court erred in simply discounting it.

ARGUMENT

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

A. ECOA's Protections Against Credit Discrimination Do Not Disappear the Moment Credit Is Extended

The Equal Credit Opportunity Act prohibits creditors from discriminating against "applicants" with respect to "any aspect of a credit transaction." 15 U.S.C. § 1691(a). It further requires that creditors provide "applicants" with an explanation for any "adverse action," including a "revocation of credit" or a "change in the terms of an existing credit arrangement." *Id.* § 1691(d)(2), (6). These protections are best read to apply to those presently seeking credit as well as those who sought credit in the past and now have an existing credit arrangement with a creditor.

1. "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); *see also United States v. Epskamp*, 832 F.3d 154, 162 (2d Cir. 2016) ("A particular statute's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." (quotation marks omitted)). Reading together the relevant

provisions of ECOA shows that the statute's protections for "applicants" are best understood to cover both those who are applying to receive credit and those who have applied for and received it.

ECOA's definition of "applicant" includes those who "appl[y] to a creditor directly for an extension, renewal, or continuation of credit," and thus designates persons who request credit as "applicants" without regard for how or whether their requests for credit are eventually resolved. There is, after all, "no temporal qualifier in the statute such as would make plain that [the definition] protects only persons still [applying] at the time of the [discrimination]." *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-42 (1997) (concluding along similar lines that Title VII's definition of "employees" includes former employees).

This conclusion is confirmed by reading ECOA's definition alongside its other provisions. First, ECOA's adverse-action provision requires that creditors provide a statement of reasons to "[e]ach applicant" against whom they take adverse action. 15 U.S.C. § 1691(d)(2). The Act defines "adverse action" to include a "revocation of credit" as well as a "change in the terms of an existing credit arrangement"—actions that can be taken only with respect to persons who have already received an extension of credit. *Id.* § 1691(d)(6). That ECOA requires "applicants" to receive an explanation

why their credit has been revoked, or the terms of their existing credit arrangement changed, makes clear that the term includes those who have applied for and received credit. These provisions would make little sense if "applicants" instead included only those with pending requests for credit.

Second, ECOA creates a private right of action under which an aggrieved "applicant" may file suit against a "creditor" who "fails to comply with any requirement" of ECOA or Regulation B. *Id.* §§ 1691e(a), 1691a(g); *see also id.* § 1691e(b) (providing that a "creditor, other than a government or governmental subdivision or agency," shall be liable to the aggrieved "applicant" for punitive damages of no more than $10,000); *id.* § 1691e(c) (the aggrieved "applicant" may apply for relief in district court). These references to "applicant[s]" as the category of persons who may seek such remedies plainly are not limited to those currently applying for credit. If they were, those who were denied credit or had it revoked on a prohibited basis—the very problem the statute is aimed to remedy—would be unable to pursue the "chief enforcement tool" that Congress created for ensuring compliance with ECOA. S. Rep. No. 94-589, at 13. Instead, a person may seek relief under these provisions as an "applicant" regardless of whether that person is presently applying for credit.

Third, ECOA is explicit that its core prohibition on discrimination applies "to any aspect of a credit transaction"—i.e., not merely to the initial application process. 15 U.S.C. § 1691(a). As courts have recognized, reading "applicant" to refer only to those with pending credit applications would ignore the terms of this broad prohibition and "improperly narrow[] the scope of the ECOA." *See Kinnell v. Convenient Loan Co.*, 77 F.3d 492 (10th Cir. 1996) (unpublished) (rejecting this interpretation and noting that it would exclude from ECOA's reach "any sua sponte action on the part of the creditor, such as accelerating the terms of a note and effectively discontinuing the extension of credit"); *Powell v. Pentagon Fed. Credit Union*, No. 10-cv-785, 2010 WL 3732195, at *4 (N.D. Ill. Sept. 17, 2010) (rejecting that "narrow[]" interpretation, which "would preclude a plaintiff with an existing account from bringing a claim for the discriminatory revocation of that account.").

Under the district court's interpretation, ECOA would apply not "to any aspect" of a credit transaction, 15 U.S.C. § 1691(a), but instead only to the process of requesting credit. This would dramatically curtail the reach of the statute, in contravention of its plain text and with far-reaching consequences. On this view, a creditor would not violate ECOA by, for example, lowering existing credit limits based on account holders' religion

or denying mortgage modification applications because the borrower received public assistance income. A creditor could require that women with existing lines of credit must reapply for that credit upon getting married. *But see* S. Rep. No. 93-278, at 17 (citing this very scenario as an example of the discrimination ECOA prohibits). ECOA has long been understood to bar such conduct with respect to existing borrowers.[3]

Even where ECOA did still apply under the district court's reading—i.e., during the application process itself—that reading would undermine the law's protections by opening obvious paths to evasion. A creditor that wished to deny credit applications on a prohibited basis, or to offer credit on less advantageous terms to certain borrowers, could in many instances achieve the same result by simply extending credit on the terms requested

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[3] *See, e.g.*, Interagency Fair Lending Examination Procedures *ii* (Aug. 2009) (exam manual issued by five financial regulatory agencies noting that ECOA bars "treat[ing] a borrower differently in servicing a loan or invoking default remedies" or "us[ing] different standards for pooling or packaging a loan in the secondary market"), *available at* www.ffiec.gov/PDF/fairlend.pdf; Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,268 (Apr. 15, 1994) (statement by nine agencies reflecting same understanding of ECOA); *Revision of the Board's Equal Credit Regulation: An Overview*, 71 Fed. Res. Bull. 913, 914, 1985 WL 68736, at *2 (1985) ("[B]ecause the [A]ct applies to all aspects of a credit transaction, the ECOA affects not only the application stage but also … credit reporting, and collection procedures.").

and then later revoking or changing the terms of the credit arrangement on a prohibited basis. By such or similar means a creditor could avoid ever having to explain the reasons for an adverse action.[4]

The district court's flawed interpretation of ECOA would, therefore, introduce a loophole big enough to threaten to swallow whole the notice requirement and the statute's central prohibition on credit discrimination. *Cf. Tyson v. Sterling Rental, Inc.*, 836 F.3d 571, 580 (6th Cir. 2016) (rejecting interpretation of ECOA that would make the Act so easy to evade as to render it "a paper tiger"); *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 977 (7th Cir. 2004) (rejecting interpretation of ECOA that "would run contrary to the purpose of the [adverse-action] notice requirement"). The better reading of the ECOA—the reading consistent with its text, structure, and purpose—is that it protects those seeking credit even after they receive (or are denied) an extension of credit.

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[4] Whether such maneuvers would actually be profitable would depend on the circumstances—for example, in what manner the creditor modified the terms of the credit arrangement. But even where they are not profitable, that alone is no guarantee they would not occur. *See generally* S. Rep. No. 94-589, at 3 ("The Committee readily acknowledges that irrational discrimination is not in the creditor's own best interests because it means he is losing a potentially valuable and creditworthy customer. But, despite this logical truth, the hearing record is replete with examples of [such discrimination].").

2. Congress's history of amending the statute strongly supports this reading. As discussed below, the Federal Reserve Board first issued Regulation B in 1975, shortly before ECOA took effect. This first iteration of Regulation B 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, one might expect Congress to have given some sign of that when it amended and expanded ECOA the following year. (The drafters of those amendments were certainly aware of the new Regulation B, and cited other parts of the rule in explaining their bill. *See* S. Rep. No. 94-589, at 2.)

But the 1976 amendments said nothing to limit the definition of "applicant" the Board had adopted just months before. And in fact, the statutory amendments included new provisions—such as the requirement that "applicants" be entitled 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 definition of "applicant" or otherwise expressed disapproval for the understanding of that term in Regulation B, despite revising the statute a number of additional times over the following decades. *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)). As described above, that maxim applies with particular force here: The first time Congress revisited the statute after the Board's rulemaking defined "applicant" to include existing borrowers, it enacted new provisions that implicitly approved the Board's interpretation by extending protections to applicants for adverse actions that can be taken only with respect to existing borrowers.

B. Regulation B Removes Any Doubt on This Point

If there were any uncertainty about ECOA's protections for existing borrowers, it is dispelled by Regulation B, which for nearly half a century—i.e., the entire time ECOA has been in effect—has expressly provided that the term "applicant" includes those who have received credit from a creditor. That definition, and the many other provisions of Regulation B that are based on that understanding of the term, represent a reasonable

and consistent exercise of the Board's and the Bureau's authority under ECOA to issues rules to carry out the statute's purpose, including by resolving this ambiguity in the statute, and to prevent evasion. These provisions are therefore entitled to substantial deference.

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

In enacting ECOA, Congress tasked first the Board and now the Bureau to "prescribe regulations to carry out the purposes of [the Act]." 15 U.S.C. § 1691b(a). Like the statute it implements, Regulation B prohibits creditors from discriminating on a prohibited basis against "an applicant," 12 C.F.R. § 1002.4(a), and requires creditors to provide a statement of reasons to "an applicant" for any adverse action, *id.* § 1002.9(a)-(b).

As first promulgated by the Board in 1975, Regulation B defined "applicant" to include "any person who applies to a creditor directly for an extension, renewal or continuation of credit" as well as, "any person to whom credit is or has been extended." 40 Fed. Reg. at 49,306. Since the Board amended that definition in 1977, it has included "any person who requests *or who has received* an extension of credit from a creditor." 12 C.F.R. § 1002.2(e) (emphasis added); 42 Fed. Reg. 1252 (Jan. 6, 1977). Thus, at all times, Regulation B has made clear that the term "applicant" is

not limited to those persons who are in the process of applying for credit for purposes of ECOA's protections.

Many other parts of the rule reflect and incorporate this understanding of the term. *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)); *id.* § 1002.9(a)(1)(iii) (lender shall notify "an applicant" within 30 days of "taking adverse action on an existing account").

There is thus no question that under Regulation B, a person, such as TeWinkle, who has applied for and received an extension of credit is an "applicant" to whom the adverse-action notice requirements (as well as the prohibition on credit discrimination) apply.[5] It is equally clear that TeWinkle can rely on this regulatory definition in pursuing his private right of action. That right of action allows applicants to hold liable a creditor "who fails to comply with any requirement imposed under [ECOA]" *or* Regulation B. 15 U.S.C. §§ 1691e(a), 1691a(g); *see also RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 386 (6th Cir.

[5] Capital One appears never to have argued that TeWinkle did not qualify as an "applicant" under the definition in Regulation B, nor could it.

2014) ("A creditor who violates Regulation B necessarily violates ECOA itself." (citing 15 U.S.C. § 1691a(g)).

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

Regulation B's definition of "applicant" to include those "who ha[ve] received an extension of credit," 12 C.F.R. § 1002.2(e), is a reasonable exercise of the Bureau's authority to issue rules "to carry out the purposes" of ECOA, including by resolving ambiguities in the statute, and "to prevent circumvention or evasion." 15 U.S.C. § 1691b(a). It is therefore entitled to substantial deference under *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984). *See, e.g.*, *NRDC v. EPA*, 961 F.3d 160, 169-70 (2d Cir. 2020); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-69 (1980) (emphasizing the "particular[]" deference owing to regulations the Board issued pursuant to its similar rulemaking authority under the Truth in Lending Act).

As described above, the best reading of ECOA's statutory language is that the term "applicant" includes those who have applied for and received credit. It was thus reasonable for the Board and now the Bureau to adopt through notice-and-comment rulemaking a definitional provision making explicit that understanding. Indeed, adopting the contrary interpretation would have led to the serious textual inconsistencies described above.

Regulation B's definition avoids that disruption to the statutory text and, in the process, serves to "carry out" and "effectuate" the purposes of ECOA by making clear that its protections continue to apply after an applicant receives credit. 15 U.S.C. § 1691b(a).

And because a view that "applicant" is limited to those currently applying for credit would open a glaring loophole through which creditors could avoid ECOA's requirements, Regulation B's definition serves also "to prevent circumvention or evasion" by making clear that the law's protections apply also to existing borrowers. *Id.*

Finally, it is noteworthy that Regulation B's definition of applicant has remained unchanged in this respect since its promulgation by the Board 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." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (discussing the practice of deference in the context of ambiguous agency regulations) (quotation marks omitted).

In short, Regulation B's 45-year-old construction of the term "applicant" addresses ambiguity in the statutory scheme in a way that is

entirely consistent with the text, structure, and purposes of ECOA and well within the scope of the Board's and the Bureau's rulemaking authority. Regulation B's definition is therefore entitled to substantial deference.

C. The District Court Erred in Its Analysis of the Term "Applicant"

The district court erred in concluding that TeWinkle did not plausibly allege that he is an "applicant" under ECOA and Regulation B.

1. The district court's reading of ECOA was mistaken for the reasons already explained. Rather than "looking to the statutory scheme as a whole and placing the particular provision within the context of that statute," *Epskamp*, 832 F.3d at 162, the district court examined the definition provision in isolation. It then read into that definition a limitation that does not appear in the text itself and that does not function sensibly alongside other provisions of ECOA.

This is equally true of the other district court decisions that have reached the same conclusion. *See Kalisz v. Bank of Am., 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) (pro se plaintiff), *report and recommendation adopted*, No. 3:16-cv-00368, 2017 WL 1079163 (M.D. Pa. Mar. 22, 2017), *aff'd on other grounds*, 765 F. App'x 766, 772 (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). And no courts of appeals have endorsed these courts' narrow view of the term "applicant" upon review.[6]

None of these decisions addressed the definition's place in the larger statutory scheme. None discussed ECOA's definition of "adverse action," its private right of action available to "applicants," or its prohibition on discrimination in "any aspect" of a credit transaction. None grappled with the clear avenue of evasion that their interpretation of "applicant" would open up. And the only one to even acknowledge Regulation B dismissed it in much the same conclusory manner as the district court here. *Kalisz*, 2018 WL 4356768, at *3. These cases therefore shed no additional light on the question presented here—beyond underscoring the need for this Court to make clear in this case the proper reading of "applicant."

The interpretation of the statute that Capital One offered in the district court is no more persuasive. Addressing the definition of "adverse action," Capital One claimed that its pinched reading of "applicant" could "be reconciled with" the definition of adverse action because "it is entirely

[6] In affirming the district court's decision in *Gorham-DiMaggio*, this Court made clear that it was not addressing whether the plaintiff was an "applicant" under ECOA. 421 F. App'x at 100 n.1.

possible for an applicant for new credit to experience a 'revocation of credit' or 'a change in terms of an existing credit arrangement.'" Opp'n to Pl.'s Objs. to R. & R. at 14-15 ("Opp'n") (ECF No. 24). As an example, Capital One describes a scenario in which a credit card holder applies to increase her credit limit and the creditor responds by cancelling the card outright or changing its terms. *Id.* at 14. Capital One suggests that Congress thought it important for a borrower in this situation to receive an adverse-action notice about the revocation (she would already be entitled to one for the denial of a higher credit limit), but *not* a borrower whose card is cancelled without her having sought a higher credit limit.

This interpretation is strained, at best. As a drafting matter, it would have been odd for Congress to target the relatively uncommon situation Capital One describes by defining "adverse action" in terms as broad as "a denial or revocation of credit" and "a change in the terms of an existing credit arrangement." 15 U.S.C. § 1691(d)(6). Nor has Capital One explained why Congress would have sought to so narrowly circumscribe the reach of the notice requirement—particularly since the threat of credit discrimination is at least as present for the borrower whose card is cancelled without any action on her part. *See Powell v. Pentagon Fed.*

Credit Union, No. 10-cv-785, 2010 WL 3732195, at *4 n.2 (N.D. Ill. Sept. 17, 2010) (rejecting the same argument for much the same reason).

Capital One also pointed to a number of places that ECOA uses "applicant" in conjunction 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) (cited in Opp'n at 13-14). This hardly indicates that the category of applicants is confined to those with currently pending credit applications. If anything, the fact that certain provisions in ECOA specify that they concern applicants who are in the midst of applying for credit tends to suggest that the term "applicant" is not automatically so limited.

Along similar lines, Capital One pointed to 15 U.S.C. § 1691(d)(5), which allows creditors "who did not act on more than one hundred and fifty applications during the calendar year preceding" to provide verbal, rather than written, notices. *See* Opp'n at 14. But this provision was plainly meant to identify, and to modify the regulatory burden on, smaller creditors. It was reasonable that Congress would choose to do so by reference to the number of applications the creditor receives each year, rather than the number of current borrowers the creditor serves. That choice does not dictate the meaning of "applicant."

Finally, Capital One noted that ECOA's definition refers not only to those who request an extension of credit, but also to those seeking a "renewal" or "continuation" of credit. 15 U.S.C. § 1691a(b). Thus, Capital One argues, Congress meant to exclude borrowers who had not requested to renew or continue their existing credit arrangements. *See* Opp'n at 9. To the contrary, the provision'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, this provision is best understood as "Congress employ[ing] a belt and suspenders approach" to ensure that the definition is read to apply broadly. *See Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020).

2. It also was error for the district court to dismiss Regulation B's definition of "applicant." JA31. That definition represents a reasonable means of implementing ECOA by resolving ambiguity in the statute, as well as preventing evasion. As such, it is entitled to substantial deference. *See, e.g.*, *NRDC*, 961 F.3d at 169-70; *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 n.3 (7th Cir. 2004) (provisions of Regulation B entitled to deference under *Chevron*).

Moreover, ECOA by its own terms provides that its private right of action extends to violations of Regulation B, 15 U.S.C. §§ 1691e(a), 1691a(g),

and Regulation B states that the "applicants" to which it applies, including those who have received credit, are entitled to an adverse-action notice, 12 C.F.R. §§ 1002.9(a)-(b), 1002.2(e). The district court should have applied the longstanding regulatory construction of the term "applicant."

CONCLUSION

The Court should reverse the district court's holding that TeWinkle was not an "applicant" entitled to a statement of reasons for the adverse action on his line of credit.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 29.1(c). It is 6,441 words, excluding the portions exempted by Federal Rule 32(f). The brief's typeface and type style comply with Federal Rule 32(a).

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